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Proportionate Liability: Towards National Consistency
Report by Tony Horan, DLA Phillips Fox, for National Justice CEOs
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Glossary of abbreviations

ACEA	Association of Consulting Engineers Australia
ACT	Australian Capital Territory
ACT Act	<i>Civil Law (Wrongs) Act 2002</i>
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
CAFTAN(NT)	<i>Consumer Affairs and Fair Trading Act 1990 (NT)</i>
CLERP 9 Policy Paper	Commonwealth of Australia, <i>Corporate Disclosure: Strengthening the financial reporting framework</i> , Corporate Law Economic Reform Program, ninth paper, September 2002
Cth	Commonwealth
Corporations Act	<i>Corporations Act 2001</i>
FTA	the <i>Fair Trading Act</i> in each state and territory including the <i>Consumer Affairs and Fair Trading Act 1990 (NT)</i>
FTA(ACT)	<i>Fair Trading Act 1992</i>
FTA(NSW)	<i>Fair Trading Act 1987</i>
FTA(Qld)	<i>Fair Trading Act 1989</i>
FTA(SA)	<i>Fair Trading Act 1987</i>
FTA(Tas)	<i>Fair Trading Act 1990</i>
FTA(Vic)	<i>Fair Trading Act 1999</i>
FTA(WA)	<i>Fair Trading Act 1987</i>
ICAA	Institute of Chartered Accountants in Australia
National Model	The procedure applying under Australian proportionate liability legislation, other than under Part IVAA of the <i>Wrongs Act 1958 (Vic)</i> , by which a court takes into account concurrent wrongdoers who are not parties to the proceeding when apportioning liability.
NSW	New South Wales
NSW Act	<i>Civil Liability Act 2002</i>
NT	Northern Territory
NT Act	<i>Proportionate Liability Act 2005</i>
PI	Professional indemnity
PL	Proportionate liability

Qld	Queensland
Qld Act	<i>Civil Liability Act 2003</i>
RAIA	Royal Australian Institute of Architects
RAIA Submission	Royal Australian Institute of Architects, 'Department of Justice proposal to amend Part IVAA of the Wrongs Act 1958', letter to Department of Justice, Victoria, 15 February 2006.
SA	South Australia
SA Act	<i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</i>
SCAG	Standing Committee of Attorneys-General
Tas	Tasmania
Tas Act	<i>Civil Liability Act 2002</i>
TPA	<i>Trade Practices Act 1974</i>
VCAT	Victorian Civil and Administrative Tribunal
Vic	Victoria
Vic Act	<i>Wrongs Act 1958</i>
Vic Model	The procedure applying under s 24A(3) of the <i>Wrongs Act 1958</i> (Vic) by which a court, when apportioning liability, may only take into account a concurrent wrongdoer who is a party to the proceeding (unless the person is dead or is a corporation which has been wound up).
Victorian Discussion Paper	Victorian Department of Justice Discussion Paper 'Review of Contractual Allocation of Risk and Part IVAA of the Wrongs Act 1958', December 2005
WA	Western Australia
WA Act	<i>Civil Liability Act 2002</i>

Proportionate Liability: Towards National Consistency

Terms of Reference

The role of the consultant will be to examine the proportionate liability legislation in all jurisdictions, and make recommendations on how it can be made more workable, consistent and certain, having regard to the purposes of the proportionate liability reforms with reference to the following areas:

- a) The definition of an 'apportionable claim'
- b) The definition of 'concurrent wrongdoer'
- c) Whether the parties should be under an obligation to notify of other concurrent wrongdoer and if so, the extent of that obligation
- d) Whether in apportioning liability, the court should have regard to any party not joined in the proceedings
- e) Whether a concurrent wrongdoer should be excluded from proportionate liability and if so, in what circumstances
- f) Whether the legislation does or should permit or prohibit successive proceedings, and the impact on damages
- g) The impact of transitional provisions
- h) The interaction of Part VIA – Proportionate liability for misleading and deceptive conduct – of the *Trade Practices Act 1974*; Part 2, Division 2, Subdivision GA – Proportionate liability for misleading and deceptive conduct – of the *Australian Securities and Investments Commission Act 2001*; and Part 7.10, Division 2A – Proportionate liability for misleading and deceptive conduct – of the *Corporations Act 2001* with relevant state legislation
- i) The extent to which the legislation should preserve contractually assumed risk allocations (including whether contracting out should be expressly permitted, impliedly permitted or prohibited)
- j) Any other matters.

The consultant will be expected to provide a written report within three months. The report will:

- Discuss how greater workability, consistency and certainty in each of the areas can be achieved, and make appropriate recommendations
- Identify any policy implications the recommendations might raise; and
- Address any other relevant issues.

Executive summary

The National Justice CEOs Group has requested a review of national proportionate liability laws in the nine Australian jurisdictions and recommendations on how they might become more workable, consistent and certain. I understand that this report is the first of a two stage process for reviewing proportionate liability legislation.

This has been a very complex task given the fact that this legislation profoundly changes how courts deal with liability in multi-party property damage and economic loss claims, and the complexity is compounded by the myriad inconsistencies between the eleven Acts.

In reviewing the legislation, I have applied three underlying principles:

- 1 Outcome: The effect of the legislation should be consistent with the purpose for which it was enacted.
- 2 Form: The meaning of the legislation should be clear.
- 3 Process: The legislation should be workable in practice.

These principles have been a useful reference point when addressing the ten issues identified in the terms of reference. In addressing those issues, four primary topics arise:

- 1 What is the intended scope of this legislation? Who should be entitled to an apportionment, in what circumstances, and by reference to whom?

The intention of the legislature is clear and consistent. All jurisdictions introduced proportionate liability to ensure that professional indemnity insurance remained available and affordable for professional service providers from both the private and public sectors. However, the legislation has been drafted in such a way that it not only satisfies its intended purpose by limiting the liability of professionals in multi-party actions, but it also allows others to elude their contractual responsibilities. Proportionate liability should only apply to those who are typically covered by professional indemnity insurance, in respect of claims against them which would usually be covered by that insurance.

A plain reading of the legislation indicates that a party is entitled to have its liability in these claims limited by reference to the comparative responsibility of others who also caused the loss or damage which is the subject of the claim. However, this interpretation produces a result which is contrary to the purpose of the legislation. I recommend that a defendant should be entitled to have its liability limited by reference to others (concurrent wrongdoers) who both caused that loss or damage, and are legally liable to the plaintiff for it. This entitlement should remain even if the plaintiff by its conduct has extinguished that liability.

- 2 In order for a court to take into account a particular party's conduct when apportioning liability, does that party need to be a litigant in the relevant proceeding?

Proportionate liability under Victorian law only permits a court to take into account the comparative responsibility of parties to a proceeding when apportioning liability

against a defendant (unless the party is dead or is a corporation which has been wound up). Under proportionate liability legislation elsewhere in Australia, when apportioning liability against a defendant, the court may take into account parties who are not joined to the proceeding. Which is the better system? I recommend the non-Victorian approach, because it gives a plaintiff greater control over the number of parties joined to the litigation, and avoids the anomaly under Victorian legislation where someone may be a party to civil litigation but without facing a claim either by the plaintiff or by defendants or third parties.

3 Should parties be entitled to contract out of the legislation?

Government and private sector business interests are concerned that proportionate liability erodes contractual allocation of risks, by adversely impacting upon contractual guarantees, indemnities and the like. They have advocated the right to contract out of proportionate liability as a solution. This right is already available under NSW, Tasmanian and Western Australian legislation. The right to contract out would adversely impact upon professionals, and effectively defeat the purpose of the legislation. In a restricted market, major public and private sector clients have greater bargaining power than the professionals they engage. Where professionals enter agreements by which they are not subject to proportionate liability, they are exposed to bearing joint and several liability with impecunious co-defendants, and are likely not to be covered by professional indemnity insurance for that additional liability. I therefore recommend that the right to contract out should not be available.

4 To what extent are the Australian proportionate liability laws inconsistent? What is the impact of this inconsistency? In what ways can proportionate liability laws move towards greater national consistency?

In 2003, the Finance Ministers of all jurisdictions agreed to produce uniform legislation nationally. This was not done. Proportionate liability has been introduced in nine jurisdictions under eleven Acts. All state and territory Acts are different. Proportionate liability in respect of building disputes survives in the ACT and South Australia under separate legislation.

While some differences in proportionate liability laws are stylistic and grammatical, others are substantive. As well as recommending various changes to particular aspects of the legislation, which may create greater uniformity, the legislature may also consider introducing a statement in each Act which articulates the purpose of the legislation. In this way, the courts may be more likely to make decisions which are not only in accord with legislative intent, but also more consistent in their interpretation and application of the legislation.

I have made 28 recommendations. While some of these are directed towards achieving greater harmonisation of the current legislation nationally, others address specific anomalies within a particular Act.

I wish to thank James Moss of the Victorian Department of Treasury and Finance, and Cynthia Marwood of the Victorian Department of Justice, for their guidance on policy issues, and Hannah Brown, Rebecca Veli and Kathleen Donnellon who assisted me in preparing this report.

List of Recommendations

Background and purpose of proportionate liability legislation

- 1 Australian proportionate liability legislation be amended to include a statement regarding its purpose.
- 2 Proportionate liability legislation include an overriding limitation by which proportionate liability only applies to claims against a 'professional' and/or for the provision of, or failure to provide, professional services.
 - The liability of professionals for breaching 'no fault' contractual obligations such as indemnities and warranties may be excluded.
- 3 Alternatively to recommendation 2, proportionate liability legislation include an overriding limitation by which proportionate liability only applies to claims against members of particular 'professions' (such as, for example, those professionals who are required by law to carry minimum levels of professional indemnity insurance).

(a) Definition of 'apportionable claim'

- 4 When determining whether a claim arose '*from a failure to take reasonable care*', courts be required to consider not only the claim as pleaded, but also consider the underlying facts of that claim.
- 5 Clarify whether:
 - proportionate liability only applies to claims under those sections of the ASIC Act, Corporations Act, TPA and state and territory FTAs which are referred to in the proportionate liability laws under the definition of '*apportionable claim*'; or
 - proportionate liability applies to claims under other statutory provisions (in those Acts or elsewhere) on the basis that the claims could also have been pursued under at least one of those designated sections, or (in respect of claims under the FTA) as a claim '*arising from a failure to take reasonable care*'.
- 6 Clarify whether the '*failure to take reasonable care*', must be a '*failure*' by the defendant who is the subject of the claim, or could alternatively be a '*failure*' by some other party.
- 7 Clarify, uniformly under all proportionate liability laws, the types of relief referred to as '*damages*'.
- 8 In relation to mixed claims, clarify the meaning of, and distinction between, ss 1041L(2) and 1041N(2) of the Corporations Act (and equivalent provisions in the TPA and ASIC Act).

(b) Definition of 'concurrent wrongdoer'

- 9 The definition of 'concurrent wrongdoer' be amended so that it refers to a party which not only caused, but is also legally liable for, the loss or damage which is the subject of the apportionable claim, and irrespective of whether that liability was subsequently extinguished by reason of an act or omission of the plaintiff.

(c) Obligation to notify of other concurrent wrongdoers

- 10 As part of its defence to an apportionable claim, a defendant be required to provide notice to the plaintiff of any alleged concurrent wrongdoer by pleading those matters referred to by Justice Hammerschlag in *Ucack v Avante Developments Pty Ltd* [2007] NSWSC 367; namely:

- the existence of that person;
- the relevant acts of omissions by that person; and
- the facts which would establish a causal connection between that act or omission and the loss which is the subject of the apportionable claim against the defendant.

- 11 The defendant also be required to provide the plaintiff with those details of the whereabouts of the concurrent wrongdoer which the defendant has in its power, possession or control.

- 12 Where a defendant wishes to have liability apportioned in respect of a person who is not a party to the litigation, it must notify that person by serving a copy of the plaintiff's statement of claim and the defendant's defence, in which the defendant alleges that the person is a concurrent wrongdoer.

- Clarify exceptions where a defendant will not be required to give notice (such as where a person has ceased to exist).
- Clarify the nature of the obligation upon a defendant to locate and notify the person.
- Clarify what sanctions may be imposed for non-compliance.

(d) Having regard to non-parties when apportioning liability

- 13 Victoria embrace the National Model by which a defendant may refer to the comparative responsibility of a non-party concurrent wrongdoer in seeking an apportionment of liability.

- 14 All jurisdictions reach agreement on whether a court 'may' or 'must' have regard to the comparative responsibility of concurrent wrongdoers who are not parties to the litigation. In order to provide litigants with greater certainty, courts be required to take into account comparative responsibility, as is the case under s 43B(3)(b) of the Tas Act and s 5AK(3)(b) of the WA Act.

- 15 In relation to the Vic Act:
- the discrepancy between ss 24AH(2) and 24AI(3), regarding the types of concurrent wrongdoers who need not be parties to the proceeding, be resolved;
 - section 24AI(3) be amended to incorporate the phrase 'is being wound up' rather than 'has been wound up';
 - the tension between ss 24AI(1) and 24AI(3) be resolved, to clarify whether s 24AI(1) means that a sole defendant may have liability apportioned without requiring the joinder of other concurrent wrongdoers.

For recommendations to prevent a plaintiff from unnecessarily pursuing subsequent proceedings, see Part (f) Successive Proceedings.

For recommendations regarding the cross-over between federal and state or territory law, see Part (h) Interaction between the TPA, ASIC Act and Corporations Act and state legislation.

(e) Excluding concurrent wrongdoers from proportionate liability

- 16 Exclusions be made uniform, and to reflect the categories of liability which would not typically be covered by professional indemnity insurance.

(f) Successive proceedings

- 17 As a general recommendation, plaintiffs be discouraged from pursuing concurrent wrongdoers in successive proceedings.
- Plaintiffs could be prohibited from pursuing a subsequent action without leave of the Court.
- 18 Once a concurrent wrongdoer has been properly identified, the plaintiff be given a specified period within which to pursue a claim against it in the current proceeding, or lose the right to do so.
- 19 Non-party concurrent wrongdoers be permitted to serve on the plaintiff a notice requiring it to elect whether or not to pursue a claim against that party in the current proceeding, with the effect that the plaintiff would then be barred from making that claim in a subsequent proceeding.
- 20 Consideration be given to implementing more widely ss 11 & 12 of the SA Act, which binds the court in a subsequent proceeding to certain earlier findings, and as a general rule does not permit a plaintiff's costs in a subsequent action.
- 21 Clarify the meaning of '*concluded proceedings*' under s 38(2) of the NSW Act (and equivalent).

(g) Transitional provisions

No recommendations.

(h) Interaction between TPA, ASIC Act and Corporations Act and state legislation

- 22 The courts be given the power to treat claims for contravention of s 52 of the TPA (and equivalent provisions under the ASIC and Corporations Act), and claims which are apportionable under state or territory proportionate liability legislation, as a single apportionable claim.

For recommendations regarding how apportionable claims might include claims under other provisions of these statutes, see Part (a) Definition of '*apportionable claim*'.

