



8th Pinsent Masons Lecture 2020 – Proportionate Liability Revisited

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Pinsent Masons

Overview

1

Developments: increasing complexity of major infrastructure projects

2

Challenge: ensuring parties have certainty in the allocation of risk and liability

3

Ways forward: clarifying the existing system of proportionate liability



A large cable-stayed bridge is under construction over a body of water. The bridge features a tall central pylon with multiple stay cables supporting the deck. The deck is partially covered with construction equipment and materials. In the background, a city skyline with various skyscrapers is visible under a cloudy sky. A small red and yellow boat is on the water in the foreground.

Developments

Crossing the Yarra: a jinxed prospect?

Westgate Bridge



1970

2020



Crossing the Yarra: a jinxed prospect?

Westgate Tunnel



West Gate Tunnel in limbo as government, companies argue over contaminated soil

West Gate Tunnel boring machines to sit idle for another six months

West Gate Tunnel delay to cost Transurban 'millions of dollars a day'



1970

2020





Challenge

How to allocate liability?

Joint and Several Liability

- Those with the deepest pockets pursued
- Increasing insurance costs

Before
2000s

2002
onwards

Proportionate Liability

- Defendants only liable for 'their' portion of loss
- Aimed to promote personal responsibility
- Creates a 'defence' to limit liability



Proportionate Liability Globally



Development of Australian law

- Uncertainty as to application of the proportionate liability regime to contractual warranties
- Ambiguous legislation has led to judicial debate (see Justice Barrett of Justice Macfarlan)
- Infringement on freedom of contract e.g. indemnities and liability caps
- Restrictions of the regime in the ADR context



The debate in England & Wales

- Policy debate ultimately found that joint and several liability regime should stay
- Proportionate liability only considered in some mesothelioma cases
- Construction cases apportioned through joint and several liability
- Provides certainty for Parties in joint venture context (as risk from a balance sheet perspective accurately assessed)



Global Approaches

- Differs across US states. Primarily adopted proportionate liability regime in tortious context in the US
- While some states of the US have adopted a hybrid model none have gone as far as Australia
- Civil law systems have not embraced proportionate liability
- Alternative means of allocating risk in the civil law context e.g. decennial liability

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A large cable-stayed bridge is under construction over a body of water. The bridge's main pylon is a tall, grey, cylindrical structure with a flag on top. Several thick cables fan out from the pylon to support the bridge deck. The bridge deck is a wide, flat structure with a metal railing. In the background, a city skyline with various skyscrapers is visible under a cloudy sky. A small red and yellow boat is on the water in the foreground.

Ways forward

Conclusion

- Australia's proportionate liability regime is not sufficiently clear – it is both broad in its application and uncertain in terms of scope.
- In order for major infrastructure projects to succeed:
 1. Parties must have certainty as to the risk they are assuming; and
 2. Freedom of contract must be protected.
- Is it economically and legally sensible to maintain a regime of proportionate liability uncertain in its application, varying from State to State, and in concept inimical to the effective financing and delivery of construction projects across the board?



Questions



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Thank you!

