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June 2014, Wellington, New Zealand | REPORT 132

LIABILITY OF MULTIPLE DEFENDANTS

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The Law Commission is an independent, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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3 June 2014

The Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R132—LIABILITY OF MULTIPLE DEFENDANTS

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

Sir Grant Hammond
President

Foreword

The question of how liability should be allocated in civil matters, when two or more parties are held liable for damage caused to another party or plaintiff, remains controversial. It is clear that if two or more liable defendants have caused the same loss, then those liable defendants must compensate the plaintiff. The more difficult question is how to allocate liability among the liable defendants. There are two main answers, and continuing disagreement as to which answer is best.

Many countries, including New Zealand, use a long-established rule called "joint and several liability". Joint and several liability is primarily concerned with protecting the injured plaintiff. As the name suggests, the rule relies on the idea that all the parties who caused the plaintiff's loss are each liable for the full amount of the damages awarded. But the plaintiff can only recover the total amount of the damages. This rule protects the plaintiff. If one liable party is insolvent, has died or has disappeared, the others may have to pay more than their share of responsibility alone would indicate, to make sure the plaintiff recovers in full.

The other main rule is "proportionate liability". This rule is used to deal with multiple liable defendants in some countries, including Australia. Under proportionate liability, each liable defendant is allocated or apportioned a share of the total liability, based on the court's judgment of each liable defendant's share of responsibility or fault. If one party does not pay their share for any reason, the plaintiff cannot recover that uncollected share from another defendant. Liable parties are protected from paying more than their "proportion", which means the plaintiff must bear the risk that there may be a missing liable party.

Many people, including people who made submissions to this review, think proportionate liability should be the rule in New Zealand. Each liable party would be required to pay their court-determined share of responsibility for the damage suffered by the plaintiff. All the shares would add up to 100 per cent, and as long as the liable parties all pay their shares, the plaintiff can still be made whole. Many others argue for joint and several liability, and say that liable defendants should only ever be liable for losses that they have caused or contributed to.

Not surprisingly, views on which rule is better, fairer or more efficient tend to divide neatly according to whether a person is more likely to be a plaintiff or a defendant. The views of either side are often strongly entrenched, and there is no consensus on which system is fairer. Given these strongly divergent views, and the large numbers of multiple defendant cases that have come from the leaky homes crisis, the Law Commission was asked to examine the issues again, to consider whether one rule is clearly preferable.

The Commission is of the view that joint and several liability is clearly the preferable system. We recommend it remain the general rule. However, we have also identified adjustments that can be made, to improve fairness for *both* sides, and for particular sectors where defendants may face unusual circumstances or truly excessive liability.

Overall, we consider that retention of joint and several liability, but with the adjustments we recommend, will provide an appropriate balance of protection for plaintiffs, and fairness to other parties.

Sir Grant Hammond
President

Acknowledgements

The Law Commission gratefully acknowledges the contributions of all the people and organisations who made submissions and provided input in other ways to this review. Copies of submissions remain available on the Commission's website at www.lawcom.govt.nz/project/review-joint-and-several-liability.

The project was led by the Honourable Dr Wayne Mapp QSO. The Senior Legal & Policy Advisor was Peter McRae and the Legal & Policy Advisor was Eliza Prestidge Oldfield. Rachel Hayward and Mark Wright were instrumental in getting the project underway. Kristen Ross contributed to bringing this Report to publication.

Contents

Summary

1 The question of how to allocate liability for damages among two or more parties who are liable to pay for the same damage is controversial in New Zealand and in other common law countries. Difficulties arise when at least one of the liable parties cannot or does not pay. Should other liable parties be made to pay the plaintiff all the damages, including any amount left unpaid by a missing defendant?[1] Or is it fairer to for each defendant to be liable only for their proportionate share of responsibility for the plaintiff's loss (as determined by a court) with the plaintiff having to bear the cost of any uncollectable share? In effect, the key choice that must be determined is: who bears the risk of an uncollectable share – the plaintiff or defendants?

2 In New Zealand where more than one party is in breach of obligations imposed through tort, equity or contract, and these breaches together cause the same loss or damage,[2] the present basis of liability is joint and several liability. That is, each defendant is liable for the whole of the plaintiff's loss. This is the case regardless of how many other defendants are also liable, although contributions from other defendants may be sought. This liability regime protects the plaintiff. If one liable defendant is not available or is insolvent, the plaintiff can enforce judgment against the remaining liable defendant(s) for any part of the damages that remain unpaid. The risk of a liable defendant not paying their share is borne by the other liable defendants.

3 The most common alternative regime to joint and several liability is some version of proportionate liability. Under a pure proportionate liability regime, each liable defendant is liable only for the proportion of loss or damage that a court determines is just, taking into account each defendant's relative level of fault or comparative responsibility. This liability regime protects defendants from having to pay any more than what the court determines is their share of responsibility or blame, and the risk of a defendant not paying their share is borne by the plaintiff.

4 In 2011, following Cabinet deliberations on the impact of the leaky homes crisis on the building sector, the Minister Responsible for the Law Commission referred a request to the Law Commission to conduct a review of what rules should govern the situation where two or more civil defendants are held liable to a plaintiff for the same indivisible damage.

The most appropriate liability system for multiple defendants

5 The terms of reference for this project state that:

> The Law Commission will consider whether the rule [of joint and several liability] should be retained, replaced or amended, either generally, or in relation to particular professions or industries, including the building and construction industry, auditors and accountants.

1 Usually described as an "uncollected share" or "uncollectable share".

2 Parties may however agree in contract the extent to which they will be liable to one another for breaches and, if applicable, how liability may be apportioned between multiple parties.

The Commission will consider the key advantages and disadvantages of different forms of liability, including:

– joint and several liability;
– proportionate liability;
– liability capped by statute; and
– contractual limitations on liability.

6 We began this project by publishing an Issues Paper in November 2012.[3] In response to the Paper, we received submissions from a number of groups, including local government, the building sector, members of the accounting and legal professions, homeowners, insurance firms and other professional advisers. We also met with many people who have significant interest or experience in the operation of the joint and several liability rule.

THE COMMISSION'S CONCLUSIONS

Joint and several liability

7 In assessing the merits of civil liability regimes where there are multiple defendants, we are of the view that the policy issue fundamentally comes down to a choice between a liable defendant having the risk that a co-liable defendant will not be able to pay their share, or the plaintiff bearing that risk. We have concluded that protection should continue to be afforded to the innocent party. Liable defendants who have actually caused the harm should bear the risk of uncollectable shares.

8 A convincing case for proportionate liability would need to demonstrate that a switch would better support industry or commerce by being more economically efficient. This might justify a change, even if it involved transferring risks to plaintiffs. However, we could not locate any empirical evidence to show that proportionate liability can achieve such efficiencies.

9 Therefore, our primary recommendation is that joint and several liability should be retained where more than one party is in breach of obligations imposed through tort, equity or contract, and these breaches together cause the same loss or damage. However, we make further recommendations to allow for some relief from the full effects of joint and several liability where the effects on liable defendants may be extreme.

The minor defendant

10 Many submitters and consultation participants argued that joint and several liability is unfair because it can result in a party whose breach has contributed the plaintiff's loss, but is minor compared to the other liable defendants, bearing the full amount of the loss. While we found it difficult to assess how often this occurs, we nevertheless can conceive of circumstances that could produce a clear injustice if a truly minor party was required to meet significant damages left unpaid by other parties.

11 We have therefore recommended giving the courts power to make orders that would mitigate the full application of joint and several liability to defendants who have only a minor responsibility for a plaintiff's loss, in a case where joint and several liability would produce a clear injustice. Nevertheless, we expect joint and several liability to remain the norm. In a case where a court decides that relief is warranted, the court must balance the interests of the plaintiff and minor liable defendant, and ensure that the plaintiff will still receive an effective remedy.

3 Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012) [*Issues Paper*].

Contributions by co-liable defendants towards uncollected shares

12 Even where there is more than one available and solvent liable defendant under the joint and several liability rule, one liable defendant can be required to pay the full loss or a disproportionate amount of the loss to the plaintiff. It is then up to that defendant to pursue the other solvent liable defendants. However, under the rules of contribution, those other liable defendants cannot be required to pay more than their allocated contribution to the defendant who has already paid the plaintiff in full. Accordingly, one liable defendant (the defendant first pursued by the plaintiff) will bear either the full amount or a greater proportion of uncollected shares of insolvent or missing liable defendants.

13 In our view available and solvent liable defendants should share the cost of uncollected shares, in direct proportion to their shares of responsibility. We therefore recommend an addition to the rules of contribution that will permit an application for supplementary contribution, to spread the cost of an uncollected share proportionately among remaining solvent liable defendants.

Specific sectors

14 It was clear from our consultation and our own research that two sectors are likely to suffer disproportionately from "deep pocket" issues, or as a result of a major or catastrophic liability event.

15 The first sector was residential construction, particularly local authority participants who act as building consent authorities. As a result of the leaky building crisis, local authorities have frequently been "deep pocket" defendants, to the point where they have been unable to insure for weathertightness-related liability. Building consent authorities are also unusual in that they do not enter a market to make a profit, cannot withdraw from providing mandated services and usually have no choice other than to pass on incurred liabilities to ratepayers.

16 We considered the practicality of introducing proportionality in the residential construction sector. Without evidence of the deep pocket issue being a systemic problem beyond local authority participants, we could not recommend the introduction of proportionate liability in this sector. This conclusion was bolstered by some specific legislative steps that have been taken over the past decade to help resolve the leaky home crisis, as well as more general changes and improvements to building legislation and regulations.

17 However, we recognise that the deep pocket problem will remain after leaky homes have been dealt with, especially if another major liability event occurs. We therefore recommend the introduction of caps on liability for building consent authorities, for new liabilities arising after leaky homes claims have been dealt with.

18 In their submissions, many professional service providers and advisers argued that, like local authorities, they were at risk of being or becoming deep pocket defendants. This is because it is common in this field to have public liability or professional indemnity insurance and to have strong incentives to minimise reputational risk by settling a claim or threatened claim. These factors, it is argued, may lead to professionals paying more than their fair share of responsibility. These submitters argued for proportionate liability and capped liability, both of which are in operation in Australia.

19 We find that, in the absence of trans-Tasman markets for professional services, the risk of being the liable defendant first sued by the plaintiff is one which must be borne by the defendant. In so far as is practical, professionals can often still reduce the potential scale of liability through indemnity insurance and by negotiating contractual limitations of liability.

20 However, where a trans-Tasman market for particular services does exist we find the argument to better align liability systems more compelling. We are satisfied a trans-Tasman market for audits of large firms already exists, and it will continue to expand. With capped liability schemes for auditors applying in all or nearly all States in Australia, we have recommended that New Zealand auditors conducting large audits have a capped liability scheme in broadly similar terms to Australian models. We expect that such a scheme should be structured so that most normal liability events will be unaffected. But, should a very large audit firm be exposed to a catastrophic loss, their liability would be capped at a known level, set by the scheme.

Recommendations

CHAPTER 3

LIABILITY REGIME FOR MULTIPLE DEFENDANTS

R1 Where two or more civil defendants are held liable to a plaintiff for the same, indivisible damage, the basis for determining liability should continue to be that of joint and several liability.

CHAPTER 4

PARTIAL REFORM OPTIONS

R2 A hybrid rule, incorporating some elements of proportionality into joint and several liability, should not be introduced into the liability regime for multiple defendants.

CHAPTER 5

RELIEF FOR A MINOR DEFENDANT

R3 While joint and several liability remains the rule, a court or tribunal should have discretion to make orders mitigating the full application of joint and several liability in respect of a defendant who has only a minor and limited responsibility for the plaintiff's loss, if the court or tribunal is satisfied that requiring the minor defendant to pay the full or part of an amount unpaid by another defendant would be unduly harsh and unjust.

R4 The relief for a minor defendant should be provided for in a new s 17A of the Law Reform Act 1936 or another appropriate statute, if that Act is consolidated.

R5 The new provision should include terms to ensure that:

(1) A minor defendant means a party held liable in a civil action but which or whom the court or tribunal determines bears only a minor and limited responsibility for the plaintiff's loss.

(2) A liable party is not a minor defendant only because:

- the party's share of responsibility falls below a particular percentage or proportion, or is less than any other party's share of responsibility, or both;
- the party's involvement in relevant events was largely or completely restricted to providing verification, certification or other independent services required to facilitate the events or elements of them; or
- the party was under a statutory obligation to provide relevant services or take relevant actions.

(3) The minor defendant may apply to the court or tribunal to be relieved from the full effect of their joint and several liability to the plaintiff, except that an application made more than 12 months after the relevant judgment was sealed is subject to leave to apply being granted.

(4) In granting relief, the court or tribunal must be satisfied that:

- the minor defendant, together with any other minor defendant approved by the court, is or are the only parties available to pay the judgment sum or any remaining unpaid portion of the judgment sum;
- requiring the minor defendant to pay all or some part of the unpaid amount would be unduly harsh and unjust; and
- the circumstances provide justification for some relief from joint and several liability.

(5) When granting any relief under this section the court or tribunal must ensure that:

- the plaintiff will still receive an effective remedy;
- the result achieves reasonable fairness between plaintiff and minor defendant; and
- the relief does not reduce the plaintiff's potential recovery from all liable parties to less than half the damages they were awarded in respect of the relevant damage.

CHAPTER 6

SUPPLEMENTARY CONTRIBUTION

R6 The rules of contribution should be extended to allow a defendant required to pay all or part of a share of liability left unpaid by another defendant, to apply for supplementary contribution from other solvent defendants or judgment debtors. A court or tribunal ordering supplementary contribution should do so by ordering contributions proportionate to the shares of responsibility of each solvent party, including the applicant.

R7 The additional rule should be modelled on proposed section 17 of a draft Civil Liability and Contribution Bill appended to the Law Commission's Report, *Apportionment of Civil Liability*, and added, with all necessary modifications, to the existing provisions governing contribution in section 17 of the Law Reform Act 1936.

CHAPTER 7

THE BUILDING SECTOR

R8 Participants in the building sector should remain subject to the normal application of joint and several liability.

R9 The liability of building consent authorities held liable in tort for acts and omissions relating to building consents and all related work should be capped.

- The cap should be set initially at: $300,000 for a single dwelling; $150,000 per unit in a multi-unit development; and $3 million per multi-unit development, with such rates reviewed over time against appropriate indices to ensure each cap remains fair to potential plaintiffs and authorities.
- Any cap should apply only to new claims arising from acts or omissions that occur after 23 July 2016 (which is the date the Financial Assistance Package is due to close to new claims).

R10 The Building Act 2004 should be amended to clarify the responsibility and potential liability of building consent authorities for commercial building consents by enacting a new section, section 52Z, which defines the extent and limits of building consent authority liability for commercial consents, in similar form to sections 52I and 52L (which deal with responsibilities for simple and low risk residential consents, respectively).

R11 The Ministry of Business, Innovation and Employment should continue to develop, for implementation if proved feasible, a comprehensive residential building guarantee scheme with options suitable for both standalone and multi-unit dwellings.

CHAPTER 8

LIABILITY OF PROFESSIONAL SERVICE PROVIDERS AND ADVISERS

R12 Professional service providers and advisers should remain subject to the normal application of joint and several liability.

R13 Auditors and audit firms conducting large or complex audits in New Zealand, including audits of listed companies, other issuers or Financial Market Conduct reporting entities, should be able to participate in a capped liability scheme covering their audit work, provided the scheme is approved by the Financial Markets Authority (FMA) and individuals and firms qualify for and comply with the scheme.

R14 The New Zealand Institute of Chartered Accountants (NZICA), its successor and/or other accredited professional bodies should be invited to develop an initial scheme to be submitted to the FMA or other suitable statutory supervisor, which may approve the scheme.

R15 The cap for each audit firm should be based on revenue, with a $2.5 million cap where income from large or complex audits is under $10 million per annum, a $25 million cap where income from large or complex audits is between $10 and $20 million per annum and an $80 million cap where income from large or complex audits is over $20 million per annum.

R16 The cap will apply to all claims from contracting parties or third party investors, whether founded in contract, equity, tort, or otherwise but will not apply to liability arising from fraud, dishonesty or other intentional wrongdoing.

R17 Approval of a scheme will be for a maximum of five years, with the professional body able to make an application for a new or renewed scheme at that time.

Chapter 1
The reasons for this review

INTRODUCTION

1.1 This Report examines and makes recommendations on what rule or rules should govern the situation where two or more civil defendants are held liable to a plaintiff for the same, indivisible damage. The reference to undertake a fresh look at this issue[4] was generated by Cabinet in 2011 as a result of deliberations on measures responding to the leaky buildings crisis.

1.2 The reference reflects the fact that the issue has been and remains important and controversial for parties to litigation where there is likely to be more than a single defendant. Whether plaintiffs will be more or less able to recover all of the losses they have suffered depends on whether joint and several liability, or some form of proportionate liability applies. Defendants, on the other hand, will either remain liable to pay up to 100 per cent of losses, or alternatively only a proportionate share that reflects their share of responsibility. This is because of the differences in the two rules. As we explained in our Issues Paper.[5]

- under joint and several liability each defendant held liable for the same damage is liable for the whole of that damage, regardless of how many other defendants are also liable for the damage (but may seek contributions from the other defendants); whereas
- under proportionate liability each liable defendant is liable only for the proportion of the loss or damage that a court determines is just, taking into account each defendant's relative level of fault or comparative responsibility.

1.3 The key issue is how each rule allocates the risk of an absent, insolvent or otherwise unavailable liable defendant. The current rule of joint and several liability protects the plaintiff by holding each liable defendant liable for the whole loss they caused or contributed to. If one liable defendant is not available, the plaintiff can enforce judgment against the remaining liable defendant(s) for any part of the damages that remains unpaid. Alternatively, the plaintiff can simply enforce judgment against a party who can pay, and leave that party to seek contribution from others. By contrast, proportionate liability protects defendants from having to pay any more than what the court determines is their share of the responsibility or blame, comparative to other defendants. If the plaintiff cannot collect any defendant's share, it remains unpaid. Thus under joint and several liability the risk of a defendant not paying is borne by the other liable defendants, while under proportionate liability, the risk is borne by the plaintiff.

1.4 Given the differing allocation of risk and the direct cost consequences on either plaintiffs or liable defendants, the choice of which rule should apply remains contentious. The debate is also often phrased in terms of fairness. Is it fair that a single defendant with possibly slight responsibility for the damage suffered by the plaintiff may nevertheless be required to meet the whole cost? Or is it fair that a plaintiff cannot recover all of their loss, even though there may be liable defendants available who have been held to have caused the damage and have the ability

4 The Law Commission undertook a review of joint and several liability and produced a Report in 1998: Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

5 Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012) [*Issues Paper*] at 3.

to pay?[6] Other commentators have explored whether one rule or the other is more efficient in economic terms, but no obvious consensus has emerged.[7]

1.5 The task for this Report is therefore to reach a conclusion on matters that are relatively well canvassed, but that are still contentious. This required us to approach and analyse options, so far as possible, afresh and without preconceived views. After a study of the options and the available literature, and after consultations with many interested groups, we developed criteria to assist with a principled evaluation and choice between the options. The criteria take into account:

- whether the current regime creates identifiable problems, and whether an alternative regime would address or reduce these problems without creating equivalent or new problems;
- the costs to affected parties of each regime;
- fairness to and between parties under each option; and
- whether any option will produce efficiency gains that should be counted in its favour.

THE BACKGROUND TO THE REVIEW

1.6 We noted in our Issues Paper that discussion of the relative merits of joint and several liability versus proportionate liability has been ongoing for at least 20 years.[8] In 1992, as part of a wider project dealing with apportionment of civil liability, the Law Commission released preliminary proposals that included retaining joint and several liability.[9] The Commission delayed its Final Report on that project to await the outcome of similar work being undertaken in Australia. When the Commission finally reported in 1998, it continued to recommend the retention of joint and several liability.[10] The Commission considered that this recommendation was required to avoid negative impact on plaintiffs and to best achieve the common law commitment to the objective of fully compensating plaintiffs for loss suffered.[11] Similar conclusions were reached by law reform bodies in, for instance, Australia and Canada.[12]

1.7 However, these reports did not settle matters. From 2001 Australia suffered an insurance crisis. This was partly influenced by overseas events including the Enron scandal, but was more particularly driven by the collapse of the HIH Insurance Group, previously a dominant provider in the professional indemnity and public liability insurance market. The insurance crisis had a role in influencing economic reforms; in 2002 the Australian Federal Government agreed with all States to move to a proportionate liability regime for property damage and economic loss claims involving failure to take reasonable care, and for statute-based misleading and deceptive conduct claims.[13]

1.8 Unlike Australia, New Zealand did not experience insurance difficulties. However, New Zealand did suffer from the rapid development of leaky home and leaky building problems from around 2000, and in due course this served to reignite concerns about joint and several liability.

6 A problem with these arguments is that they tend to be phrased in terms of fairness or unfairness to one side or the other. The challenge for this review has been to arrive, after analysis, at the choice of the rule that is most fair and appropriate, balancing where necessary the respective interests of plaintiffs and defendants.

7 See *Issues Paper*, above n 5, at ch 8 for a summary of some of the main contributions.

8 *Issues Paper*, above n 5, at [1.7]. See [1.7] to [1.15] for a more detailed summary of the relevant history.

9 Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992).

10 Law Commission, above n 4, at [90].

11 *Issues Paper*, above n 5, at [4.5].

12 *Issues Paper*, above n 5, at [1.8] to [1.9].

13 P Long "The impact of proportionate liability legislation" (2010) 7(6) CL 74 at 74. The change became effective, State by State, on various dates in 2004 and 2005.

Leaky homes and liability

1.9 As we discussed in our Issues Paper, the leaky homes crisis has been a major liability event for the wider building industry, centred on leaking or weathertightness issues and affecting predominantly new residential homes in both standalone and multi-unit developments. The crisis had multiple causes and cases typically involve multiple potential liable parties.[14]

1.10 Leaky homes cases have brought renewed calls to deal with perceived problems with joint and several liability. The large number of participants involved in any significant building project readily translates to a number of potential defendants for a leaky home claim. Each potential defendant will, most likely, have made varying contributions to any lack of weathertightness that is proven, and may eventually be held to bear differing shares of responsibility (based on the secondary contribution rules) while still being jointly and severally liable for the plaintiff's indivisible damage (primary liability).

1.11 The sheer scale of the crisis in the building industry has contributed to an increasing number of liable defendants becoming unavailable because of personal insolvency or corporate collapse. This has left a shrinking supply of solvent liable defendants to meet some or all of the uncollected share left by insolvent liable defendants. This is inevitably perceived as unfair by solvent liable defendants, especially if they bore only a small or very small share of overall responsibility. The impact of uncollected shares also fell disproportionately on certain categories of liable defendants, especially local authorities who cannot become unavailable due to insolvency and have deep pockets funded by ratepayers.

1.12 It was as a consequence of the leaky homes situation that the Government asked the Law Commission to take a fresh look at the issues under joint and several liability and make recommendations on whether any change is required.[15] Although the leaky home crisis was the catalyst, our review and this Report is not restricted to considering certain sectors or situations. The Commission has completed a first principles review of the competing liability rules for multiple parties, and has sought in its recommendations to propose rules of general application, while still taking account of conditions that may apply in particular sectors.

The global financial crisis

1.13 Problems in world financial markets, after Enron from 2001 and again from 2007 as part of the Global Financial Crisis, have contributed to further concerns regarding joint and several liability. The most notable result of the financial crisis in New Zealand has been the failure of numerous non-bank finance companies or investment schemes, from as early as 2005 through to and beyond 2010. Litigation resulting from these failures has been dominated by criminal prosecutions of finance company directors. However, the possibility exists that depositors interested in recovering lost investments may be able to target a finance company auditor, trustee or supervisor, and could benefit from joint and several liability if the party sued has assets or insurance.

1.14 More generally, Enron and the Global Financial Crisis raise at least the theoretical prospect of another major liability event causing a catastrophic failure, like that of Enron's auditors, Arthur Andersen. Large audit firms, in particular, have argued that joint and several liability leaves

14 The causes included, at least: introduction of new building products, especially monolithic cladding; wider use of untreated softwood timber, including for structural work and framing; increasing compartmentalisation and use of unskilled labour-only contractors on more tasks; varying and inadequate skills generally; poor selection of materials for particular jobs, whether because of skill gaps or cost drivers; uneven or inadequate inspection standards and systems from local authorities and new private sector certifiers; and a difficult transition to a quite different regulatory environment. The range of potential causal factors means that virtually all parties involved in a residential construction, from developers and designers through to builders, subcontractors and building consent authorities and certifiers could be liable for damage caused by weathertightness faults in a leaky home.