(i) Preserving contractually assumed risk allocations including contracting out

- 23 The right to contract out of proportionate liability not be available, and the right be removed from NSW, Tasmanian and Western Australian law.
- 24 Alternatively to recommendation 23, a right to contract out may be introduced in all states and territories, on the basis that it is not permitted in relation to the liability of a professional or in respect of the provision of, or failure to provide, professional services.
- 25 Contractual rights to claim contribution or indemnity by one concurrent wrongdoer against another be preserved.
- One option is to insert in s 36 of the NSW Act (and equivalent), the following subsection from the NT, Tas and WA Acts: Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

See also recommendations under Part (a) Definition of '*apportionable claim*' and Part (b) Definition of '*concurrent wrongdoer*' above.

(j) Settling claims and offers of compromise

No additional recommendations.

(k) Arbitration and EDR schemes

- 26 Clarify whether proportionate liability applies to arbitration.
- 27 Clarify whether proportionate liability applies to industry based EDR schemes such as FICS.

If proportionate liability applies to arbitration or for EDR schemes, then it should apply under the National Model.

(l) Summary judgment applications

- 28 The courts' power to enter judgment in default be retained on the basis that the recipient is not then entitled to an apportionment of liability.

Introduction

- 1 Proportionate liability (**PL**) has been introduced nationally to eliminate the effect of joint and several liability in damages claims involving property damage or economic loss, subject to various exceptions. In claims which are subject to PL, each defendant is only held liable to the plaintiff for the loss attributed to it, rather than for the total loss suffered by the plaintiff.
- 2 Previously, a plaintiff would not only sue the party which primarily caused the plaintiff's loss, but also 'deep pocket' defendants, such as professional service providers, councils and public authorities, who typically carried professional indemnity insurance. These defendants were commonly minor contributors to the loss. Often, the claim against them was that they failed to prevent the major contributor from causing the loss. Even if the major contributor could not pay the judgment against it, the plaintiff could still recover 100% of its loss from the deep pocket defendants, provided that they were liable for at least 1% of that loss; due to each defendant being jointly and severally liable for the full judgment sum. The deep pocket defendants (and their insurers) assumed the risk that other defendants could not pay their share of the liability to the plaintiff.
- 3 Between 2002 and 2004, each Australian jurisdiction introduced a PL regime by which a defendant is only liable to pay the loss apportioned by a Court against it. The plaintiff therefore bears the risk of a defendant which cannot pay the amount apportioned against it on judgment. Unfortunately, the various state and federal PL provisions are inconsistent in the way they implement PL.

Purpose of this report

- 4 The Standing Committee of Attorneys-General (**SCAG**) has established a working group to review the current national legislative framework on PL and make recommendations for achieving greater national consistency. The working group's objectives are:
 - 4.1 harmonise Australian PL legislation where possible;
 - 4.2 reduce procedural complexity;
 - 4.3 make the provisions workable in terms of commercial policy outcomes;
 - 4.4 reduce the likelihood of increased or further litigation;
 - 4.5 ensure an appropriate balance of interests between plaintiff and defendants.
- 5 I understand that the purpose of this report is to flesh out reform options for consideration by the National Justice CEOs, and that this is the first phase of a national review of PL legislation. A second phase is likely to be commissioned,

seeking final recommendations on ways to reform PL legislation for greater consistency and to satisfy policy aims agreed to by Ministers.

- 6 In line with the terms of reference, the report examines PL legislation in all 9 Australian jurisdictions, and considers options for making the legislation more workable, consistent and certain. I have generally used the NSW PL legislation as a reference point.
- 7 There are 2 issues which underpin a review of PL laws, and consideration of reform options:
 - 7.1 What is the underlying purpose of the legislation? Who is meant to be protected, and from what are they to be protected?
 - 7.2 What are the basic principles which need to be applied in order that the legislation can become more workable, consistent and certain?

Legislation

- 8 PL has been introduced under the following Acts:
 - 8.1 Commonwealth: section 3 and Schedule 3, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, which amended:
 - 8.1.1 the *Trade Practices Act 1974 (TPA)* by inserting Part VIA – Proportionate liability for misleading and deceptive conduct (sections 87CB - 87CI);
 - 8.1.2 the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* by inserting Part 2, Division 2, Subdivision GA - Proportionate liability for misleading and deceptive conduct (sections 12GP - 12GW); and
 - 8.1.3 the *Corporations Act 2001 (Corporations Act)* by inserting Part 7.10, Division 2A – Proportionate liability for misleading and deceptive conduct (sections 1041L - 1041S).
 - 8.2 NSW: *Civil Liability Amendment (Personal Responsibility) Act 2002*, which inserted Part 4 - Proportionate Liability in the *Civil Liability Act 2002 (NSW Act)*, and *Civil Liability Amendment Act 2003*,
 - 8.3 ACT: *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004* which inserted Chapter 7A - Proportionate Liability in the *Civil Law (Wrongs) Act 2002 (ACT Act)*;
 - 8.4 Northern Territory: *Proportionate Liability Act 2005 (NT Act)*;
 - 8.5 Queensland: Chapter 2 Part 2 - Proportionate Liability of the *Civil Liability Act 2003 (Qld Act)*,

- 8.6 SA: *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005*, which amended section 3 and inserted Part 3 – Apportionable Liability in the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (**SA Act**).
- 8.7 Tasmania: *Civil Liability Amendment (Proportionate Liability) Act 2005*, which inserted Part 9A - Proportionate Liability in the *Civil Liability Act 2002* (**Tas Act**);
- 8.8 Victoria: *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* which inserted Part IVAA - Proportionate Liability in the *Wrongs Act 1958* (**Vic Act**), and *Wrongs and Other Acts (Law of Negligence) Act 2003*;
- 8.9 WA: *Civil Liability Amendment Act 2003* which inserted s 4A and Part 1F - Proportionate Liability in the *Civil Liability Act 2002* (**WA Act**),
- 9 Although the general principles are the same, each Act is unique.
- 10 The following states previously introduced PL in relation to building disputes:
- 10.1 *Building Act 1993* (Vic) s131 (repealed)
- 10.2 *Environmental Planning and Assessment Act 1979* (NSW) s109ZJ (repealed)
- 10.3 *Construction Practitioners Registration Act 1998* (ACT) s26(1) (repealed) and *Building Act 2004* (ACT) s141 which remains current;
- 10.4 *Building Act 1993* (NT) s155 (repealed);
- 10.5 *Development Act 1993* (SA) s72 which remains current;
- 10.6 *Building Act 2000* (Tas) s252 (repealed).
- 11 To the extent that s 72 of the *Development Act 1993* (SA) and s 141 of the *Building Act 2004* (ACT) apply, ACT legislation apply, PL under the SA Act and ACT Act respectively are excluded.¹ When considering national consistency of PL laws, this legislation needs to be taken into account.

¹ Under SA Act s 4(2)(c) and *Building Act 2004* (ACT) s 141(2) respectively.

Applying PL

- 12 In order to determine whether PL applies to a claim against a defendant, the Court must ask 3 questions:
- 12.1 Is it an 'apportionable claim'?²
- 12.1.1 Under the first limb of this definition, '*apportionable claim*' is defined as a claim for economic loss or property damage (but not arising out of personal injury) in an action for damages (in contract, tort or otherwise) arising from '*a failure to take reasonable care*'.³ The meaning of the phrase '*failure to take reasonable care*' is unclear and causes significant uncertainty not only for litigants, but also for parties to commercial contracts who require certainty in allocating risk.
- 12.1.2 Under the second limb, it is an action for damages for misleading and deceptive conduct in contravention of designated state or federal legislation.⁴ These claims are not confined to claims involving a failure to take reasonable care.
- 12.2 If 'yes', is the defendant a 'concurrent wrongdoer'?⁵ This is broadly defined as one of two or more persons who caused the loss or damage that is the subject of the claim. The Court is asked to limit the liability of the defendant by reference to the other '*concurrent wrongdoers*'. In order to be a '*concurrent wrongdoer*' it is unclear whether it is sufficient for that person simply to have caused the loss or damage, or whether the person must also be legally liable to the claimant for that loss or damage.
- 12.3 Is PL excluded from the claim?⁶
- 13 If a defendant is entitled to PL, then its liability for the plaintiff's loss or damage is limited to an amount which reflects the extent of the defendant's responsibility for that loss or damage. In making that apportionment of liability, the Court may (in South Australia, Tasmania and Western Australia, must) take into account the comparative responsibility of other concurrent wrongdoers.

² The SA Act refers to an '*apportionable liability*' rather than an '*apportionable claim*'.

³ Except the SA Act, which refers to negligent or innocent liability for harm (arising in tort, for breach of a contractual duty of care, or under statute), and the Qld Act, which refers to '*a breach of a duty of care*'.

⁴ Except under the Qld Act, where claims for misleading and deceptive conduct are limited to claims under FTA (Qld) s 38 that fall outside the exclusion for claims by a '*consumer*' including professional advice given for an individual's use; Qld Act ss 28(3)(b) & 29.

⁵ Under the SA Act, a '*wrongdoer*'.

⁶ Or, in South Australia, 'from the liability'.

- 14 The significance of PL as it affects contracting parties, litigants and, indirectly, the broader community, should not be underestimated. In a civil dispute, the question whether PL applies in respect of a particular defendant's liability may be the difference between a defendant, who has a minor responsibility for the loss, paying 10% or 100% of a judgment sum, where the other defendants are unable to meet their liability to the plaintiff (or their liability to that defendant to contribute) for the balance of the loss.
- 15 The greater the complexity and uncertainty of PL laws:
 - 15.1 the more time and resources must be devoted to anticipating how PL might apply to a particular set of circumstances and addressing those risks in contracts and other commercial arrangements;
 - 15.2 the more time and resources must be devoted by litigants in pleading their positions in respect of PL, and contesting PL issues at an interlocutory stage and at trial; and
 - 15.3 the more difficult it is for disputing parties to reach a settlement before or during litigation.
- 16 The 4 major issues appear to be:
 - 16.1 What is the scope of this legislation? Who should be entitled to an apportionment, in what circumstances, and by reference to whom?
 - 16.2 In order for a court to take into account a particular party's conduct, when apportioning liability, does it need to be a party to the relevant proceeding?
 - 16.3 Should parties be entitled to contract out of the legislation?
 - 16.4 To what extent are the Australian PL laws inconsistent? What is the impact of that inconsistency? In what ways can PL laws move towards greater national consistency?

Underlying principles

- 17 The objectives of this review are neatly described in the terms of reference as making PL legislation more workable, consistent and certain. From these objectives, I have derived three principles.

Outcome: The effect of the legislation should be consistent with the purpose for which it was enacted

- 18 Why was PL introduced? To what extent is the legislation serving its purpose? Are there unintended consequences? Where provisions under various Australian PL laws diverge, which provisions are consistent with the legislation's purpose?
- 19 The Australian PL laws do not expressly define the underlying purpose of the legislation.⁷ However, it appears clear that the legislatures nationally intended to limit the liability of 'deep pocket' defendants to their apportioned liability to a plaintiff, so that their professional indemnity (PI) insurance would not be required to cover the liability of other impecunious defendants. Part of the current concern is that PL may apply to others, such as contractors, operators, manufacturers, suppliers and tradespersons, and in doing so may undermine arms' length contractual allocation of risk.

Form: The meaning of the legislation should be clear

- 20 Where are the areas of uncertainty as to the meaning of the legislation? How does this impact upon its effectiveness?
- 21 There is uncertainty over, among other things:
- 21.1 whether it is the substance or the form of a claim which is relevant when a court considers whether PL applies;
 - 21.2 the meaning of the 2 key terms: '*apportionable claim*' and '*concurrent wrongdoer*';
 - 21.3 how the courts will deal with mixed claims (either claims in the one proceeding some of which are apportionable and others are not, or where in the one proceeding PL provisions under more than one Act apply); and
 - 21.4 the meaning of those provisions which prohibit defendants from seeking an indemnity from each other.
- 22 As issues arise before them, the courts will be asked to clarify the meaning and operation of the legislation. If we had uniform PL laws, the development of such a

⁷ See, for example, the *Wrongs and Limitations of Actions Acts (Insurance Reform) Act 2003* (Vic) s 1 'Purposes' states that '*The main purposes of this Act are... (a) to amend the Wrongs Act 1958 - ... (iii) to provide for proportionate liability in proceedings for economic loss...*'

body of case law would be accelerated.⁸ Unfortunately, the inconsistencies between the Australian PL laws will mean that in many cases decisions in one jurisdiction may not apply elsewhere.

23 Moreover, where a legal proceeding involving PL is subject to the substantive or procedural laws of more than one jurisdiction, the parties, their lawyers and the courts must grapple with the resultant complexities of dealing with the inconsistency.

24 As the Victorian Law Reform Commission stated when considering the implementation in Victoria of the Uniform Evidence Act, '*compelling reasons are required to recommend departure from the uniform model*'.⁹

25 The major areas of difference in PL laws are helpfully summarised by Andrea Martignoni and Philip Hopley:¹⁰

25.1 whether or not a defendant must notify the plaintiff of other concurrent wrongdoers;

⁸ The Courts have shown a preference for interpreting uniform legislation consistently throughout Australia. In *Camden Park Estate Pty Ltd v O'Toole* (1969) 72 SR (NSW) 188 at 190, the NSW Court of Appeal stated that '*It is highly desirable that there be conformity of decision between States where legislative provisions are identical.*'

In *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492, the High Court of Australia was critical of the WA Supreme Court for failing to do so:

'It is somewhat surprising that the Full Court of the Supreme Court of Western Australia...declined to follow what was said by the Full Court of the Federal Court in Windsor. Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court - and all the more so a single judge - should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.'

See also the discussion in Dennis Pearce and Robert Geddes *Statutory Interpretation in Australia*, 6th edition (2006) at [1.12].

In *Wray v Ellis* (1859) E&E 276, 288, Lord Campbell CJ stated: '*There can be little use in referring to cases where a similar question has arisen on Acts of Parliament differently framed; for they only illustrate the general principle, which is not in dispute.*'

⁹ In its February 2006 Report on Implementing the Uniform Evidence Act, the Victorian Law Reform Commission stated:

'2.1 Apart from addressing a variety of problems in the present law of evidence, a major benefit of the introduction of the UEA [Uniform Evidence Act] in Victoria would be greater uniformity of evidence law in all courts, state and federal. It would allow practitioners to utilise a single evidentiary regime, whether a case is brought in a federal court or one of the state courts. Uniformity of evidence law would also contribute to narrowing the potential for different outcomes between similar cases in different jurisdictions.

2.2 The benefits of introducing the UEA in Victoria would be substantially diminished if the provisions of the Victorian Act were to differ from the substantive provisions in other UEA jurisdictions. Therefore, the commission believes that compelling reasons are required to recommend departure from the uniform model in the Victorian UEA.'

¹⁰ Andrea Martignoni and Philip Hopley, 'Proportionate Liability - Legislative Reforms and their Implications', Allens Arthur Robinson, May 2006.

