



BY HAND

22 July 2005

Our Ref.: C/PRMC

The Hon. Frederick MA Si-hang
Secretary for Financial Services and the Treasury
8th Floor, West Wing
Central Government Offices
Hong Kong

Dear Fred,

**Hong Kong Institute of Certified Public Accountants
Proposed Proportionate Liability Framework for Hong Kong**

Further to my letter to you dated 14 March 2005 enclosing the Institute's Paper "A Case for Professional Liability Reform in Hong Kong" and our lunch meeting on 14 June 2005, I am pleased to present three possible scenarios in summarized form and our recommendations for the introduction of Proportionate Liability in Hong Kong as requested.

A Three common types of Proportionate Liability

The Institute is of the view that there are three approaches to Proportionate Liability:

- (i) Introducing a wholesale tort reform to replace the principle of joint and several liability with Proportionate Liability.
- (ii) Introducing Proportionate Liability legislation to replace the common law that imposes joint and several liability for economic loss or damage to property caused by concurrent wrongdoers with rules that limit the liability of each concurrent wrongdoer to reflect the extent of the wrongdoer's responsibility for the loss or damage (excluding personal injury, fraud or dishonesty).

--- This is a system of Proportionate Liability adopted in Australia. The Administration's attention is drawn to the Proportionate Liability Act 2005 of the Northern Territory of Australia (**Annex I**), which we believe can be easily adapted for Hong Kong.

- (iii) Introducing amendments to the Companies Ordinance to adopt Proportionate Liability for auditors (and corporate officers) in situations where they are found to be liable for damages arising out of the performance of any function contemplated by the Ordinance. Joint and several liability continues to apply where there has been fraud or dishonesty.

--- This is the system of proportionate liability adopted in Bermuda. The Administration's attention is drawn to section 98(B) of the Bermuda Companies Act 1981 "Liability of auditor or officer" (**Annex II**), which we believe can be adapted to suit Hong Kong.



B The Institute's Recommendations

The Institute would like to make the following recommendations to the Administration for proactive consideration:

- Approach (i) is not recommended as this would involve a significant and fundamental change to the law of tort covering a very wide scope including personal injury. The Institute has always advocated that proportionate liability should be introduced with exceptions and to exclude actions involving personal injury, fraud, dishonesty or willful defaults.
- Approach (ii), as adopted in the Northern Territory of Australia, is considered an appropriate framework for Hong Kong. This legislation has the advantages of being simple, excludes personal injury and would benefit business in general and all professions, not solely auditors.
- Approach (iii), as adopted in Bermuda, is the simplest and fastest way to introduce proportionate liability for auditors (or auditors and corporate officers) in Hong Kong. The approach will involve only an amendment to the Companies Ordinance which is not onerous. However, this approach will only apply to Hong Kong incorporated entities. The vast majority of listed entities in Hong Kong are not Hong Kong incorporated. Furthermore, this option applies only to auditors and/or corporate officers.

For the avoidance of doubt the Institute would take this opportunity to advise that both options (ii) & (iii) will need to be backed up by the introduction of Limited Liability Partnership (LLP) which can proceed independently as it is not directly linked in a legislative sense with the introduction of Proportionate Liability. However, we would specifically reiterate that LLP on its own would not be sufficient as regards our profession.

The Institute urges you to support our recommendations and take them through to your colleagues in the Department of Justice and the Chief Secretary's Policy Committee. We would welcome an opportunity to meet with you once you have had an opportunity to consider the recommendations.

Yours sincerely,

Edward K.F. Chow
President
Hong Kong Institute of Certified Public Accountants

EC/SSLC/jc
Encl.

PROPORTIONATE LIABILITY ACT 2005

Agency: Department of Justice

Type : Act

Parent :



Word Version: Repp084.doc



PDF Version: Repp084.pdf

NORTHERN TERRITORY OF AUSTRALIA

PROPORTIONATE LIABILITY ACT 2005

As in force at 1 June 2005

TABLE OF PROVISIONS

Section

PART 1 – PRELIMINARY MATTERS

1. Short title
2. Commencement
3. Definitions
4. Apportionable claims to which Act applies
5. Act binds Crown

PART 2 – PROPORTIONATE LIABILITY

Division 1 – Preliminary matters

6. Concurrent wrongdoers
 7. No apportionment for loss caused intentionally or fraudulently\
- Division 2 – General provisions for proceedings*

8. Determination as single claim if more than one cause of action
 9. Determination of apportionable claim and other claim
 10. No need for all concurrent wrongdoers to be parties
 11. Joining concurrent wrongdoers as defendants
 12. Costs order if failure to inform of concurrent wrongdoer
- Division 3 – Determination of liability in apportionable claims*

13. Determination of liability of concurrent wrongdoers
 14. Other liability not affected
- Division 4 – After judgment given in proceedings*

- 15. Concurrent wrongdoers not required to contribute or indemnify
- 16. Subsequent actions

PART 3 – MISCELLANEOUS MATTERS

- 17. Regulations

PART 4 – REPEAL AND TRANSITIONAL MATTERS FOR *PROPORTIONATE LIABILITY ACT 2005*

- 18. Repeal of apportionable liability provisions of *Building Act*
- 19. Transitional matters

Notes

NORTHERN TERRITORY OF AUSTRALIA

This reprint shows the Act as in force at 1 June 2005. Any amendments that may come into operation after that date are not included.