15 Cabinet Office Circular "Building Act Review: Review of Joint and Several Liability" (14 September 2011) EGI Min (11) 20/12 at [4].

important economic infrastructure open to unlimited and potentially catastrophic losses that the economy as a whole cannot afford.[16]

THE SCOPE OF THIS REPORT

1.15 The principal question that this Report must answer is which, of joint and several liability and proportionate liability, is the appropriate rule for New Zealand today. We set out our analysis of the issues and consequent recommendation on this central point in Chapters 2 and 3. We provide a general answer and recommendation, applicable to all cases where liability of multiple defendants arises. We also give separate consideration to whether the features and needs of particular sectors require some individual treatment, in Chapters 6 to 8.

1.16 The terms of reference require us to examine hybrid schemes, involving some mixture of elements of joint and several liability, proportionate liability, or some other arrangement, as well as arrangements for capping liability, either by contract or through statute. We deal with the possibility of hybrids in Chapter 4. Capping is discussed in Chapters 7 and 8 as part of our consideration of limitation of liability for building consent authorities, professional advisers and service providers. Capping is most relevant for these groups because it may mitigate the catastrophic loss risk, and reflects that capping is already a reality in Australia.

1.17 We have also considered whether other adjustments could or should be made. In the building sector, we note the desirability of more comprehensive and effective building guarantee or warranty products, whether or not the liability rule changes. In the building sector it is also necessary to work through the implications for the liability of building consent authorities (local authorities) from changes to consenting rules and allocation of responsibility. The landscape for local authority liability in this area is changing and this should be clearly understood and consistently expressed in the relevant legislation.

1.18 There are issues this Report was not intended to, and does not, address. This Report mainly concerns an important set of secondary liability rules, namely how liability is allocated amongst multiple defendants after they have each been held liable according to some primary liability rule.[17] Whether a party is liable to a plaintiff is clearly the fundamental issue in any potential claim, and will normally be of much greater or immediate significance to the plaintiff and defendant than the secondary liability rules regarding multiple defendants. Controversial issues exist in respect of many of these primary liability rules, for instance the liability of local authorities for negligence regarding commercial or non-residential building projects, as found recently in *Spencer on Byron*.[18] As indicated in the previous paragraph, we consider that recent legislative changes to building legislation implicitly affect the commercial buildings issue, as well as other liabilities in the sector, and it would be helpful if such liabilities were spelled out as clearly as possible. However this Report cannot and does not seek to address the many and varied issues surrounding primary liability in negligence, either in the building or local government sector, or generally.

16 See the submissions of the New Zealand Institute of Chartered Accountants, Deloitte, Ernst & Young, KPMG and PWC on *Issues Paper*.

17 For example liability in negligence, breach of contract, or on some other basis, such as statute.

18 *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*]. See *Issues Paper*, above n 5, at [5.19]–[5.23] for a discussion of that case.

Chapter 2
Options for allocating liability among multiple defendants

INTRODUCTION

2.1 This review addresses issues that arise in cases where multiple parties have been found liable for the same loss. This may occur where the liable parties have each contributed to the single loss through separate actions, or where they have together performed or participated in the same action(s) that caused the loss.[19]

2.2 Under the current law in New Zealand, two wrongdoers[20] who have caused the same damage will be "jointly and severally liable" to compensate the injured party for the full amount of the loss. Their shared responsibility for the loss requires each of the liable defendants to pay up to the full cost of damages awarded to the injured party to ensure that the injured party receives full compensation.

2.3 As discussed in Chapter 1, the system of joint and several liability has been the subject of extensive discussion and debate in the past few decades, and some jurisdictions have moved to alternative systems for allocating liability among multiple defendants. This chapter will outline how these different systems operate in practice, including some of the more significant issues in application.[21] The remainder of the Report will draw on this discussion when assessing the problems with the current system and recommending options for reform.

JOINT AND SEVERAL LIABILITY FUNDAMENTALS

2.4 Currently in New Zealand the allocation of loss among multiple liable defendants is determined by the rule of joint and several liability, which is a common law rule,[22] and the law governing contribution between wrongdoers, which is found in equitable rules and section 17 of the Law Reform Act 1936.

2.5 The rules provide that when multiple defendants are held jointly and severally liable for one indivisible loss suffered by the plaintiff, they can each be obliged to pay up to the full amount of the damages awarded for the loss (although the injured party cannot recover more than the total loss assessed by the court). Contribution rules act to soften the harsh effects that joint and several liability can have on liable defendants. Each set of rules focuses on different responsibilities or relationships. Joint and several liability focuses squarely on each wrongdoer's liability to the injured party, whereas contribution rules concentrate on each liable defendant's responsibility to other wrongdoers, albeit in the context of each owing or being

19 Although use of terms varies somewhat in different jurisdictions, in tort law persons whose separate or unrelated actions cause a single loss are known as "concurrent tortfeasors". Persons who acted together (or are deemed to be acting together, for example, partners) and cause a loss are known as "joint tortfeasors".

20 For ease of expression, we will use the term "wrongdoers" to mean parties who have been or who may be found liable in civil litigation.

21 More detailed description of different liability schemes can be found in Law Commission *Review of Joint and Severable Liability* (NZLC IP32, 2012) [*Issues Paper*].

22 More detail about this can be found in *Issues Paper*, above n 21.

capable of owing concurrent liability to the plaintiff.[23] It is only when all contribution awards against or in favour of each liable defendant are considered together that the relative liability or shares of responsibility between the wrongdoers becomes clear. Each jointly and severally liable wrongdoer is still liable to pay the plaintiff up to 100 per cent of the total damages, but can realistically hope to recover amounts they pay beyond their "share" from contributions owed to them by other wrongdoers. Unless there are any missing wrongdoers, the result will be proportionate to the apportionment of responsibility determined by the court. However, the individual wrongdoers have to do the work to pursue other wrongdoers to collect contributions and thereby minimise their total cost from being held liable.

Assessment of liability

2.6 In proceedings with multiple defendants, the courts must determine whether each defendant should be held liable for the loss claimed by the plaintiff. This is not a matter of degree. The particular legal rules that the court must apply vary depending on the case and what the plaintiff alleges. But the defendant will either be liable or not liable, depending on whether or not they breached, for example, a contract or a legal duty, and in doing so caused some relevant loss or damage. The court also must decide whether the loss is single and indivisible, or whether different aspects of the loss should be attributed to different liable defendants. A single, indivisible loss contributed to or caused by several wrongdoers is a common but not inevitable finding. The following example illustrates how losses can fairly be divided, even if at first they appear indivisible.

> The plaintiffs own a leaky home. An independent report identifies five major causes of the leaks:
>
> - lack of eaves over the windows;
> - failure of monolithic cladding;
> - the use of untreated timber;
> - improperly secured window flashings; and
> - improperly laid waterproofing on an upstairs deck on the south side of the house.
>
> The plaintiffs are suing the architect, the builder who decided to use untreated timber and who was responsible for installing window flashings, the subcontractor who installed the waterproofing on the upstairs deck, and the Council as building consent authority.
>
> The court finds that architect, builder and Council negligently caused damage to the entire building but the subcontractor caused damage only to the deck and the area of the south wall below the deck. The total cost to fix all leaks is $250,000. Water ingress through windows on the south wall, combined with the damage from the deck, means the entire south wall will need to be replaced. The subcontractor is jointly and severally liable with the other parties for this divisible portion of the loss, with damages assessed as $75,000; while the other parties are jointly and severally liable for the entire cost of the rebuild ($250,000, including the $75,000 portion for the deck and south wall).

2.7 As the above example demonstrates, wrongdoers will only be jointly and severally liable where they have each been found to have caused the same damage. The logic of the rule is that these wrongdoers have all caused the whole loss through their actions, and there is no sensible way of dividing their common obligation to the plaintiff between them. This reflects the completely orthodox view that if a defendant is proved to have wrongfully caused or contributed to a loss,

23 Because the plaintiff has the choice of who to pursue, they may decide not to sue a particular wrongdoer. Another wrongdoer may nevertheless add that wrongdoer as a third party, so long as they can demonstrate that the wrongdoer would have been liable if sued in time: Law Reform Act 1936, s 17(1)(c).

compensation should be available from that defendant for all of that loss.[24] The appropriate levels of contribution between each of the liable defendants is assessed separately.

Contribution between wrongdoers

2.8 Section 17 of the Law Reform Act 1936 provides for contribution between multiple parties liable for the same damage. Alternatively, parties may rely on equitable contribution.[25] Liable defendants can claim contributions from each other and these can be assessed in the main proceeding that determines liability to the plaintiff. Liable defendants can also claim contributions in a subsequent proceeding. In practice, contribution is generally assessed as part of the main proceeding.[26] The plaintiff will claim against one or more defendants, each of whom may then join third parties or make cross-claims against other defendants, to bring their claims for contribution. The court will first determine whether each defendant is liable to the plaintiff. The court will then assess respective contributions of the liable defendants and those of third parties.

2.9 The combined effect of joint and several liability and contribution means that each defendant found jointly and severally liable for the indivisible loss can be called upon by the plaintiff to pay in full, but can hope to receive sufficient contribution from other liable defendants to reduce their net exposure to their "share" of responsibility. For example:

> A plaintiff sues two defendants D1 and D2. D2 joins D3 and D4. Each defendant cross-claims against the others. First the court finds that the four defendants are jointly and severally liable for the whole loss of $100,000. For contribution purposes the court then assesses the defendants' relative fault: D1 – 40 per cent; D2 – 30 per cent; D3 – 20 per cent; D4 – 10 per cent.
>
> The judgment will therefore contain an order to the following effect:
>
> - D1 is to pay the plaintiffs $100,000[27] and is entitled to recover up to $30,000 from D2, up to $20,000 from D3, and up to $10,000 from D4 for amounts paid above $40,000.
> - D2 is to pay the plaintiffs $100,000 and is entitled to recover up to $40,000 from D1, up to $20,000 from D3, and up to $10,000 from D4 for amounts paid above $30,000.
> - D3 is to pay the plaintiffs $100,000 and is entitled to recover up to $40,000 from D1, up to $30,000 from D2, and up to $10,000 from D4 for amounts paid above $20,000.
> - D4 is to pay the plaintiffs $100,000 and is entitled to recover up to $40,000 from D1, up to $30,000 from D2, and up to $20,000 from D3 for amounts paid above $10,000.

2.10 The plaintiff is entitled to seek the full amount from any liable defendant and leave it to that defendant to recover from the others. This should not be problematic where the other parties are solvent and amenable to court orders, if required. However, this process can mean that any unrecoverable shares as a result of a missing or insolvent liable defendant will be borne by a single liable defendant. Even if two or more remaining liable defendants share the burden of paying the plaintiff an unpaid amount, it is unlikely that their additional payments will be

24 Causation can be a complex issue, and evidence and argument over causation will often be critical to determining liability. For the purposes of this Report when we say a defendant "has caused" a loss, we generally mean that on a common sense basis the defendant's actions are a necessary or "but for" cause of the loss that is not trivial or able to be ignored as *de minimus,* and which the court determines falls within the scope of liability for the particular cause of action.

25 Particularly where defendants are sued under different causes of action, making the Law Reform Act provisions difficult or impossible to apply. For a recent but difficult New Zealand case involving equitable contribution, see *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

26 In more complex cases, separate proceedings may be required to determine contribution.

27 An alternative formulation would be that the court orders or gives judgment for the plaintiff against defendants D1, D2, and so forth in the amount of $100,000. The contribution orders in favour of each defendant could then follow in similar form as above.

proportionate to either the shares of responsibility of all the liable defendants, or the shares of responsibility of those who still remain available to pay.

2.11 The combination of the joint and several liability rule and the contribution rules often produces a reasonably proportionate result for liable defendants. However, the primary focus remains on maximising the plaintiff's or judgment creditor's opportunities for being paid, and there is currently no mechanism for seeking to improve proportionality among remaining wrongdoers where it has been defeated by an unavailable wrongdoer's uncollected share.[28]

PROPORTIONATE LIABILITY

2.12 Proportionate liability is the name given to systems of allocating liability among multiple wrongdoers so that each wrongdoer is liable for no more than their relative share of fault. For proportionate liability to operate effectively, it is necessary for all potentially liable parties to be joined in the same proceedings. The court will determine whether each of the parties is liable, and then determine their relative liability. The plaintiff can then recover from each of the wrongdoers but only in accordance with their assessed shares.

2.13 The major ramification of proportionate liability is that the plaintiff bears the risk of uncollectable shares. If a liable defendant becomes insolvent or otherwise unavailable after judgment, the plaintiff cannot look to the other liable defendants to pay the outstanding amount. Therefore, the relative liability of the wrongdoers becomes a matter of concern to the plaintiff, who will have an interest in ensuring that a greater proportion of the loss is allocated to wrongdoers who are likely to be able to satisfy the judgment.

2.14 Proportionate liability presents a difficult conceptual and procedural problem: how to deal with parties who are not joined to the proceedings?[29] This is known as the "empty chair" or "phantom defendant" problem. Empty chairs or phantom defendants can occur for different reasons and the effects on the parties and the proceeding may vary.[30] One example might occur in a leaky building claim where the building company has been liquidated before the commencement of proceedings. In some jurisdictions, the court may take account of the liability of absent parties in determining the relative shares. In other jurisdictions the court will ignore the potential liability of absent parties. Both options present problems.

2.15 Allowing the liability of an absent party to be taken into account is consistent with the principle behind proportionate liability. The difficultly with this option is that it risks creating highly complex litigation. Defendants will have a strong incentive to identify as many missing parties as possible and to argue that they all would have been liable if available. Without access to information known only to the absent party or parties, it may be difficult for the courts to accurately assess their relative liability. Of course, courts will adopt a robust approach to parties seeking to rely on highly speculative arguments or evidence about parties who cannot be shown to have a real connection with the matter in hand. There is nevertheless potential for fairness issues to arise for plaintiffs. Each dollar of liability allocated to an absent, possibly insolvent defendant may directly reduce the plaintiff's recovery, with the plaintiff having little ability to challenge the scale of impact.

28 The prospects for improving proportionality in the latter situation are discussed in ch 6, below.

29 For a detailed discussion of this issue, see N Marcus "Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability" (2007) 60 Ark Law Rev 438.

30 Possibilities include: where a wrongdoer is already insolvent or is approaching insolvency; the wrongdoer has died (but the wrongdoer's estate may still be liable); the wrongdoer has physical, geographical or other barriers that affect their ability to participate; or a wrongdoer who could participate elects, either tactically or from ignorance, not to answer summons.

2.16 Ignoring the liability of an absent party is also problematic and is a departure from the rationale for proportionate liability. Doing this at trial would create a difference in outcome depending on when a potentially liable party becomes unavailable. If a building company becomes insolvent and is liquidated before the plaintiff discovers the defects and brings a claim, the other parties will bear what would have been the absent party's share. If the building company is liquidated after judgment, the plaintiff will be unable to recover the share allocated. However, there could be an incentive for plaintiffs to delay bringing claims for as long as possible to increase the likelihood that financially vulnerable parties become unavailable before the proceedings rather than after.

PARTIAL REFORM OPTIONS

2.17 In the course of this review it has become apparent that full proportionate liability is very rare. Most jurisdictions that have reformed the rule of joint and several liability have not shifted wholly to proportionate liability, instead adopting more moderate or partial reforms.[31] It is therefore particularly important that this review considers these "hybrid" options.

2.18 In our Issues Paper we discussed different partial reform models, including some used in parts of the United States and Canada and those considered in our previous review in 1998. Such models are intended to ameliorate some of the effects of joint and several liability for defendants, without going the whole way to proportionate liability. An example is to provide proportionate liability where a plaintiff is found to be contributorily negligent, with joint and several liability applying if the plaintiff is judged not to have contributed to their own loss. The detail of different hybrids will be discussed more fully in Chapter 4.

31 For example, the Australian move to proportionate liability only applies to property damage and economic loss claims alleging negligence, another cause of action akin to negligence, or some statutory causes of action, including Trade Practices. See ch 4.

Chapter 3
The appropriate liability system for multiple defendants

INTRODUCTION

3.1 Having outlined the principal features of joint and several and proportionate liability, and the key differences between them, in this chapter we recommend the system we consider is best for New Zealand. This requires further analysis of the key attributes of each system. Essential to this analysis is an acceptance that each system prioritises different objectives. The starkness of the central distinction means the choice must, to some extent, be between maximising plaintiff recoveries and minimising defendant risks. The result will inevitably favour one group. However, in later chapters we consider what can be done to make the chosen system fairer to both parties.

ANALYSIS OF JOINT AND SEVERAL LIABILITY

3.2 The requirement that each liable defendant is liable for the totality of the loss is seen as the key advantage of joint and several liability. Supporters of joint and several liability accept that if one or more liable defendants are not available, then it is appropriate that the remaining available liable defendants should be responsible for compensating the plaintiff. The consistent view of the various law commissions who have examined the question of the appropriate liability regime is that joint and several liability meets the legitimate expectations of plaintiffs who have been harmed by the actions of liable defendants.[32] Any shift away from the joint and several liability regime will transfer part of the risk to the plaintiff. The plaintiff, however, is the only party who has not actually caused the loss, unless there is an issue of contributory negligence. This is seen as so advantageous that the law commissions have not recommended major changes.[33]

3.3 An obvious but important point to highlight is that a defendant will only incur the risk of full liability if they have actually contributed to the full loss. A liable defendant who contributed to or caused only some identifiable portion of the plaintiff's loss has not caused the same damage as other liable parties and should not be jointly and severally liable with them.

3.4 The great virtue of joint and several liability is that the plaintiff will in theory receive full compensation for their loss provided at least one liable defendant is present and solvent. The plaintiff has the freedom to choose which defendant they will commence proceedings against. The plaintiff can also choose which liable defendant or defendants they will enforce judgment against and in which order. The contribution issues between liable defendants and third parties joined by them are matters solely for them, and need not concern the plaintiff.

32 New South Wales Law Reform Commission *Contribution between Parties Liable for the Same Damage* (Report 89, 1999); Law Commission of Ontario *Joint and Several Liability under the Ontario Business Corporations Act* (2011).

33 Thus in 1999, the New South Wales Law Reform Commission did not consider that the problems with joint and several liability warranted a change, above n 32. But, note that this view did not convince policy makers at both the state and commonwealth level. They have made the decision to shift to proportionate liability for property and economic losses, excluding personal injury. Australia is so far the only complete national jurisdiction to make this change.

3.5 The consistent view of various Law Commissions who have examined the question of the appropriate liability regime is that joint and several liability meets the legitimate expectations of plaintiffs who have been harmed by the actions of liable defendants. Any shift away from the joint and several liability regime will transfer part of the risk to the plaintiff.

3.6 The central feature of joint and several liability, that so long as there is an available liable defendant an innocent plaintiff[34] will not have to bear any proportion of the loss, is also the feature most objected to by its critics. The question from potential defendants and other critics is whether it is appropriate, reasonable or fair that a liable defendant who has the financial capability to pay should have to bear the full loss if other defendants are not present or are insolvent. The objection is especially strong if the solvent liable defendant, compared to other defendants, was judged to bear only a small share of fault or responsibility for the loss.

3.7 The argument also has aspects other than fairness. It has been asserted that the joint and several liability rule is likely to contribute to excessive caution by some parties.[35] An example where this may occur is a building project where there are many parties who contribute. All parties naturally have incentives to avoid risk and minimise their exposure to liability. However, the argument suggests that fear of 100 per cent liability from joint and several liability provides strong incentives for parties to take excessive steps to reduce or eliminate their risk of liability. The overall effect is to increase costs and potentially reduce innovation, since with innovation there is likely to be greater risk.

3.8 It is by no means clear how far these suggested negative effects can fairly be traced back to joint and several liability. Simple fear of *any* liability may be enough to encourage parties to exercise excessive precaution, especially if the consequence of liability is high. Levels of precaution may also depend on how well defined the required standard of care is, achievement of which would avoid liability. If the standard of care is not clearly defined or regulatory or judicial decisions are unpredictable, parties may react by either abandoning all efforts to exercise care or taking excessive steps "just in case". Fear of joint and several liability may add to the mix, but it is not the only, nor necessarily the decisive, factor affecting parties' decisions about how much care to exercise.

3.9 A further effect of joint and several liability in the building industry is that local authorities are often the only solvent and available liable defendant, and are effectively acting as insurers for homeowners. This means that ratepayers are acting as insurers of last resort when a building fails as a result of wrongdoing by multiple insolvent wrongdoers. It must be doubtful that this arrangement is either efficient or fair.

3.10 The fact that joint and several liability is the current liability regime for multiple defendants in New Zealand, as well as the most common regime used internationally, is also important. Any case for proportionate liability would need to be strong enough to outweigh the current benefits to plaintiffs under joint and several liability that would be lost. A convincing case for proportionate liability would need to demonstrate that a switch would better support industry or commerce by being more economically efficient. If such a benefit were demonstrated this might justify a change, even if it involved transferring some risks to plaintiffs. However, as we indicated in our Issues Paper, the economic evidence to support proportionate liability is lacking.[36] Nor have we been able to locate any empirical evidence to show that proportionate

34 That is, where there is no question of contributory negligence on the part of the plaintiff.

35 New Zealand Productivity Commission *Housing affordability inquiry* (New Zealand Productivity Commission, Wellington 2012) at 161. See also Law Commission *Review of Joint and Severable Liability* (NZLC IP32, 2012) [*Issues Paper*] at ch 8.

36 *Issues Paper*, above n 35, see generally ch 8.

liability may achieve economic efficiencies. From the limited evidence available, moving to proportionate liability is likely to cause economic disbenefits.[37]

ANALYSIS OF PROPORTIONATE LIABILITY

3.11 The principal alternative system of liability is the proportionate system in which each co-defendant is only liable for the proportion of the damage that they are judged responsible for. As noted in our Issues Paper:[38]

> Proportionate liability therefore rejects the common law principle that once a defendant has been found to have wrongfully caused a plaintiff's loss, that defendant is then liable to compensate the plaintiff for all the reasonably foreseeable losses – regardless of whether some other defendant has also caused or contributed to the loss occurring. Proportionate liability requires a court to examine and discover each defendant's relative share of responsibility and order each defendant to pay only that share.

3.12 Proportionate liability will disadvantage plaintiffs if liable defendants are absent or insolvent. In such a situation, the plaintiff will not be able to recover the loss that is attributed to these liable defendants. In essence the plaintiff will bear the absent or insolvent liable defendant's proportion of loss. This is despite the fact that the plaintiff has not caused the loss and there are available and solvent defendants who have contributed to the loss and who could pay. Similarly to joint and several liability, the central feature of proportionate liability is seen by defendants as its great advantage and by plaintiffs as its crucial deficiency.

3.13 While joint and several liability is still the normal rule for most countries, proportionate liability has made some headway.[39] Proportionate liability has been adopted in whole or in part in most states in the United States and for some purposes in some Canadian provinces. Australia is the only country to adopt proportionate liability at state and federal levels, although not for personal injury cases and with some grey areas remaining in respect of other civil claims.[40]

3.14 The adoption of proportionate liability in the United States must be seen as part of a wider impetus for tort reform in North America over at least the last 20 years. The impetus for reform resulted from the disruption and costs to society and business from litigation processes and costs, which were perceived to be spiralling out of control. Joint and several liability was an important target for reform because of the impact of joint and several liability on defendants who had made, or saw themselves as having made, only a minor contribution to the loss. Concerns tended to focus on personal injury and product liability cases, and the need for general reform, not just of joint and several liability.[41] However, the cost to liable defendants due to joint

37 MA Geiger, K Raghunandan and D V Rama "Auditor decision-making in different litigation environments: The Private Securities Litigation Reform Act, audit reports and audit firm size" (2006) 25 Journal of Accounting and Public Policy 332. Geiger, Raghunandan and Rama found that after law changes that introduced proportionate liability big firm auditors were significantly less likely to issue qualified audit reports regarding clients that went into bankruptcy shortly afterwards. The change to proportionate liability was not the only change affecting litigation risk; changes in the same Act made it harder for third parties to join in class action lawsuits. But it is clearly arguable that both changes to perceived litigation risk and cost affected auditors and contributed to reduced and insufficient precaution.

38 *Issues Paper*, above n 35, at [3.6].

39 *Issues Paper*, above n 35, at ch 7 provides details on the extent to which proportionate liability has been applied in the Commonwealth and the United States. For Civil Law jurisdictions see Ken Oliphant "Concluding Reflections on the Aggregation and Divisibility of Damage in Tort Law and Insurance" in Ken Oliphant (ed) *Aggregation and Divisibility of Damage* (Springer, Vienna, 2009) 519 at 530.