- 25.2 in apportioning liability against a defendant, whether the court may take into account the comparative responsibility of concurrent wrongdoers who are not a party to the proceeding;
 - 25.3 the exclusion of consumer related claims in the ACT, Queensland and (to a lesser extent) the Northern Territory;
 - 25.4 definitions of '*concurrent wrongdoers*' particularly in Queensland and South Australia where the definition does not include persons who jointly caused the loss;
 - 25.5 the provision of a right to contract out in NSW, WA and Tasmania, while contracting out is prohibited in Queensland; and
 - 25.6 transitional provisions.
- 26 While some helpful direction from the judiciary is beginning to emerge, one of the key issues confronting practitioners is that it is often unclear whether a particular claim is an '*apportionable claim*' (in South Australia, an '*apportionable liability*') and whether the relevant responding parties are '*concurrent wrongdoers*'. The effect of this is that it can be very difficult to resolve these claims. Pleadings become complicated because they need to take into account the possibility that PL applies or, alternatively, that the defendants are jointly and severally liable and therefore entitled to claim contribution or indemnity from each other. Parties to commercial contracts and their legal advisers are developing complex contractual clauses (including releases, warranties and indemnities) to address the uncertainty surrounding the application of this legislation.¹¹

Process: The legislation should be workable in practice

- 27 Does PL help to bring finality to civil disputes, preferably through negotiated settlements? Can the incidence of complex pleadings and technical interlocutory disputes be minimised? When apportioning liability, should the Court only be permitted to take into account parties to the proceeding or non-parties as well?
- 28 In *Aquatec-Maxcon Pty Ltd v Barwon Regional Water Authority (No 2)*, a multi-party construction dispute, his Honour Justice Byrne stated:
- 'The procedural complexity attending the proceeding and, I suspect, a cause for great difficulty in achieving a commercial settlement of these disputes, has been, to a very large extent, the consequence of the suggested operation of the apportionment of liability provisions of s.131 of the Building Act 1993.'¹²

¹¹ For example, clauses by which a contractor provides the principal with an indemnity for any shortfall in the recovery of loss or damage arising because the Court apportioned some liability to a subcontractor who cannot meet its liability.

¹² [2006] VSC 117, [17] (*Aquatec-Maxcon*).

- 29 Justice Byrne has expressed concern that the current PL laws may encourage ‘*tactical manoeuvring between litigants for procedural advantage*’.¹³
- 30 There is uncertainty over the way the Courts will deal with situations where:
- 30.1 one defendant wishes to settle with the plaintiff and extract itself from the litigation;
 - 30.2 the plaintiff pursues successive proceedings;
 - 30.3 in the one proceeding in Victoria, a defendant is required to join others in order to attract PL for claims under state law, but not for claims under Commonwealth legislation.
- 31 On an encouraging note, the decisions by the Victorian Court of Appeal in *Boral Resources Pty Ltd v Robak Engineering & Construction Pty Ltd & Anor*¹⁴, and by Justice Byrne in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd*¹⁵, resolved many of the procedural dilemmas arising from the PL regime for building actions, particularly the process for joining parties and the status of ‘defendants’ under that legislation. In the same way, the Courts are beginning to resolve some of the procedural issues under the current PL laws, particularly the question whether the underlying facts or the way a claim is pleaded is paramount in determining whether a claim is subject to PL.

Stakeholders

- 32 In reviewing this legislation, I have broadly considered the interests of the following stakeholders:
- 32.1 consumers (as contracting parties and as plaintiffs),
 - 32.2 government (at all levels and in various capacities),
 - 32.3 the corporate and financial sectors (as contracting parties and as plaintiffs and defendants),
 - 32.4 professional groups (as contracting parties and primarily as defendants responding to professional liability claims),
 - 32.5 the insurance industry (as underwriters of defendants’ liability, and plaintiffs in subrogated recovery actions), and
 - 32.6 the judiciary.

¹³ Justice David Byrne, ‘Proportionate Liability: Some Creaking in the Superstructure’ presented to the Judicial College of Victoria, 19 May 2006, 20.

¹⁴ [1999] VSCA 66 (*Boral*).

¹⁵ [2000] VSC 102 (*Wimmera-Mallee*).

Background and purpose of PL legislation

33 The following brief history of the development of PL legislation in Australia, including various government inquiries, second reading speeches and explanatory memoranda, make it clear that the intention behind introducing PL was to ensure the availability of affordable PI insurance for professionals including those in the public sector.

Joint and several liability

34 Joint and several liability can apply to defendants who are held liable for causing the same loss to a plaintiff. The plaintiff is entitled to recover the full amount of that loss from any one of those defendants. A defendant who paid the plaintiff more than a sum commensurate with its liability is entitled to seek recovery of the excess amount from the other defendants.

35 Historically, there were three categories of concurrent tortfeasors:¹⁶

35.1 joint tortfeasors, who participated in the same tort, and were jointly liable;

35.2 several tortfeasors, who committed separate wrongs to the one plaintiff, causing separate damage;

35.3 several concurrent tortfeasors, who committed separate wrongs, but caused the plaintiff the same damage.

36 Each joint tortfeasor was fully liable for the loss. Accordingly, upon judgment being entered against one joint tortfeasor, the claims against the others were discharged. There were no rights of contribution.

37 Under the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK), plaintiffs could pursue separate claims against joint tortfeasors, defendants were entitled to pursue contribution claims, and judgment against one joint tortfeasor no longer discharged the others. This reform was adopted in Australia.¹⁷ In 1985, the Victorian parliament extended the right to claim contribution to any two parties (not just joint tortfeasors) who caused the same loss, irrespective whether the cause of action was

¹⁶ Justice David Byrne above n 13, and Dominic Villa, *Annotated Civil Liability Act 2002 New South Wales* (Lawbook, 2004) [4.0.020] - 4.0.070].

¹⁷ *Law Reform (Married Women and Tortfeasors) Act 1935* (UK), s 6(1)(a); as adopted by *Civil Law (Wrongs) Act 2002* (ACT), s 20(1); *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5(1)(a); *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 12(2); *Law Reform Act 1995* (Qld), s 6(a); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 12(1); *Wrongs Act 1954* (Tas), s 3(1)(a); *Wrongs Act 1958* (Vic), s 24AA; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s 7(1)(a). The provisions are not uniform.

for breach of contract, in tort or otherwise.¹⁸ The other states did not make this change.

Proportionate liability under building legislation

38 As mentioned above¹⁹, ACT, NSW, Northern Territory, South Australia, Tasmania and Victoria introduced PL in relation to non-personal injury damages claims involving building disputes. This reform was included as part of the introduction of uniform building codes across Australia, as developed by the Australian Uniform Building Regulations Co-ordinating Council in 1991. The intention was for the reform to be introduced nationally.

39 In his second reading speech for the *Building Bill*, the Victorian Minister for Planning, Mr Maclellan stated:

'The construction industry, local government and interested members of the public alike are on record as welcoming the liability reforms contained in the Bill. Abolition of the unfair doctrine of joint and several liability, or deep-pocket syndrome, will introduce a far more equitable and responsible allocation of risk. No defendant will be liable for more than his individual apportionment. This means that architects, engineers, local government officers and building surveyors will not have to assume liability for mistakes of other defendants. Traditionally, a large part of the costs of insurance premiums has resulted from the risk that an insured practitioner has had to accept for awards involving insolvent defendants. The reforms will diminish the risk to insurers which in turn will restrain insurance premiums. This reform is one of the major factors that will give insurers the incentive to stay in the construction industry. Together with the new compulsory insurance requirement, the measures will establish a fair and responsible liability regime.'²⁰ (my emphasis)

40 The *Building Act* 1993 (Vic) introduced compulsory PI insurance for registered building practitioners, and the option of engaging private building surveyors to certify building work as an alternative to municipal surveyors. Dr Donald Charrett notes that the insurance industry expressed reluctance to offer PI insurance to cover private building surveyors because of the risk of their being held jointly and severally liable with impecunious builders.²¹ PL was seen as a way to ensure that affordable PI insurance was available and therefore the building control model under the *Building Act* 1993, which utilised private building surveyors, was able to operate effectively.

41 The PL provisions of the *Building Act* 1993 (now repealed) provided:

¹⁸ *Wrongs Act* 1958 (Vic) Part IV.

¹⁹ paragraph 10.

²⁰ Hansard, 11 November 1993.

²¹ Donald Charrett, 'Proportionate Liability - Uniform Legislation in Australia?', February 2005. This liability extends to subsequent purchasers of domestic dwellings: *Moorabool Shire Council & Anor v Taitapanui* [2006] VSCA 30 (*Moorabool*).

131 Limitations on liability of persons jointly or severally liable

- (1) After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly and severally liable for damages for such proportion of the total amount of damages as the court considers just and equitable having regard to the extent of that defendant's responsibility for the loss and damage.
- (2) Despite any Act or rule of law to the contrary, the liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against that person by the court.

132. Rights to contribution

Despite anything to the contrary in the **Wrongs Act 1958**, a person found to be jointly or severally liable for damages in a building action cannot be required to contribute to the damages apportioned to any other person in the same action or to indemnify any such other person in respect of those damages.

- 42 Under this legislation, if two defendants were held jointly and severally liable to a plaintiff for damages in a '*building action*' then each was entitled to PL. While the current SA Act applies PL to cases where a defendant is liable, all other PL Acts refer to '*apportionable claims*', rather than to liability.
- 43 The main issues brought before the Courts under this regime were:
- 43.1 whether PL applied on the basis that the dispute was a '*building action*', as defined under section 129 of the *Building Act* 1993,²² and
 - 43.2 procedural complexities, primarily arising from the requirement (similar to the current Victorian PL provisions) that a defendant is only entitled to limit its liability under PL by reference to other 'defendants' who had been joined as parties to the litigation.²³

Government inquiries

- 44 In February 1994, the Commonwealth and NSW Attorneys-General commissioned an inquiry into the law of joint and several liability as it applied to non-personal injury claims, to be carried out by Professor Jim Davis.²⁴ Professor Davis' report recommended that proportionate liability replace joint and several liability.

²² *Australian Rail Track Corporation Ltd & Anor v Leighton Contractors Pty Ltd & Anor* [2003] VSC 189; and *Aquatec-Maxcon* [2006] VSC 117 per Byrne J at [337] - [351]. *Aquatec-Maxcon* may be subject to appeal.

²³ *NBD Bank v South Italy Tiling SA And Anor* [1997] SADC 3596; *Boral* [1999] 2 VR 507; *Wimmera-Mallee*, [22]; *Hampton Park Central Pty Ltd v Australian Safeway Stores Pty Ltd* [2000] VSC 422; *Westkon Precast Concrete Pty Ltd v Multiplex Constructions Pty Ltd* [2000] VSC 491; *Moorabool Shire Council & Anor v Taitapanui* [2002] VSC 418, and *Aquatec-Maxcon* [2006] VSC 117.

²⁴ Professor Jim Davis, JLR, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth of Australia, 1995).

- 45 In July 1996, SCAG released for comment draft model provisions which implemented recommendations of the Davis Report. These provisions proposed amendments to the common law, the Fair Trading Act (**FTA**) in each of the states and territories,²⁵ the TPA and the Corporations Act, in line with Professor Davis' recommendations.
- 46 In 1999, the NSW Law Reform Commission issued a report '*Contribution between persons liable for the same damage*', which recommended against the introduction of proportionate liability.²⁶ The Commission considered that there were no compelling reasons why PL should be introduced, and objected to creating separate systems for personal injury and non-personal injury damages claims. The Commission expressed concern about how the Courts might apportion liability between a defendant and a non-party.
- 47 Subsequently, the accounting profession revived the issue when it made submissions to the Senate Economics Reference Committee calling for the Davis Report recommendations to be implemented.
- 48 In September 2002, the Commonwealth government issued its ninth paper on Corporate Law Economic Reform Program (**CLERP 9 Policy Paper**) entitled 'Corporate Disclosure: Strengthening the financial reporting framework', which recommended that the Commonwealth government seek agreement from the states to introduce proportionate liability. Under Part 5 'Auditor Liability', the paper stated:
- 'The Government believes that the market for audit services will be improved if the arbitrary consequences of the present rules relating to joint and several liability in relation to economic loss and property damage are reformed.'²⁷
- 49 The paper acknowledged that the introduction of PL could not be confined to the Corporations Act.
- 50 At this time, governments across Australia were engaged in tort reform, mainly for personal injury claims.
- 51 In September 2002, a Panel of Eminent Persons chaired by Justice Ipp issued a Final Report of its Review of the Law of Negligence. The Panel's review was limited to personal injury and death claims. It took the firm view that joint and several liability should remain. It did not consider whether PL should be applied to claims involving property damage and economic loss.

²⁵ *Fair Trading Act 1992 (ACT) (FTA(ACT)); Fair Trading Act 1987 (NSW) (FTA(NSW)); Consumer Affairs and Fair Trading Act 1990 (NT) (CAFTA(NT)); Fair Trading Act 1989 (Qld) (FTA(Qld)); Fair Trading Act 1987 (SA) (FTA(SA)); Fair Trading Act 1990 (Tas) (FTA(Tas)); Fair Trading Act 1999 (Vic) (FTA(Vic)); Fair Trading Act 1987 (WA) (FTA(WA))*

²⁶ The Commission also opposed PL in its 1990 interim report.

²⁷ page 96.

Ministerial Meetings on Insurance Issues

- 52 On 4 April 2003, Commonwealth, State and Territory Finance Ministers and the President of the Australian Local Government Association held a Ministerial Meeting on Insurance Issues. In a Joint Communiqué, they confirmed their agreement to '*work urgently towards developing a nationally consistent model for proportionate liability for economic loss*'. The Commonwealth committed to introducing PL by amending the TPA and Corporations Act so that it would apply in federal as well as state jurisdictions.
- 53 At a further meeting on 6 August 2003, the Ministers discussed '*reforms to improve the availability and affordability of liability insurance*'. The Ministers agreed to introduce PL as part of a package of measures. The Ministers endorsed a national model by which a court is required to have regard to the responsibility of any potential defendant when apportioning liability amongst defendants. The Communiqué noted Queensland's wish to '*quarantine consumer transactions*', while other jurisdictions considered that was unnecessary.
- 54 On 14 August 2003, in a speech to the 2003 Insurance Council of Australia Canberra Conference, Senator Helen Coonan, then Minister for Revenue and Assistant Treasurer, stated:
- 'Over the past 18 months, Governments across Australia have embarked on an unprecedented program of law reform. Those reforms have been designed to improve the cost and availability of liability classes of insurance...
- 'The operation of insurance and the law of joint and several liability has given rise to professionals often being singled out as the sole target for legal action in proceedings for property damage and pure financial loss. This may be the case even when a professional is only one of the parties involved and may have only contributed in a minor way to the loss. The deep pocket approach to litigation is one factor driving exponential increases in professional indemnity premiums.'

Introduction of PL legislation

Commonwealth – Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

- 55 In the Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, which introduced PL to the ASIC Act, Corporations Act and TPA, the Federal Government described the problem giving rise to a need for reform as follows:
- 'Specifically, professional groups are reporting that they are experiencing extreme difficulties with the availability and cost of professional indemnity insurance. This is a result of fewer insurers offering the product, while those insurers that do are severely restricting the scope of services they are prepared to cover.'²⁸

²⁸ Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, [4.87].