PROPORTIONATE LIABILITY ACT 2005

An Act to replace the common law rule that imposes joint and several liability for economic loss or damage to property caused by concurrent wrongdoers with rules that limit the liability of each concurrent wrongdoer to reflect the extent of the wrongdoer's responsibility for the loss or damage, and for related purposes

PART 1 – PRELIMINARY MATTERS

1. Short title

This Act may be cited as the *Proportionate Liability Act 2005*. (See back note 1)

2. Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*. (See back note 1)

3. Definitions

In this Act, unless the contrary intention appears –

"apportionable claim" means an apportionable claim to which this Act applies by virtue of section 4;

"concurrent wrongdoer" has the meaning in section 6(1);

"court" means the court, tribunal or other statutory body determining a proceeding;

"damages" includes any form of monetary compensation for loss or damage;

"defendant" includes any person joined as a defendant in a proceeding, whether joined under this Act or otherwise;

"economic loss" does not include economic loss resulting from a personal injury;

"loss or damage" means economic loss or damage to property;

"proceeding" means a proceeding involving an apportionable claim.

4. Apportionable claims to which Act applies

(1) This Act applies in relation to an apportionable claim if the loss or damage that is the subject of the claim occurs wholly or partly after the commencement of this Act.

(2) An apportionable claim is –

(a) a claim for damages (whether in tort, in contract, under a statute or otherwise) arising from a failure to take reasonable care; or

(b) a claim under the *Consumer Affairs and Fair Trading Act* in respect of loss or damage arising from a contravention of section 42 of that Act.

(3) However, none of the following is an apportionable claim:

(a) a claim arising from a personal injury;

(b) a claim under the *Consumer Affairs and Fair Trading Act* arising from a contravention of Part 4 of that Act;

(c) a claim specified by the Regulations not to be an apportionable claim.

(4) The Regulations may specify that a claim or class of claims is not an apportionable claim.

5. Act binds Crown

This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

PART 2 – PROPORTIONATE LIABILITY

Division 1 – Preliminary matters

6. Concurrent wrongdoers

(1) A concurrent wrongdoer is one of 2 or more persons whose acts or omissions caused (either jointly or independently) the loss or damage that is the subject of a claim for damages.

(2) In applying this Part to an apportionable claim, it is immaterial that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

7. No apportionment for loss caused intentionally or fraudulently

(1) This section applies to a concurrent wrongdoer ("the excluded concurrent wrongdoer") who intended to cause, or fraudulently caused, the loss or damage that is the subject of an apportionable claim.

(2) This Part does not limit the liability of the excluded concurrent wrongdoer for that loss or damage.

(3) The liability of the excluded concurrent wrongdoer must be determined in accordance with the legal rules that, apart from this Part, are relevant.

(4) The liability of any other concurrent wrongdoer must be determined in accordance with this Part.

Division 2 – General provisions for proceedings

8. Determination as single claim if more than one cause of action

If a proceeding involves 2 or more apportionable claims in respect of the same loss or damage arising out of different causes of action, liability for the loss or damage must be determined in accordance with this Part as if the claims were a single claim.

9. Determination of apportionable claim and other claim

If a proceeding involves both an apportionable claim and a claim that is not an apportionable claim –

(a) liability for the loss or damage that is the subject of the apportionable claim must be determined in accordance with this Part; and

(b) liability for the loss or damage that is the subject of the other claim must be determined in accordance with the legal rules that, apart from

this Part, are relevant to that claim.

10. No need for all concurrent wrongdoers to be parties

This Part applies in relation to a proceeding whether or not all concurrent wrongdoers are parties to the proceeding.

11. Joining concurrent wrongdoers as defendants

(1) The court may give leave for any one or more persons who are (or may be) concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in the proceeding involving that claim.

(2) The court must not give leave for the joinder of a person who was a party to any previously concluded proceeding in respect of that apportionable claim.

12. Costs order if failure to inform of concurrent wrongdoer

(1) This section applies if –

(a) a defendant in a proceeding has reasonable grounds to believe that another person may be a concurrent wrongdoer in relation to the apportionable claim;

(b) the defendant does not give the plaintiff, as soon as practicable, written notice of the information the defendant has about –

(i) the identity of the other person; and

(ii) the circumstances that may make the other person a concurrent wrongdoer; and

(c) the plaintiff unnecessarily incurs costs in the proceeding because the plaintiff does not know the other person may be a concurrent wrongdoer.