40 Apart from the fact that proportionate liability does not apply to personal injury cases, the exact extent of proportionate liability in Australia is not completely clear, because of continued differences between state and federal legislation. Proportionate liability generally applies for claims for injury to property or economic loss that are founded in negligence and in most cases where the cause of action or claim is "akin to negligence". Proportionate liability can therefore apply to breach of contract claims, so long as the alleged breach involved some sort of carelessness: *Reinhold v NSW Lotteries Corporation (No 2)* [2008] NSWSC 187; BC200801327. There are differing authorities on whether claims for simple breach of a term of a contract (without negligence) are subject to proportionate or joint and several liability, but it appears that in future they may be subject to joint and several liability: *Perpetual Trustee Company Ltd v CTC Group Party Ltd (No 2)* [2013] NSWCA 58; BC201301287. Some statute-based claims, for instance Australian Consumer Law claims for the equivalent of Fair Trading Act 1986 breaches, are also covered by proportionate liability – but again with variations between states.

41 See for example the discussion in G N Meros Jr "Toward a More Just and Predictable Civil Justice System" (1997) 25 Fla St UL Rev 141. See also *Issues Paper*, above n 35, at [7.20]–[7.21].

and several liability was seen as sufficiently onerous that it[42] increased the cost of business, and potentially restricted economic innovation and activity. It was felt that the adverse economic effects from litigation costs, including the effect of joint and several liability, harmed overall efficiency within the wider economy and thus imposed costs on the whole of society.

3.15 In Australia, the proportionate liability system was first introduced in the building industry in Victoria and New South Wales.[43] In 2003 it the State and Commonwealth governments agreed that there would be a general shift from joint and several liability to proportionate liability for situations other than personal injury.[44] The reasons for this shift have not been particularly well articulated. However, the failure of HIH Insurance in 2001, and the subsequent difficulty or feared difficulty in obtaining liability insurance was seen as a crucial factor in the adoption of proportionate liability.[45] Thus shifting a proportion of the burden of loss onto plaintiffs was seen as a necessary response to ensure maintenance of economic activity at pre-crisis levels.

3.16 The experience of the general shift to proportionate liability in Australia has been less successful than first envisaged. Levin observed that the proportionate system has caused "considerable increase in the complexity and cost of litigation and made settlement by way of an effective offer of compromise or negotiation and mediation more difficult".[46] This is because the proportionate system requires a full assessment of the relative liability of defendants at trial. The relative shares to be borne by each of the liable defendants is also an issue for plaintiffs. They must identify all possible defendants who have caused the loss in order to gain the maximum possible compensation. Plaintiffs may also need to devote energy and argument to convincing the court that defendants best able to pay also attract the greatest proportionate share of liability. At a more basic level, complexity continues because of the unsettled boundary between proportionate liability and joint and several liability, for different types of claims or fact situations, and because of differing state provisions on several important issues.[47] The uncertainties created all add to the procedural issues litigants have to navigate.

3.17 Jurisdictions that have shifted to proportionate liability, either in whole or in part, have determined that the plaintiff may reasonably be required to carry a proportion of the risk of absent or insolvent liable defendants. There are many examples in law and policy where this kind of assessment is made. It is often related to a statute-imposed cap on the extent of loss that can be claimed from a liable defendant or class of defendant, or the extent of insurance that may be offered. The extent of Accident Compensation Corporation (ACC) coverage is an example of limitations on payments. Other examples include the liability of carriers of people and cargo where the liability is limited by legislation or international convention to an amount per kilo, or per package, or per person. The reason for such limits is that if the limit was greater, carriers may not enter the market or may not be able to stay in the market.

3.18 The appeal of proportionate liability can also be described in terms of supporting industry or commerce by relieving businesses of the threat of excessive liability. In the same manner that limiting liability for carriers and insurers could promote the transport and insurance markets, proportionate liability may promote economic activity, resulting in economic efficiency. Looking at the Australian example, the shift to proportionate liability first occurred in areas

42 Along with other targets for reform.

43 Building Act 1993 (Vic) ss 131 and 132; Environmental Planning and Assessment Act 1979 (NSW), s 109ZJ. Despite the earlier date of the parent Act, the introduction in New South Wales was also from legislation enacted in 1993.

44 The Australian situation is more fully discussed in ch 8.

45 See generally Hon Justice Owen "The Failure of HIH Insurance, Vol 1: A corporate collapse and its lessons" (HIH Royal Commission, Sydney, 2003).

46 See the New Zealand Building Disputes Tribunal Quarterly Newsletter: D Levin "Proportionate liability: The Australian Experience" (2011) 9-11 Build Law.

47 Above n 40.

of the economy that are particularly susceptible to multiple parties contributing to activity. The building industry is notable for multiple contractors and parties contributing to the final product. In Australia the building and construction industry was the first beneficiary of the shift to proportionate liability, with a number of states introducing specific legislation for these industries.[48] It had been considered unreasonable for the various parties in the building and construction industry to bear the risk that they would be responsible for the totality of the loss irrespective of their degree of fault. While the wider move to proportionate liability occurred only a decade later, it too had a "commercial" impetus, with the insurance crisis sparked by the collapse of the HIH Group.

COMPLEXITY OF PROCEEDINGS

3.19 The complexity of legal proceedings issue arises principally under proportionate liability. Under proportionate liability the plaintiff needs to identify all possible defendants who may have contributed to the loss. Failure to include a potentially liable defendant will result in less than full recovery.[49] The incentive for the plaintiff is therefore to include any party who might conceivably have caused loss, no matter how tangential their alleged contribution may have been. Assuming the system allows them to do so, a defendant may also have an incentive to add defendants that the plaintiff has not joined.[50]

3.20 In contrast, under joint and several liability it is not crucial for the plaintiff to identify and sue all possible defendants, since full recovery can be made from any one wrongdoer. Of course the defendants have the opportunity to join third parties in order to lay off some of the cost of the potential liability, or they may bring subsequent proceedings for contribution for the same purpose.

3.21 Under either system of liability, the judge is required to deal with the allocation of relative fault between the defendants. However, it is only under proportionate liability that this allocation automatically takes place in the main proceedings.

3.22 As was noted in our Issues Paper,[51] both systems of liability are likely to lead to some level of complication in legal proceedings since they inevitable involve complex factual situations and multiple defendants. Each system of liability will have their own incentives acting upon the parties. The Australian experience suggests that defendants as well as the plaintiff can face difficult decisions about whether to add another party, whom the plaintiff has not sued.[52]

3.23 Under joint and several liability it is the defendants who normally have the greatest incentive to join third parties in order to share the risk. In contrast, under proportionate liability, the plaintiff has the incentive to join as many defendants as possible, since each of them can only incur liability up to the proportion of their blameworthiness. The best opportunity for the plaintiff to ensure that they will receive full compensation for the loss is to join as many defendants as possible so that no one who has contributed to the loss is missed out. The result in

48 Building Act 1993 (Vic) ss 131 and 132: Environmental Planning and Assessment Act 1979 (NSW), s 109ZJ.

49 This is a feature of systems that take account of the liability of "empty chairs", see the discussion in ch 2 above. Depending on the procedural rules adopted, a plaintiff could still make tactical decisions not to join particular defendants. This would likely require a rule allowing defendants to add other defendants as well – with obvious effects on complexity.

50 Again, depending on what the "empty chair" rules are.

51 *Issues Paper*, above n 35, at [6.13].

52 Differing rules among states make this area particularly difficult. Greenham, Morrow and Naylor note that in Western Australia, South Australia and Tasmania, courts *must* have regard to proportionate liability of non-parties. In New South Wales, Australian Capital Territory, Queensland, Northern Territory and the Commonwealth, courts *may* have regard to non-parties and in Victoria they *must not* unless the non-party is deceased or insolvent: Philip Greenham, Kate Morrow and Shelley Naylor "Single line accountability! Proportionate liability and joint and several liability" (2011) 6 C L Int 6.

both cases is complex proceedings involving as many parties who have potentially contributed to the loss as possible.

3.24 The Australian experience also suggests other sources of complexity, including some that may be temporary and others that could conceivably be avoided by good legislative drafting and a simple, comprehensive scheme. As pointed out above, proportionate liability will not apply in Australia in every case. The question of whether a claim is subject to proportionate liability depends on the particular state legislation that applies. In all cases the key question will be whether the claim is an "apportionable claim".[53] Whatever terminology is used, it will inevitably take several years of litigation to determine its boundaries.

ISSUES IN LOSS ALLOCATION

3.25 As the above discussion demonstrates, allocating loss among multiple wrongdoers is always complicated. Our Issues Paper discussed advantages and disadvantages of different options for apportioning liability and many of these points were also mentioned by submitters. In general terms, defendants have argued that it is unfair to hold them liable for the full loss when the loss was not caused by their actions alone. Plaintiffs have argued that it is unfair they should bear loss when a solvent wrongdoer remains available. There is no way to completely reconcile these two points of view.

3.26 Not all issues in loss allocation raise such fundamental points of principle. Many submitters commented that under joint and several liability plaintiffs target parties that appear most likely to have the capacity to pay, even when there are other available parties. For example, local authorities are particularly concerned that they are likely to bear the whole of the uncollectable share in leaky building claims when one liable defendant is insolvent even if there are other solvent liable defendants. This is because contribution rights do not extend beyond the amount or proportion originally allocated to a particular party on judgment, and so one liable defendant cannot recover a share left unpaid from another liable co-defendant. This problem may perhaps be addressed through more moderate changes to our system of civil litigation and we discuss such possibilities in Chapter 6.

3.27 Many submitters also pointed to issues that arise because of other features of New Zealand law, rather than because of the way loss is allocated. The central difference between proportionate and joint and several liability is limited to *who bears the cost of losses allocated to an absent party*. Our terms of reference do not extend to a more fundamental review of civil litigation in New Zealand. For example, no matter what system of loss allocation is adopted, there is always a possibility that the courts will impose a higher standard of care than defendants consider is reasonable in some or all classes of cases. Further, civil litigation always involves at least the risk that an innocent party is joined as a defendant, and elects to settle the claim rather than bear the financial and other costs of defending it. The extent of the plaintiff's legal duty to protect their own position is also a distinct issue. While the stakes may be higher under joint and several liability (because a single liable defendant may end up facing the full loss), joint and several liability does not create the underlying causes of defendants' complaints in these other areas, and this reference does not include these issues.

53 See for example Civil Liability Act 2002 (NSW), s 34. Cases have traversed, through to the High Court of Australia, as to what falls within the definition of "apportionable claim". While after 10 years some of the possibilities have been settled (most recently in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, (2013) 247 CLR 613 on the question of what constitutes the "same damage"), there are likely to be further ingenious arguments from plaintiffs to suggest that their claim is not "apportionable" on one or more grounds, meaning they can still pursue a single deep-pocketed liable defendant for all of their loss.

SUBMITTER COMMENTS

3.28 The majority of submissions were concerned with leaky building problems, coming from the various perspectives of local authorities, builders, architects, other professionals involved in construction, and homeowners. These submitters frequently emphasised the need for a warranty scheme and many also expressed concern with single-build companies and current insolvency law. They also emphasised the need to address the overall framework for residential building in New Zealand. For example, the Home Owners and Buyers Association of New Zealand (HOBANZ) stated:

> The key to resolving the issues faced by both consumers and those involved in construction of homes is to move the focus away from liability and on to compliance and quality.

Many local authorities also commented that piecemeal litigation by individual homeowners is a poor solution to a systemic problem such as the leaky building crisis.[54] Making a different point but with similar ramifications, the New Zealand Law Society (NZLS) stated:

> It would be imprudent to make adjustments to the general law that are the result of very specific issues arising out of the leaky building crisis.

3.29 Submissions from local authorities emphasised the aggregate effects of joint and several liability on local authorities given the scale of the leaky building problem and the likelihood that other liable parties will have become unavailable by the time the homeowner discovers the damage. Organisations representing builders and architects highlighted that their members were fully committed to standing behind their work, but felt aggrieved by joint and several liability as they consider it penalises one party for the negligence and unavailability of another.

3.30 Many of the issues raised by leaky home defendants are likely to arise whenever loss is caused by concurrent wrongdoers. It is common in such situations to have a "perfect storm" of causative factors; the loss may only arise because multiple parties have *all* failed to some degree. The extent of the loss may therefore be greater than the sum of the losses that would have resulted had each instance of negligence occurred in isolation. For example, the negligence of the architect who designed a house with monolithic cladding, with no cavity and without eaves is compounded by the negligence of the builder who used untreated timber and did not install window flashings properly. From the perspective of either one of the defendants, it may seem obvious that the damage is disproportionate to their failures, but from the plaintiff's perspective, it may seem obvious that anyone who caused the loss should be required to provide full compensation.

3.31 We also received substantial comment from accountants regarding liability for audits. This sector raised concern around potential future liability rather than experience arising out of an existing liability crisis. In particular, accountants argued that tortious liability is not needed to ensure high quality audits in a properly regulated environment. Furthermore, it was argued that the potential for liability may drive risk-averse behaviour that does not serve the public interest, for example leading auditors to refuse to undertake some audits or some types of audit or to increase fees significantly.

3.32 While common themes run through submissions from different sectors or groups, the submissions also raise issues that are unique to particular sectors or groups, for instance the position of local authorities as building consent authorities, or the risk of catastrophic loss to

54 It is worth noting that this point has also been made by the Court of Appeal – see *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 [*Sunset Terraces*] at [212] per Arnold J. This point would apply equally under a system of proportionate liability or a hybrid system.

large-scale audit firms. We will examine in Chapters 7 and 8 whether some of these specific factors require specific responses.

THE APPROPRIATE LIABILITY SYSTEM

3.33 The Law Commission has assessed the relative merits of the two broad liability systems of joint and several liability and proportionate liability and recommends the retention of the joint and several liability system. We do, however, endorse some modifications to the joint and several liability regime. In Chapter 5 we discuss giving the court power to make orders that would mitigate the full application of joint and several liability to liable defendants who have only a minor responsibility for a loss relative to other liable defendants. In Chapter 6 we recommend an expansion of the rules of contribution, to enable the cost of uncollected shares to be more fairly distributed among available and solvent liable defendants. We also discuss some specific measures for the building and construction sector and auditors in the professional services sector in Chapters 7 and 8.

3.34 The principal reason for the recommendation is that joint and several liability provides the best assurance that plaintiffs will be compensated for their loss. Provided there is a present and solvent liable defendant who has caused the loss, the plaintiff will receive full compensation irrespective of the proportion of the loss actually caused by that present and solvent liable defendant. The proportionate system, which limits the liability of a liable defendant to the proportion of the loss they have been judged responsible for, means that if liable defendants are absent or insolvent, it is the blameless plaintiff who will be out of pocket. It is imperative to note that proportionate liability is not a case of the plaintiff sharing some of the risk that there may be insolvent liable defendants. Under straight proportionate liability, that risk is allocated purely to the plaintiff.[55]

3.35 Many have argued that the policy issue comes down to a choice between an innocent plaintiff paying for an absent liable defendant, or an innocent liable defendant paying more than their fair share of a loss. However, this is an incorrect summary of the issue and one which is too commonly made. This statement misunderstands divisible and indivisible loss.

3.36 Joint and several liability only arises where there is indivisible loss. This is where each liable defendant has caused or contributed to a single indivisible loss suffered by the plaintiff. The unfairness of the proportionate system of liability is that the risk of the uncollected share will be carried by a party, the plaintiff, who has not actually caused and is not in any sense responsible for the loss. Our conclusion is that the asserted "unfairness" of joint and several liability to some defendants is, at best, overstated. No defendant is called upon to meet up to 100 per cent of the plaintiff's damages unless they have first been found to have caused the plaintiff's loss in some material way, and meet all other legal requirements to be held liable. In simple terms it is just for such a defendant to be called upon to make good the harm suffered by the plaintiff.[56]

55 It is possible to build a system of proportionate liability with reallocation, where some or all of any uncollected share is eventually reallocated amongst available defendants (potentially including the plaintiff if they are judged to be contributorily negligent). Such a system could, in theory, decide what portion of the uncollected share risk should be borne by a blameless plaintiff, a negligent plaintiff and defendants. However, the closer such a system moved towards full reallocation, the nearer end results would be to simple joint and several liability, but by an administratively more complex and costly process. On the other hand, a system that allowed only a fraction of the uncollected share to fall on a blameless plaintiff could still be seen as achieving the worst of all worlds: the plaintiff is at risk of not recovering some necessarily arbitrary portion of their loss, defendants would still have to meet liability disproportionate to their responsibility, and all parties would likely bear additional costs, including extra court costs and time to dispose of claims.

56 We acknowledge however that this justice may appear strained when the relevant defendant bears only a very small share of responsibility for the loss. We therefore recommend in ch 5 that a "minor defendant" exception be provided, to avoid or mitigate apparent unfairness in what should be a small number of cases.

3.37 Thus the Commission is of the view that fundamentally the policy issue comes down to a choice between a *blameless* plaintiff taking on the risk of an absent defendant, or a *wrongdoer* co-defendant taking on that risk. On this issue, the Commission comes down in favour of the innocent party. Unless there is some substantial reason of public policy that demands some adjustment, parties who have actually caused the harm are the parties who should bear the risk.

3.38 As discussed above, the appeal of proportionate liability rests on supporting industry or commerce by promoting economic efficiency. When there is no sound evidence that it would be more efficient within the wider economy for our country as a whole to move this risk to the innocent party via a proportionate liability regime, the Commission finds that there can be no justification to depart from our current rule of joint and several liability.

RECOMMENDATION

R1 Where two or more civil defendants are held liable to a plaintiff for the same, indivisible damage, the basis for determining liability should continue to be that of joint and several liability.

Chapter 4
Partial reform options

INTRODUCTION

4.1 As indicated in Chapter 3, we do not recommend a change to proportionate liability. There are strong reasons in principle and in practice to prefer joint and several liability as the general rule for loss allocation in civil litigation. However, in the course of this review we have also considered the merits of a variety of different partial reform options. This chapter describes the partial reforms considered. The options include hybrids that combine some elements of joint and several liability and some elements of proportionate liability, liability caps limiting the total damage recoverable, and options for allocating an unrecoverable share.

DIFFERENT REFORM OPTIONS

Proportionate liability for wrongdoers below a certain threshold

4.2 Many submitters focused on the difficult position of a wrongdoer whose allocated share is relatively low compared to other wrongdoers. While the principles of causation imply that all jointly and severally liable parties will have contributed to the loss, this does not suggest that they are all equally to blame. Differences in relative blameworthiness may be reflected in comparative level of liability as assessed through contribution proceedings.

4.3 Many jurisdictions within the United States have adopted a hybrid in which joint and several liability applies only to wrongdoers above a certain threshold, while the liability of wrongdoers below that threshold will be limited to their proportionate share. Different jurisdictions have explored a range of thresholds for separating principal wrongdoers from lesser wrongdoers,[57] usually through establishing a percentage beyond which joint and several liability will apply (such as 20 or 30 per cent). However, such percentage thresholds have their problems. Determining the appropriate threshold is likely to be arbitrary, and defendants have incentives to make extensive arguments in efforts to demonstrate that their liability does not meet the threshold. This could lead to more complicated litigation, and the court's determination will also be to some extent arbitrary.[58] The plaintiff will become concerned with the level of liability allocated to each defendant, as they stand to lose if liable defendants with "deep pockets" fall below the relevant threshold.

4.4 As with any model that includes elements of proportionate liability, the result could be the plaintiff failing to recover fully. If the only available liable defendant is below the threshold for joint and several liability the plaintiff will be unable to recover more than the amount allocated to that liable defendant. While we appreciate the potential harshness of joint and several liability for parties who have a relatively low share of responsibility, this particular response raises questions about the degree of risk that can fairly be shifted to the plaintiff. As

57 Also called "minor", "secondary" or "peripheral" wrongdoers.

58 Courts will struggle to make fine distinctions as to whether particular defendants are 19.5 per cent, 20.5 per cent or 21 per cent liable – if 20 per cent is the threshold percentage.

with full proportionate liability, there is no accepted basis for establishing how much risk can fairly be transferred in this way.

Proportionate liability for contributory negligence

4.5 Under the current law, if the liable defendants can successfully demonstrate contributory negligence on the part of the plaintiff, the court will reduce the damages recoverable by the amount of the plaintiff's contribution to their own loss. However, the liable defendants still remain jointly and severally liable for the balance. A range of jurisdictions have adopted the partial reform of switching to proportionate liability in cases where the plaintiff's negligence is found to be a partial cause of the loss. This option was considered in the Law Commission's earlier review,[59] but was not recommended.

4.6 There are several reasons not to favour this option. Failure to adequately protect one's own position is different from carelessness that causes loss to another. Between the negligent plaintiff and the negligent defendant, the negligent defendant will generally be considered the more culpable party. Importantly, the plaintiff has not breached a legal duty to the defendant(s) – unlike the defendant(s) to the plaintiff. The plaintiff's "share" of the loss will already have been considered by the court in assessing the total damages, ensuring that no defendant will be liable for damage attributable to the plaintiff. In contrast, allowing proportionate liability in this situation involves a significant double discount. The plaintiff must give up any proportion of the damages attributed to their own fault. In addition, the plaintiff is at risk for the whole of any uncollected share. There is no principled basis for such a risk allocation. The plaintiff cannot be conceptualised as just another defendant – the interest of plaintiff and defendant are fundamentally opposed. In any case, the plaintiff is not treated like other defendants. The plaintiff would become the only "defendant" responsible for meeting uncollected shares.

4.7 This reform would also impose very high stakes for the finding that a plaintiff is contributorily negligent, which could influence litigation and settlement behaviour and may have unforeseen or perverse effects, such as unjustifiable pressure on plaintiffs to settle, to avoid what may be only a remote risk of being held negligent.

Proportionate caps on liability

4.8 Some hybrid models impose an upper limit on the liability of a party held jointly and severally liable. Two main forms of capped joint and several liability are used in a number of jurisdictions within the United States, both of which are discussed below.

4.9 A cap can be used to modify proportionate liability so that the plaintiff will always receive at least a particular percentage of the total damage, generally set at around 50 per cent. Wrongdoers who are allocated more than 50 per cent would be liable only for their proportionate share, while wrongdoers allocated less than this could be required to pay up to half the total loss if the plaintiff could not otherwise recover. The plaintiff would bear the remaining risk of other wrongdoers being unable to pay. The obvious critique of this option is that a party with a smaller allocated share may have to pay more than their allocated share, while a party with a much larger allocated share will not.

4.10 Alternatively, a cap could be based on a multiplier of the liability allocated. This could provide that no party will be liable for more than double their allocated share (or triple their allocated share under a model that is more generous to plaintiffs). This option can provide some relief for liable defendants, without placing the whole burden of the uncollectable share on plaintiffs. For example, if the only remaining solvent wrongdoer was allocated 20 per cent liability, a

59 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

multiplier of two would require that wrongdoer to pay 40 per cent, leaving the plaintiff to bear 60 per cent. This option is clearly a compromise between joint and several liability and proportionate liability, and as such can be seen as a pragmatic response to the issue, rather than resting on firm legal principle.

Court-supervised reallocation

4.11 This possible reform is one of the more cohesive partial reform options, but also one of the more complex. It has been suggested by two different law reform commissions in Canada,[60] but was not adopted in either case. Under this option, the court would determine the relative share of each liable defendant in the same proceedings as determining the plaintiff's claim. Each liable defendant would initially be liable to pay their allocated share. If the plaintiff was unable to collect from each liable defendant after a certain period of time, the court would "reallocate" the uncollected share among available liable defendants. In this way, the plaintiff would receive full recovery eventually, but would not be able to demand full payment from a single liable defendant at the outset.

4.12 The disadvantages of this option include that the plaintiff's ability to recover damages promptly may be defeated; it also may require the plaintiff to be involved in a second set of court proceedings. Full payment to the plaintiff would be further delayed, and the plaintiff may incur additional costs in going back to court that they cannot recover from liable defendants. Conversely, it could be argued that plaintiffs already face significant difficulties enforcing judgment, and this option is likely to simplify matters through providing greater clarity about the balance of liability between defendants.

4.13 The chief difficulty with this option is that it is unclear how it would work in practice, as it has not been tested in other jurisdictions. While it would be a minor change to the rule of joint and several liability and is not a form of proportionate liability, it would be a reasonably significant change to the rules of civil procedure and the enforcement of judgments. There may also be consequential impacts on the law of contribution.

Proportionate liability for some sectors only

4.14 Some submitters from the building sector suggested that the prevalence of leaky building litigation justifies a move to proportionate liability in that sector, regardless of changes in other sectors. This reflects the reform trend in Australia, where the building sector switched to proportionate liability before other sectors did.