- 56 The Memorandum identified three consequences, with broad economic ramifications:²⁹
- 56.1 Where professionals have been negligent, consumers may be unable to recover losses where the professionals have chosen not to take out appropriate PI insurance cover, and have alienated their assets.
 - 56.2 The lack of PI insurance is leading some professionals to avoid offering services in higher risk areas where insurance is either more expensive or unavailable; for example, auditing services by accountants, and pollution control and asbestos removal in the case of engineers. This contraction in supply of professional services reduces competition.
 - 56.3 For those professions which are the subject of compulsory PI insurance, the lack of availability or affordability of such insurance acts as a disincentive to entrants to that profession.
 - 56.4 The reduction in some professional services is detrimental to community well-being.
- 57 The Memorandum acknowledged that, in the CLERP 9 Policy Paper, the Federal Government proposed seeking agreement from all states and territories for the introduction of PL for economic loss and property damage.³⁰ It identified the purpose of the reform as:
- 57.1 preventing the 'deep pocket' syndrome where professionals are sued in negligence primarily because they carry PI insurance and will be liable to pay 100% of the loss even if they are only marginally liable;
 - 57.2 allowing insurers to price their risk more accurately because they are only required to cover the insured party's apportioned liability, rather than being required also to cover other impecunious defendants' liability;
 - 57.3 making it easier for professionals to obtain the necessary PI cover;
 - 57.4 limiting the liability of a professional to the extent to which that professional is responsible for that loss.³¹

NSW - Civil Liability Amendment (Personal Responsibility) Bill 2002

- 58 The then Premier, Bob Carr, did not identify the reason for introducing PL when giving his second reading speech on 23 October 2002. However, he stated that the overall purpose of the legislative reform was to gain the perceived community benefits

²⁹ Ibid at [4.89] – [4.99].

³⁰ Ibid at [4.98] and CLERP 9 Policy Paper above [48], 96.

³¹ Ibid at [4.100].

derived from increasing the availability and affordability of insurance, and to arrest the drifting of the law away from personal responsibility towards a culture of blame.³²

Queensland - Civil Liability Bill 2003

59 In his second reading speech on 11 March 2003, Rod Welford, Attorney-General and Minister for Justice, stated that the introduction of PL was '*in response to the concerns raised by professional bodies about excessive professional indemnity premiums and the potential for unlimited liability from large claims*'.³³ By contrast with PL legislation elsewhere, Mr Welford stated that the PL provisions had been '*carefully framed to ensure that average consumers are protected in claims for negligent professional advice, giving rise to damages for which compensation might be apportioned*'.

60 On that basis PL was excluded for claims by a '*consumer*'.³⁴

Western Australia - Civil Liability Amendment Bill 2003

61 Mark McGowan, WA Parliamentary Secretary, commenced his second reading speech on 20 March 2003 by referring to the '*impact of unaffordable and in some cases unobtainable public liability and professional indemnity insurance on business and on the community*'.³⁵ In referring to PL, Mr McGowan stated:

'The first of two significant provisions that will benefit all businesses and community organisations is the introduction of proportionate liability to replace the concept of joint and several liability...This will be particularly good news for auditors, accountants, engineers and other professionals who struggle to secure affordable professional indemnity insurance due to the unlimited exposure of the current system that makes professional indemnity a very high risk class.'

Victoria - Wrongs and Limitations of Actions Acts (Insurance Reform) Bill 2003

62 The then Victorian Premier, Steve Bracks, did not specifically give a reason for introducing PL when giving his second reading speech on 21 May 2003. However, he commented that PL had operated successfully in the building industry in Victoria, and that the move to PL '*comes after extensive research and consultation over the last decade by attorneys-general and others across Australia*.' Mr Bracks also stated that Victoria supported '*national uniformity, or at least, consistency, in the way the law of negligence is applied*'.³⁶

³² New South Wales, Parliamentary Debates, Legislative Assembly, 23 October 2002, 576ff (Bob Carr).

³³ Queensland Parliamentary Debates, 11 March 2003, 366 - 369 (Rod Welford).

³⁴ Qld Act s 28(3)(b).

³⁵ Western Australia, Parliamentary Debates, Legislative Assembly, 20 March 2003, 5691 - 5694 (Mark McGowan).

³⁶ Victoria, Parliamentary Debates, Legislative Assembly, 21 May 2003, 1781 - 1788 (Steve Bracks).

ACT - Civil Law (Wrongs)(Proportionate Liability and Professional Standards) Amendment Bill 2004

63 On 26 August 2004, the Chief Minister and Attorney-General, Jon Stanhope, said that the introduction of PL and professional standards represented 'a *further measure to deal with the problems experienced by the insurance industry since 2001*' as part of a '*national initiative agreed to by the Standing Committee of Attorneys General in August 2003*'.³⁷ The legislation targeted '*the problem of economic loss as a result of professional negligence...*'

Tasmania - Civil Liability Amendment (Proportionate Liability) Bill 2004

64 In her second reading speech on 17 November 2004, the Minister for Justice and Industrial Relations, Judy Jackson, commented that, while joint and several liability might protect a plaintiff by allowing him or her to recover damages from at least one defendant, this approach '*has led to problems for defendants, particularly in terms of availability and cost of professional indemnity insurance*'.³⁸

65 Mrs Jackson gave the following example:

'For example, if economic loss was caused mainly by the negligence of a fly-by-night investment consultant with no assets or insurance, but was also in a very small part caused by advice from a reputable accountant with insurance cover, the successful plaintiff would be entitled to receive full damages from the latter.'

66 Mrs Jackson stated that PL was one of a range of measures '*to alleviate the crisis in professional indemnity insurance*'.

NT - Proportionate Liability Bill 2005

67 On 17 February 2005, the Attorney-General and Minister for Justice, Peter Toyne, identified the reason for introducing PL as being to alleviate the effect of joint and several liability particularly upon professionals who are targeted in property damage and economic loss claims, resulting in increased PI insurance premiums.³⁹ Dr Toyne gave the following example:

'...[If] economic loss has been caused primarily by the negligence of a property advisor, with no assets or insurance, but was also partially caused by advice from a lawyer or accountant with assets or insurance cover, the successful claimant could obtain full damages from the lawyer or accountant.'

³⁷ Australian Capital Territory, Parliamentary Debates, Legislatively Assembly, 26 August 2004, 4396 - 4398 (Jon Stanhope).

³⁸ Tasmania, Parliamentary Debates, Legislative Assembly, 17 November 2004, 53 - 57 (Judy Jackson).

³⁹ Northern Territory, Parliamentary Debates, Legislative Assembly, 17 February 2005, (Peter Toyne).

South Australia - Law Reform (Contributory Negligence and Apportionment of Liability)(Proportionate Liability) Amendment Bill 2005

68 On 2 March 2005, the Attorney-General, Michael Atkinson, confirmed that the introduction of PL in South Australia was '*intended to help ensure that insurance remains available and affordable. It is consistent with measures taken in other States*'.⁴⁰ While Mr Atkinson referred generally to insurance issues as giving rise to the introduction of PL, he did not refer specifically to PI insurance, other than to make a passing reference to receiving submissions from professional groups seeking the introduction of PL.

Recent developments

69 In 2005, the Chief Justice of the NSW Supreme Court, Justice Spigelman AC, commented that the introduction of PL:

'...is a matter likely to be of particular significance on the area of professional liability for auditors and lawyers who are frequently joined in commercial proceedings simply on the basis of the depth of their pockets or rather of that of their insurers. In many such cases the directors of a particular company, who are primarily liable for the events leading to economic loss, are not sued at all'.⁴¹

70 Chief Justice Spigelman considered that the '*principal impact of the new [PL] regime is likely to be in the sphere of professional indemnity insurance*'.⁴²

71 In December 2005, the Victorian Department of Justice issued a Discussion Paper entitled 'Review of Contractual Allocation of Risk and Part IVAA of the Wrongs Act 1958' (**Victorian Discussion Paper**). The Paper noted that:

'3. Commonwealth, State and Territory governments received submissions from the insurance industry and various professional associations strongly recommending that the current liability system be altered to assist in correcting severe market failure in the provision of professional indemnity insurance ('PII'). In response to concerns over the withdrawal of PII by various insurance providers, the Standing Committee of Attorneys-General and the Ministerial Council for Corporations convened a joint working party to review and address options for introducing proportionate liability ("PL") reforms and professional standards legislation...'

72 Fred Hawke has commented that the introduction of PL will achieve its objective of improving the availability and affordability of professional indemnity insurance. He stated that:

'As the Davis Report⁴³ foreshadowed it is likely that such a change will, indeed, have a positive effect upon the cost and availability of professional indemnity

⁴⁰ South Australia, Parliamentary Debates, Legislative Assembly, 2 March 2005 (Michael Atkinson).

⁴¹ Chief Justice Spigelman, 'Tort Reform: An Overview', September/October 2005, *Australian Construction Law Newsletter*, 6, 15.

⁴² Ibid.

⁴³ Professor Jim Davis, above n 24.

insurance. This is due to the fact that under a proportionate liability regime, insurers can confidently rate a professional's risk for professional indemnity premium calculation purposes by reference only to that professional's own claims experience history and the inherent risks of his or her profession, without having also to take into account the possibility of that professional being made jointly and severally liable for the incompetence of any other uninsured service providers with whom he or she may become involved on a project.⁴⁴

- 73 Similarly, in a paper entitled 'Compensation Arrangements For Financial Services Licensees: Research Into The Professional Indemnity Insurance Market', which was published in December 2006 and commissioned by ASIC, it was noted that the collapse of HIH and FAI:

'...contributed significantly to the crisis in both the affordability and availability of PII [professional indemnity insurance]. This occurred at a time when the insurance market generally was reacting with increased pricing, more restrictive terms and conditions and even withdrawal of capital, to burgeoning and unsustainable losses in liability classes of insurance including public liability, medical malpractice and professional indemnity.

'Since that time a combination of factors have substantially improved the position. These have included:

- Significant tort law reform enacted by Commonwealth, State and Territory Governments. The major focus of this was on personal injury compensation, but the professional indemnity market was also assisted by professional standards legislation, capping, the introduction of proportionate liability and other measures.⁴⁵

- 74 That research was part of the research material which led to the introduction from 1 July 2007 of Regulation 7.6.02AAA 'Compensation arrangements if financial services provided to persons as retail clients',⁴⁶ which deems that adequate PI insurance satisfies the requirement under section 912B of the Corporations Act that financial services licensees must have arrangements for compensating retail clients.

Discussion

- 75 The Commonwealth, states and territories each introduced PL legislation in line with the agreement reached by Finance Ministers at their Joint Meetings on Insurance Issues, particularly their meeting in August 2003.
- 76 Consistently, the Commonwealth and the states and territories have given as their reason for introducing PL the need for a response to the problem that professionals had been finding 'extreme difficulties' in obtaining affordable and available PI insurance because they were being targeted as 'deep pockets' in civil litigation. This problem was seen as detrimental not only to professional groups, but also to the broader community. It appears that the introduction of PL for '*building actions*' some

⁴⁴ Fred Hawke, 'Proportionate Liability and Contract Certainty', Australian Insurance Law Association conference paper, 2006.

⁴⁵ ASIC, 'Compensation Arrangements for Financial Services Licensees: Research into the Professional Indemnity Insurance Market, December 2006, [3.1]

⁴⁶ Made under Corporations Act s 912B.

years earlier, at least in Victoria, was also because of this need to encourage the industry to offer PI insurance to professionals, particularly private building surveyors.

- 77 I can see no reference in any second reading speeches or explanatory memoranda to any need for PL to benefit anyone other than professionals, and then only insofar as it is necessary to ensure that they have access to available and affordable PI insurance.
- 78 Moreover, one can infer from a number of the features of the legislation that the legislature intended to marry the scope of PL with PI insurance cover. For example, the PL legislation generally:
- 78.1 responds to claims arising from a failure to take reasonable care;
 - 78.2 applies to damages claims for breach of contract, in tort, and for misleading and deceptive conduct in contravention of various statutes;
 - 78.3 applies to claims for compensation, but possibly not for actions to recover a sum certain;
 - 78.4 excludes strict liability such as vicarious liability; and
 - 78.5 excludes liability for fraud and in some jurisdictions, intentional conduct.
- 79 By contrast, the examples given under sections 3(2) and 8(4) of the SA Act are not typical examples of claims involving professional liability. They involve, respectively, a publisher of a misleading statement, and a contractor engaged to protect a forest from fire.
- 80 Some commentators have suggested that the reason for introducing PL was to protect liability insurers. That appears to be incorrect. There is no indication in the materials I have seen to suggest that the reason for introducing PL was to ensure the viability of insurers in Australia or overseas. The reason given for introducing PL was to protect professionals by ensuring that they could obtain available and affordable PI insurance. PL was seen as a way to encourage insurers in Australia and off-shore to offer affordable PI insurance in the Australian market for all professional groups (including higher risk categories such as auditors and soil engineers), rather than diverting their resources to other insurance lines, or to other forms of investment, either locally or overseas.
- 81 I have not seen any material which might indicate that the intended purpose of the legislation has changed since it was introduced.

- 82 However, as Professor Barbara McDonald says, the PL laws do not just apply to professional liability claims.⁴⁷ The legislation as drafted responds to a much wider group, namely:
- 82.1 anyone against whom a damages claim is made for economic loss or property damage '*arising from a failure to take reasonable care*'; and
- 82.2 anyone against whom a claim is made alleging misleading and deceptive conduct in contravention of specific provisions of the Corporations Act, ASIC Act, TPA and state and territory FTAs.
- 83 Accordingly, PL laws may apply to parties with no assets or insurance, who are clearly not 'deep pockets', and also to major corporations and government in circumstances where they do not carry insurance to cover their liability (usually contractual).
- 84 Leaving aside particular legislative exceptions in some jurisdictions, PL applies to simple property damage claims, provided there are at least two defendants who caused the damage.⁴⁸ For example, PL might apply to litigation involving a car accident, a tree that fell onto a neighbouring property, or a fire that damaged a neighbouring building (on the argument in each case that the relevant defendant failed to take care). I cannot see how such claims and liabilities have any connection with the legislature's reason for introducing PL, except where they include a claim against a professional for breach of professional duty.
- 85 Given that the purpose of the legislation was to prevent professionals, and their PI insurers, from bearing the liability for impecunious parties who had been held liable to the plaintiff for the same loss, it is difficult to understand why the legislation applies more extensively.
- 86 Most of the debate and concerns expressed over the new PL regime are about the application of PL to non-professionals who enter commercial contracts (as distinct from consultancy agreements for professional services) and the resultant impact of PL on the allocation of risk under those agreements.⁴⁹ Those expressing such concerns are calling for the introduction in all jurisdictions of the right to contract out.

⁴⁷ Barbara McDonald, 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26 *Australian Bar Review* 29.

⁴⁸ Under Qld Act s 30(1) and SA Act s 3(2), the wrongdoers must have caused the damage independently (not jointly).

⁴⁹ See, for instance, Andrew Stephenson, 'Proportional Liability in Australia – The Death of Certainty in Risk Allocation in Contract' (2005) 22(1) *International Construction Law Review* 64; and Owen Hayford, 'Proportionate liability - its impact on risk allocation in construction contracts' (2006) 22 *Building and Construction Law* 322, 330-332. A number of commentators remark on the potential impact of PL on the contractual allocation of risks under a joint venture agreement, where 2 joint venturers are each held liable to the plaintiff, one being liable purely under a contractual warranty (and therefore jointly and severally liable), whereas the other's liability arising from a failure to take reasonable care (and therefore subject to a 'just' apportionment by the court).

