

7 March 2023

Mr Chris Lamont
NSW Small Business Commissioner
4 Parramatta Square,
12 Darcy Street
PARRAMATTA NSW 2150

Via email: Chris.Lamont@smallbusiness.nsw.gov.au

Re: Proportionate Liability

Dear Mr Lamont

A short note to thank you for our initial conversation via **Teams** on 13 February regarding the issue of Proportionate Liability on contracts, which is becoming an ever-increasing issue for our members.

As you are aware, the **Association of Australian Certifiers** represents registered certifiers employed in private practice and in local government in NSW. Most of our members are either owners and operators of small businesses or sole operators.

The practice of NSW Government agencies contracting out proportionate liability is of serious concern to our members and other building practitioners who work on government construction projects, because it increases insurance premiums in excess of 10 per cent. This unfairly and disproportionately exposes consultants to liability and increases operating costs for our members.

At the meeting you asked for some real examples of how Proportionate Liability is impacting our members, particularly those in smaller practices who are finding it has become a pass down condition of contracts, particularly with the NSW Government that cannot be changed.

Some relevant examples include:

Case Study 1

Type of client:

Type of project: State Government schools' projects with SINSW and DoE - every contract mandates exclusion to Part 4A, even though Government procurement policy documents discourage this practice.

Insurance increase: Certifier's Professional Indemnity insurance increased approximately 15%- 20% to cover this exclusion. Knock on effect was to substantially limit the insurers that would cover the project.

Case Study 2

Type of Client : Tier 1 Developer/Builder

Type of Project : CBD office tower \$300M

Services provided : Certification / Crown

Is it a NSW Gvt project or Private : NSW Government

Was it a “pass down” clause? : No

Excerpt from the clause in the contract.

Clause 28.2 28.2 Proportionate Liability

(a) To the maximum extent permitted by law:

the parties agree that the Proportionate Liability Acts will not have any application to this Contract, the performance of the Services, or any of the obligations of the Consultant under this Contract or at law; the Consultant's agreement of sole responsibility in clause 9.1(c) and the indemnity contained in clause 15 shall apply despite the provisions of the Proportionate Liability Acts; and

the parties agree that their rights, obligations and liabilities will be those which would exist if the Proportionate Liability Acts did not apply.

(b) If, despite clause 28.2(a), the Proportionate Liability Acts do apply, then the Consultant acknowledges and agrees that, for the purposes of the Proportionate Liability Acts, the Consultant is entirely and solely responsible for any failure to take reasonable care on the part of any of its employees or Subcontractors.

Note: Certifier requested the additional words to reduce the certifier's risk, but it was rejected.

Case Study 3

Type of Client : Tier 1 Developer Builder

Type of Project : University renewal project \$60M

Services provided : BCA Consultancy

Is it a NSW Gvt project or Private : Private/University

Was it a “pass down” clause? : No

Excerpt from the clause in the contract.

Clause 28.2 28.2 Proportionate Liability

(a) To the maximum extent permitted by law:

the parties agree that the Proportionate Liability Acts will not have any application to this Contract, the performance of the Services, or any of the obligations of the Consultant under this Contract or at law; the Consultant's agreement of sole responsibility in clause 9.1(c) and the indemnity contained in clause 15 shall apply despite the provisions of the Proportionate Liability Acts; and

the parties agree that their rights, obligations and liabilities will be those which would exist if the Proportionate Liability Acts did not apply.

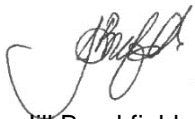
(b) If, despite clause 28.2(a), the Proportionate Liability Acts do apply, then the Consultant acknowledges and agrees that, for the purposes of the Proportionate Liability Acts, the Consultant is entirely and solely responsible for any failure to take reasonable care on the part of any of its employees or Subcontractors.

Note: Certifier requested the additional words to reduce the certifier's risk, but it was rejected.

We thank you for your offer to advocate on behalf of our members on this important issue, as its impact is not well understood.

We would welcome the opportunity to discuss this further with you or your office. I can be reached on 0431 082 259 or via email jbrookfield@aacertifiers.com.au.

Yours sincerely



Jill Brookfield
Chief Executive Officer
Australian Association of Certifiers