4.15 In our Issues Paper, we suggested that a move to proportionate liability for construction claims would not be viable in the absence of a comprehensive warranty scheme. We remain of this view. We also reject in principle the suggestion that proportionate liability is justified by virtue of the leaky building crisis. There is no convincing argument that proportionate liability would encourage better building standards sufficient to justify the clearly detrimental effect its introduction would have on owners of leaky homes. We also note that this review does not provide an opportunity for retrospective changes that would prejudice parties who have already suffered loss.

Liability caps for some sectors only

4.16 A similar option is to adopt liability caps in some sectors only. For example, some professionals argue that their industries are well regulated and the risk of professional negligence claims

60 Ontario Law Reform Commission and Ontario Ministry of the Attorney General *Report on contribution among wrongdoers and contributory negligence* (Vancouver, Ontario Ministry of the Attorney General, Toronto, 1988); Law Reform Commission of British Columbia "Report on Shared Liability" (LRC88, 1986).

drives up costs without promoting responsible activity. This option allows a more targeted response to perceived problems. In particular, it may be appropriate for sectors or classes of defendants where insurance is not readily available because of the high risk of liability. Potential defendants are more likely to be able to obtain insurance cover if a cap confirms the maximum potential liability for a particular class of claim. We explore the merits of caps for two groups, building consent authorities and auditors, in Chapters 7 and 8.

Proportionate liability for some types of damage only

4.17 Some jurisdictions have adopted proportionate liability for some types of damage but not others. In the United States it is particularly common for joint and several liability to be limited to "objectively quantifiable" loss, but not matters such as emotional distress. Conversely, in Australia joint and several liability is retained for personal injury cases but not for cases of property damage or economic loss. Proportionate liability may also not apply there to some causes of action, such as a simple breach of contract, not involving negligence.

4.18 In a New Zealand context this reform option is less pertinent, as personal injury is addressed by the comprehensive and no-fault accident compensation scheme. The potential reach of civil liability is already much narrower, and there is no obvious category of damage that is clearly different to others, such that it might require only proportionate liability.

Proportionate liability for some causes of action

4.19 A similar reform is to adopt proportionate liability for some causes of action only, such as tortious claims in negligence but not claims for breach of fiduciary or statutory duty. In practice, this is a very common feature of systems that have shifted to proportionate liability. New Zealand is in a different situation, with causes of action, like types of damage, already circumscribed by ACC.

4.20 The net result is that civil claims in New Zealand are already generally limited to property, or economic or financial loss claims. This helps to explain why calls for "tort law reform" have never gained prominence here compared, for example, to Australia. Significant benefits are unlikely to be gained from attempting to re-categorise how some causes of action may be brought, or what damages may be awarded. These are in any case issues that relate to primary liability rules (such as when should a person be liable for negligence) rather than secondary rules as to how multiple liable parties will be treated, if found liable.

ASSESSMENT OF PARTIAL REFORM OPTIONS

4.21 Partial reform options enable a more targeted response to issues identified for particular classes of defendants, particular industries, or particular fact patterns within civil litigation. This offers a more nuanced approach than a move to proportionate liability, while potentially addressing some of the more significant criticisms of the status quo. However, there are some pitfalls of partial reform options – including the risk that these can result in unprincipled or incoherent law that is complicated to apply.

4.22 In later chapters we suggest some partial reform measures that we consider will improve the status quo in a targeted and workable manner. In developing these proposals, we have sought to create principled reform that will achieve intended outcomes without causing unforeseen consequences. We have drawn from a number of the partial reform options explored in this chapter, but we do not suggest any of the more common "hybrid" models. Our reform proposals are more narrowly focussed, addressing particular areas in which we can locate a strong case for reform.

4.23 We have considered the effects on settlement and litigation strategy, and the potential for defendants or plaintiffs to "game the system". We have also sought to retain aspects of the common law that are particularly important, such as the autonomy of the plaintiff. Most importantly, partial reform options were assessed for their implications for equity as between plaintiffs and defendants. We have deliberately rejected reform options that merely shift the outcome in favour of defendants; rather, we consider that to justify change there must be benefits across the board, either in terms of economic efficiency or the conduct of litigation.

RECOMMENDATION

R2 A hybrid rule, incorporating some elements of proportionality into joint and several liability, should not be introduced into the liability regime for multiple defendants.

Chapter 5
Relief for a minor defendant

INTRODUCTION

5.1 We recommended in Chapter 3 that joint and several liability remain the rule in all cases involving the liability of multiple defendants for the same damage. Each defendant who is held liable for a proven loss should remain liable to compensate the plaintiff for the whole of the damage or loss. However, they may claim a contribution or indemnity from other wrongdoers who are liable for the same loss.[61] We are convinced that joint and several liability best supports the principle that a blameless party wronged by another should be compensated for their loss. Because of the availability of contribution, the end result will also often be broadly fair and proportionate among the liable parties.

5.2 Accepting that joint and several liability should apply in all cases, there will be a small number of cases where the actual liability a defendant is required to pay is not matched by their share of responsibility as determined by the court. We have concluded that in the interests of fairness there should be provision for an exception that allows that defendant some relief. Such a concession should only be made after a judge has carefully assessed the nature of the obligation that the defendant has breached and its connection to the total loss suffered by the plaintiff. The court would also need to be satisfied that there would still be an effective remedy for the plaintiff. We do not envisage this concession being granted lightly, but we believe it to be an essential brake on the potential injustice from a too thorough-going application of the normal rule. Otherwise, there will be a small number of cases where a defendant who is properly held liable nevertheless bears a much lower proportion of fault or responsibility compared to other liable defendants. If such a liable defendant is forced to pay all or most of the plaintiff's damages because other defendants are unavailable, it may be difficult to describe that result as fair or just.

5.3 Differences in levels of responsibility among wrongdoers are fact-specific and are likely to involve a variety of considerations. These are matters that judges must assess when dealing with contribution, and apportionment of responsibility more generally. However, there will be a small number of liable defendants who may be described in a common sense way as minor contributors to the plaintiff's loss, or "minor defendants". Occasionally, a defendant may be only just above the relevant threshold for liability, but once held liable they are subject to joint and several liability in the normal way. Liable defendants in this category, whom we term "minor defendants",[62] may consider that joint and several liability applies particularly harshly to them, at least when other defendants are missing or unable to pay.

61 Or, in most cases, who would have been liable if sued by the plaintiff in time: Law Reform Act 1936, s 17(1)(c). The exception is the 10 year longstop provisions from the Building Acts 1991 and 2004, which have been held to exclude contribution claims more than 10 years after the relevant event, in addition to the primary exclusion of liability to a plaintiff: *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 3404 at [47].

62 In Law Commission *Review of Joint and Several Liability (NZLC IP32, 2012)* [*Issues Paper*] we used alternative names for this potential class of defendants, including "peripheral wrongdoer". We have opted for "minor defendant" in this Report, because we consider it best characterises the truly minor responsibility that such a defendant would need to demonstrate to be considered for any partial relief from their legal liability. "Minor" is a simpler concept, and can be more naturally and readily applied to the circumstances, contribution and responsibility of a particular liable party.

5.4 In Chapter 4 we discussed and rejected the option of providing a percentage threshold below which parties would be proportionately liable and above which joint and several liability would apply. In this chapter we recommend a reform that would retain joint and several liability for all liable defendants but also address the circumstances of the small subset of truly minor defendants. We propose that legislation set out a statutory definition and a regime for minor defendants, to allow courts and tribunals to grant relief to a minor defendant from the full effects of joint and several liability in cases where that is necessary to prevent injustice.

THE CASE FOR REFORM

5.5 In the course of this review, many consultation participants argued that joint and several liability is unfair because it could result in a very minor party bearing the full amount of a loss. It was difficult to assess whether this is predominantly a theoretical problem or fear, or whether such results occur reasonably often in practice. This is because while judgments are public documents, their enforcement is generally undertaken by and between the parties, so that who actually pays and how much is not normally a matter of public record.[63] However, we can reasonably conceive that there will be cases in which the loss may be largely due to the wrongdoing of other defendants and may significantly exceed the amount of loss that can be reasonably attributed to the actions of the minor defendant alone.[64]

5.6 The minor defendant issue may be more readily apparent in the usual situation where the contribution of each liable defendant is determined at the same time as judgment is given in the main proceeding. For example, in a leaky building claim a judge gives judgment against a number of defendants for the whole loss, making them all liable defendants. The judge then determines how responsibility should be apportioned between liable defendants and makes contribution orders accordingly. One of the liable defendants, a subcontractor, is adjudged to have a five per cent share of responsibility and gets the benefit of a contribution order for any amount he pays above that level. Under joint and several liability the plaintiff is not concerned with the contribution order and is entitled to demand the full amount of damages from the subcontractor. If the subcontractor pays as demanded he can then use the contribution order to seek contributions from the other liable defendants, subject to their respective maximum obligations to contribute. If one or more of the other liable defendants is insolvent or has absconded, the subcontractor may be left bearing the cost of most or even all the plaintiff's damages.

5.7 This example confirms that the main justification to allow relief in such a situation is to redress or reduce unfairness or injustice that clearly could otherwise arise, in extreme cases. This is not so much because of a weakness in the joint and several liability rule, but rather is an attempt to address an inherent problem in application that will arise regardless of which liability rule applies. Under joint and several liability, a clearly unfair or unjust result is most likely where most, or all but one, liable defendants are insolvent, but there is a solvent minor defendant who can be made to pay the whole of the damages.[65] The solvent minor defendant in such a situation may be required to pay many times more than their share of responsibility indicates – for instance 19 times their own share of responsibility, if they were adjudged to have a 5 per cent share of responsibility. We expect that this result would generally be regarded as unfair or

63 Cases disposed of by settlement – which almost certainly include the significant majority of disputes – are even less open to scrutiny, unless some element of the settlement is later brought to court.

64 For example, in a defamation claim (putting aside pure defamation law), the major defendants might be the journalist and the newspaper publisher, while minor defendants might include individuals who posted the article on Facebook. Subcontractors in building and other industries are also likely to generate potential minor defendants – but always depending on the facts in each case.

65 The corresponding situation with proportionate liability is also where most liable defendants are unavailable, with the difference that the cost is borne by the plaintiff.

unjust, depending on all the facts in a particular case, and some facility is warranted to at least reduce the harshness or injustice of the result.

5.8 As a secondary consideration, the multiple defendant liability rules ought to be seen to operate fairly. If there is a widespread view that an aspect of our civil litigation system is unfair then the integrity of the system may be undermined. The submissions we received confirm that views continue be strongly divided, depending on whether the observer is associated with or is more likely to be a plaintiff or defendant. Nevertheless, we accept that there is a concern, likely to continue among a significant number of litigants or potential litigants, regarding the implications of joint and several liability for smaller defendants. We also accept that minor defendants exist and may suffer demonstrably excessive liability in circumstances where the minor defendant must pay close to or 100 per cent of a judgment, despite their responsibility for the plaintiff's damage being set at a very small proportion, for example, five or ten per cent. No doubt defendants may initially be overly inclined to see themselves as "minor defendants" – it may take some time for expectations to be set by Court decisions. We nevertheless consider that the overall system, including joint and several liability as the central principle and rule, will be better accepted and function better if some limited scope to deal with hard cases is introduced.

5.9 We stress that any discretion to reduce or remove unfairness must be limited. Joint and several liability remains the general rule, and may only be departed from so far as is necessary to alleviate the injustice, to the extent this is possible, while still providing a fair and effective remedy for the plaintiff. In the next section we discuss how a minor defendant regime ought to operate, including the protection of the plaintiff interest and the necessary balancing of fairness to plaintiff and liable defendant.

DETAIL OF PROPOSED REFORM

5.10 A provision to allow discretionary relief to a minor party must be simple, and avoid replacing one injustice with another. The objective should be to avoid unduly complicating existing litigation and to achieve results that balance the interests of plaintiffs as well as minor liable defendants.

5.11 We have considered many options for how to provide relief to a minor liable defendant. Our recommendation is to provide an additional tool in statute to be applied by judges with regard to all the circumstances in a particular case. The judge's determination will of a matter of fact, but involving a substantial level of discretion. This will provide flexibility and allow the application of the law to progressively develop based on decisions of the courts.

5.12 A judge's decision in such a case will inevitably involve an exercise of discretion. The discretion for relief should be limited, with discretion to depart from joint and several liability as little as is necessary to avoid or reduce injustice. We expect that exercise of the discretion would typically apply to defendants who are at or just above the threshold for being held liable.

5.13 Joint and several liability will remain the norm in the great run of multiple defendant cases. The provision for relief of minor defendants should be a limited but important exception to the normal rules. It will deal with those cases where applying the normal rules to bring plaintiff recoveries as close as possible to the damages awarded would lead to a clear injustice or unfairness. If a minor party would otherwise be left to pay the balance of damages left unpaid by other, significantly more blameworthy defendants, despite their own minor responsibility and possibly marginal liability, it is appropriate that a court or tribunal be able to assess a fair result as between plaintiff and the minor defendant.

5.14 Any provision for relief should contain considerable hurdles for a would-be minor defendant to overcome. Even where a minor defendant has limited or very limited responsibility for the relevant damage, they may still fail to gain relief because they do not satisfy all requirements.

5.15 The minor defendant exception should be a general provision, not limited to particular sectors and with no group or category of defendant either automatically included or excluded. Minor defendants can be expected to fall at the very bottom end of liability and comparative responsibility – they should not qualify as minor defendants otherwise. However, there should be no qualifying or disqualifying percentage threshold, to avoid sterile arguments from counsel that a liable defendant's share of responsibility falls "just below" or "just above" it. The size or proportion of a liable defendant's responsibility is clearly highly relevant but is better considered in the context of the particular facts including where applicable, a comparison or contrast with the responsibility of others. And, even though a minor defendant is very likely to have the smallest share or responsibility, this should not be treated as a sufficient condition. Shares of responsibility will vary widely, and whether any defendant can be treated as a minor defendant must always be determined after assessing all relevant factors.

5.16 Any relief provision should address the relatively frequent case where a party becomes jointly and severally liable for some damage after performing or failing to perform some inspection, verification, audit or other similar independent service in relation to a transaction or event involving other principal parties. This party is often referred to as a "gatekeeper" because of the way in which they can help prevent damage to others if they carry out their functions competently and refuse to support anything falling below required standards. Negligence by a gatekeeper can readily contribute to or cause damage to a prospective plaintiff and the gatekeeper is likely to be liable to the plaintiff, usually along with a main party or parties whose misconduct the gatekeeper failed to pick up.

5.17 A gatekeeper's share of responsibility based on simple negligence is likely to be considerably less than that of the principal actor.[66] This raises the question of whether such gatekeepers ought to be at risk of joint and several liability. This is particularly where the gatekeeper is performing a socially useful function and should not be discouraged from doing so. An argument can be made that gatekeepers, as a class, should either be treated as minor defendants to restrict their liability, or have their liability restricted even further, for instance by restricting their liability to only their proportion of responsibility (proportionate liability).

5.18 We do not recommend this approach. Gatekeepers are important but their roles are also very diverse. Gatekeeper responsibilities are often conferred or developed by detailed statutory schemes, and may be subject to different common law or statutory rules regarding their potential liability. The extent to which particular schemes need to be reinforced by gatekeeper liability is mainly an issue for particular schemes, as applied by the courts. It would not be helpful to propose that all gatekeepers, however defined, should be subject to a different liability regime from other defendants.

5.19 In any case, we doubt that gatekeepers will necessarily or regularly incur a low enough share of responsibility to qualify as minor defendants. Auditors, building consent authorities, valuers and solicitors may have a lesser share of responsibility in an impugned transaction than a principal actor. However, the gatekeeper's actions may be a strong "but for" cause to the extent that it is difficult to say their responsibility is minor or limited. The relief provision should therefore require that each case must be examined on its merits, with no presumption that certain behaviours or responsibilities are likely to fall in the "minor" range. As discussed above,

66 If a gatekeeper engaged in reckless conduct or knowingly participated in, for instance, a fraud, then their share of responsibility will likely be much higher and the question of minor defendant or not will be unlikely to arise.

bare percentages of responsibility will not be enough. A gatekeeper may be allocated a relatively low share of responsibility, for example because there are several "main" defendants to share responsibility around. However, it is still necessary to determine whether the gatekeeper's responsibility can be characterised as minor, taking into account all relevant factors. Such factors should include but not be limited to their responsibilities and level of responsibility, the nature of their negligence or other fault and the consequences of their actions.

5.20 Some gatekeepers may act because they are under a statutory obligation to do so. If they incur liability as a result of acting, there should again be no presumption that their responsibility is less only because it was compelled. After all the relevant statute will have required reasonable and lawful action. If any general allowance is to be made for performing a statutory duty, it would be better for this to be done through the enabling statute imposing those obligations or through the courts settling the primary issue of whether the party should be held liable. The fact that a particular defendant was obliged to act in a given set of circumstance may of course be a factor for a court to weigh along with all others when deciding whether the liable defendant is a minor defendant or not.

5.21 We have considered whether or how the nature of the relationship between plaintiff and minor defendant should affect the availability of relief. In at least one situation we consider it must be determinative. If a valid contract exists between the parties, it will be necessary in all cases to establish whether the parties have either expressly or impliedly agreed to exclude the possibility of minor defendant relief. If so, then the parties' bargain should apply. We see no reason to prevent parties agreeing to contract out of the minor defendant provisions, and there is similarly no case for a court to re-examine any decision of the parties on this matter. There is no consumer protection issue in this situation. It is unlikely that a consumer will be seeking minor defendant status or relief, especially if the counterparty is a commercial party.

5.22 If the parties have a contract but it is silent on the minor defendant exception, it will still be necessary for the court to consider the terms of the contract to determine whether or how they might impact on the availability of relief. Even if a contract makes no mention of minor defendants or does not deal with limitations of liability at all, it would still be open to the court to consider the nature of the obligations between the parties, and whether they are consistent with one of them being relieved from some liability as a minor defendant.

5.23 The relief provision for a minor defendant should not be a hybrid in the sense discussed in Chapter 4. No element of proportionate liability should be involved. The minor defendant remains subject to joint and several liability. Rather, this provision is a judicial discretion to alleviate the effect of joint and several liability to a level that the court holds is just in all the circumstances, and to plaintiff and defendant. We do not recommend that the minor defendant's liability be limited to their proportionate share of responsibility, because on too many occasions this would be unfair to the plaintiff and prevent the plaintiff receiving an effective recovery. The court should be allowed to set a ceiling for recovery from a minor defendant that achieves fairness between minor defendant and plaintiff. This requires that the plaintiff will still recover a much more substantial portion of their loss than the minor defendant's share of responsibility, but the minor defendant is relieved from having to pay 100 per cent of the total award. We propose that a court or tribunal satisfy itself, when determining the level of any relief, that the result achieves reasonable fairness as between plaintiff and minor defendant.

5.24 We consider limits must be put on any minor defendant relief for the protection of plaintiffs. We would not support any relief to a minor defendant if the result would be that the plaintiff would not have an effective remedy. The court or tribunal should be required to verify this point

before determining any application. Clearly, "an effective remedy" does not mean the plaintiff must recover in full; there are many reasons why a plaintiff may not recover in full despite a sealed judgment in their favour. To provide some reasonable relief to a minor defendant it may be necessary in some cases to reduce the plaintiff's recovery by some proportion. Subject to the important qualification in the next paragraph, such a reduction should be mainly for the courts to assess on the circumstances before them.

5.25 Setting some "floor" for the plaintiff's recovery will help to ensure an effective remedy. We recommend that no relief to a minor defendant should be allowed to reduce the plaintiff's recovery below 50 per cent of the judgment damages, because it would be difficult or impossible to categorise any lower amount as an effective remedy. We stress that this floor is only a minimum to protect the plaintiff – it should not be treated as the target by minor defendants. Depending on what the plaintiff has managed to recover from other liable defendants, there should be situations where the plaintiff's remedy can remain well above this floor, but with some substantial relief for the minor defendant.

5.26 We expect that successful applications for relief as a minor defendant will be infrequent. We envisage that applications will only be favourably considered when a considerable portion of damages is still outstanding, and the minor defendant (or minor defendants if the court approves more than one), is the only viable judgment debtor. The minor defendant route should not normally be available if the plaintiff is making demand, but the minor defendant would rather not pay before other debtors who are still available. The supplementary contribution provision that we recommend in Chapter 6 may be appropriate if a minor defendant can and does pay some part of an insolvent party's uncollected share and wishes to recover proportionately from other solvent parties.

Procedure

5.27 Applications and other steps relating to the draft provision should be dealt with in accordance with existing court rules. The necessary procedural steps should be simple, and kept consistent with normal court rules for analogous situations.[67]

5.28 We anticipate that an application to be considered a minor defendant, or a minor defendant if liable, would be brought by the relevant party during the trial and would be determined in the main judgment (if not already determined), or whenever applications for contribution are dealt with. If it is clear by the end of trial that a potential minor defendant will be "last man standing" and will inevitably be responsible for uncollected shares as well as their own responsibility, then the court might determine the relief issue at the end of the trial as well. However, in many or most cases it is unlikely to be clear until sometime later whether a minor defendant is exposed to uncollected shares, for how much, and whether they face that prospect alone or with others. A minor defendant seeking relief should therefore make an application, supported by affidavit evidence under normal rules, if and when they wish to seek relief as a minor defendant. The plaintiff will have the main interest in opposing such an application, but remaining defendants who can be located should also be served.

5.29 If for some reason the party concerned did not apply to be declared a minor defendant at the trial, then they should not be prevented from applying later, but the application should be subject to the court granting leave. The best evidence of a party's responsibility to the plaintiff

67 It may be that the Rules Committee might prefer to include a reference to the procedure for seeking relief as a minor defendant in the High Court Rules, where convenient. Or the Rules Committee may prefer to make a short rule to expressly take account of the proposed provision and clarify how it will be treated and applied within the High Court Rules. In our view the emphasis should be on conforming to existing procedures, and avoiding creating new processes. We expect that for most issues adapting rules for interlocutory procedures should achieve the desired result.

is likely to be available at trial, and a party applying later could reasonably expect to have to justify the delay and perhaps bear some costs consequences.

5.30 Finality of proceedings is important, which means the ability to apply for relief should not be open-ended. The relative ease or difficulty in collecting judgment debts varies considerably, and it may take some time for a minor defendant to have confirmed that they will have to pay uncollected portions. Nevertheless, we think it is reasonable that any application for relief be made within 12 months of the date of judgment in the matter, with a court or tribunal able to enlarge time, where the interests of justice require.

5.31 A provision to allow relief for minor defendants must be prospective in the usual way. This could be in respect of acts or omissions that occur after the date any legislation comes into force, or from a date six or 12 months after that. The choice of "acts or omissions" not "causes of action" is important. It avoids difficulties with latent defect cases, where the relevant conduct might occur before new provisions come into force but the cause of action is delayed until discovery of damage, potentially well after new provisions apply.

Draft provision

5.32 Draft wording for a proposed provision is included in Appendix A.

RECOMMENDATIONS

R3 While joint and several liability remains the rule, a court or tribunal should have discretion to make orders mitigating the full application of joint and several liability in respect of a defendant who has only a minor and limited responsibility for the plaintiff's loss, if the court or tribunal is satisfied that requiring the minor defendant to pay the full or part of an amount unpaid by another defendant would be unduly harsh and unjust.

R4 The relief for a minor defendant should be provided for in a new s 17A of the Law Reform Act 1936 or another appropriate statute, if that Act is consolidated.

R5 The new provision should include terms to ensure that:

(1) A minor defendant means a party held liable in a civil action but which or whom the court or tribunal determines bears only a minor and limited responsibility for the plaintiff's loss.

(2) A liable party is not a minor defendant only because:

- the party's share of responsibility falls below a particular percentage or proportion, or is less than any other party's share of responsibility, or both;
- the party's involvement in relevant events was largely or completely restricted to providing verification, certification or other independent services required to facilitate the events or elements of them; or
- the party was under a statutory obligation to provide relevant services or take relevant actions.

(3) The minor defendant may apply to the court or tribunal to be relieved from the full effect of their joint and several liability to the plaintiff, except that an application made more than 12 months after the relevant judgment was sealed is subject to leave to apply being granted.

(4) In granting relief, the court or tribunal must be satisfied that:

- the minor defendant, together with any other minor defendant approved by the court, is or are the only parties available to pay the judgment sum or any remaining unpaid portion of the judgment sum;
- requiring the minor defendant to pay all or some part of the unpaid amount would be unduly harsh and unjust; and
- the circumstances provide justification for some relief from joint and several liability.