- 87 If PL laws were amended so that they only applied to claims involving professional liability, the legislation would remain consistent with its purpose, and reap the following benefits:
- 87.1 PL would not apply to the liability of parties to commercial contracts, other than professionals engaged by clients under consultancy agreements. This would ameliorate most of the current concern regarding the potentially adverse impact of PL on contractual warranties, indemnities and other contractual allocations of risk. Such provisions are not the type of provisions to be found in professional services contracts, and liability under such provisions are not usually covered by PI insurance;
 - 87.2 managing PL claims in legal proceedings (including, perhaps, arbitrations) will be easier, both procedurally and substantively, because it will only apply to claims against professionals. There will be far fewer defendants seeking to limit their liability under PL;
 - 87.3 in claims for breach of contract, parties will have less scope to frame pleadings artificially, or engage in technical interlocutory disputes, in an attempt to attract or to avoid PL. Professional services agreements include an implied duty to take reasonable care. Unless a claimant can point to some form of deliberate or fraudulent conduct, actions involving such agreements will therefore almost inevitably arise from an alleged failure to take reasonable care, and consequently fall within the ambit of PL legislation;
 - 87.4 parties will have greater certainty over whether they fall within the scope of PL legislation. This should reduce the incidence of defendants including alternative claims for contribution from other defendants and third parties.
- 88 To make the point, it seems to me that by carving out all liability save for the liability of those providing professional services, the liability of parties to the following types of agreements would not be the subject of PL:
- 88.1 construction, civil engineering, and infrastructure (roads, bridges, airports etc) contracts and subcontracts, as distinct from consultancy agreements;
 - 88.2 contracts to supply goods or services, other than professional services;
 - 88.3 contracts to manufacture goods;
 - 88.4 remediation agreements to treat contaminated land;
 - 88.5 software supply agreements, and other IT contracts;
 - 88.6 contracts of carriage and transport by air, sea, road and rail;
 - 88.7 advertising agreements;
 - 88.8 maintenance contracts;

- 88.9 multi-media development agreements;
- 88.10 facilities management agreements;
- 88.11 contracts by which private operators agree to deliver and run health, prison, public transport and other services;
- 88.12 security systems installation contracts;
- 88.13 arbitration agreements, save where they are between a professional and its client.
- 89 Present issues surrounding the scope and application of PL, particularly as it may affect major commercial agreements, are significant and complex. The dilemma of defining the scope of PL legislation in order that it only applies to parties who deliver professional services is a difficult issue, but less of a problem. As outlined below,⁵⁰ case law on what it is to be a professional is already well developed. While the courts may have to make further determinations from time to time on whether a particular party might fall within the scope of the legislation, the issue is likely to be reasonably limited and manageable. This should bring greater certainty to the legislation and make it more workable.
- 90 Alternatively, PL could be limited to those groups who are required by law to carry minimum levels of PI insurance (such as for lawyers, architects and local government), or are required to do so by their professional associations (as is contemplated under professional standards legislation being implemented nationally).
- 91 The other issue raised during the introduction of PL, was the need for national consistency. The second reading speeches for the NSW, Western Australian and Victorian PL legislation each specifically referred to this requirement. Unfortunately, it did not happen.
- 92 While one reason for this lack of consistency arose from differing views about the form and substance which the PL legislation should take, there appears also to have been a sense of understandable urgency at the time when the legislation was being introduced in order to arrest the diminishing availability of affordable PI insurance. The Premiers of both NSW and Victoria referred to this urgency in their second reading speeches.
- 93 Broadly speaking, if PL is reformed by limiting its application to those who typically carry PI insurance, then even if inconsistencies remain, problems which arise will be more contained and manageable.
- 94 Given the profound way that PL legislation changes how multi-party economic loss and property damage claims are dealt with by the courts, it is impossible to predict what new dilemmas may confront judges in the future. This is exacerbated by the inconsistencies within the legislation. The legislature may consider introducing a

⁵⁰ from [147]

provision in all PL laws explicitly stating the purpose of the legislation. In this way, the courts may be more likely to make decisions which are not only in accord with legislative intent (which appears to have been uniform across Australia), but also more consistent in their interpretation and application of the legislation.

RECOMMENDATIONS	
1	Australian proportionate liability legislation be amended to include a statement regarding its purpose.
2	<p>Proportionate liability legislation include an overriding limitation by which proportionate liability only applies to claims against a 'professional' and/or for the provision of, or failure to provide, professional services.</p> <p>The liability of professionals for breaching 'no fault' contractual obligations such as indemnities and warranties may be excluded.</p>
3	Alternatively to recommendation 2, proportionate liability legislation include an overriding limitation by which proportionate liability only applies to claims against members of particular 'professions' (such as, for example, those professionals who are required by law to carry minimum levels of professional indemnity insurance).

Cases dealing with PL

95 I have summarised below in chronological order how the courts and tribunals have to date addressed PL issues. Most of the cases were interlocutory. One can see that some of the concerns expressed by various commentators have potentially been resolved by the Courts. These decisions also highlight some issues where the courts, even at this early stage, do not agree with each other on the meaning and application of the legislation.

Ferdinand Nemeth & Anor v Prynew Pty Ltd & Ors (Supreme Court of NSW)⁵¹

96 In *Nemeth*, the plaintiff claimed damages arising from the subsidence of his house, allegedly caused by the building work carried out on an adjoining property by the first, second and third defendants. The plaintiff objected to the following proposed amendment to the third defendant's defence:

'14. In the alternative, the third defendant's liability is limited to such other proportion as the Court determines is just and equitable, having regard to the extent of its liability for any damage.'

97 Einstein J of the NSW Supreme Court addressed the question of who has the onus of proof in pointing to the relative responsibility of other concurrent wrongdoers. His Honour noted that the NSW Act was silent on the issue. Rather than explicitly imposing upon the defendant an obligation to plead and prove that other concurrent wrongdoers caused the plaintiff's loss, the NSW Act only states that, where there are concurrent wrongdoers, the defendant's liability may be limited. His Honour referred to an article by Professor Barbara McDonald, which states:

'...if a defendant wishes to have the benefit of a limitation on liability, then the defendant should bear the onus of pleading and proving the elements of that limitation. In *Platt v Nutt* (1988) 12 NSWLR 231, Kirby P, in a dissenting judgment, referred to 'the general rule which obtains in our courts namely that "those who assert must plead". That principle applies throughout the law'. If the onus is on a defendant to plead and prove a defence under limitations of actions statutes then, by analogy, the onus should be on the defendant to prove the limitation of liability under apportionment legislation.⁵²

98 His Honour expressed concern that a defendant might remain silent about other concurrent wrongdoers early in a proceeding as a deliberate tactic. Such a defendant faced only a 'limited deterrent' of paying the plaintiff's costs of the late notice on an indemnity basis.⁵³ Again quoting Professor McDonald, his Honour suggested:

'a more effective guarantee of co-operation by a defendant in the bringing of all relevant parties to court: eg, a provision which would estop it from relying on the contribution of non-parties to reduce its own liability unless it gave early notice, say, in its pleadings, of its intention to do so. A plaintiff will not

⁵¹ [2005] NSWSC 1296 (*Nemeth*).

⁵² [2005] NSWSC 1296, [17], quoting Barbara McDonald above n 47, 39 - 40.

⁵³ NSW Act s 35A.

necessarily want to halt proceedings at a later stage and set about joining another party, even if the defendant has to bear the costs of it doing so.⁵⁴

- 99 In order to force the third defendant to identify the concurrent wrongdoers, Counsel for the plaintiff sought leave to administer interrogatories to elicit the facts by which that defendant had a reasonable belief that particular persons were concurrent wrongdoers. Einstein J granted leave in order to avoid ambush, surprise or aborted hearings.

Commonwealth Bank of Australia v Witherow (Victorian Court of Appeal)⁵⁵

- 100 In *Witherow*, the Victorian Court of Appeal held that a bank's claim against the defendant for payment of \$150,606.90 under a deed of guarantee was not an apportionable claim, and therefore the defendant could not limit its liability to the bank by reference to his accountant's allegedly negligent conduct. The Court held that the bank's claim did not satisfy the criteria under s 24AF(1)(a) of the Vic Act because the bank's claim:

- 100.1 was not a claim '*in an action for damages*' but a claim for a sum certain; and
- 100.2 was not a claim '*arising from a failure to take reasonable care*', but effectively sought specific performance on a guarantee.

Kyrou v Contractors Bonding Ltd (VCAT)⁵⁶

- 101 In *Kyrou*, the applicant sued a builders warranty insurer, asking the Tribunal to review its decision to deny indemnity under a policy of insurance for a claim regarding the performance of a builder. The respondent insurer applied to have the project architect joined as a defendant under the Vic Act for the purposes of an apportionment of liability. The Tribunal dismissed the application on the basis that the applicant was not pursuing an apportionable claim against the insurer. The applicant's claim against the insurer was neither a claim arising from a failure to take reasonable care nor a claim under s 9 FTA (Vic).

Bestcare Foods v Origin Energy (Supreme Court of NSW)⁵⁷

- 102 This decision of Justice Hammerschlag addresses transitional issues under the NSW Act. His Honour determined that, for PL under the NSW Act to apply:
- 102.1 the proceeding must have been commenced on or after 1 December 2004; and
- 102.2 the cause of action must have accrued on or after 26 July 2004.

⁵⁴ [2005] NSWSC 1296, [17], quoting Barbara McDonald above n 47, 39 - 40.

⁵⁵ [2006] VSCA 45. (*Witherow*)

⁵⁶ [2006] VCAT 597 at [21]. (*Kyrou*)

⁵⁷ [2007] NSWSC 354. (*Bestcare*)

Ucack v Avante Developments (Supreme Court of NSW)⁵⁸

103 The plaintiff applied to strike out a defendant's pleading which referred to other 'concurrent wrongdoers', as defined under s34(2) of the NSW Act.⁵⁹ In striking out the pleading, Justice Hammerschlag considered the requirements necessary to plead a limitation of liability under the PL provisions of the NSW Act. His Honour held that, in order to assert that another person was a 'concurrent wrongdoer', a defendant must plead the following elements 'with the same degree of precision and particularity as it would have done before the Act if it were bringing a cross-claim against an alleged concurrent wrongdoer'.⁶⁰

103.1 the existence of that person;

103.2 the relevant acts of omissions by that person; and

103.3 the facts which would establish a causal connection between that act or omission and the loss which is the subject of the apportionable claim against the defendant.

104 The defendant submitted that it was not yet in a position to plead the material facts regarding other concurrent wrongdoers; rather than striking out the pleading, the Court should, in line with Einstein J's approach in *Nemeth*, permit the plaintiff to interrogate the defendant on the three matters outlined in the previous paragraph. Justice Hammerschlag rejected this submission on the basis that the plaintiff was entitled to have the pleading struck out. In *Nemeth*, the Court was not asked to strike out the relevant pleading.

105 His Honour also makes a passing reference to the question whether a claim for the intentional tort of trespass could constitute an apportionable claim on the basis that it arose 'from a failure to take reasonable care'.

Lawley v Terrace Designs Pty Ltd (VCAT)⁶¹

106 The Victorian Civil and Administrative Tribunal (**VCAT**), has (among other things) unlimited and virtually exclusive jurisdiction over domestic building disputes in that State.⁶²

107 In *Lawley*, owners of two semi-detached houses sought damages for defective building work from the builder, its director and an architectural draftsman, as well

⁵⁸ [2007] NSWSC 367. (*Ucack*)

⁵⁹ under the *Uniform Civil Procedure Rules 2005* (NSW) r 14.28.

⁶⁰ *Ucack* [2007] NSWSC 367, [35] and [41]. In this context, Hammerschlag J refers to the views expressed by Justice Robert McDougall, 'Proportionate Liability in Construction Litigation' (2006) 22 *Building and Construction Law Journal* 394, 400.

⁶¹ [2006] VCAT 1363. (*Lawley*)

⁶² *Domestic Building Contracts Act 1995* (Vic) s 57.

as appealing a decision on indemnity by the builders warranty insurer. In turn, the builder joined a soil engineer and the relevant building surveyor to the proceeding.

108 In his decision, Senior Member Young concluded that '*an apportionable claim only arises where there is at law a recognised duty of care...[Section 24AF, which defines 'apportionable claim'] is referring to claims recognised at law as arising from a failure to take reasonable care. This means that purely contractual claims are not apportionable*'.⁶³ The Tribunal was saying that, unless a contract claim could alternatively have been pursued as a negligence claim, PL would not apply because the claim would not have arisen '*from a failure to take reasonable care*'.

109 Senior Member Young found that the builder was not entitled to the protection of PL, because the claims against it were generally not in connection with a failure to take reasonable care, but involved alleged breaches of contractual and statutory warranties. Mr Young acknowledged that one of the claims alleged that the builder breached a statutory implied warranty that it would carry out the work with reasonable skill and care,⁶⁴ but this single allegation regarding lack of care was insufficient for him to find that the claims against the builder attracted PL.

110 Senior Member Young also found that a concurrent wrongdoer was someone who had caused the plaintiff to suffer loss or damage. That party did not have to be guilty of some wrongdoing; it was unnecessary for the plaintiff also to have a cause of action against that party.⁶⁵

111 *Lawley* is on appeal to the Supreme Court of Victoria.

Vollenbroich v Krongold Constructions Pty Ltd & Ors (VCAT)⁶⁶

112 In *Vollenbroich*, the owners of a new house sued the builder, architect and drainage design engineer seeking damages in relation to alleged defective design and construction.

113 In turn, the engineer had the landscape designer (who had been engaged by the owners) joined as a respondent for the purposes of PL under the Vic Act. The builder joined a number of its subcontractors to the proceeding seeking damages for breach of contract, alternatively seeking contribution under s 23B of the Vic Act, alternatively seeking an apportionment of liability by reference to them as concurrent wrongdoers under the Vic Act.

114 The architect and the engineer settled with the owners shortly prior to the hearing. They each applied for judgment in the owners' favour for their respective settlement sums.

⁶³ *Lawley* [2006] VCAT 1363, [317].

⁶⁴ *Domestic Building Contracts Act 1995* (Vic) s 8(d).

⁶⁵ *Lawley* [2006] VCAT 1363, [8].

⁶⁶ [2006] VCAT 1710. (***Vollenbroich***)

- 115 Counsel for the builder and two of the subcontractors opposed the application, expressing concern that their clients' interests might be prejudiced if the Tribunal entered judgment. They argued that, if judgment were entered against the architect and the engineer, then by operation of s 24AJ of the Vic Act, the remaining parties might be prevented from having the architect's and the engineer's liability taken into account when the Tribunal apportioned liability. Section 24AJ prohibits a contribution claim against a defendant '*against whom judgment is given under this Part*'.⁶⁷
- 116 Senior Member Walker acknowledged that, if he entered judgment, he would not then be able to take into account the extent to which the architect or the engineer's design work might have contributed to the losses claimed against the builder and the subcontractors. The Senior Member stated that he would not enter judgment against the architect or the engineer while the case was ongoing, because that would result in their removal as parties from the proceeding. Under the Vic Act, the Tribunal was not entitled to take into account a non-party when apportioning liability in respect of the remaining parties. Mr Walker also noted that, once they were no longer parties, s 24AL(2) of the Vic Act meant that they could not be re-joined. Section 24AL(2) prohibits a court from allowing the joinder of a person '*who was a party to any previously concluded proceeding in relation to an apportionable claim*'.
- 117 Senior Member Walker ordered that:
- 117.1 the points of claim against the architect and the engineer were struck out;
 - 117.2 the architect and the engineer remained parties (nominally) to the proceeding;
 - 117.3 Counsel for the architect and the engineer were excused from further appearance;
 - 117.4 orders for judgment against the architect and the engineer would be made at the conclusion of the proceeding.

