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# LAW COMMISSION

## TE AKA MATUA O TE TURE

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### **MEDIA RELEASE**

24 June 2014

Hon Sir Grant Hammond KNZM  
President  
Law Commission

## **LAW COMMISSION RECOMMENDS JOINT AND SEVERAL LIABILITY BE RETAINED**

In their Report, *Liability of Multiple Defendants* (NZLC R132), which was tabled in the House of Representatives today, the Law Commission recommends that the existing rule of “joint and several liability” be retained, with some modifications.

Joint and several liability provides that where two or more persons (defendants) are liable to a person they have harmed (claimant) for the same harm or loss, they are each individually liable for all the damages awarded for the loss.

The President of the Law Commission, Hon Sir Grant Hammond, comments:

“There are a number of alternatives to joint and several liability, and our review investigated them all, in detail. We concluded that none was sounder in principle, or more likely to produce better policy outcomes. For example, proportionate liability can deliver cost benefits to defendants, in some cases. But this could only be done by putting claimants at much greater risk of not achieving effective compensation. Joint and several liability’s emphasis on achieving compensation for wrongs makes it still clearly the best system.”

Problems arise under any liability system, when some persons cannot pay because they are missing or insolvent. The fundamental issue between joint and several liability and proportionate liability comes down to who should bear the risk of these non-paying defendants: the other liable defendants, or the claimant? The Commission’s clear view is that defendants should continue to bear this risk.

The main alternative rule is some form of proportionate liability. This approach involves allocating each liable defendant their share of responsibility for the loss and then making them liable to pay only that share. The difference is that if a defendant cannot pay their share, the claimant cannot recover that uncollected amount from other defendants, even though they all contributed to the loss.

Law Commissioner Hon Dr Mapp said:

“Under joint and several liability, costs are only borne by parties who have been held to be at fault – they are all liable for all the undivided damage they have caused. Defendants can reduce their liability costs by seeking contribution orders against other defendants. Defendants will sometimes

bear higher liability costs because of missing defendants and uncollectable shares. However, the Law Commission considers that an exception should be made for minor defendants so that they do not bear the full impact of joint and several liability, in extreme cases.”

### **Discretionary relief for minor defendants**

The Commission proposes a discretion to grant relief to such a minor defendant, to allow courts to do justice in particular cases. The discretion should be exercised rarely and within limits that balance the interests of the person who suffered the loss with the person who caused the loss.

### **Capped liability for local authority building consent authorities**

Local authorities acting as building consent authorities can experience excessive liability because they become potential “deep pockets” for building negligence claims.

The Commission proposes caps on local authority liabilities from future residential building consents. The caps should make it possible for local bodies to insure against potential liability. The Commission recommends initial caps of: \$300,000 for each claim relating to a single dwelling; and \$150,000 per dwelling for claims from dwellings in a multi-unit complex, with a \$3 million cap per multi-unit development. The caps are not retrospective and joint and several liability still applies, up to the cap.

### **Capped liability for some auditors**

The Commission accepts that a trans-Tasman market exists for audit services for New Zealand’s largest and most complex entities. Major auditors in Australia, who now compete for large New Zealand audit assignments, have access to state-by-state capped liability schemes. This provides them with a potential competitive advantage over their New Zealand counterparts. The Commission therefore recommends a capping scheme on similar terms to those in Australia, to allow fair competition between New Zealand and Australian firms competing for large audits in New Zealand.

The Commission concluded that the case for capped liability for other professional advisers or service providers is not similar. The Commission does not recommend capping schemes for various professional groups in New Zealand, as currently exist in Australia.

ENDS

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