(5) When granting any relief under this section the court or tribunal must ensure that:

- the plaintiff will still receive an effective remedy;
- the result achieves reasonable fairness between plaintiff and minor defendant; and
- the relief does not reduce the plaintiff's potential recovery from all liable parties to less than half the damages they were awarded in respect of the relevant damage.

Chapter 6
Supplementary contribution

INTRODUCTION

6.1 It is common in civil litigation for the courts to determine applications for contribution or indemnity in the same judgment as liability, although a claim for contribution, indemnity or both may still be brought in separate, later proceedings. Either way, as explained in Chapter 2,[68] contribution is determined as between defendants, and does not affect the plaintiff's rights to recover 100 per cent from any liable defendant or to enforce judgment against any of them. This enhances plaintiff autonomy and choice. If one liable defendant is better or more immediately able to pay than other liable defendants, the plaintiff can seek the full judgment debt from that defendant and leave it to them to seek contribution orders, if necessary, and then enforce them against other liable parties. Attaining a fairer spread of costs among the liable defendants is achieved by the contributions they are entitled to or must pay each other.

6.2 While joint and several liability provides that any liable defendant can be required to pay the full loss to the plaintiff, the rules of contribution mean that other liable defendants cannot be required to pay another liable defendant more than their share or contribution, as determined by the court, even if the other defendant has been required to pay the plaintiff in full or pay a share left unpaid by an absent liable defendant. As discussed in Chapter 3[69] this does not cause problems where all defendants are judgment-worthy and are able to satisfy the contribution order against them. However, a disproportionate burden or effect from joint and several liability may still fall on a defendant who pays all or most of the judgment sum even when there are at least some solvent defendants available to make contribution. Unjust results can ensue when the defendants include a mixture of solvent parties and unavailable parties.

6.3 The problem typically arises where a plaintiff makes a demand against one defendant and is paid in full by that defendant; but recoveries from other defendants, in accordance with respective contribution orders, do not cover the uncollected share of an insolvent or missing defendant. The defendant paying the plaintiff has effectively already paid and met that uncollected share to the plaintiff but has no means to recover or distribute the cost of the uncollected share.

6.4 Such a result inevitably disrupts the broadly proportionate allocation of responsibility that may otherwise be achieved through orders for contribution. The issue here is not that a party faces extra costs as a result of an uncollected share – under joint and several liability it is expected that other defendants must pay uncollected shares. Rather, we seek to avoid an arbitrary, unfair and unnecessarily imbalanced result among defendants. The objective is that when an uncollected share needs to be made good, all solvent defendants can be made to contribute in proportion to their share of responsibility to that additional share.

6.5 This problem can be addressed without curtailing the plaintiff's freedom to enforce judgment as they see fit. The appropriate mechanism is to allow a liable party that has been required by the plaintiff to "overpay" to apply for orders for "supplementary contribution" from other

68 At [2.5].
69 At [3.9].

remaining and solvent liable parties. Each liable party should contribute to the cost of the unmet share in proportion to their share of responsibility compared to other remaining liable defendants, including the applicant but excluding any missing party. In this chapter we discuss the rationale for this reform, and how it can be adopted.

RATIONALE FOR REFORM

6.6 Under the current enforcement rules, a plaintiff may seek the full judgment sum from any defendant held liable, as soon as judgment has been sealed.[70] Liable defendants' claims against each other are addressed through contribution orders. Liable defendants who are well-resourced, or insured against liability, or both, have expressed the concern that in a case where one (or more) liable defendants are unavailable but two (or more) liable defendants are available, it is unfair that one liable defendant can be made to pay the full amount of the uncollectable share. Such a result is not required to achieve the goal of full compensation for the plaintiff, although it is a possible and relatively likely result from the operation of joint and several liability and contribution.

6.7 This situation is best illustrated through an example:

> The court finds that D1, D2, and D3 are jointly and severally liable for the plaintiff's loss of $100,000. The court assesses contribution orders at the same time as giving judgment and determines the relative liability of the defendants as follows:
>
> D1 – 20 per cent - able to recover up to $30,000 in contribution from D2 and up to $50,000 from D3.
>
> D2 – 30 per cent - able to recover up to $20,000 in contribution from D1 and up to $50,000 from D3.
>
> D3 – 50 per cent - able to recover up to $20,000 in contribution from D1 and up to $30,000 from D2.
>
> The plaintiff is aware that D1 is insured up to $100,000. The plaintiff therefore seeks the full judgment sum from D1. D1 then seeks to recover from D3, who has assets but is uninsured, and D2. D1 successfully recovers from D3 but is unable to recover from D2, who has absconded.
>
> Even though D1 was adjudged to have the smallest share of responsibility, it ends up bearing the same cost as D3 ($50,000), who had a much greater responsibility. D3 does not bear any of the unrecoverable share caused by the absence of D2. This is not fair result as between D1 and D3.

6.8 As this example demonstrates, the current rules can have unfair results for some defendants, even when they are not required to bear the full loss. Other defendants liable for the same damage effectively share in a corresponding windfall. The plaintiff is theoretically unaffected, other than benefitting from the normal operation of joint and several liability. The defendant's inability to seek recovery from others is not required to achieve the goal of full compensation for the plaintiff. The result occurs only because current rules governing contribution do not extend to this situation, despite it being highly analogous to the traditional operation of contribution.

6.9 The question we addressed is whether it is possible to remove or mitigate the potential for injustice between defendants, but without introducing any prejudice to plaintiffs. The problem could be mitigated by, for example, requiring plaintiffs to initially sue defendants only up to the contribution levels awarded by a court; or by allowing a liable party to delay payment while they pursue contributions from others. Apart from being cumbersome and difficult to administer, such solutions would significantly affect at least the operation of joint and several liability, if not the underlying rule and principle. The frequent result would be increased difficulties and costs

70 Unless the judgment allows time for payment, before enforcement may commence: High Court Rules, r 17.3(3).

for plaintiffs and most likely fewer plaintiffs achieving full recovery of judgment sums owed to them.

6.10 We recommend instead making an adjustment to the rules of contribution to address the potential unfairness between defendants. This is a modest reform that will benefit all solvent defendants, including well-resourced and insured defendants, and produce more equitable or proportionate distribution of uncollected shares, without involving any change in plaintiffs' rights and freedom to enforce judgment. The basic rules of contribution, expressed in section 17 of the Law Reform Act 1936 and in equity, will remain unchanged and operate as now. The new rule we propose will only operate beyond the range of existing rules and in the limited case of a defendant having paid beyond their required contribution, due to an uncollected share.

CHANGES TO RULES OF CONTRIBUTION

6.11 Under this proposal, plaintiffs would retain the right to seek the full amount from a single liable defendant from the outset. But if one liable defendant has paid more than their court-ordered contribution after all rights to contribution have been exhausted, that defendant may apply for supplementary contribution orders to spread the "overpayment" between itself and other solvent defendants (and also third parties that the court has previously held liable to contribute to one or more defendants). Such subsequent orders would only allocate responsibility for the unallocated share – there would be no impact on or revisiting of any original orders for contribution. The court should normally allocate liability to make supplementary contributions in proportions that reflect the relative shares of responsibility among the remaining solvent parties – the first-called defendant and the other defendants from whom supplementary contribution is sought.

6.12 In the example above, the plaintiff would still be able to claim $100,000 from D1 immediately after judgment. Unlike the status quo, once it is established that D2 is unavailable, D1 would be able to return to court for an order that D3 pay an additional $21,400 in supplementary contribution – their proportionate share of the $30,000 that has proved to be uncollectable from D2.[71] (D1 can already seek up to $50,000 contribution without a further court order, under the original awards).

6.13 This achieves a more just end result between solvent defendants without requiring the plaintiff to pursue separate judgments or return to court at any stage. The outcome will be more certain and predictable for defendants, and less arbitrary for those with deep pockets. It retains all advantages of joint and several liability for plaintiffs but deals more fairly with the issues that arise when one or more defendants are unable to pay.

6.14 The result should be more predictable outcomes for defendants and so better prospects for resolving respective obligations by agreement. If a well-resourced defendant has the option and grounds to apply for a subsequent contribution order, this may be enough to encourage another solvent defendant to pay or negotiate regarding their share, without incurring further costs.

6.15 The proposal can be implemented by an addition to the existing provisions governing contribution in section 17 of the Law Reform Act 1936. A draft provision was developed in the proposed Civil Liability and Contribution Bill contained in the Law Commission's 1998 Report: *Apportionment of Civil Liability*.[72] The provision includes a one-year limitation for applications,

71 The uncollected share is $30,000. D1 and D3's comparative liability, ignoring the missing D2, is for $2/7^{ths}$ and $5/7^{ths}$ respectively, based on the original contribution orders. So D3 must still reimburse D1 the $50,000 maximum contribution originally ordered, plus $5/7^{ths}$ of $30,000 or $21,400 (slightly rounded). D1 still must bear $2/7^{ths}$ of the uncollected share, ($8,600) but this is better than paying the whole $30,000, and is proportionate.

72 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998) at [7.26].

which is sensible and consistent with what we suggest for applications from minor defendants.[73] We recommend below that the 1998 draft be used as the basis for a suitable amendment to the 1936 Act. A copy of the draft Bill is included.[74]

6.16 Such a provision will be effective in cases of contribution and supplementary contribution governed by the statutory regime. The change will not automatically apply to matters involving equitable contribution, unless a more detailed reform is undertaken of contribution and related matters, such as that which was recommended in *Apportionment of Civil Liability*.[75] We trust that courts called upon to consider a suitable case applying equitable rules may adopt a similar approach as the proposed change, preserving as it does the essence of contribution.

RECOMMENDATIONS

R6 The rules of contribution should be extended to allow a defendant required to pay all or part of a share of liability left unpaid by another defendant, to apply for supplementary contribution from other solvent defendants or judgment debtors. A court or tribunal ordering supplementary contribution should do so by ordering contributions proportionate to the shares of responsibility of each solvent party, including the applicant.

R7 The additional rule should be modelled on proposed section 17 of a draft Civil Liability and Contribution Bill appended to the Law Commission's Report, *Apportionment of Civil Liability*, and added, with all necessary modifications, to the existing provisions governing contribution in section 17 of the Law Reform Act 1936.

73 At [5.30].

74 Refer to Appendix B.

75 Law Commission, above n 72. Despite developments in other areas since 1998 and as s 17 demonstrates, the reforms proposed to contribution, the law regarding contributory negligence and related issues in *Apportionment of Civil Liability* are still apposite and worthy of serious consideration. The objects of this current reference can be achieved through introduction of the amendments to the Law Reform Act 1936 that we have recommended. However those amendments would be more coherent and achieve wider reform at little or no cost if they were included in a Bill modelled on that presented in *Apportionment of Civil Liability*.

Chapter 7
The building sector: room for a special case?

INTRODUCTION

7.1 Despite our recommendation to retain joint and several liability, we considered whether a proportionate scheme could be justified in any sectors. Proportionate liability could be considered where the normal operation of joint and several liability in a particular sector causes such significant distortions or injustice that some intervention is justified, or the characteristics of a sector mean that a proportionate regime could result in enhanced sector outcomes and still provide adequate protections for plaintiffs.

7.2 The building sector, and more particularly the residential building sector, is the main sector for such consideration primarily because the impact of the leaky homes crisis on this sector was the principal catalyst for this reference to the Law Commission, and the majority of submissions to the Commission came from participants in this sector.[76] The large majority of building sector submitters report what they perceive as substantial unfairness to solvent defendants in leaky home cases. We have not found evidence that building sector defendants, other than local authorities, have had to meet uncollected shares in a way that is clearly disproportionate to defendants in other sectors. But we do accept that local authorities have had their cost of liability approximately doubled by having to meet uncollected shares in leaky home matters, adding several hundred million dollars to local authority liability costs.[77]

7.3 We therefore agree that it is necessary to consider the practicality of introducing proportionality in the home building sector, to determine whether it could reduce liability for uncollected shares without creating similar or greater unfairness to plaintiffs. The possibility is worth considering, not only because of the potential or actual impact of joint and several liability on some defendants, but also because specific, targeted schemes have previously been attempted in the construction sector in neighbouring jurisdictions.[78]

76 Provided local authorities are counted as building sector participants because of their statutory responsibilities as building consent authorities, 28 of the 49 submissions received were from building sector participants.

77 Price Waterhouse Coopers *Weathertightness - Estimating the Cost* (Department of Building and Housing, Wellington, 2009) at 62 estimates actual costs to local authorities at 45 per cent of adjudicated costs, compared to a typical share of responsibility in the 20 to 30 per cent range. The Report also finds that the local authority cost share increases, to an average of up to 65 per cent, for larger claims involving the total recladding of a leaky home. Auckland Council, the local authority bearing up to two thirds of local authority liabilities for leaky homes, has made provision in its financial reports for up to $45 million for claims yet to be resolved, which is in addition to substantial amounts already paid out: see Auckland City Council *Annual Report* (2011/2012) vol 3 at 93.

78 The most closely relevant examples come from Australia in the 1990s, including New South Wales and Victoria: Environmental Planning and Assessment Act 1979 (NSW), s 109ZJ, which was added by the Environmental Planning and Assessment Amendment Act 1997 (NSW); Building Act 1993 (Vic) ss 129–131. The New South Wales and Victorian provisions were repealed in 2002 when *general proportionate* liability statutes were enacted, but building sector-specific schemes remain in force in South Australia and the federal territories despite the enactment of general legislation covering the balance of each jurisdiction: Developments Act 1993 (SA), s 72; and Building Act 2004 (ACT), s 141.

PROPORTIONATE LIABILITY FOR THE BUILDING SECTOR?

The case for a separate scheme

7.4 The strongest argument for a proportionate scheme for the building sector is that it is the only sector in which there is convincing evidence of joint and several liability forcing some sector defendants (namely local authorities) to meet uncollected shares.[79] While we have not found or received evidence of significant numbers of non-local authority defendants regularly having to meet such shares, we have had anecdotal evidence from some building professional groups.[80] The leaky homes crisis has demonstrated that major liability events can occur and may have large impacts on some solvent defendants when they do. No one can reliably predict whether the sector will face an equivalent event to leaky homes in the future but we accept that such a possibility cannot be discounted, even after allowing for the major structural changes that have been and are being made to building regulations.

7.5 The lead taken by Australia in the 1990s is instructive. Between 1993 and 1995 three states and both federal territories introduced proportionate liability for building certifiers and building practitioners.[81] The relevant statutes compelled practitioners to take out suitable insurance, the requirements for which could be prescribed by regulation. These initiatives were attempts to stem the perceived rising costs of insurance, and minimise cost increases in a sector subject to fluctuating demand and occasional shocks.

7.6 The replacement of these sector schemes by jurisdiction-wide proportionate liability from 2002 makes it impossible to tell what effects or success building sector proportionality actually had. However, proportionality was attempted first in the building sector in Australia, and a trans-Tasman harmonisation argument suggests that a similar approach could be taken in New Zealand.[82]

7.7 The Australian approaches to building sector schemes tend to confirm that proportionate liability should not be introduced without appropriate protection for plaintiffs. In Australia this came from compulsory insurance and state-mandated building guarantee or warranty schemes. We recognised in our Issues Paper that we could not recommend proportionate liability for the sector unless it was accompanied by a suitable compulsory warranty or guarantee system.[83] We considered that the two changes would have to be introduced as a package, and that remains our view. We noted that a warranty or guarantee scheme could require express government backing and possibly management. If owners and plaintiffs were made to accept the lowered protection offered by proportionate liability they could be expected to demand the best possible assurance they can get, from any warranty scheme. The inherent difficulty in establishing and maintaining a suitable warranty scheme is therefore another factor in the balance, when considering the potential problems with an industry proportionate liability scheme.

The case against a separate scheme

7.8 It is not clear that missing or insolvent liable defendants are so disruptive across the building sector that they justify the introduction of proportionate liability. There is no evidence that solvent liable defendants being required to meet part or all of uncollectable shares is a systemic

79 Price Waterhouse Coopers, above n 77.

80 For example, Submission of the New Zealand Institute of Architects on Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012).

81 Above n 78.

82 This argument was made by some submitters who already operate in Australian or trans-Tasman markets. See the submissions of Fletcher Building and Beca Group on *Issues Paper*.

83 Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012) [*Issues Paper*] at [9.20].

problem, beyond local authority participants. The additional costs borne by local authorities are likely to have had material effects on larger local authority finances, and on ratepayers.[84] These costs have come from one major liability crisis and have fallen mainly on local authorities and their ratepayers, and the impact does not justify altering the liability rule for *all* building industry participants.[85]

7.9 Calls for proportionate liability have remained strong from other sector participants, despite the lack of concrete evidence of costs from joint and several liability. We suspect that this is because joint and several liability is often blamed for results it does not necessarily cause, and proportionate liability is expected to bring changes that it would not. Participants may expect proportionate liability to take away a liability that they think is not "really" theirs, when the participants' real issue is with a primary liability rule that holds them liable for the plaintiff's damage in the first place.

7.10 The allocation of liability and costs between head contractor-builders and subcontractors demonstrates this point. A traditional head contractor-builder is likely to be liable in contract, with or without statutory warranties, to the purchaser and subsequent owners for any relevant damage they have caused. This liability should normally include damage caused by subcontractors they engaged and controlled. Their primary liability arises from a breach of contract or of a statutory warranty, not from being held jointly and severally liable with negligent subcontractors. A liable subcontractor may be jointly and severally liable for the same damage if it is impossible to divide responsibility for the damage. However, if a subcontractor's misconduct was limited and the effects can be differentiated, the subcontractor may not be jointly and severally liable for all damage but only for the divisible damage to the relevant place or part where they caused damage.

7.11 Introducing proportionate liability would not help the builder. A proportionate liability regime would not enable the builder to automatically pass on portions of liability to a variety of subcontractors. The builder would remain liable for what they have contracted to deliver and what the statutory warranties require – a building that is built with reasonable care and skill and is fit for its identified purpose, for example. Such liability forms part of the builder's primary liability and would not be overridden by a secondary rule of proportionate liability.

7.12 Not every residential building contract involves a head contractor who takes on responsibility for all work, including that done by subcontractors.[86] Situations do occur where, for example, an owner takes on a labour-only carpenter and the owner then selects, engages and supervises subcontractors. A court or tribunal dealing with such contracts would have to determine on the facts what each party was responsible for and on what terms, before it could determine the primary liability, if any, of each party.[87] We expect that in the great majority of cases where building contractors are held to bear substantial liability, this will be because of their primary obligations arising in contract, from statute or both. Compared to local authorities, head contractor-builders have a relatively low likelihood of having to meet an uncollected share, and if they do it will usually be for a much smaller additional share. We conclude that there is no

84 The pattern of realised and anticipated liabilities from weathertightness claims indicates that liability tends to be disproportionately concentrated in large urban areas with substantial rates of home building. By contrast, one small rural local authority commented in its submission that it had never had a leaky home claim. It is reasonable to infer that future local authority liability from building consent matters will continue to be concentrated in Auckland, Christchurch, Wellington and perhaps Tauranga/Bay of Plenty.

85 There may however be a case for more targeted relief to local authorities, which we discuss below at [7.33]–[7.36].

86 The Building Amendment Act 2013 anticipates the orthodox building contractor with employees, subcontractors or both. However the Act clearly leaves arrangements as between contractor and subcontractor, if any, to those parties: new pt 4A of the Building Act 2013 (not yet in force).

87 It is possible that the carpenter could then be held jointly and severally liable with one or more subcontractors for some or all damage, depending on what damage they have caused or contributed to, and the extent to which damage is divisible. Or if the carpenter is found not to be responsible for the work of subcontractors and the carpenter's own work is competent, he or she may have no liability at all.

need to adjust the secondary liability rule to ensure that results are just for non-local authority parties.

7.13 We are therefore not convinced that there is a case for proportionate liability across the building sector. Even if the case were stronger, it would still depend on establishing an effective building warranty scheme. In contrast, we do consider that an effective warranty or guarantee scheme is highly desirable whether or not proportionate liability is introduced. We discuss this point at paragraph [7.46] below.

THE IMPACT OF REGULATORY CHANGE

7.14 Our conclusion, against a separate proportionate liability scheme for the building sector, is bolstered by some specific legislative steps that have been taken to help resolve the leaky homes crisis, as well as more general changes and improvements to building legislation and regulations over the past decade. It is likely that such changes are lessening or will lessen the impact of joint and several liability, or liability generally, on local authorities.

The Financial Assistance Package

7.15 The Financial Assistance Package for leaky homes was introduced in 2011. The Financial Assistance Package means that remaining owners of leaky homes have an additional option for securing assistance. If qualifying homeowners select the Financial Assistance Package the effective liability burden on local authorities is reduced and rendered more certain as a result.

7.16 The Financial Assistance Package was effected through the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011, which came into force on 23 July 2011. Its central provisions constitute a new Part 1A of the principal Act.[88] The legislation's purpose is stated to be:[89]

> [T]o facilitate the repair of leaky buildings by providing for certain matters relating to the provision of a package of financial assistance measures to qualifying claimants.

7.17 The focus of the Financial Assistance Package is on assisting owners of leaky homes. The package grew out of widespread concern and complaints that the process of resolving leaky home cases was taking too long, and it was too difficult and expensive to get funds out of builders, local authorities and others who could not or would not pay, or pay promptly. The innovation under the Financial Assistance Package was that central government agreed to contribute 25 per cent of the owner's assessed costs, and if there was a potential local authority defendant, it could, and usually does, participate and do the same.[90] The homeowner therefore receives, usually, 50 per cent of their assessed costs – quickly and without incurring litigation expenses – and can still pursue other liable parties.

7.18 As well as the intended benefits to homeowners, the Financial Assistance Package has significant benefits for local authorities, depending on the rate of take-up. Local authorities know that their liability to any Financial Assistance Package claimant will be limited to 25 per cent of the claimant's independently assessed costs, which is about the average or median local authority "share" for cases that proceed to adjudication. The Financial Assistance Package may therefore significantly reduce the risk local authorities face from uncollected shares. Like homeowners, participating authorities also save on litigation costs. Given that a reasonable

88 Weathertight Homes Resolution Services Act 2006.

89 Section 125A.

90 The Crown and the local authority receive immunity from being sued by the participating homeowner. The scheme therefore seeks settlement of potential claims against central and local government agencies, while leaving owners free to pursue other parties.

proportion of homeowners appear to be exploring or accepting the Financial Assistance Package option, the impact from joint and several liability on local authorities may not be as severe, for remaining cases, as it apparently has been for cases resolved before the Financial Assistance Package was introduced.[91] The Financial Assistance Package may reduce local authorities' leaky homes costs for later claims, through to at least July 2016, when access for new claims will expire.[92]

Building consent authority liability after the Building Act 2004

7.19 After the one-off effect from the Financial Assistance Package, building consent authority liabilities should decline. The cumulative effect of the Building Act 2004; particular amendments to that Act in the Building Act Amendment Act 2012 (most not yet in force); and the further amendments passed at the end of 2013,[93] should allow local authorities to better manage and therefore reduce their potential liability for residential buildings. For the first time, the 2012 Amendment Act also describes various parties' responsibilities for commercial building work. This is a useful step, and we explain below[94] why we consider the Act should go one step further and expressly describe the limit or extent of responsibility of building consent authorities for commercial consents, as has already been done for amendments dealing with new "simple" and "low risk" consents.[95]

7.20 Local authority liability for negligence when acting as building consent authority for residential buildings is well established in New Zealand.[96] Liability was originally confirmed in case law, in part based on international precedents, some of which were later overturned overseas.[97] However, subsequent cases at Privy Council and, more recently, Supreme Court level, have confirmed the New Zealand position that such liability in respect of residential buildings is taken to be consistent with and support the scheme of the Building Act 1991.[98] Most recently, the Supreme Court held in *Spencer on Byron* that no distinction should be drawn between residential and commercial building work, meaning local authorities may be held liable for negligence in respect of commercial consents as well.[99] The leading judgment for the majority, given by Chambers J concluded:[100]

> We accept that other courts and judges could reasonably evaluate the policy factors differently from us. We have not been satisfied, however, that it would be just and reasonable to restrict the duty of care [owed by councils] to residential buildings.

91 See Ministry of Business, Innovation and Employment "Weathertight Homes Resolution Service (WHRS) claims statistics" (February 2014) < http://www.dbh.govt.nz >. The figures suggest that over half of current claims are pursuing the Financial Assistance Package track for resolution. Note that some caution may be required as these figures also include cases where no local authority was involved and the claimant is seeking only the central government contribution. Some such cases involved private certifiers of large multi-unit developments, where each individual homeowner will be counted as one case in the statistics. Thus the figure for cases seeking the Financial Assistance Package may overstate the number of cases where local authorities contribute the fixed 25 per cent share.