Woods v De Gabrielle & Ors (Supreme Court of Victoria)⁶⁸

- 118 In an interlocutory matter involving the collapse of the Westpoint group of companies, Justice Hollingworth was asked to consider an application by the defendants to join another party for the purposes of limiting their liability under PL. The plaintiff sought damages from:
- 118.1 the first defendant, de Gabrielle, who allegedly provided the plaintiff with financial planning and investment advice;
 - 118.2 the second defendant, a company (Pyxus), as de Gabrielle's employer or principal from about September 2004; and

⁶⁷ Equivalent to the NSW Act s 36.

⁶⁸ [2007] VSC 177. (***Woods***)

- 118.3 the third defendant, a company (Chimaera), for whom de Gabrielle allegedly acted as an authorised representative.
- 119 In order to attract the protection of PL, Pyxus and Chimaera applied to join Strategic Project Marketing Pty Ltd (in liquidation) (**SPM**) as a further defendant, on the basis that, prior to September 2004, de Gabrielle had been SPM's employee, agent and authorised representative. They also sought leave to allege that de Gabrielle and SPM were concurrent wrongdoers under the Vic Act and the Commonwealth Acts.
- 120 The plaintiff had initially pursued claims alleging breach of contracts containing an implied duty to exercise '*reasonable care, skill or diligence*', and misleading and deceptive contrary to ss 9 and/or 12(e) FTA (Vic), s 1041H Corporations Act and s 53(g) TPA.
- 121 Pyxus and Chimaera proposed an amended defence which asserted that the plaintiff's claims against them were apportionable claims, and SPM, de Gabrielle, Pyxus and Chimaera were concurrent wrongdoers, under the PL provisions of the Vic Act, the Corporations Act and the FTA(Vic).
- 122 In an attempt to avoid the effect of PL, the plaintiff proposed an amended claim, seeking to: describe the implied contractual duty as being to exercise '*due skill and diligence*'; delete the statutory claims; and substitute claims under ss 12(e) & 12(n) FTA (Vic) and sections 12BB & 12DB (1)(g) ASIC Act, all provisions which are not referred to in PL legislation.
- 123 Justice Hollingworth held that, irrespective of the fact that SPM was involved in advising the plaintiff from about September 2002 (the 2002 advice), and Pyxus and Chimaera in advising him in September 2004 (the 2004 advice), the three parties were concurrent wrongdoers to the plaintiff's claim because they allegedly caused the plaintiff's loss '*independently or jointly*'.
- 124 Her Honour then addressed whether a plaintiff could avoid PL by only pleading statutory provisions and contractual terms which are not referred to in PL legislation. Her Honour stated:
- '42 The defendants referred me to the explanatory memorandum to the *Corporations Law Economic Reform Programme (Audit Reform and Corporate Disclosure) Bill* 2003, which set out the objectives of the introduction of the proportionate liability regime as being to:
- (a) Prevent the 'deep-pocket' syndrome which is synonymous with professionals. This syndrome occurs when professionals are the targets of negligence actions not because of culpability but because they are insured and have the capacity to pay large damages awards;
 - (b) Allow insurers to more accurately price risk. Currently under joint and several liability insurers have to price for the negligent actions of third parties. Proportionate liability enables insurers to insure only against the negligent conduct of the insured;
 - (c) Assist professionals to obtain suitable cover at more reasonable premiums;

- (d) Limit the liability of defendants for the loss suffered by a plaintiff to the extent to which each defendant is responsible for the plaintiff's loss.
- 43 There is much force in the defendants' submission that the plaintiff's narrow construction would permit the objects of the legislation to be defeated in many cases, simply by the plaintiff changing the legal label attaching to the contravening conduct.'
- 125 In relation to the plaintiff's intended claim under ss 12(e) & (n) FTA (Vic), and deleting of his claim under s 9 of that Act, her Honour applied the same approach, stating:
- '50 Part IVAA of the Wrongs Act was inserted by the *Wrongs and Limitations of Actions Acts (Insurance Reform) Act 2003*. The explanatory memorandum for the Bill for that Act makes clear in its commentary to clause 2 that the proportionate liability provisions are part of the national scheme discussed above. The second reading speech delivered by the Premier on 21 May 2003 said little specifically about proportionate liability, but in its introductory remarks makes it clear that the reforms contained in the Bill were a response to concerns about insurance, in particular professional indemnity and public liability insurance. It may thus be inferred that the objectives of the proportionate liability legislation enacted by Victoria are similar, if not the same, to those articulated in the explanatory memorandum to the federal legislation.
- '51 If this is accepted, then for the reasons articulated above, the defendants argue that a construction of s24AF (1)(b) which advances those objectives should be preferred. That construction would apply the definition of apportionable claim to all claims for damages under s159 of the FTA based on conduct that in fact contravened s9, whether or not the plaintiff expressly pleads that section. As with the earlier legislation, it is at least arguable for the purposes of these applications that the plaintiff's claims are apportionable.'
- 126 In relation to the plaintiff's claim for breach of contract, Justice Hollingworth noted that '*There is implied by law in every contract for services a term that the party to provide those services will exercise reasonable care and skill in doing so*'.⁶⁹ Accordingly, in holding that the breach of contract claim was an apportionable claim under the Vic Act, her Honour stated: '*whether or not the plaintiff has pleaded it, the SPM and Pyxus retainers did contain the obligation of reasonable care and skill which the law implies in such contracts*'.⁷⁰
- 127 Her Honour was effectively saying that the underlying facts should have precedence over the way a plaintiff makes its claim: '*it is arguable that an apportionable claim is a claim for economic loss or damage to property that arises, on the facts, from a failure to take reasonable care*'.⁷¹
- 128 Her Honour acknowledged that s 24A(3) of the Vic Act required that, for Pyxus and Chimaera to attract PL by reference to SPM, then SPM must be joined as a party to

⁶⁹ *Woods* [2007] VSC 177, [54] and referring to *Astley v Austrust Ltd* (1999) 197 CLR 1, [44] – [48].

⁷⁰ *Woods* [2007] VSC 177, [55].

⁷¹ *Woods* [2007] VSC 177, [58].

the proceeding. Her Honour accepted the submissions from Pyxus and Chimaera that SPM should be joined as a defendant, rather than a third party, because:

'The defendants make no claim against SPM which could be the subject of a third party notice. The Wrongs Act clearly envisages the possible joinder of such a person as a defendant, for the purpose of apportioning the defendants' respective liability to the plaintiff. In so far as the plaintiff's submissions [*that SPM should be joined as a third party*] seem to be driven by a concern as to who will pay the costs occasioned by SPM's joinder, the ultimate responsibility for those costs is a matter which can be determined at trial, and is not dependent on the capacity in which SPM is joined'.⁷²

129 The parties referred the Court to a difficulty in reconciling the meaning of s 1041L(2) and s 1041N(2) regarding how the courts should treat mixed claims.

130 Section 1041L(2) states:

'(2) there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).'

131 Section 1041N(2) states:

'(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

- (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
- (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.'

132 Justice Hollingworth made the following comments:

'33 The meaning of s1041L(2) is not easy to extract. The defendants argue that the construction which seems most naturally to arise is that all of the claims in the proceeding that are in respect of the same loss are a single apportionable claim, regardless of whether they are individually apportionable claims. This reading flows from the fact that the words "(whether or not of the same or a different kind)" in relation to causes of action suggest that sub-s1041L(2) is not simply referring to other apportionable claims (in this context, claims under s1041I for a loss caused by contravention of s1041H) but to claims generally, so long as they are in respect of the same loss. After all, there is only one kind cause of action with which s1041L(1) is concerned, namely a claim under s1041I caused by a contravention of s1041H.

34 The defendants suggest that one way to resolve that tension is to regard s1041N(2) as directed to claims which are not for the same damage or loss as the apportionable claim.

35 If these submissions by the defendants are correct, then, as all claims in this proceeding are for the same loss or damage, there would be a single apportionable claim under the Corporations Act. In that case, s1041N(1) would apply and there would be no need to refer to the ASIC Act or the Wrongs Act. In addition, there would be no need to join SPM, because under s1041N(4) the

⁷² Woods [2007] VSC 177, [65].

court may have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding.'

133 The Court did not draw a conclusive view.

134 The final quandary for the Court was whether leave was required to join SPM (in liquidation) under s471B of the Corporations Act, which requires that a party cannot, without the Court's leave, '*begin or proceed with a proceeding in a court against a company*' being wound up. Given that neither the plaintiff nor the defendants were pursuing a claim against SPM, her Honour took the view that no one was bringing an action against SPM and so leave was not required.⁷³

Chandra v Perpetual Trustees Victoria Ltd & Ors (Supreme Court of NSW)⁷⁴

135 In *Chandra*, Justice Bryson of the NSW Supreme Court considered the NSW Act in a claim involving a forged mortgage. A non-party, Mr Pan, was responsible for a series of fraudulent acts by which he obtained advances of money under a mortgage. The landowners, who innocently became subject to the mortgage, sued:

135.1 the mortgagee, Perpetual Trustees Victoria, seeking a declaration that nothing was owed under the mortgage,

135.2 the Registrar of Mortgages, seeking a statutory right to compensation under the *Real Property Act 1900* (NSW);

135.3 a solicitor whom Pan had engaged purportedly on the plaintiffs' behalf, who applied for a new duplicate Certificate of Title (on false instructions from Pan) which lead to the production of the false mortgage and related documents.

136 Counsel for the solicitor contended that his liability to the plaintiff should be limited under the NSW Act by reference to other concurrent wrongdoers. Justice Bryson agreed, holding that the plaintiff's claim was for economic loss and that:

136.1 the solicitor was a concurrent wrongdoer within the meaning of the Act;

136.2 Pan's intentional actions breached the duty of care which he owed to the plaintiffs. Therefore Pan (a non-party) was a concurrent wrongdoer in respect of the apportionable claim made against the solicitor;

136.3 those persons who approved the loan application which led to the mortgagee to advance funds to Pan were not concurrent wrongdoers '*because they owed no duty of care to the plaintiffs*';

136.4 the Justice of the Peace who witnessed various documents was not a concurrent wrongdoer because she did not breach her duty of care.⁷⁵

⁷³ *Woods* [2007] VSC 177, [66] - [69]

⁷⁴ [2007] NSWSC 694. (*Chandra*)

137 In making the apportionment under s 35(1) of the NSW Act, Justice Bryson commented that the solicitor's responsibility for the plaintiff's loss *'is altogether overwhelmed by Mr Pan's responsibility for the loss. Mr Pan acted deceitfully in pursuit of a large monetary advantage which he gained; [the solicitor] was deceived and conducted an apparently small piece of professional work in a way which fell short of appropriate skill.'*⁷⁶ The Court limited the solicitor's liability to 10% of the plaintiff's loss.

Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd and Anor (Federal Court of Australia)⁷⁷

138 In *Dartberg*, the applicant sought damages for alleged contravention of ss 851 and 849 (now known as ss 945A and 947C(2)(e)) and 1012A of the Corporations Act and s 12GF of the ASIC Act. The applicant said that it had relied upon the respondents' advice in deciding to invest in two of the failed Westpoint group of companies. The respondents were:

138.1 the first respondent, which allegedly was involved in promoting the investments (the promoter);

138.2 the second respondent, who was a financial planner and principal of the promoter (the financial planner).

139 In an interlocutory application, Middleton J held:

'There are no proportionate liability provisions in the old Corporations Act. Proportionate liability provisions were introduced into the amended Corporations Act by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) ('CLERP Act'), Sch 3(4), which commenced on 26 July 2004: see s 2(1) of the CLERP Act. They are contained in Div 2A of Pt 7.10 and apply only to conduct done in contravention of s 1041H (which prohibits misleading or deceptive conduct in relation to a financial product or a financial service). They do not apply to ss 945A and 947C(2)(e) of the amended Corporations Act. Nor do they apply to s 1012A of the amended Corporations Act. Accordingly, there is no provision of the old Corporations Act or the amended Corporations Act which applies a proportionate liability regime to the causes of action pleaded by the applicant.'⁷⁸

140 Accordingly, the Court held that the claims *as pleaded* under the Corporations Act and ASIC Act were not subject to PL.

⁷⁵ *Chandra* [2007] NSWSC 694, [110].

⁷⁶ *Chandra* [2007] NSWSC 694, [113].

⁷⁷ [2007] FCA 1216. (*Dartberg*)

⁷⁸ *Dartberg* [2007] FCA 1216, [18].

- 141 Alternatively, the respondents argued that s 79 of the *Judiciary Act 1903* (Cth)⁷⁹ meant that the applicant's claims under the Corporations Act and ASIC Act were subject to the PL provisions of the Vic Act. In rejecting this argument, Middleton J held that:⁸⁰
- 141.1 the phrases '*under statute*', or at least '*or otherwise*', referred to under s24AF(1)(a) of the Vic Act,⁸¹ could include Commonwealth legislation;
 - 141.2 the requirement that there be an action for damages '*arising from a failure to take reasonable care*' should be interpreted broadly. His Honour stated that '*The provisions do not require that the claim itself be a claim in negligence for a breach of duty - it only requires that the claim arise from a failure to take reasonable care. The expressions 'arising from' or 'arising out of' are of wide import*'.⁸² PL under the Vic Act could apply;
 - 141.3 the damages sought by the applicant fell within the definition of '*damages*' under the Vic Act (which includes '*any form of monetary compensation*'). His Honour considered that the Vic Act would therefore apply to claims for a sum certain, contrary to the Victorian Court of Appeal's view in *Witherow*;
 - 141.4 in his view, concurrent wrongdoers '*must each have committed the relevant legal wrong against the applicant*'. In other words, for a party to be a concurrent wrongdoer for the purposes of PL, it is insufficient for the party merely to have caused the applicant to suffer the loss or damage; the party must also be legally liable to the applicant;⁸³
 - 141.5 even though the claims might fall within the purview of the Vic Act, s 79 of the Judiciary Act does not make the Vic Act binding upon the Federal Court because Commonwealth laws '*otherwise provide*'. The PL provisions under the Vic Act are not complimentary to the operation of Commonwealth laws.⁸⁴
- 142 His Honour provided a helpful outline of the process to be followed in evaluating whether a claim arises from a failure to take reasonable care, and how liability might be apportioned:

⁷⁹ **s 79 State or Territory laws to govern where applicable**

'The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.'

⁸⁰ *Dartberg* [2007] FCA 1216, [20] - [36].

⁸¹ Equivalent to s 34(1)(a) of the NSW Act, save that the NSW Act does not include the phrase '*under statute*'.

⁸² [2007] FCA 1216, [29]. Justice Middleton refers: Andrew Stephenson above n 49, 71 - 73; and Barbara McDonald, above, n 47.

⁸³ *Dartberg* [2007] FCA 1216, [40].

⁸⁴ *Dartberg* [2007] FCA 1216, [32] - [34].

'30 In my view, Pt IVAA could apply in the circumstances of this proceeding according to its own terms. Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.

'31 In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings: see eg *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the Wrongs Act, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.⁸⁵

143 I understand that a notice of appeal has been lodged in relation to the Court's finding on the applicability of s 79 of the *Judiciary Act* (Cth).