(2) The court may order the defendant to pay all or any of those costs unnecessarily incurred.

(3) The court may order that the costs payable by the defendant be assessed on the indemnity basis or otherwise.

Division 3 – Determination of liability in apportionable claims

13. Determination of liability of concurrent wrongdoers

(1) In a proceeding –

(a) the liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting the proportion of the loss or damage claimed that

the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) the court may give judgment against the defendant for not more than that amount.

(2) In apportioning responsibility for loss or damage between the defendants –

(a) the court must exclude any proportion of the loss or damage in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.

14. Other liability not affected

This Act does not –

(a) prevent a person from being held vicariously liable for a proportion of an apportionable claim for which another person is liable;

(b) prevent a partner from being held jointly and severally liable with another partner for the proportion of an apportionable claim for which the other partner is liable; or

(c) affect the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Division 4 – After judgment given in proceedings

15. Concurrent wrongdoers not required to contribute or indemnify

(1) A defendant in a proceeding against whom judgment is given under section 13 as a concurrent wrongdoer cannot be required –

(a) to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the proceeding; or

(b) to indemnify any such wrongdoer.

(2) Subsection (1) does not affect any agreement by the defendant to contribute to the damages recoverable from, or to indemnify, another concurrent wrongdoer in the proceeding.

16. Subsequent actions

(1) A plaintiff who has previously obtained judgment against a concurrent wrongdoer for

an apportionable part of loss or damage is not prevented by this Part or any other law from bringing another action against any other concurrent wrongdoer for that loss or damage.

(2) However, in a proceeding in respect of such an action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually sustained by the plaintiff.

PART 3 – MISCELLANEOUS MATTERS

17. Regulations

The Administrator may make regulations, not inconsistent with this Act, prescribing matters –

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

PART 4 – REPEAL AND TRANSITIONAL MATTERS FOR *PROPORTIONATE LIABILITY ACT 2005*

18. Repeal of apportionable liability provisions of *Building Act*

Sections 154 to 158 (inclusive) of the *Building Act* are repealed.

19. Transitional matters

(1) Despite the repeal of the sections of the *Building Act* referred to in section 18, those sections continue to apply after the commencement date in relation to an action referred to in section 154 of the former *Building Act* –

- (a) instituted before the commencement date; or
- (b) instituted on or after the commencement date if the economic loss and rectification costs for which damages are claimed were incurred wholly before the commencement date.

(2) In this section –

"commencement date" means the date on which this Act comes into operation;

"former *Building Act*" means the *Building Act* as in force immediately before the commencement date.

Notes

1. The *Proportionate Liability Act* comprises the *Proportionate Liability Act 2005*, the details of which are specified in the following table:

Act	Number and year	Date of assent by Administrator	Date of commencement
<i>Proportionate Liability Act 2005</i>	No. 18, 2005	5 May 2005	1 June 2005 (a)

(a) See section 2 and *Gazette* S16, dated 16 May 2005.

Annex II

Bermuda – Companies Act 1981

(Section 98(B) on Proportionate Liability of auditor or officer)

Liability of auditor or officer

- 98(B) (1) Where an auditor or an officer is found liable to any person for damages arising out of the performance of any function as such auditor or officer as contemplated by this Act, then the following provisions of this section shall apply.
- (2) An auditor or officer may be liable jointly and severally only if it is proved that he knowingly engaged in fraud or dishonesty.
 - (3) In any case other than that contemplated by subsection (2) hereof, the liability of the auditor or officer, as the case may be, shall be determined as follows—
 - (a) the Court shall determine the percentage of responsibility of the plaintiff, of each of the defendants, and of each of the other persons alleged by the parties to have caused or contributed to the loss of the plaintiff. In considering the percentages of responsibility, the Court shall consider both the nature of the conduct of each person and the nature and extent of the causal relationship between the conduct and the loss claimed by the plaintiff;
 - (b) the liability of the auditor or officer, as the case may be, shall be equal to the total loss suffered by the plaintiff multiplied by the auditor's or officer's, as the case may be, percentage of responsibility as determined under paragraph (a) hereof.
 - (4) No auditor or officer whose liability is determined under subsection (3) hereof shall have any liability in respect of any judgement entered against any other party to the action.
 - (5) Except where agreed in writing between the parties, where the liability of an auditor or officer has been determined in accordance with subsection (3) no other person shall have any right to recover from such auditor or officer any portion of any judgment entered against such other person in respect of the action.

[Section 98B inserted by 1996:21 effective 24 July 1996]