92 Section 125D of the Weathertight Homes Resolution Services Act 2006 provides that: "An application under section 125C must be made no later than the expiry of the period of 5 years after the date of commencement of this section." The deadline for applications is therefore 22 July 2016. The deadline is an incentive for any "tail" of leaky home cases to be resolved quickly, as is the normal 10 year longstop limitation on suit, for building cases.

93 Building Amendment Act 2013.

94 At [7.28]–[7.30].

95 See Building Act 2004, s 58I (for simple consents); and s 58l (for low risk consents). Neither provision is as yet in force.

96 See: *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

97 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; *Anns v Merton London Borough Council* [1978] AC 728 (HL); *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

98 *Sunset Terraces*, above n 96.

99 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297, referred to as *Spencer on Byron,* after the apartment building the case was concerned with.

100 At [214].

7.21 *Spencer on Byron* was expressly restricted to cases where the Building Act 1991 applies. There were indications that the Court might well reach a similar conclusion, should a Building Act 2004 case come before the Court, but the Court consciously forbore from analysing the point.[101] With respect, we consider that when the Court hears a fully argued Building Act 2004 case, it may instead consider it has grounds to hold that local authorities should have at most only restricted liability in commercial building cases, either from 2005 when the Building Act 2004 came into force, or once the amendments enacted in 2012 and 2013 are in force.[102]

Implications of the Building Act 2004

7.22 An important reason given by the Court in *Spencer on Byron* for concluding that no distinction ought to be made between building regulatory work for commercial and residential projects, was that the 1991 Act could have made such a distinction, but did not.[103] That position began to change when the 2004 Act was passed. In section 4 of the 2004 Act, Parliament for the first time directed various statutory decision-makers, including territorial authorities, to take into account a number of detailed principles "when dealing with any matter relating to one or more household units".[104] Section 4 contains a number of other principles that apply equally and do not differentiate between residential and commercial buildings, but only "household units" are selected for special attention in this way.[105]

7.23 The 2004 Act also introduced specific contract-based protections for purchasers of household units, and subsequent owners. Sections 396 and 397 implied a number of standard warranties into contracts for building work relating to household units or the sale of such units by a developer.[106] Unsurprisingly, there are no similar or equivalent provisions in respect of non-residential building contracts.

7.24 There is therefore a reasonably strong inference under the Building Act 2004 that residential or household units, or buildings containing them, are different in character from other buildings, or their owners and users are deserving of direct statutory protections, whereas parties to commercial building contracts can be expected to adopt self-help. The Act acknowledges that different principles may apply to residential and commercial building work and the parties involved or affected by such work.

7.25 These differences may not be enough by themselves to justify different outcomes on liability for residential and commercial cases, especially regarding building consent authority liability. It might still be expected that Parliament would deal with the matter more expressly if that had been the intention. Weight might be given to the fact that sections 397 to 399 define and

101 At [217] per Chambers J. Even the lone dissent, while disagreeing that local authorities should be liable in commercial building cases, predicted a certain inevitability to eventual liability under the 2004 Act, if liability under the 1991 Act was allowed: at [308] per William Young J.

102 See Building Amendment Act 2012, s 17, in particular the new sections to the principal Act ss 52A to 52Y, to come into force at a date to be determined.

103 *Spencer on Byron*, above n 99, at [103]–[106] per Chambers J.

104 Section 4(2)(a). The principles include: "the role that household units play in the lives of the people who use them...".

105 The definition of household unit is reasonably straightforward; section 7 provides that:

> **household unit**—
> (a) means a building or group of buildings, or part of a building or group of buildings, that is—
> (i) used, or intended to be used, only or mainly for residential purposes; and
> (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
> (b) does not include a hostel, boarding house, or other specialised accommodation

106 The warranties set out in s 397 are an orthodox and extensive set of consumer protections, including requirements that contracts must be performed competently, according to specifications and plans and in accordance with the building consent; with reasonable care and skill and on time, or within a reasonable time; and so that the household unit will be suitable for occupation on completion; and if any particular purpose has been stated in the contract, the unit will be reasonably fit for that purpose or be of such a nature and quality that it might reasonably be expected to be fit for the purpose: s 397(a)–397(f). Section 398(1) extends the right to sue on the warranties to subsequent owners "as if they were parties to the contract". Section 399 prevents a person giving away any of the warranties by contract, unless the provision relates to a breach that is already known to the person, or ought to be.

amend the relationship between the immediate contractual parties (and subsequent owners), and have nothing at all to say about local authorities. And it can be argued that little should be read into these express liability provisions dealing only with the residential and household sector, because clear consumer protection provisions such as these will typically apply only in "consumer" situations. Nevertheless, the scheme of the Building Act 2004 exhibits a much clearer and stronger residential consumer protection focus, in addition to the overall health and safety focus of the statute. This additional focus and emphasis is in contrast to the Building Act 1991, and it is reasonable to infer that consumer householders and commercial parties need not necessarily receive identical treatment as to whether building consent authorities may be liable to either group.

The Building Amendment Act 2012: express differentiation of responsibilities

7.26 Whatever the conclusion on the Building Act 2004, Parliament has subsequently made changes that tend to confirm that residential and commercial consents and claims can be distinguished for liability purposes. This has mainly been achieved through a suite of related provisions introduced in the Building Amendment Act 2012 (the 2012 Amendment Act). The 2012 Amendment Act sets out to differentiate and describe the responsibilities of the full range of building industry participants, and expressly describes the extent of building consent authority responsibilities in two out of three new classes of consent that will eventually come into force. Key provisions include:

- A re-worked purpose section that includes an additional purpose "to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code".[107]
- New descriptive outlines of responsibilities for owners, owner-builders, designers, builders and building consent authorities.[108]
- The framework for a new system of risk-based consenting.[109]
- Express provisions defining the building consent authority's extent of responsibility, and what it is not required to do, for the two new classes of residential consents: low risk and simple consents. For example, new section 52I provides:

  52I Responsibility of building consent authority in relation to building work carried out under low-risk building consent

  (1) A building consent authority that has issued a low-risk building consent—

  (a) is not required to inspect the building work in question at any time before the issue of a consent completion certificate for that building work; and

107 Building Amendment Act 2012, s 3(b).

108 Building Amendment Act 2012, s 14A. The outlines are stated to be for guidance only, and must give way to particular sections of the Act. This highlights a new effort to differentiate between respective responsibilities of the participants, with consequential effects on accountability. Consistent with a differentiated system of consenting that is to come into force, the responsibility of the building consent authority depends on what type of building work or consent the authority is asked to deal with:

> 14F Responsibilities of building consent authority
> A building consent authority is responsible for—
> (a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that—
> (i) an application for a building consent complies with the building code:
> (ii) building work has been carried out in accordance with the building consent for that work:
> (b) issuing building consents and certificates in accordance with the requirements of this Act.

109 With owners to be able, once the system is in force, to apply for a low risk consent; simple consent; the current, general type of consent now called a "standard consent"; or a new, commercial consent, according to the complexity, risk and type of the work to be done: Building Amendment Act 2012, s 17; new sections to the principal Act, ss 41 and 52B.

(b) incurs no liability to any person by reason only of not checking the plans and specifications accompanying the application or not inspecting the building work in question at any time before the issue of a consent completion certificate.

(2) Nothing in subsection (1) limits or affects the provisions of sections 90 or 222.

- New provisions for "commercial consents" in new sections 52O to 52Y. The new procedure places primary responsibility for achieving a safe, building code-compliant building on the owner or their agent. Before applying for a commercial consent, the owner must obtain approval of a risk profile from the building consent authority, as well as a quality assurance system for the building work. The consent authority must check that the system complies with requirements in regulations, and provide for appropriate supervision, testing, inspection and third party review. The authority can compel information from the owner, for instance on the operation and results of the quality assurance system. The authority may, but is not compelled to, inspect the building work. The strong inference is that the owner should provide for all necessary checks in the quality system, which should produce verifiable data for the authority. The authority's power of inspection nonetheless remains as a valuable sanction and incentive to compliance.

7.27 None of the above changes relate directly to joint and several liability. Nor do they amount to exclusions of liability. They nevertheless provide statutory indications to local authorities regarding the potential extent of their responsibilities. Local authorities may choose to take such indications into account as they plan and manage their building consent responsibilities, with a view to minimising their future liability in negligence. The statements regarding the extent of building consent authority responsibilities for each of the new residential consent options may well be relied on by individual building consent authorities to confirm that their responsibility is limited – although whether limited responsibility automatically translates to limited liability will still be a matter for the courts. For activities that continue to provide opportunity for liability, the clearer definitions should at least allow authorities to develop systems and internal checks to minimise breaches of required standards.

7.28 Presently no equivalent to section 52I exists for commercial consents. The current provisions do not contain a description of the extent of building consent authorities' responsibilities for commercial building work. This is probably because the 2012 Amendment Act received the royal assent on 12 March 2012, well before the decision in *Spencer on Byron*.[110] At the time the 2012 Amendment Act was passed, consent authorities were generally considered to have no liability for negligence in respect of building consents for commercial projects. This position had been confirmed by a line of Court of Appeal authorities, which were however overturned in *Spencer on Byron*.[111]

7.29 There is therefore no express "responsibility" section for commercial consents. The extent and limits of local authorities' involvement and responsibility for commercial consents is relatively clear from the commercial consent provisions that are included. However, to avoid confusion we recommend that a "responsibility" section, equivalent to sections 52I and 52L should be added to achieve better clarity. Such a section should confirm the allocations of responsibilities described in sections 52O to 52Y. The provisions confirm that a building consent authority's responsibility in respect of commercial consents is to ensure that consents are not approved without an appropriate and regulations-compliant risk profile and quality assurance system, and that the authority must satisfy itself on reasonable grounds that the approved quality

110 Judgment for *Spencer on Byron* was given on 11 October 2012.

111 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460; *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786; and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).

assurance system is being or has been complied with. Although clearly a matter still to be resolved by the courts, especially after *Spencer on Byron,* building consent authorities may then reasonably argue that they should not be liable for damage connected with a commercial building consent issued under the Building Act 2004 unless they have failed to carry out their specific, limited role.

7.30 We considered whether there was a simpler, more direct approach. Given the likelihood of only very restricted liability for commercial consents governed by sections 52O to 52Y, and the policy of the 2004 Act to make the correct party or parties accountable, we considered whether it would be appropriate to recommend an amendment to section 392 of the Act, to exclude building consent authority liability in commercial consent cases. Such a provision could achieve rather more directly what a "responsibility" section might also achieve, but only by implication. However, we concluded that, whatever the merits, excluding local authority liability for commercial consents is beyond the scope of this reference. We therefore recommend the clarificatory amendment to define responsibilities, but make no recommendation on excluding liability.

The Building Amendment Act 2013: more emphasis on protection of residential consumers

7.31 The Building Amendment Act 2013 does not deal directly with the responsibilities of building consent authorities. It does, however, continue to develop the express consumer protection provisions for residential building work, begun by sections 396 to 399 of the 2004 Act, by incorporating them into a new Part 4A of the Act, entitled "Consumer rights and remedies in relation to residential building work".[112] The new Part retains the existing implied warranties and:

- introduces specific remedies for dealing with breaches;
- requires a variety of disclosure information to be provided before contracting and on completion of works;
- prescribes, or authorises regulations to prescribe, minimum requirements for residential building contracts;
- mandates a one-year maintenance period for qualifying residential building work;[113] and
- allows parties to contract out of minimum standards outside the mandatory warranties, so long as this is done in writing.[114]

7.32 Overall, the amendments further expand consumer protection for residential homes, with a strong emphasis on the building contract between the owner or purchaser and the builder, developer or on-seller as the principal instrument of consumer protection. This development further underlines the different treatment of residential and commercial building under the Building Act 2004. This strengthens the inference that the two classes of work and the regimes governing them are sufficiently different that the liabilities of building consent authorities for each can be distinguished – and that this is what the scheme of the Act envisages should occur.

112 Building Amendment Bill (No 4) 2011 (322-2), cl 44.

113 Building Amendment Bill (No 4) 2011 (322-2), cl 44, new s 362A. Some provisions await thresholds to be set by regulation, along with other details.

114 Building Amendment Bill (No 4) 2011 (322-2), cl 44, new s 362G.

A CAP ON BUILDING CONSENT AUTHORITY LIABILITY

7.33 Despite our conclusion against proportionate liability, we recognise that local authorities remain attractive potential defendants because of their resources, especially if another major liability event emerges. We therefore considered whether local authorities warrant some further protection from excessive liability. Our conclusion is that such protection is justified, and we recommend caps on building consent authority liabilities to provide it.

7.34 Local authorities have different characteristics to other potential building sector defendants. They are not participants in a market, which they have entered voluntarily and with a view to profit. Rather, they are second level regulators and supervisors under the Building Act 2004 and any regulations made under it. They are themselves supervised by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE). They can be regarded as gatekeepers, in that so long as they perform their supervisory role satisfactorily they will reduce the risk of unsatisfactory building work and therefore of litigation and other costs to other market participants, including consumers.[115] They are not volunteers, unlike for example auditors and professional adviser gatekeepers, who choose to provide audit, supervisory or other professional services in the expectation of making a profit. Building consent authorities can and do charge fees for work done.[116] However, any fee must be reasonable and based on the activities undertaken. While an auditor can include in his or her audit fee the cost of maintaining professional indemnity cover, the building consent authority cannot add a loading to its consent fees to allow for the risk of later being held liable in tort.

7.35 Local authorities also have limited opportunities to insure against potential liabilities, particularly when such liabilities stem from a major event with potential for uncollected shares. At the beginning of the leaky homes crisis, local authorities had access to cover for liabilities as building consent authorities through Riskpool, a pooled insurance fund participated in by most New Zealand local authorities. This was a form of mutual self-insurance. The fund proved able to cope with claims for the first few years of the crisis. Once it became clear that claims would continue to mount, especially from larger and northern local authorities, Riskpool acted to decline cover for all further leaky home claims from 2007. The mutual self-insurance model continues to function for more routine, non-extraordinary risks. But the experience of leaky homes leaves especially larger or highly exposed local authorities with no effective insurance options for major public liability risks.

7.36 The particular difficulty for local authorities is that their status as potential deep pocket defendants arises mainly from their inability to withdraw from providing services. Their ability to pay stems from ratepayers, not from business profits or insurance. A private sector gatekeeper, such as an auditor of large commercial companies, has the option of withdrawing service from a particular customer or type of customer, or withdrawing their services altogether, if the risk of damage to profits or reputation or the insurance risk is too great. The only effective options local authorities have to reduce risk is to invest more in training and systems to minimise the risk of liability in the first place, or to manage the building consent function as efficiently and competently as possible within available resources. This turns the uncollected shares from leaky homes into costs that will ultimately be borne by all ratepayers, rather than a risk that falls only on owners and purchasers of, mainly, homes using monolithic cladding and related techniques. While some might regard this result as a satisfactory, if not ideal, form of

115 There is an extensive international literature on the role and potential use of gatekeepers in "risky" markets or service areas. Effective use of gatekeepers as part of a regulatory scheme may reduce the need for parties to protect and pursue their own interests, including through frequent resort to litigation. The design of the regulatory scheme for building works in New Zealand is clearly outside our terms of reference. But it is relevant for our review that the role of local authorities in the building sector is the socially and economically useful one of gatekeeper.

116 Building Act 2004, s 219.

risk-spreading, the results are far too unpredictable, arbitrary and unfair on ratepayers as a class to be readily supportable.

A cap on local authority liability

7.37 We are proposing appropriate caps on building consent authority liability, to enable the unique situation of local authorities to be addressed without unduly preventing the plaintiffs from recovering, in most situations. There should be little disruption to other parties, because the cap is only on building consent authority liability. Joint and several liability would continue to operate for all parties, including for local authorities, up to the level of the cap. This means that local authorities can and will have to accept liability for part or all of uncollected shares, below the cap level.

7.38 We do not expect that caps need be introduced immediately. The Financial Assistance Package may help pull local authority liabilities back towards their share of responsibility,[117] and the Building Act 2004 amendments may also enable authorities to better manage their liability risk from normal or routine claims. Rather, we have concluded that a backstop cap ought to be placed on building consent authority liability to mitigate any excessive effects on local authorities that could arise from a future major liability event, stemming from future acts or omissions, where local authorities are again very likely to constitute the "last person standing". The relevant cap should apply to new events, acts or omissions arising no earlier than the closure of the Financial Assistance Package scheme to new claims, on 23 July 2016.[118]

7.39 A critical choice is the level of the cap. A cap needs to be set high enough so that the normal run of plaintiffs can expect to recover full compensation even where they have to look to the local authority for the share of another party, but not so high that it would offer authorities no effective relief in another major liability event. The cap therefore needs to reflect likely building and repair costs, which should be drawn from the best available evidence. Also, as we are dealing with an unknown date in the future, any cap level should be subject to regular review or updating, for example by application of a suitable building and construction-related price index.

7.40 For likely repair costs we have started from the Report prepared in 2009 by Price Waterhouse Coopers for the then Department of Building and Housing (PWC Report).[119] The PWC Report is a relatively recent and thorough review of likely actual costs for repairs in a major weathertightness liability event involving thousands of claimants. We recognise that future liability events, if they occur, may not relate to weathertightness. However, weathertightness cases typically involve extensive and expensive repairs, and probably provide the most comprehensive information we have regarding potential costs of major repairs. We have in any case cross-checked against average costs of residential building consents, as discussed below.

7.41 The PWC Report notes that repairs to individual units in multi-unit developments tend to cost less than repairs to standalone single dwellings – although of course the cost for the whole development is far higher. Given the increasing importance of multi-unit developments in major cities, we consider that we should have separate caps on liability for local authority liability: one for single, standalone dwellings; and one for units in a multi-unit development. We also propose

117 The rate of uptake of the Financial Assistance Package is controversial, and the split between applicants who would or would not otherwise have a claim against a local authority is unclear. However, a recent information release from Auckland Council suggests at least a material impact on the most significantly affected region and Council, with the Council reporting payments to 144 homeowners under the Financial Assistance Package: Rob Stock "Auckland's $300m leaky home bill" *Sunday Star Times* (New Zealand, 23 March 2014).

118 This means that existing leaky homes claims, and any potential claims where relevant acts or omissions have occurred but not yet been discovered will not be affected by the cap – they will dealt with under existing provisions, including the Financial Assistance Package where appropriate, up to its close-off date.

119 Price Waterhouse Coopers, above n 77.

an overall cap per development.[120] This is to reflect that many repairs in such a development will be common to or for the benefit of all owners, and also to ensure that there is still an effective cap on liability, in very large developments.

7.42 Our recommendation is that the liability for building consent authorities held liable in tort for acts and omissions relating to building consents and all related work be capped as follows:

SINGLE DWELLING	MULTI-UNIT DEVELOPMENT
Cap at $300,000	Cap at $150,000 per unit
	Cap at $3 million per development

7.43 The caps should be inclusive of all court or tribunal-awarded amounts, including interest and costs.

7.44 The levels for individual homes and units have been set taking into account the cost of a major repair – in leaky home terms, a full recladding of the property.[121] We have also considered the average costs of residential building consents over several months in 2013. These averages indicate an average of $360,000 to $380,000 per consent.[122] It should only be in the most serious or extreme cases that a local authority is faced with meeting the whole of a claim, or up to the full value of a consent. The cap we propose is therefore set at a high level and most claims involving a local authority should be unaffected. We expect, however, that the existence of the cap will provide the intended backstop, should another major liability event occur.

7.45 Unlike a scheme for auditors, we do not recommend compulsory insurance – the deep pocket credentials of local authorities are well established. However, we anticipate that having a cap will make it practical for local authorities to arrange insurance if they wish, either individually or mutually. Restoring the ability of local authorities to better manage building consent-based risks through appropriate insurance is perhaps the strongest justification for introducing the proposed caps.

THE CASE FOR A COMPREHENSIVE BUILDING WARRANTY SCHEME

7.46 We have already confirmed our view, which we first expressed in our Issues Paper, that a comprehensive building warranty or guarantee scheme would be a prerequisite for any chance of proportionate liability being introduced in the sector.[123] A truly comprehensive scheme would reduce stress on both plaintiffs and defendants, and help facilitate fair outcomes when problems or disputes arise. Having a scheme to back up builders' resources when claims arise would greatly reduce the risk of plaintiffs not recovering all their losses under proportionate liability. More importantly, a working guarantee or warranty scheme should ensure that plaintiffs are paid and liable defendants pay no more than their appropriate share of responsibility, compared to other liable defendants, regardless of whether proportionate liability or joint and several liability applies. The multiple defendants rule should only need to be applied to a small number

120 The extent of each "development" should be determined as a matter of fact in each case, based on the number of units consented in the resource consent, or for which building consent was granted, or were actually built.

121 The PWC Report evaluates a full re-clad for a standalone home at $300,000, and $120,000 for a unit in a multiunit dwelling: see Price Waterhouse Coopers, above n 77 and Appendix E at 54. The PWC figures are expressed in 2008 $ terms.

122 We have not differentiated between single and multi-dwelling consents.

123 *Issues Paper*, above n 83, at [9.20]. We have used the names "building guarantee scheme" and "building (or builders') warranty scheme" essentially interchangeably in this Report. We take it that in theory a "warranty" scheme would be provided by builders themselves, although most likely with external financial and administrative support. In contrast, a "guarantee scheme" could be more external to the parties to the building contract, with an insurer or other financial institution providing guarantees subject to scheme terms. Use of the term "warranty" may be confusing, given the increasingly important warranties implied by law in ss 396 to 399 of the Building Act 2004, and soon to be brought within the new consumer protection provisions in new pt 4A. However, if a workable scheme is to be drawn up, we suspect that very little will depend on the name chosen, and this issue can safely be left until detailed design is undertaken.

of cases, where for some reason a plaintiff could not be covered or chooses not to be covered by the warranty scheme.[124]

7.47 Introducing an effective scheme would be much more likely to deal with perceived unfairness to defendants than a shift to proportionate liability. Plaintiffs could be made whole without the risk of significant uncollected shares to be met by solvent liable defendants.

7.48 We expect that a guarantee scheme with wide industry coverage and support and adequate financial strength would shift the focus away from the very protracted debate over joint and several versus proportionate liability, by rendering it unnecessary. We therefore support the development of a comprehensive[125] guarantee or warranty scheme to cover building work for residential dwellings, both single and multi-unit. We recognise that the design and implementation of such a scheme is a major enterprise, and well beyond the scope of this Report. We are aware that MBIE has previously investigated and advised Ministers on such schemes and we think this work should move forward as a matter of priority. To assist, we offer further high level comments on some design issues below.

7.49 The scheme will require broad participation rates. The full benefits of a warranty scheme will only be achieved with uptake approaching 100 per cent for all new builds. A near-100 per cent participation rate would also help ensure the scheme's financial viability, reduce litigation and should resolve any remaining argument over joint and several liability. This raises the question of whether cover should be compulsory for all new homes and all renovations above a given value.

7.50 Judging from take-up of the presently available commercial products, a voluntary scheme may struggle to achieve and maintain a satisfactory participation level. The two main products available have perhaps 50 per cent coverage of new standalone dwellings but neither product is designed for intending homeowners in multi-unit projects and there is currently no alternative product for this sub-sector. A well-designed comprehensive scheme will hopefully be more attractive to prospective owners of new homes, particularly if an option is also available to unit owners in multi-unit developments. Clearly a scheme will struggle in the longer term if it cannot achieve uptake at or above around 80 per cent and compulsion might have to be considered if that were the situation. Our preference is to avoid compulsion by having comprehensive availability of approved warranty products across all typical housing types.

7.51 We suggest that builders should be required to offer a suitable warranty product to each customer, who then decides whether or not to purchase the warranty. While we do not underestimate the challenges of running a long-term, successful scheme or schemes, we consider the benefits are substantial enough to justify further work to develop, and if proved feasible, implement a comprehensive scheme or schemes in New Zealand.

124 For instance because the plaintiff wished to build a house using approved but "risky" techniques, and the scheme excluded cover for such "non-standard" builds. At least in this situation the plaintiff would be on notice that they were accepting a level of risk and could consider whether to seek some assurance of solvency from their builder, or attempt to arrange insurance.

125 By "comprehensive" we do not necessarily mean "compulsory". A scheme in our view should at least be available to the normal range of purchasers of residential dwellings, and comprehensive availability may be enough to reduce the number of cases affected by insolvent or unavailable liable parties. Comprehensive availability could include a compulsion on builders or developers to offer an acceptable warranty product – but without any compulsion on the purchaser to accept.