Discussion

144 There are other decisions which consider the current PL legislation, but they do not raise significant issues relevant to this review.⁸⁶

145 The main issues which have been dealt with by the Courts to date are:

145.1 In order to ascertain whether PL applies to a common law claim, the Court must look beyond the way that the plaintiff has pleaded its claim. In respect of claims falling within the first limb of the definition of '*apportionable claim*', the Court should also consider the underlying facts when determining whether a claim arose '*from a failure to take reasonable care*' (*Lawley, Woods, Dartberg*).

145.2 It is unclear whether the same approach applies to damages claims made under statute for misleading and deceptive conduct. *Woods* supports the view that, provided a claim could *also* have been made under a statutory provision which is covered by PL, then that claim is apportionable even though it may in fact have been made under statutory provisions to which PL does not expressly apply. Although the issue appears not to have been

⁸⁵ *Dartberg* [2007] FCA 1216. [30] - [31].

⁸⁶ For example, *Labour v Pehlivan & Ors* [2005] VCAT 1900 and *Giardina v E Decoport & Ors* (Home Building) [2005] NSWCTTT 705.

contested in *Dartberg*, it seems that the Court in that case considered that claims under statutory provisions which had not been specifically referred to in the PL legislation could not be the subject of an apportionable claim.

- 145.3 There is tension between ss 1041L(2) and 1041N(2) Corporations Act (and equivalent provisions in the TPA and ASIC Act)⁸⁷ regarding mixed claims. There is an argument to say that:
- 145.3.1 section 1041L(2) means that the court should treat all claims for the same loss or damage as a single apportionable claim even though not all the claims are apportionable under s 1041L(1). This has the potential to broaden the scope of PL significantly;
- 145.3.2 section 1041N(2) tells the court how to deal with an apportionable claim and a non-apportionable claim in the one proceeding where the same loss or damage is *not* being sought (*Woods*).
- 145.4 State and territory PL laws do not affect damages claims made under Commonwealth statutes. There is no cross-over (*Dartberg*).
- 145.5 PL may not apply to an action for the recovery of a sum certain (*Witherow*), although the Court in *Dartberg* took the opposite view, stating that the definition of ‘damages’ under the Vic Act (*‘includes any form of monetary compensation’*) would apply to claims for a sum certain.
- 145.6 For a party to be a concurrent wrongdoer for the purposes of PL under state or Commonwealth legislation, it must not only have caused the plaintiff’s loss or damage, but must also be liable to the plaintiff for that loss or damage (*Woods, Chandra, Dartberg*). It appears that the Courts generally support this approach although in *Lawley* the VCAT took a different view.
- 145.7 The defendant has the onus of pleading and proving that there are concurrent wrongdoers who also caused, and are liable for, the plaintiff’s loss and damage (*Nemeth, Ucack, Dartberg*). There is limited deterrence for defendants who delay notifying the plaintiff of other non-party concurrent wrongdoers (*Nemeth*).
- 145.8 Under the Vic Act, which only permits the Court to take into account parties joined to the proceeding when making an apportionment (unless they are dead or have been wound up), a defendant can settle with the plaintiff. Thereafter that defendant should remain a party to the proceeding nominally, solely for the purposes of allowing the Court to take that party into account when apportioning liability against the remaining defendants (*Vollenbroich*).

146 There are two further conclusions which may be drawn from the decision in *Dartberg*:

⁸⁷ ss 12GP(2) and 12GR(2) ASIC Act and ss 87CB(2) and 87CD(2) TPA.

- 146.1 Not all states and territories refer specifically to claims '*under statute*' when defining the first limb of the definition of '*apportionable claim*'.⁸⁸ However, applying the Court's reasoning in *Dartberg*, provided the claim constitutes an action for damages '*arising from a failure to take reasonable care*' (interpreted broadly), then it may fall within the scope of that definition even though the plaintiff's cause of action is made under statute (*Dartberg*).⁸⁹
- 146.2 Where an action for damages was pursued under the provisions of a state or territory FTA, and the underlying facts demonstrated that the claim arose '*from a failure to take reasonable care*', then it would constitute an '*apportionable claim*' under the first limb of the definition. Arguably, this would be the case, even if the provisions were not those specifically referred to under the second limb of the definition. However, the counterargument would be that the relevant state or territory parliament made specific provision in the PL legislation for claims under particular sections of the relevant FTA (being the second limb of the definition of '*apportionable claim*'), and therefore the first limb of the definition cannot be used to include claims under other FTA provisions.

RECOMMENDATIONS

See recommendations below under Part (a) Definition of '*apportionable claim*'.

⁸⁸ While the NT Act, s 4(2)(a), the SA Act, s 4(1)(c) and the Vic Act, s 24AF(1)(a) specifically include damages claims made under statute, this is not the case in other jurisdictions.

⁸⁹ Claims under such statutes as, for instance, the *Water Act 1989* (Vic) ss 16 or 157 (for liability arising out of the flow of water).

Professional indemnity insurance and professional liability

147 Given that the reason for introducing PL insurance was to encourage insurers to provide affordable PI insurance to public and private sector professionals, it is important to consider the nature of professionals, the scope of their insurance, and professional liability.

The extent of PI insurance cover

148 If the purpose of PL legislation is to ensure that professionals can obtain available and affordable PI insurance, then there is no need for the legislation to apply other than to those types of claims made against professionals for which they are usually covered by PI insurance.

149 I am not suggesting that PL should only be available when a professional is covered by PI insurance. However, as mentioned above, the PL legislation appears to respond to the sort of liability which professionals typically face - professional liability for negligence and liability for misleading and deceptive conduct - and which is usually covered by PI insurance.

150 The nexus between the existence of a duty of care and professional liability has been commented upon by the learned author, the late Geoff Masel:

'Nevertheless, there can be no legal liability for professional negligence unless there has been a breach of duty of care owed to some person. The duty of care may arise in tort, in contract or by reason of statute, and may be owed by the professional to a client or to a third party. The differences between contract and tort are continually diminishing, but they are still separate concepts, while working closely together and often overlapping, and are best appreciated in their relationship to each other rather than in isolation.

'...Justice *Deane* in *Hawkins v Clayton* [stated] that the duty of care owed by a solicitor to a client in respect of professional work "prima facie transcends that contained in the express or implied terms of a contract between them and includes the ordinary duty of care arising under the common law of negligence"⁹⁰.

151 PI policies usually restrict indemnity cover to this type of liability, by referring to: 'breach of professional duty', 'professional liability', 'liability in a professional capacity', 'liability in connection with professional services' or similar terms. Some policies offer broader insurance, such as those policies which cover 'civil liability' arising from carrying out the insured's business.

152 PI policies almost invariably also cover damages claims for misleading and deceptive conduct in contravention of various statutes.

⁹⁰ Geoff Masel, *Professional Negligence of Lawyers, Accountants, Bankers and Brokers* (CCH, 2nd ed, 1989) 2; *Hawkins v Clayton* (1988) CLR 539, 574.

- 153 The areas of liability for which a professional will not be covered by PI insurance usually include liabilities assumed exclusively in contract, beyond the professional's common law liability. For example:
- 153.1 the CGU Civil Liability PI insurance policy (CGU PI 10/05) contains the following exclusions:
- '6.3 Assumed duty or obligation**
- Claims:
- (a) alleging a liability under a contractual warranty, guarantee or undertaking (unless liability would have existed regardless of the contractual warranty, guarantee or undertaking)
...
- (d) arising from any Civil Liability which the Insured agrees to accept outside that which is normal in the course of the conduct of the Insured Professional Business Practice...;⁹¹
- 153.2 the Planned Professional Risk Underwriting Agency PI insurance policy wording includes an exclusion for:
- '2.16 Unrelated Contract**
- any legal liability imposed upon the *Insured* under the law of contract other than those liabilities assumed under any consultancy agreement for the provision of professional services.⁹²
- 154 Such policies usually do not cover a person who is fraudulent or deliberately causes the plaintiff's loss or damage (although other directors or employees may be covered for that liability), nor liability to pay punitive or exemplary damages.
- 155 Negligence claims against professionals, which are typically covered by PI policies, include an element of non-deliberate fault. In cases of strict liability, for example when a professional guarantees their services on a 'no fault' basis, they will only be insured to the extent that their liability also arises in negligence. The insured is without insurance cover *to the extent that* they may be held liable exclusively by reason of the warranty or indemnity which they provided to their client or a third party. On that basis, if PL excluded liability for breaching contractual warranties and indemnities (and some say that it already does so), then this should not affect the availability of affordable PI insurance.

⁹¹

<<http://www.cgu.com.au/cgu/cgu/linkAuthContent.do?contentId=%2FOurProducts%2FProfessionalRisks/ProfessionalIndemnity>> at 7 September 2007.

⁹²

<http://www.plannedins.com.au/planned/policy_wordings/PPRUA%20Insurance%20Policy%20Book.pdf> at 7 September 2007.

Can 'professional' be satisfactorily defined?

- 156 Would it be possible to draft legislation which adequately describes a carve out from PL laws for claims which do not involve the liability of professionals when delivering professional services? How much certainty and clarity is there over the meaning of 'professional' and 'professional services'?
- 157 Other legislation has been drafted to apply to professionals. For example, as part of the tort reforms, section 50 of the NSW Act was introduced to modify the law pertaining to the standard of care for professionals:

50 Standard of care for professionals

- (1) A person practising a profession (**a professional**) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

- 158 Section 57 of the Vic Act states: "*professional*" means an individual practising a profession.' Section 382 of the *Local Government Act 1993* (NSW) requires councils to have 'adequate insurance against public liability and professional liability'. The objects of the *Professional Standards Act 1994* (NSW) includes 'the creation of schemes to limit the civil liability of professionals and others'.⁹³
- 159 The term 'professional' has no clear meaning. However, case law is reasonably well developed. Usually the courts have considered the issue when addressing questions over the applicability of professional indemnity insurance or professional negligence exclusions in other types of policies.
- 160 Most of the key cases relate to local government. However, the concepts arising from these cases apply generally.
- 161 A professional person may be distinguished from those who earn money by doing work and labour on the basis of carrying out a trade and not a profession. In *Marx v Hartford Accident & Indemnity Co*, the Court stated that "a professional act or service is one arising out of a vocation, calling, occupation or employment involving specialised knowledge, labor or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual."⁹⁴
- 162 In *FAI v Gold Coast City Council*, the Queensland Court of Appeal took a restrictive view, finding that liability arising when a council employee gave incorrect information about the location of a water main trench was not covered by a professional indemnity policy, because there was no sense of judgment or skilled assessment involved in carrying out the activity. In that case, the Court considered an exclusion

⁹³ *Professional Standards Act 1994* (NSW) s 3(a)

⁹⁴ 157 NW 2d 870 (1968).

clause stating that the policy did not apply to '*the rendering of or failure to render professional advice or service*'.⁹⁵

- 163 In *Newcastle City Council v GIO*, O'Keefe CJ similarly held that the provision of building approvals, building orders and inspections carried out by or on behalf of the Council were "*made or carried out in fulfilment by the Council of its statutory duties and functions. None of them, in my opinion, constitutes the rendering of professional advice or professional service, nor do they involve a failure so to do.*"⁹⁶
- 164 The approach in the above cases has been superseded; firstly by the NSW Court of Appeal in *GIO v Newcastle City Council*⁹⁷ which found that the term 'professional' in the context of professional indemnity insurance was very broad. The fact that the services might have been grounded in statute was not the deciding factor when considering whether certain business activities should be characterised as 'professional'. The term 'professional' referred to advice or services of a skilful character according to an established discipline. The assessment of an application for a building permit fell within this category. It did *not* necessarily matter whether the persons who made the assessment had professional qualifications.
- 165 In *GIO of NSW v Council of City of Penrith*⁹⁸, the court found that the request for information of what was contained in Council's records, and later, information as to Council's future intentions in relation to a property was not advice of a professional nature. Neither request involved the Council in providing any professional service. The dissenting judge, her Honour Justice Beazley, held that dealing with certain types of documents is an integral part of the administration and coordination of a Council, which is professional in nature.
- 166 The insurance industry no longer sees itself restricted to offering PI insurance only in traditional fields of professional practice, and the courts appear to have developed case law which has similarly broadened the definition of 'professional'.
- 167 In many cases, such as claims against accountants, lawyers and engineers, it will be obvious that they are professionals. In other cases, it may be less clear and judicial guidance may be required.
- 168 Obviously, government at all levels is attacked for its deep pocket. Therefore, PL laws should ensure that they cover government employees who carry out professional work, and therefore would normally be covered by PI insurance.

⁹⁵ [1995] 2 Qd R 341 at 343.

⁹⁶ (1994) ANZ Ins Cas 61-227

⁹⁷ (1996) 38 NSWLR 558.

⁹⁸ [1999] NSWCA 42.

- 169 On the other hand, while there may be debate, for instance, over whether a builder is a 'professional',⁹⁹ it is difficult to see how a builder who carries out building work would be considered to be delivering 'professional services'. The builder is delivering on a 'no fault' promise to produce a building.
- 170 As mentioned above, an alternative would be to limit PL to claims against designated professionals who are required by law to carry PI insurance.

RECOMMENDATIONS

See recommendations 1, 2 and 3

⁹⁹ See discussion by Patrick Mead, 'The Impact of Contract Upon Tortious Liability of Construction Professionals' (1997) 13 Building and Construction Law 359, 362-364; and the reference by the High Court of Australia to 'professional builder' in *Bryan v Maloney* [1995] HCA 17, [1].

Apportioning liability

- 171 In cases where the court finds that an apportionable claim has been made against a defendant, and that defendant is a concurrent wrongdoer, then it apportions liability against that defendant on the basis of what it considers '*just*'¹⁰⁰ having regard to the extent of the defendant's responsibility for the loss, and must give judgment for no more than that amount. It is unclear what factors the Courts will take into account in determining what is '*just*', other than to note that the Court must exclude the extent to which the plaintiff's contributory negligence caused the loss or damage, and it may (in some jurisdictions, must) have regard to the comparative responsibility of other concurrent wrongdoers.
- 172 Professor McDonald indicates that, in apportioning liability between a defendant and other concurrent wrongdoers, the Courts are likely to look at a combination of culpability and causative importance.¹⁰¹
- 173 The High Court gave the following direction to courts when apportioning liability between a plaintiff and defendant:
- 'A finding on a question of apportionment is a finding upon a `question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds' ... Such a finding, if made by a judge, is not lightly reviewed. The task of an appellant is even more difficult when the apportionment has been made by a jury...
- 'The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man...and of the relative importance of the acts of the parties in causing the damage...It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination.'¹⁰²
- 174 I see no reason why the courts would depart from this approach in dealing with apportionments between concurrent wrongdoers. This was the approach taken in *Lawley*.¹⁰³ The Court in *Chandra* took a straightforward approach to apportioning

¹⁰⁰ Qld Act s 31(1)(a) uses the term '*just and equitable*' and the SA Act s8(2) uses the term '*fair and equitable*'. Query if this makes any material difference.

¹⁰¹ Barbara McDonald above n 47, 36]

¹⁰² *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532. See also *Toomey v Scolaro's Concrete Constructions Pty Ltd and Ors* (No 3) [2001] VSC 477, [38]-[51].