RECOMMENDATIONS

R8 Participants in the building sector should remain subject to the normal application of joint and several liability.

R9 The liability of building consent authorities held liable in tort for acts and omissions relating to building consents and all related work should be capped.

- The cap should be set initially at: $300,000 for a single dwelling; $150,000 per unit in a multi-unit development; and $3 million per multi-unit development, with such rates reviewed over time against appropriate indices to ensure each cap remains fair to potential plaintiffs and authorities.
- Any cap should apply only to new claims arising from acts or omissions that occur after 23 July 2016 (which is the date the Financial Assistance Package is due to close to new claims).

R10 The Building Act 2004 should be amended to clarify the responsibility and potential liability of building consent authorities for commercial building consents by enacting a new section, section 52Z, which defines the extent and limits of building consent authority liability for commercial consents, in similar form to sections 52I and 52L (which deal with responsibilities for simple and low risk residential consents, respectively).

R11 The Ministry of Business, Innovation and Employment should continue to develop, for implementation if proved feasible, a comprehensive residential building guarantee scheme with options suitable for both standalone and multi-unit dwellings.

Chapter 8
Liability of professional service providers and advisers

INTRODUCTION

8.1 Professional service providers and advisers are often considered to be disproportionately affected by joint and several liability. This group includes accountants, financial advisers, investment advisers, lawyers, engineers, surveyors and potentially other professions that provide consulting, advisory or other services, usually to other businesses. The distinguishing characteristic of membership is that they provide professional advice in significant business projects or enterprises but are not normally the prime mover, business leader or head contractor.

8.2 Professional service providers and advisers are likely to share some of the business risk associated with businesses or projects in which they are engaged. They will have contractual obligations to the principals who engage them, and may be found to owe obligations in tort (usually in negligence) to other parties contracting with or otherwise affected by a business venture. If they are held to be liable to the business's customers or other third parties, then it is highly likely their liability will be joint and several along with a "principal" defendant, such as the business, project promoter or developer.

8.3 Professional service providers and advisers may be vulnerable as defendants for two main reasons. Professionals, especially if well-established or operating on a significant scale, are likely to have public liability or professional indemnity insurance. In many cases this may make them a logical target for plaintiffs, as possibly the only potential defendant (or the most easily accessible) likely to be able to pay a large award. Secondly, this group is likely to regard reputation as an important contributor to their business success. They therefore tend to have strong incentives to settle a claim or threatened claim, even at the cost of paying over the odds, which in this context means paying more than their likely share of responsibility. This could lead to a preference to incur higher professional indemnity premiums in future rather than face a protracted legal battle that may damage their reputation, even if they might ultimately be held to be responsible for only a relatively small share of damage, or realistically may not be liable at all.

8.4 There is therefore a question as to whether this group ought to be granted some relief from the risk or effects of being pursued as deep pocket defendants under joint and several liability. This chapter first looks at this question for the broad class of professional service providers and advisers, without expressly including or excluding particular professions. The chapter then examines whether there is a special case for auditors, especially auditors of "large" companies (which will be known as FMC reporting entities under new financial markets legislation).[126]

126 Financial Markets Conduct Act 2013, s 451. The equivalent category under the existing Securities Act 1978 and Securities Markets Act 1988 is "issuer", whether as an issuer of debt, equity, participatory or other securities, or as a public issuer, listed on an exchange.

CLOSER ECONOMIC RELATIONS WITH AUSTRALIA

8.5 In the Issues Paper, the Law Commission considered the impact of Closer Economic Relations with Australia (CER) on the development of the law in this area.[127] The intent of CER, which came into force in 1982, was to bring about greater harmonisation of law and policy in New Zealand and Australia, particularly as it relates to commercial matters.

8.6 Since CER the two countries' economies have been much more integrated. Certain aspects of commercial activity have been fully harmonised, particularly in competition and corporation law. In recent years there has been an increased impetus to this work and, as the Issues Paper noted, in 2009 a trans-Tasman Options Framework was announced. Included under this Framework was business law, and in particular insolvency law, financial reporting policy, competition policy, personal property, securities law, intellectual property law and consumer policy.

8.7 One of the specific challenges facing regulators is determining those sectors of the economy that are most appropriate for harmonisation. The basic test is the extent to which a trans-Tasman market exists. If there is no such market then there will be no compelling case for a harmonised legal framework.

8.8 In our Issues Paper we asked the question of the importance of a harmonised legal liability regime. We noted that this would inevitably mean that New Zealand would adopt a proportionate liability regime given that in Australia, both the Commonwealth and the states made this shift in 2003.

8.9 We received considerable feedback on this question. Submitters who represented organisations operating on both sides of the Tasman preferred New Zealand to adopt the proportionate system of liability. This was most evident in the area of professional services.[128] Other submitters also wanted a proportionate liability system but did not make the case primarily on the basis of trans-Tasman considerations. Instead they focused on the increased costs that joint and several liability imposes on business providers. This was particularly evident amongst the submissions of those involved in the building industry.

8.10 The New Zealand building industry is marked by its relatively small scale. Unlike Australia, the industry has not developed a comprehensive manufacturing approach to building, and a large amount of work is undertaken at the final site with high levels of customisation. As a result there is no significant trans-Tasman market for the supply of new residences. New Zealand suppliers are primarily concerned with the provision of homes in New Zealand, rather than for export markets. The industry is therefore essentially domestic. Thus trans-Tasman harmonisation arguments are not strong in relation to changing the liability regime to meet the needs of the building industry.

8.11 As discussed above, the Law Commission has come to the view that the joint and several liability system with modifications is the most appropriate liability regime for New Zealand. In the absence of a trans-Tasman market, there are insufficient reasons, particularly within the building industry, to make the case for a general shift to a proportionate liability regime. However, the question arises as to whether other specific sectors would benefit from reform where CER is particularly relevant.

127 Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012) [*Issues Paper*] at ch 6.

128 For example, see submission of Beca Group on *Issues Paper*.

OPTIONS FOR PROVIDING RELIEF

8.12 This section will specifically examine the options for reform in respect of the liability of service providers and professional advisers, where CER factors may be highly relevant.

8.13 The nature and coverage of the options discussed below reflects our principal recommendation that joint and several liability should remain the primary rule. The reasons for retaining joint and several liability are as applicable to adviser and service provider defendants as they are generally. To be jointly and severally liable, advisers and service providers must still be held to have caused or contributed to, and be causally responsible for, a plaintiff's loss. If they were not, then they would not be liable in the first place. We have therefore concentrated on options that do not fundamentally change or negate the joint and several liability of each defendant,[129] these being:

- option one: retain status quo;
- option two: enhanced status quo; or
- option three: capped liability.

Option one: retain status quo

8.14 As with other businesses, advisers and service providers already have a number of tools available to help reduce the potential impact of a liability. Subject to any statutory or other restrictions, they can:

- seek to exclude or limit by contract, any liability to contractual counter-parties;
- seek an indemnity from a party they contract with for any liability they may incur in respect of a third party, for example in tort;
- expressly disclaim or limit responsibility to any third parties, for example for any negligent misstatement or misrepresentation that a third party might seek to rely on; and/or
- maintain appropriate professional indemnity cover.

8.15 We are aware that not all of these tools will be available to all defendants or be effective in all circumstances.[130] But in general, properly advised contract parties will be able to negotiate to protect their respective interests in limiting their liability.

8.16 A common criticism of this current state of affairs is that it works best when parties have relatively equal bargaining power and access to information. Despite the theoretical freedom to negotiate risk allocation arrangements as part of an overall contract proposal, a stronger party may present its limitation proposals on a take-it-or-leave-it basis. An adviser or service provider who wants to secure a contract may have little choice but to accept what is offered. This use of relative contracting strength may either limit, maintain or transfer each party's potential liability.[131]

129 But see ch 5 and our recommendations to allow some relief from the full effects of joint and several liability to minor defendants.

130 For example, auditors are currently prohibited by the Securities Act 1978, s 61 from obtaining an indemnity from or being provided with insurance by their audit client, for any negligence or related liability arising from their engagement. A similar provision, Financial Markets Conduct Act 2013, s 529 will continue this prohibition when the Securities Act is repealed. The effectiveness of a general disclaimer of responsibility, while available in theory, is likely to be highly fact-specific – it may be difficult to effectively disclaim responsibility when the particular engagement was expressly to provide some mixture of assurance and certification to an identified class of third parties.

131 One submitter discussed this phenomenon in an Australian proportionate liability context. In some states it is possible to contract out of proportionate liability. Tenderers have frequently found that agreeing to joint and several liability, in contract, is made a condition for securing the deal. Of course, this only shows that market freedom is working, albeit in the opposite direction to the interests of parties who wish to limit their liability. In contrast, see also [8.20]–[8.22] below regarding proposed loosening of the Fair Trading Act 1986 prohibition on contracting out, which may nevertheless allow some protection to a party with lesser bargaining power who may have little choice but to agree to a limitation provision proposed by a stronger party.

8.17 The status quo nevertheless has simplicity and does not require any additional regulatory intervention. Parties can influence their own situation, within relatively broad business and some statutory parameters.

8.18 However, in light of the continuing availability and affordability of suitable insurance and market conditions, especially where trans-Tasman markets exist, options other than the status quo need to be considered.

Option two: enhanced status quo

8.19 This option would retain the same general range of tools for advisers and service providers to reduce their potential limit of a liability, but provide scope for legislative interventions to improve the effectiveness of some of these opportunities.

8.20 A productive area in this regard could be lifting or reducing statutory restrictions on contractual limiting of liability. Section 61 of the Securities Act 1978, for example, is a very specific prohibition on indemnities or insurance for company directors, officers and auditors.[132] Other Acts, including the Fair Trading Act 1986 (FTA) and the Consumer Guarantees Act 1993 (CGA), currently contain provisions of general application prohibiting contracting out of liabilities under each Act.

8.21 The CGA does allow contracting out for business transactions. In contrast, business, professional and commercial parties cannot currently exclude the operation of the false or misleading conduct provisions in the FTA. This restriction tends to discourage and limit the effectiveness of other legitimate agreements to contract out, for example, an agreed limitation or exclusion of liability for contractual misrepresentation or negligent misstatement. But this position is changing. The Consumer Law Reform Bill[133] was passed in December 2013 and will add new sections 5C and 5D to the FTA. While section 5C will expressly confirm the broad prohibition on contracting out, section 5D will allow an exception for business-to-business contracts.[134]

8.22 There is clearly scope for statutory restrictions on contracting out of liability to be revisited. Assuming the proposed amendments to the FTA proceed, they will strike a fair balance between contractual freedom and guarding against a dominant party abusing its strength in contract negotiations. Beyond our support of this useful improvement, we do not propose any amendments to other statutory provisions that limit contracting out. We indicated in our Issues Paper that proposing amendments to such restrictions are beyond the scope of this review,[135] and that is still the case. The place or continuing need for such provisions should be assessed when relevant statutes are revisited and any amendment must fit within the particular statutory and policy context that applies. Thus, a decision to amend the prohibition on auditors seeking or being granted indemnities by their issuer or FMC reporting entity clients must be determined as part of the overall scheme of audit and financial market regulation.

8.23 In any case, we are not convinced that further efforts to loosen statutory constraints on negotiating limitations would be fruitful. There has already been a decline in statutory

132 Above n 130.

133 Consumer Law Reform Bill 2011 (287–2).

134 Section 5D will allow an exception for business-to-business contracts; where each party is acting "in trade" the parties may, so long as certain conditions are met, agree to contract out or limit some Fair Trading Act responsibilities, including the duty to avoid false or misleading conduct. A court can later determine whether a particular agreement is fair and reasonable. If not, the limitation will be unenforceable. The potential for agreed limitations to be struck down in this way may create uncertainty, but the proposed amendment should significantly improve the general ability of parties to agree between themselves the extent and limits on their potential liabilities to each other in an area that broadly overlaps common law misrepresentation/misstatement liability.

135 *Issues Paper*, above n 127, at [3.30].

constraints. Further, allowing greater freedom to negotiate contracts does not guarantee parties will achieve results that both agree with. Negotiations remain open to the impacts of potentially unequal bargaining strength and interference from non-parties. In the case of auditors in the United Kingdom, opposition from United States regulators and local institutional investors made changes to companies legislation largely ineffective.[136] If the provisions had been able to function as designed, auditors and their clients could have negotiated contractual limits on liability, subject to complying with applicable Companies Act provisions. There is every reason to expect that institutional investors in New Zealand could take a similar stand.

Option three: capped liability

8.24 This option involves the maximum liability of members of a qualifying group or groups being capped, either directly in statute, or by an industry scheme approved under an enabling statute. The liability of a service provider or adviser who is held liable, usually in contract or negligence, will be limited by a set dollar amount, or by a set multiplier, and with an upper dollar limit setting the maximum possible liability. For example, in some Australian states, engineers are subject to one of four levels of cap, from not more than $1.5 million to no more than $20 million, depending on a firm's income. The schemes also allow for a higher cap to be set for a firm that has income above $20 million.[137]

8.25 We noted in our Issues Paper that caps for professional defendants' liabilities are often promoted or used where there is a prospect of catastrophic liability resulting from the catastrophic collapse of a client.[138] The argument is that some level of protection from open-ended liability is needed to encourage professionals to enter and remain in the sector, and to keep insurance costs affordable. The example provided by the Enron collapse, and the fatal damage that was done to Enron's auditors Arthur Andersen, demonstrates that catastrophes can lead to unsurvivable liability for affected advisers or service providers. In the wake of Enron it has been asserted that any further catastrophic collapse, accompanied by loss of one of more international professional services firms, could damage whole economies. Capping of liability is therefore argued as necessary in the public interest, to protect business confidence and avoid damage to economic infrastructure.

8.26 As a result of the Enron experience, capping is often advanced as being necessary for major audit firms, especially those who audit the largest corporates and are potentially most at risk of being caught by a catastrophic collapse.[139] Capping schemes have also been proposed and implemented for various other professional groups, most notably in Australia. Professions that have or have had schemes in place in one or more Australian states include auditors, other accountants, barristers, solicitors, IT or computer consultants, valuers, engineers and surveyors.[140]

8.27 Capping is a potentially strong option for providing relief for some professionals but we consider that the arguments for and against capping liability are not necessarily the same for each profession. The case for auditors is strongly influenced not only by the "catastrophic collapse"

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136 Under the Companies Act 2006 (UK) parties may negotiate "Liability Limitation Agreements" (LLAs) as long as they meet various statutory requirements. LLAs have proved unpopular with institutional investors who have "insisted" that LLAs only be used to institute proportionate liability for auditors. The refusal by United States regulators to accept audit engagements that include LLAs for companies listed in the United Sates as well as the United Kingdom has further reduced the impact of the option.

137 Professional Standards Councils "Engineers Australia (Vic) Scheme" (Notified 19 October 2012) < www.psc.gov.au > .

138 *Issues Paper*, above n 127, at [3.21].

139 For example, in 2008 the European Union recommended that member countries adopt one or more of: proportionate liability, statutory or contractual capping: see European Commission Recommendation 2008/473/EC concerning the limitation of the civil liability of statutory auditors and audit firms (5 June 2008). However, apart from the contracting out provisions included in the Companies Act (UK), these proposals have not yet generated significant national responses.

140 As approved by or notified to Professional Standards Councils of Australia, see "Schemes" < www.psc.gov.au > .

argument, but also by emerging trans-Tasman competition. In the next sections of this chapter we consider in more detail the case for capping and, in particular, the capping of auditor liability.

OPERATION OF CAPPED LIABILITY IN AUSTRALIA

The various Australian schemes

8.28 It is relevant to consider the Australian experience with capping. This is not only because Australia is our closet neighbour and largest international market, but also because Australia is the only country to develop a widespread application of capped liability for professionals.

8.29 New South Wales first developed state-authorised limitation schemes in the 1990s.[141] Such schemes later formed a standard component for a commonwealth and state consensus plan for tort and related business law reform.[142] All states and territories, except Tasmania, agreed to enact uniform Professional Standards Acts. These allowed professional bodies in each state to develop and propose schemes covering their membership. In return for maintaining various scheme requirements aimed to encourage high professional standards, the maximum liability of members would be capped.[143] Schemes are submitted for approval to the relevant Professional Standards Council for the state or territory. In practice the states and Commonwealth operate a single Council with common membership. Where a state capping scheme is approved for a professional group, the federal government may also prescribe analogous rules to cover potential federal liability arising within the state.

8.30 The actual caps on liability vary between professions but are usually standardised across states. Auditors have had the highest potential liability and cap, with a minimum cap per event of $1 million per engagement, where reasonable fees were less than $100,000; a cap of 10 times the reasonable fees for the engagement, up to a maximum cap of $75 million.[144] The "10 times fees" approach is not applied to other accounting work, to which caps on liability of $1 million, $10 million or $20 million apply, depending on the size and income of the firm.[145] Other groups, for example solicitors, have sought approval to lower their standard cap per event for smaller firms from $2 million to $1.5 million, with the cap for larger firms (more than 20 principals or more than $10 million fee income) remaining at $10 million.[146] There is no sliding scale of increasing maximum, but the scheme does provide for a very large firm to apply for a higher maximum for all or a class of business. The engineers' schemes impose caps in four steps, from $1.5 million up to $20 million, depending on the income of the sole trader, partnership or body corporate. The $20 million cap applies to bodies with income over $10 million.[147] Again, truly large firms with turnover in excess of $20 million can apply to have an appropriate cap set.

141 See for instance Professional Standards Act 1994 (NSW).

142 Introduced from 2002 after the collapse of HIH Insurance, one of the major professional indemnity providers in Australia.

143 Generally, to qualify for approval and therefore capped liability, a scheme must require compulsory professional indemnity insurance or equivalent approved assets held, up to the relevant capped liability level; satisfactory admission standards and compulsory continuing professional development (CPD) for covered members; a code of ethics; a complaints and discipline system accessible to the public/consumers; ongoing risk management programmes by the professional body to track claims, complaints and discipline, and CPD outcomes; and reporting annually on all of the above, to the Professional Standards Council.

144 Initial schemes allowed for caps as low as $500,000, the lowest limit allowed for in the legislation. But some significant changes have occurred in some recent Australian capping schemes. The latest capping scheme from CPA Australia for its New South Wales members (in force since October 2013) has raised the "minimum" cap to $2 million for firms with fewer than 20 principals and total annual fee income under $10 million per annum; the same $10 million cap as previously for firms with fee income less than $20 million per annum and fewer than 60 principals; and a cap of $75 million for audit firms with income over $20 million or more than 60 principals; or the existing $20 million cap for "large" non-audit firms. The upper caps have not moved – but the base and intermediate levels have been lifted significantly, in part by elimination of the previous "10 x fees" multiplier for auditors.

145 See for example Professional Standards Councils "Institute of Chartered Accountants in Australia Professional Standards Scheme (NSW)" (2013, Draft) < www.psc.gov.au > .

146 Law Society of New South Wales "Scheme" (Notified 8 February 2012) < www.psc.gov.au > .

147 Professional Standards Councils, above n 137.

8.31 Apart from New South Wales, which introduced legislation to permit capping schemes in 1994, most schemes were implemented progressively by 2007 and 2008. One of the criteria for schemes is that they may be approved for not more than five years. Professional bodies must then apply again for a "new" scheme. The Professional Standards Councils have indicated that most, if not all, schemes have been or will be renewed in 2012 and 2013.[148] Renewal is not automatic. At least one major accounting professional body, the Institute of Chartered Accountants of Australia ICAA, had its application for renewal of its scheme in the Australian Capital Territory declined in 2013, and other state ICAA schemes expired as they reached their termination dates.[149]

8.32 It is difficult to tell what practical impact capping is having in Australia, primarily because it was introduced at approximately the same time as proportionate liability. Fears of a professional insurance crisis in Australia have receded since 2002 and 2003 but it remains debatable whether this is because of proportionate liability, and capped liability for professionals, or simply the retreat of a temporary panic in the market. Professional Standards Australia indicates that the considerable majority of claims covered by each capping scheme are for amounts falling below the applicable cap. Thus it may be that the main effects of the capping schemes are educative, and provide stronger incentives for groups of professionals and their governing bodies to develop and maintain high professional standards.

Capping for New Zealand professional advisers

8.33 With the exception of auditors, which we discuss separately below, we do not consider there is a strong case for introducing capping schemes like the Australian models. Unless caps were set in statute, which we would not recommend, introduction of capping schemes would require an extra level of administration by professional bodies, as well as supervision and approval of schemes by either the Crown or some entity selected or created to fulfil the monitoring and approval roles.[150] Given the differences between Australian and New Zealand conditions and the lack of evidence of the actual effect of caps, there is not a substantial case to build this infrastructure.

8.34 More importantly, New Zealand is not in the situation that Australia appeared to face around 2002. New Zealand professionals requiring indemnity insurance can acquire it, presumably at prices they can reasonably meet as part of their costs of doing business. In addition New Zealand does not have a professional standards gap that capping schemes might help to bridge. Professional bodies and government continue to develop appropriate regulatory structures for particular professions as appropriate. Unlike Australia, in New Zealand there is usually only one national body per profession, with national standards, discipline and professional development already well in hand. Furthermore, some professions in New Zealand are also subject to statutory regulation, including lawyers and conveyancers, and auditors.[151]

8.35 We do not consider that the existence of the Australian capping models necessarily raises a CER argument for professions generally. Apart from some auditors, and perhaps a small segment of consulting engineers who regularly compete and operate in Australia and New Zealand, the various professionals markets for the two countries remain separate. Even if a New Zealand professional does conduct business in Australia from time to time, or vice versa, the differences

148 "Professional Standards Council" < www.psc.gov.au > .

149 The Professional Standards Council announced in May 2013 that it had not approved the proposed scheme for ICAA members in ACT: see Professional Standards Councils "Information regarding expiry of ICAA schemes in ACT, QLD, SA and VIC" (2013) < www.psc.gov.au > . Temporary schemes are being put in place, and the Professional Standards Council has asked the ICAA to reconsider important features of proposed long term replacements, including the minimum and maximum caps, and the "times 10" multiplier, for caps below the maximum.

150 This is performed in Australia by the Professional Standards Councils.

151 Lawyers and Conveyancers Act 2006; Auditors Regulation Act 2011.

in liability provisions are unlikely to cause them or their customers significant difficulties. We therefore conclude that there is no need to harmonise or standardise arrangements in the narrow area of liability limitation for professional service providers and advisers.

A SPECIAL CASE FOR AUDITORS

Introduction

8.36 The accounting and auditing professions, including their national professional body, the New Zealand Institute of Chartered Accountants (NZICA), have strongly communicated to us that the audit industry presents unique problems that proportionate liability as well as capping of liability could fix.

8.37 We identify two main considerations that may distinguish the case for capping auditor liability from that for other professionals. Despite our recommendation to reject proportionate liability, we accept that the question of capped liability deserves to be considered separately for auditors.[152]

CER considerations

8.38 The first aspect of the audit profession that is distinct from other professions is the current and likely development of the audit market in New Zealand, especially the market for "large" audits. Within large audits we include audits of listed companies, audits of other securities or financial markets "issuers" under the present Securities Act 1978 regime and its successor, the Financial Markets Conduct Act 2013.[153] Since the Auditor Regulation Act 2011, which came into force in 2012, auditors conducting these audits must be licensed under that Act, with at least one licensed partner who is responsible for the engagement.[154] This tends to narrow the competitive field for such engagements to large or very large firms.

8.39 The market for audit services is increasingly becoming a trans-Tasman one. Large New Zealand firms told us that Australian offices of the largest firms (the "Big Four"),[155] rather than mid-sized New Zealand firms, are their principal competitors for large audit engagements. We accept this and note that this trend will continue given the introduction of the Accounting Infrastructure Reform Bill in Parliament in December 2013. This Bill should remove the existing prohibition on audit firms being incorporated. The provisions of the bill recognise that audit firms that are companies or overseas companies may in future be engaged to conduct issuer or FMC reporting entity audits.[156] This will remove a remaining barrier that could have prevented some overseas auditors competing in New Zealand, because they had already incorporated in their home jurisdiction. In return, New Zealand firms will be able to incorporate and achieve the benefits of shareholders' limited liability and separate legal personality, while still carrying out audit work.

152 We acknowledge that auditors in Australia have the advantage, like other Australian potential defendants, of proportionate liability being likely to apply to them. And as we note in the text, Australian auditors will inevitably be undertaking engagements in New Zealand, given CER and trans-Tasman Mutual Recognition arrangements. But it is not clear that Australian auditors will be able to "import" proportionate liability when operating in New Zealand. In any case, it is quite unrealistic to consider proportionate liability for one profession, or part of one profession, in New Zealand, especially when other measures such as a capping scheme can address the potential disadvantages that could be suffered by New Zealand auditors.

153 Under the Financial Markets Conduct Act 2013 the general category will become either: "FMC reporting entities" as defined in s 451; or quite likely the subset of "FMC reporting entities considered to have a higher level of public accountability", defined at s 461K. The 461K definition is likely to include companies and other entities that can be expected to have their audits carried out by the largest audit firms operating in New Zealand – whether they are New Zealand-based or overseas firms licensed to operate here.

154 Auditor Regulation Act 2011, ss 8 and 9.

155 The "Big Four" includes; Ernst & Young, Price Waterhouse Coopers, KPMG, and Deloitte.

156 Accounting Infrastructure Reform Bill 2013 (180-1), cl 5.

8.40 The nature of the market for issuer or FMC reporting entity audits has CER dimensions. In our Issues Paper we discussed what weight we should give to CER considerations when assessing the case for reform.[157] While we have not found CER considerations to have altered our conclusion on proportionate liability, we consider that such considerations have much greater weight in the large audit market. Regulatory schemes for auditing are already converging and this will continue. This has helped facilitate what is most likely already a natural interest by Australian audit offices in selected New Zealand clients and assignments. This might suggest that the trans-Tasman audit market is already a CER success story – except that the market appears somewhat unbalanced in its present state. This is because the availability of capped liability in Australia means that in that one important respect there is not a satisfactorily level field of competition. Australian firms will benefit from capped liability in their home market, and may benefit in New Zealand if their engagements allow them to rely on capped liability, including by having the law of an Australian state specified as the law of the contract. It is not certain that this result can be achieved; there will be conflict of laws arguments to be dealt with if such a contract is ever the subject of litigation. But at the very least, Australian firms operating in New Zealand can rely on capped liability at home, and the prospect of or potential for capped liability for some New Zealand engagements. However, New Zealand firms cannot presently pursue either option.

8.41 This is a relatively unusual case for CER, where firms from the entering State already enjoy superior conditions to the incumbent. Thus it is not a case of changing New Zealand conditions to promote entry. Rather, there is a good argument to pursue capped liability for New Zealand auditors of issuers or FMC reporting entities – not to further open the market, but rather to ensure the market operates fairly for incumbents and New Zealand auditors are not excluded from the market of large audits.

8.42 The argument is that New Zealand auditors and firms ought to have the same or similar ability to cap liability as their Australian competitors. If both national and state regimes provide for capping, then it ought to be possible to adopt mutual recognition, so that New Zealand and Australian firms operating in New Zealand or any Australian jurisdiction will have similar access to capped liability.

Catastrophic risk

8.43 The other major consideration that we have given weight to is that auditors, particularly auditors of the largest firms, are more likely to be exposed to the flow-on effects of a major catastrophic event than are other professionals. The auditor will typically be one of the first additional parties aggrieved investors or other creditors may look to if the insolvency of the principal firm or body makes direct recovery of losses impractical. This by itself would not be particularly remarkable or cause for concern given that pursuing the auditor is never straightforward.[158] And it is tempting to treat New Zealand auditors as facing only low risk of catastrophic liability. However, their rarity makes such events even harder to predict, and if one was to occur, the likely severity of harm remains a significant concern that should be managed, to the extent possible. Introducing capped liability for auditors is one prudent step that can be taken to limit the impact of a catastrophic collapse. If auditors' maximum liability is capped at or about the same level as Australian schemes, say NZD$80 million, and the auditor must

157 *Issues Paper*, above n 127, at [6.16]–[6.26].

158 The question of whether and when auditors can or should be liable in negligence to investors and other third parties remains at best opaque in New Zealand law, even though New Zealand law is theoretically more open to the possibility than, say, Australia or Canada: compare *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA); and *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA); to *Esander Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 (HCA); and *Hercules Managements Ltd v Ernst & Young* [1997] 2 SCR 165.

carry suitable professional indemnity cover liability up to that level, then the risk of a local Enron–Arthur Andersen collapse is significantly reduced.

8.44 Capped liability is unlikely to be a complete answer to preventing catastrophic loss to audit firms. A local scheme may not cope with an overseas event with multinational effects. For example, if a "Big Four" firm suffers catastrophic damage from a very large event in an overseas market, capping of local liability may not be enough to save its New Zealand office.[159] And capped liability would no doubt apply only for negligence, as opposed to deliberate, intentional or fraudulent wrongdoing – so a firm could still bring on its own disaster. However, having a cap and defined liability exposure should encourage and enable firms to put in place their own systems to ensure that, at worst, a firm's liability is restricted to the applicable capped level.

THE COMMISSION'S VIEW

8.45 The Law Commission considers that there is a sound case for capped liability for auditors conducting large audits. We see large audits as comprising audits of issuers or FMC reporting entities, or a subset of the largest, most publicly accountable FMC reporting entities that will be captured by section 461K of the Financial Markets Conduct Act.

8.46 The principal reasoning for capped liability for this part of the audit sector is to allow New Zealand firms to remain competitive, and reduce the risk or consequences of a catastrophic loss event. Where a trans-Tasman market exists and the conditions are more favourable in one jurisdiction, the other jurisdiction will be penalised in the market place. A similar capped regime to those operating in Australia will ensure a fair market for New Zealand auditors who want to tender for large audits. Taking prudent steps to reduce the risk or consequences of a catastrophic loss event through capping is also desirable for auditors who conduct large audits, because the risk of a catastrophic loss increases with the size of the audit. We are not convinced that there is a similar case to extend capping either to medium or smaller audits, or to other accounting services. There has been no suggestion that trans-Tasman competition extends or indeed is likely to extend to these services in the near future. Furthermore, for reasons of scale, these services do not contribute significantly to the risk of catastrophic loss. It is also possible that the lesser scale of activities and potential liabilities would make the likely caps less relevant at this level. If the relevant caps were at either $2.5 million or $10 million, depending on the firm or activity, we expect that this is a level at which suitable professional indemnity cover ought to be sufficient to manage risks.

8.47 A capped liability scheme for large audits will only be realistic if it can be set up and supervised efficiently. We expect that, similar to Australia, the professional accounting body, NZICA, should develop and submit a suitable scheme that complies with appropriate legislative specifications and restrictions, to a statutory supervisor. In respect of supervision, we do not recommend the establishment of a new entity like the Australian Professional Standards Councils, for obvious reasons of economy and scale. Given the Financial Markets Authority (FMA) already has the central regulatory role under the Audit Regulation Act we recommend that the FMA be given authority to approve and supervise a scheme.

8.48 Like Australia, approval of a scheme should be for a maximum of five years, with the professional body able to make a new application for a new or renewed scheme. The requirement for periodic renewal is important. Given the novelty of such a scheme, it is desirable that the need for it, as well as its features, be reviewed regularly. It may turn out that the scheme is of little use, with all or substantially all applicable liabilities falling below

159 Although the availability of local cover may help save some of the local infrastructure.

the capped levels. Or the opposite could be the case, with capped levels so low that they reduce liability for many claims.

8.49 The capping level should be similar to the levels set in Australia and should apply to all claims from contracting parties or third party investors. The cap for each audit firm should be set based on audit firm revenue, with a cap at $2.5 million where income from audits of large companies is under $10 million per annum; $25 million where income from audits of large companies is between $10 and $20 million per annum; and $80 million where income from audits of large companies is over $20 million per annum.

8.50 Practitioners and firms who wish to be subject to the capping scheme will be required to comply with ongoing professional obligations.[160] Similar to Australian schemes, the scheme should require the professional body to report on the working of the scheme.[161] The legislative provisions to give effect to a scheme need not be extensive. We suggest that the power to approve schemes, and the consequences and key requirements, be included in amendments to the Auditor Regulation Act, with provision to make legislative instruments, if required.

160 These should include: maintain adequate professional indemnity cover, to the level of the highest cap affecting them (this provision should be harmonised with the existing provisions under the Auditor Regulation Act, for compulsory professional indemnity insurance); satisfy CPD obligations; comply with other professional supervision and disciplinary requirements; and provide all necessary information required under the scheme to the professional body, which will have reporting obligations to the supervisor.

161 For example, on claims patterns, availability and cost of suitable indemnity cover; plans for risk management, risk reduction and review of outcomes; and compliance with CPD requirements.

RECOMMENDATIONS

R12 Professional service providers and advisers should remain subject to the normal application of joint and several liability.

R13 Auditors and audit firms conducting large or complex audits in New Zealand, including audits of listed companies, other issuers or Financial Market Conduct reporting entities, should be able to participate in a capped liability scheme covering their audit work, provided the scheme is approved by the Financial Markets Authority (FMA) and individuals and firms qualify for and comply with the scheme.

R14 The New Zealand Institute of Chartered Accountants (NZICA), its successor and/or other accredited professional bodies should be invited to develop an initial scheme to be submitted to the FMA or other suitable statutory supervisor, which may approve the scheme.

R15 The cap for each audit firm should be based on revenue, with a $2.5 million cap where income from large or complex audits is under $10 million per annum, a $25 million cap where income from large or complex audits is between $10 and $20 million per annum and an $80 million cap where income from large or complex audits is over $20 million per annum.

R16 The cap will apply to all claims from contracting parties or third party investors, whether founded in contract, equity, tort, or otherwise but will not apply to liability arising from fraud, dishonesty or other intentional wrongdoing.

R17 Approval of a scheme will be for a maximum of five years, with the professional body able to make an application for a new or renewed scheme at that time.

Appendix A

INDICATIVE DRAFT: RELIEF FOR MINOR DEFENDANT

Relief for minor defendant

(1) In this section **minor defendant** means a party held liable in a civil action but which or whom the court or tribunal determines bears only a minor and limited responsibility for the plaintiff's loss. A liable party is not a minor defendant only because:

(a) the party's share of responsibility falls below a particular percentage or proportion, or is less than any other party's share of responsibility, or both;
(b) the party's involvement in relevant events was largely or completely restricted to providing verification, certification or other independent services required to facilitate the events or elements of them; or
(c) the party was under a statutory obligation to provide relevant services or take relevant actions.

(2) In this section and for the avoidance of doubt, "**damages**", include damages, interest and costs awarded by a court or tribunal, other than any separate costs awards for which the minor defendant is not expressly made liable.

(3) A party may make an application, before or at trial, to be declared a minor defendant, but such a declaration has no effect unless and until the applicant is held liable. Applications must be on appropriate notice, in accordance with the High Court Rules.

(4) A liable party that has been declared a minor defendant may make an application at or after trial for relief from the full effect of their joint and several liability to the plaintiff provided:

(a) the application for relief is made within 12 months of the sealing of the of the relevant judgment on damages, except that the court or tribunal may grant leave for a late application where it is in the interests of justice that the application be heard;
(b) the minor defendant (or minor defendants, if the court has determined that there is more than one minor defendant) is or are the only remaining liable party or parties available to meet the judgment sum or an unpaid part of the judgment sum.

(5) The court or tribunal may grant relief to a minor defendant only if it is satisfied that the normal application of joint and several liability would produce a clear injustice because:

(a) the minor defendant would be required to meet damages substantially in excess of those indicated by the minor defendant's share of responsibility; and
(b) the circumstances otherwise provide justification for relief.

(6) When determining whether there is justification for relief in terms of paragraph (5)(b), the court or tribunal shall take into account all relevant circumstances including but not limited to:

(a) the minor defendant's adjudged share of fault or responsibility for the plaintiff's loss;
(b) whether any of the factors listed in paragraphs (1)(b) or (1)(c) apply to the minor defendant and if so, whether or not the minor defendant's conduct in their role, office or duty tends to support relief being granted.
(c) the likely effects on the minor defendant if relief is not granted, and the extent to which any relief might mitigate such effects;
(d) the likely effects on the plaintiff if any relief is granted, (other than any effects that would prevent the plaintiff from receiving an effective remedy, see paragraph 7(a)).

(7) The court or tribunal may, if it considers the case for relief is made out, reduce a minor defendant's liability to an amount or maximum amount that is just in all the circumstances and which ensures that:

(a) the plaintiff will still receive an effective remedy; and
(b) the result achieves reasonable fairness as between plaintiff and minor defendant.

(8) What constitutes an effective remedy for the purposes of subsection (7)(a) shall be determined by the court or tribunal in each case, except that in no case may relief reduce the plaintiff's potential total recovery to less than half the damages they were originally awarded.

Appendix B

DRAFT CIVIL LIABILITY AND CONTRIBUTION ACT[162]

DRAFT CIVIL LIABILITY AND CONTRIBUTION ACT 199–

CONTENTS

11

162 Taken from: Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

The Parliament of New Zealand enacts the Civil Liability and Contribution Act 199–

1 Title

This Act is the *Civil Liability and Contribution Act 199–*.

2 Purposes

The purposes of this Act are

(a) to provide that concurrent wrongdoers are jointly and severally liable for the damages payable in respect of a loss; and

(b) to revise and extend the rights of wrongdoers to have their liability to pay damages reduced because the wronged person has failed to act with due regard for that person's own interest; and

(c) to revise and extend the rights of concurrent wrongdoers to contribution among themselves; and

(d) to provide for the apportionment of uncollectible contribution.

3 Commencement

This Act comes into force on 1 January 199–.

4 Definitions

In this Act

compromise includes a consent judgment, a payment into court which has been accepted, and a settlement reached whether or not a proceeding has been brought;

concurrent wrongdoer means each of two or more wrongdoers whose acts or omissions give rise, wholly or partly, to the same loss, and includes a person who is vicariously liable for any act or omission of a wrongdoer;

judgment includes an award made by an arbitrator and an approved settlement or order that is final and binding under section 23 of the *Disputes Tribunals Act 1988*;

loss means loss or damage to which this Act applies under section 5;

payment includes the conferment of any benefit having a monetary value that is reasonably capable of being ascertained;

wrongdoer means a person whose acts or omissions give rise, wholly or partly, to a loss;

wronged person means a person who suffers a loss.

5 Application

(1) This Act applies to any loss or damage if the person who suffered it, or anyone representing that person's estate or dependants, is entitled to recover compensation from some other person in respect of that loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise.

(2) Notwithstanding subsection (1), this Act does not apply to loss or damage arising wholly or partly from a failure to pay a debt or from the fault of two or more ships within the meaning of Part VIII of the *Maritime Transport Act 1994*.

(3) This Act does not apply to any loss or damage arising wholly or partly from any act or omission that occurred before the commencement of this Act.

6 Act to bind the Crown

This Act binds the Crown.

7 Liability of concurrent wrongdoers

Concurrent wrongdoers are jointly and severally liable for the whole of the damages payable to a wronged person in respect of a loss.

8 Attribution of loss

(1) Loss suffered by a wronged person is attributable in accordance with subsection (2)

(a) as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer, or concurrent wrongdoers taken as a group; and

(b) as among concurrent wrongdoers.

(2) Loss suffered by a wronged person is attributable in the proportions that are just and equitable, having regard to

(a) the nature, quality and causative effect of

(i) the wronged person's failure (if any) to act with due regard for that person's own interest; and

(ii) the acts and omissions of the wrongdoer or of each concurrent wrongdoer; and

(b) the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another.

Section 8 continues overleaf

(3) For the purposes of this section,

(a) a wronged person who does or fails to do anything in justified reliance on a contract, a rule of law, or an enactment does not fail to act with due regard for that person's own interest; and

(b) the reliance by a wronged person on a contract does not cease to be justified by reason only of a failure by that person to take any precaution against default by the wrongdoer in the performance of an obligation under the contract before the wronged person knows that such default has occurred.

9 Reduced damages where part of loss attributable to wronged person

(1) Where part of a loss suffered by a wronged person is attributable to a wronged person and part to a wrongdoer or concurrent wrongdoers,

(a) the wronged person is not precluded from recovering damages in respect of the loss from the wrongdoer or concurrent wrongdoers, but

(b) the damages payable to the wronged person by the wrongdoer or concurrent wrongdoers are reduced by the proportion of the loss attributable to the wronged person.

(2) Where the legal basis of the liability of the wrongdoer to the wronged person is breach of contract, this section shall have effect subject to any express provision of the contract inconsistent with this section.

10 Contribution among concurrent wrongdoers

(1) A concurrent wrongdoer who in good faith has paid, or has agreed or is obliged by a judgment to pay, to a wronged person an amount which, as a proportion of the whole of the damages payable to the wronged person, exceeds the proportion of the loss attributable to that concurrent wrongdoer is entitled to recover contribution from any one or more other concurrent wrongdoers.

(2) The amount of contribution recoverable by a concurrent wrongdoer is the amount by which the amount paid, agreed or obliged to be paid by that concurrent wrongdoer to the wronged person by way of damages exceeds an amount proportionate to the loss attributable to that concurrent wrongdoer.

(3) A concurrent wrongdoer from whom contribution is recoverable is not liable to pay, by way of contribution, an amount greater than

(a) the amount for which that concurrent wrongdoer is liable to the wronged person by way of damages; or

(b) an amount that is proportionate to the loss attributable to that concurrent wrongdoer,

whichever is the smaller.

11 Legal proceedings

(1) A wrongdoer or concurrent wrongdoers may seek reduction of damages under section 9 in a proceeding brought by a wronged person for the recovery of damages.

(2) A claim for contribution by a concurrent wrongdoer against another concurrent wrongdoer under section 10 may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution.

(3) In a proceeding where the reduction of damages is sought or there is a claim for the recovery of contribution, or both,

(a) the court must

(i) first, ascertain the loss suffered by the wronged person;

(ii) second, ascertain, in relation to the wrongdoer or concurrent wrongdoers taken as a group, the proportion of the loss (if any) attributable to the failure of the wronged person to act with due regard to that person's own interest;

(iii) third, where there are concurrent wrongdoers, ascertain, as among them, the proportion of the loss attributable to each; and

(b) the court must not

(i) attribute any proportion of a loss to a person who is not a party to the proceeding;

(ii) apportion as between the wronged person and the wrongdoer or concurrent wrongdoers, or as among concurrent wrongdoers, any entitlement to or liability for an amount awarded to the wronged person as exemplary damages.

12 Effect of prior judgment

In a proceeding for contribution brought by a concurrent wrongdoer, a judgment on the merits in a prior proceeding brought by the wronged person against any other concurrent wrongdoer is conclusive evidence, in the absence of fraud or collusion, of the liability of that other concurrent wrongdoer to the wronged person and of the amount by way of damages for which that other concurrent wrongdoer is liable to the wronged person.

13 Payments already made to be taken into account

In making any order for the payment by any concurrent wrongdoer of an amount by way of contribution, the court must take account of any payment already made by that wrongdoer by way of damages or by way of contribution.

14 Compromises

A compromise made by a concurrent wrongdoer with a wronged person is not a defence to a claim for contribution made against that concurrent wrongdoer and does not affect the attribution of a proportion of a loss to that concurrent wrongdoer for the purposes of such a claim.

15 Limitation in contribution proceedings

(1) A defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against that concurrent wrongdoer is not a defence in respect of a claim for contribution against that concurrent wrongdoer.

(2) Notwithstanding subsection (1), if

(a) a defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, is available to all concurrent wrongdoers in respect of a claim for damages made by a wronged person against them or any of them; and

(b) that defence ceases to be available to one or more of those wrongdoers because of an acknowledgement of liability or a payment in favour of the wronged person,

that defence is available in respect of a claim for contribution from any other concurrent wrongdoer to whom the defence would have been available in respect of a claim for damages.

(3) This section does not affect the availability to a concurrent wrongdoer of any defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement in respect of a claim for contribution in its own right.

16 Other defences in contribution proceedings

(1) A defence to which this section applies that is available in respect of a claim for damages by a wronged person against a concurrent wrongdoer is similarly available to that concurrent wrongdoer in respect of a claim for contribution from that concurrent wrongdoer.

(2) This section applies to a complete or partial defence under

(a) an agreement made between the concurrent wrongdoer and the wronged person before the loss occurred; or

(b) an enactment other than a limitation provision in the *Limitation Act 1950* or another enactment.

17 Apportionment of uncollectible contribution

(1) If

(a) contribution is recoverable from a concurrent wrongdoer under this Act; and

(b) a court has attributed a proportion of a loss to that concurrent wrongdoer; and

(c) the proportionate amount of contribution payable by that concurrent wrongdoer is uncollectible,

any other concurrent wrongdoer to whom all or part of that contribution is payable may apply to the court for apportionment of the uncollectible contribution.

(2) Contribution is uncollectible for the purposes of this section if it cannot be collected because the concurrent wrongdoer by whom it is payable is insolvent, absent from New Zealand, or cannot be found.

(3) If the court is satisfied that contribution payable by a concurrent wrongdoer is uncollectible, it may make an order apportioning the uncollectible contribution among the other concurrent wrongdoers (including the applicant) so that each is liable to pay or to forego a share of the uncollectible contribution that is proportionate to the loss attributable to each.

(4) An application under this section may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution or in a separate proceeding, but must be brought within one year after the attribution of a proportion of the loss to the concurrent wrongdoer whose contribution is uncollectible.

(5) Apportionment of uncollectible contribution under this section does not discharge the concurrent wrongdoer whose contribution is uncollectible from liability to pay contribution.

18 Contractual or indemnity rights not affected

(1) This Act does not affect any right to contribution or indemnity that arises otherwise than under this Act.

(2) This Act does not make any agreement for contribution or indemnity enforceable that would not have been enforceable if this Act had not been enacted.

19 Powers of the court

In a proceeding to recover damages or contribution or to apportion uncollectible contribution, the court may

(a) order that contribution should be paid directly to a wronged person or into court pending a further order; or

(b) order that payment of contribution should be postponed pending a further order; and

(c) make any other order that it considers necessary or desirable to give effect to this Act.

20 Consequential amendments to other Acts
The enactments specified in Schedule 1 are amended in the manner indicated in that schedule.

21 Repeals
The enactments specified in Schedule 2 are repealed.

SCHEDULE 1
ENACTMENTS AMENDED

See section 20

Carriage by Air Act 1967 (1967/151)
section 12
Delete: "Contributory Negligence Act 1947"
Substitute: "Civil Liability and Contribution Act 199–"

section 27
Delete: "Contributory Negligence Act 1947"
Substitute: "Civil Liability and Contribution Act 199–"

Carriage of Goods Act 1979 (1979/43)
section 12(5)
Delete: "Contributory Negligence Act 1947"
Substitute: "Civil Liability and Contribution Act 199–"

Civil Aviation Act 1990 (1990/98)
section 97(5)
Delete: "Contributory Negligence Act 1947"
Substitute: "Civil Liability and Contribution Act 199–"

Occupiers' Liability Act 1962 (1962/32)
section 4(8)
Delete: "Contributory Negligence Act 1947"
Substitute: "Civil Liability and Contribution Act 199–"

SCHEDULE 2
ENACTMENTS REPEALED

See section 21

Contributory Negligence Act 1947 (1947/3)
Repeal: the whole Act

Crown Proceedings Act 1950 (1950/54)
Repeal: section 8(2)

Judicature Act 1908 (1908/89)
Repeal: section 86

Law Reform Act 1936 (1936/31)
Repeal: Part V

Occupiers' Liability Act 1962 (1962/31)
Repeal: section 6

Appendix C

LIST OF SUBMITTERS

- Auckland Council
- Beca Group Limited
- Building Industry Federation
- Building Officials Institute of New Zealand
- BuiltIn New Zealand
- Christchurch City Council
- Construction Industry Council
- CPA Australia Ltd
- Deloitte
- Dunedin Community Law Centre
- Ernst & Young Limited
- Fletcher Building Limited
- Alan Grace
- Grimshaw & Co Solicitors
- Hamilton City Council
- Hastings District Council
- Rt Hon Sir John Henry QC
- Home Owners & Buyers Association of New Zealand
- IAG New Zealand Group
- Insurance Council of New Zealand
- IPENZ & ACENZ (Combined Submission)
- KPMG
- Local Government New Zealand
- Lumley General Insurance (New Zealand) Limited
- Master Plumbers, Gasfitters and Drainlayers
- Bruce McCartney, Registered Architect, ANZIA
- Will McKenzie
- Ministry of Business, Innovation and Employment
- New Zealand Institute of Architects Incorporated
- New Zealand Institute of Building Surveyors Inc
- New Zealand Institute of Chartered Accountants
- New Zealand Law Society
- Orchiston Architects Limited
- Parker & Associates Barristers & Solicitors
- Property Council New Zealand
- PwC
- QBE Insurance New Zealand
- Queenstown Lakes District Council
- Registered Master Builders Federation of New Zealand Incorporated
- Riskpool
- Society of Local Government Managers
- Tararua District Council
- Vero Liability Insurance Limited
- Waipa District Council staff submission
- Wellington City Council
- WHK
- Anonymous