¹⁰³ *Lawley*, [324] – [328]

liability by drawing a comparison between the negligent solicitor and the deceitful Mr Pan.¹⁰⁴

- 175 Unfortunately, the various PL laws diverge on whether a court is required to take into account the comparative responsibility of concurrent wrongdoers who are not parties to the proceeding, when apportioning liability against a defendant. As discussed below in Part (d) 'Having regard to non-parties when apportioning liability':
- 175.1 under the NSW, ACT, NT and Qld Acts, the ASIC Act, Corporations Act and the TPA the Court '*may*' have regard to non-parties;¹⁰⁵
 - 175.2 in Victoria, the Court must not have regard to non-parties unless they are '*dead or, if the person is a corporation, the corporation has been wound-up*;¹⁰⁶
 - 175.3 the Tas Act and the WA Act say that the Court '*is to have regard*'¹⁰⁷ to non-parties; and
 - 175.4 the SA Act refers to the Court '*having regard*' to the extent of responsibility of other wrongdoers including non-parties to the proceeding.¹⁰⁸
- 176 It appears that, in some jurisdictions, the courts have discretion whether to take into account non-party concurrent wrongdoers, while in others it is required to do so. This is potentially a major inconsistency, where one line of case law will consider the courts' exercise of their discretion in apportioning liability, while another line will consider the courts' obligations to do so. Both may be relevant in a proceeding where the plaintiff pursues claims under the Tas or WA Act and for contravention of s 52 of the TPA.

RECOMMENDATIONS

See recommendation 14.

¹⁰⁴ *Chandra*, [113]

¹⁰⁵ NSW Act s 35(3)(b); ACT Act s 107F(2)(b); NT Act s 13(2)(b); Qld Act s 31(3); SA Act s 8(2)(b); Tas Act s 43B(3)(b); WA Act s 5AK(3)(b); ASIC Act s 12GR(3)(b); and Corporations Act s 1041N(3)(b); TPA s 87CD(3)(b)

¹⁰⁶ Vic Act s 24AI(3)

¹⁰⁷ Tas Act, s43B(3)(b); WA Act, s5AK(3)(b).

¹⁰⁸ SA Act, s8(2).

(a) Definition of 'apportionable claim'

Introduction

- 177 Other than under the SA Act (which uses the term '*apportionable liability*') and PL under the building legislation in the ACT and South Australia, PL only applies to an '*apportionable claim*'. That is the term which defines the scope of PL. Therefore, if PL presently applies, or may possibly apply, more broadly than the legislature intended, then this term needs to be redefined or qualified.
- 178 The key issues appear to be:
- 178.1 Types of claims. What types of claims (or, in South Australia, liabilities) fall within this definition? Of particular concern is whether, and to what extent, PL might undermine the effect of 'no fault' warranties and indemnities. If a contractor provides a 'no fault' warranty that it will perform particular work, is the contractor entitled to limit its liability under PL by reference to others who also caused the claimant to suffer loss?
- 178.2 Form or substance of the claim? In determining whether a claim is apportionable, should the courts only take into account the specific form of the plaintiff's claim, or are the courts entitled also to take into account the underlying substance of that claim? In other words, can a plaintiff avoid PL by the way it formulates its claim, or are the courts entitled to look at the substance of that claim and find that PL applies notwithstanding the way it is pleaded?
- 178.3 Inconsistencies. What are the inconsistencies between the various PL provisions and the resultant potential problems?

Legislation - state and territories

- 179 The NSW Act defines '*apportionable claims*' as follows:

34 Application of Part

- (1) This Part applies to the following claims (**apportionable claims**):
- (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.
- (1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

- 180 The ACT, Northern Territory, Tasmania, Victoria and WA are consistent with NSW in defining the scope of PL by reference to '*apportionable claims*', subject to the following variations:
- 180.1 Section 107B of the ACT Act essentially mirrors the NSW Act (with minor variations), with reference to claims for damages under s 46 FTA(ACT) for contravention of Part 2 of that Act;
 - 180.2 Section 4(2) of the NT Act refers to a '*claim for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care*' and a claim under the CAFTA(NT) for loss or damage arising from a contravention of s 42 of that Act. The NT Act does not specifically refer to claims for economic loss and damage to property. It refers to a '*claim*' for damages whereas all other Australian PL legislation refer to an '*action*' for damages.
 - 180.3 Section 43A(1) of the Tas Act mirrors the NSW Act, with reference to s 14 FTA(Tas);
 - 180.4 Section 24AF of the Vic Act specifically includes an action for damages '*under statute*', as well in tort and contract. The second limb of the provision refers to '*a claim for damages for a contravention of section 9*' FTA(Vic) without stating that it must also be a claim for economic loss or property damage;
 - 180.5 Section 5AI of the WA Act mirrors the NSW Act, with reference to s 10 FTA(WA).
- 181 Section 28(1) of the Qld Act defines an '*apportionable claim*' as a claim for economic loss or property damage in an action for damages:
- 181.1 '*arising from a breach of a duty of care*' or
 - 181.2 for a contravention of s 38 FTA(Qld).
- 182 As mentioned above, the SA Act departs from the concept of an '*apportionable claim*'. Sections 3, 4 and 8 of the SA Act refer to the limitation of a defendant's liability where it is an '*apportionable liability*'. The SA Act relevantly provides as follows:

3 Interpretation

- (1)
- (2) A liability is an **apportionable liability** if the following conditions are satisfied:
- (a) the liability is a liability for harm (but not derivative harm) consisting of—
 - (i) economic loss (but not economic loss consequent on personal injury); or
 - (ii) loss of, or damage to, property;
 - (b) 2 or more wrongdoers (who were not acting jointly) committed wrongdoing from which the harm arose;
 - (c) the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent.

Example-

A, who acts with intention to defraud, prepares a false and deceptive statement. B, who is not aware of the fraud, negligently publishes the statement to C, who relies on it and suffers financial loss in consequence. C brings an action against A and B under section 56 of the Fair Trading Act 1987. In this case, B's liability is an apportionable liability but A's is not.

4—Application of Act

- (1) This Act applies to liabilities of the following kinds—
- (a) a liability in damages that arises under the law of torts;
 - (b) a liability in damages for breach of a contractual duty of care;
 - (c) a liability in damages that arises under statute.

183 Under s 3 of the SA Act, '*derivative harm*' is defined as being '*harm suffered as a result of injury to, or death of, another (but does not include nervous shock arising from injury to, or death of, another)*', such as loss suffered by dependants upon the death of the person on whom they are dependent, loss or impairment of consortium, or business losses resulting from injury to or death of a spouse who participated in the business.

184 All jurisdictions exclude claims '*arising out of personal injury*', although the NT Act refers to a claim '*arising from a personal injury*', and (as shown above) the SA Act which deals with the issue by reference to '*derivative harm*'.

185 The NSW Act states that '*damages*' '*includes any form of monetary compensation*'.¹⁰⁹ The NT Act, Qld Act, Tas Act and the Vic Act use the same phrase to define

¹⁰⁹ NSW Act s 3 (but note that the NSW Act excludes certain types of payments of an industrial, superannuation, or insurance nature).

'damages'.¹¹⁰ The SA Act defines 'damages' as 'compensation or damages for harm and includes solatium but does not include workers compensation'. The ACT Act and the WA Act (as well as the Commonwealth Acts) do not define 'damages' for the purposes of PL.

Legislation - Commonwealth

186 Section 87CB TPA defines 'apportionable claim' as follows:

87CB Application of Part	
(1)	This Part applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 82 for: <ul style="list-style-type: none"> (a) economic loss; or (b) damage to property; caused by conduct that was done in a contravention of section 52.
(2)	For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
(3)	...
(4)	...
(5)	For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

187 The ASIC Act and the Corporations Act deal with the definition in the same way.¹¹¹

Discussion

188 Fortunately, the decided cases may have either resolved, or at least clarified, some of the problems with the definition and scope of 'apportionable claim'.

189 Below, I have considered the various components of the definition of 'apportionable claim' and some related issues.

Apportionable claims - substance over form?

190 Justice Byrne suggests that, because the PL laws (other than the SA Act) refer to 'claims', the applicability of PL will depend upon the claim as pleaded by the plaintiff. His Honour comments that: '*the pleaders will contrive to formulate their claims to escape this definition*'¹¹². This is what has happened, for example, in *Woods*.

¹¹⁰ NT Act s 3; Qld Act s 8 and schedule 2; Tas Act s 3; Vic Act s 24AE.

¹¹¹ ASIC Act, s 12GP, Corporations Act, s 1041L.

¹¹² Justice David Byrne above n 13, [20]

- 191 However, in determining whether a claim is apportionable (on the basis that it arose ‘*from a failure to take reasonable care*’), the courts so far are not just looking at the claims as pleaded, but in relation to common law claims, they are also looking at the underlying facts (*Lawley, Woods, Dartberg*). While this might allow the legislation more closely to meet its intended purpose, and prevent plaintiffs from artificially avoiding PL, this also may result in greater uncertainty about which claims are the subject of PL. Instead of answering a simpler question - does the claim as pleaded fall within the relevant PL law - lawyers and clients face greater uncertainty in ascertaining whether the facts behind a claim fall within the scope of PL. This approach gives the Court more flexibility in applying the legislation, but this may add to inconsistency between jurisdictions and greater uncertainty.
- 192 If the Court was required only to consider the claim as pleaded by the plaintiff when determining whether a claim arose ‘from a failure to take reasonable care’, that would (as suggested by Justice Byrne), encourage parties to pursue artificially constructed claims and dispute technical pleadings issues. The better approach is, as proposed by Justice Middleton in *Dartberg*, for the Court also to look at the underlying facts of the case.
- 193 The position with statutory claims is less clear. While in *Woods*, the Court considered whether a statutory claim could also have been pursued under one of the provisions designated under the relevant PL Act, the court in *Dartberg* did not do so (although it is unclear whether the issue was argued before the Court in that case). If the approach in *Woods* is correct, then conceivably it does not matter whether the plaintiff pursues a claim under the ASIC Act, Corporations Act, TPA, local FTA or some other Act, provided that the claim could also have been pursued under one or more of those provisions designated under the PL provisions in those Acts.
- 194 It seems surprising that this is what the legislature intended. Given that parliament drafted PL legislation which allowed for PL for damages claims for contravention of particular sections of specified Acts, one would not expect it to have intended that PL would apply to claims made under other provisions of those Acts or under other statutes.
- 195 The PL provisions under Commonwealth legislation may also serve to broaden the application of PL. As pointed out in *Woods*, there is a tension between the meaning of ss 1041L(2) and 1041N(2) of the Corporations Act (and equivalent provisions of the ASIC Act and the TPA). One interpretation is to say that, provided one of the causes of action being pursued is an apportionable claim as defined under the Act, and provided that other claims are in respect of the same loss or damage, then those claims should all be treated by the Court as a single apportionable claim.
- 196 From a procedural perspective, one would expect that the effect of the approach taken in *Woods* would be, in respect of a statutory claim:
- 196.1 a plaintiff might sue for contravention of s 53(g) of the TPA;
- 196.2 in its defence, the defendant would deny the claim but also positively allege that, if it were found liable to the plaintiff, then it hypothetically would also have been liable under s 52 of the TPA;

- 196.3 the plaintiff would (if it can) then deliver a reply, denying that the claim could alternatively have been pursued under s 52 TPA.
- 197 For a common law claim:
- 197.1 the plaintiff might sue for breach of a contractual warranty;
- 197.2 in its defence, the defendant would deny the claim and allege that, if the defendant were held liable, the claim '*arose from a failure to take reasonable care*', and therefore was an apportionable claim;
- 197.3 the plaintiff might serve a reply, denying that that the claim arose in this way.

Scope of an action for '*damages*'

- 198 As mentioned earlier in this section, the scope of the definition of '*damages*' is unclear. In *Witherow*, President Maxwell said that a claim for a sum certain was not subject to PL.¹¹³ However, Justice Middleton in *Dartberg* queried whether this was correct, given the breadth of the definition of '*damages*' which includes '*any form of monetary compensation*'.¹¹⁴ In his article, Justice McDougall suggested that, because '*damages*' is defined so broadly, it was not limited to damages at law or in equity, but might also include claims for other forms of compensation including restitution.¹¹⁵
- 199 What seems clear is that PL does not apply where a plaintiff seeks non-monetary relief.
- 200 In the circumstances, there is uncertainty as to the types of relief that will be caught by PL, particularly given the different positions taken by the Victorian Court of Appeal and the Federal Court.
- 201 It is worth noting that the usual relief pursued against professional service providers is compensation by way of damages. It seems less likely that claims of specific performance would be made against professionals than against, for instance, the manufacturers or suppliers of products.

Claims '*arising from a failure to take reasonable care*' and strict contractual liability

- 202 Judicial decisions to date suggest that a claim which is pursued under a cause of action (including a claim under statute) under state or territory law, is an apportionable claim provided that the underlying facts demonstrate that the claim '*arose from a failure to take reasonable care*'.

¹¹³ *Witherow* [2006] VSCA 45 [10].

¹¹⁴ *Dartberg* [2006] FCA 1216, [17].

¹¹⁵ Justice Robert McDougall above n 60, 397.

- 203 In referring to an action in damages ‘*arising from a failure to take reasonable care*’ (in Queensland, a ‘*breach of a duty of care*’) the legislation does not identify who it is that failed to take reasonable care. Obviously, it would apply to the defendant who is the subject of the claim, but might it apply to others? For example, if the plaintiff makes a claim against a builder, could it be said to have arisen from a failure to take reasonable care on the basis that the builder’s subcontractor was negligent? In other words, even though the builder’s liability is for breach of contract and not for any failure to take care, the claim might still be apportionable on the basis that the builder is contractually responsible for the party which failed to take care.
- 204 Some of the claims where a failure to take reasonable care might arise include:
- 204.1 a breach of a duty of care;
 - 204.2 a breach of implied contractual terms to take reasonable care;
 - 204.3 a breach of express contractual terms to take reasonable care;
 - 204.4 a breach of statutory duties to take reasonable care;¹¹⁶
 - 204.5 the civil obligation of directors and other officers to act with the degree of care and diligence of a reasonable person;¹¹⁷
 - 204.6 implied warranties to render services with due care and skill.¹¹⁸
- 205 A major area of controversy is how PL may impact upon contractual warranties and other ‘no fault’ promises.
- 206 It is a reasonable proposition that PL should not interfere with arms’ length contractual relations. As Justice McDougall stated, it is ‘*a basic principle of the law that people should honour their contracts; that idea “forms part of our idea of what is just”*’.¹¹⁹
- 207 For example, PL should not interfere with joint venturers who agree, for commercial reasons, to allocate their joint liability in a particular way. Otherwise, investors, financiers and others who stand behind major transactions and projects cannot be confident that the contracts they sign and the arrangements they approve will be upheld by the courts. This uncertainty not only may interfere with commercial relations, but also can make disputation more likely to occur. In respect of joint promisors, Andrew Stephenson states:

¹¹⁶ for example, under *Domestic Building Contracts Act 1995* (Vic) s 8.

¹¹⁷ under the Corporations Act s 180.

¹¹⁸ For example, under the TPA s 74 and equivalent provisions under state and territory FTAs.

¹¹⁹ Justice Robert McDougall above n 60, 403, and see *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1 at 9 (Gleeson CJ) (*Baltic*).

'...the parties receiving the benefit of the joint promise have comfort in knowing that at least one of the promisors is capable of meeting a damages claim in the event that the promise is not fulfilled.

'This is particularly important in very large projects, such as large private infrastructure projects. The existence of several liability allows debt, equity and government to be satisfied that the joint promisors have (when their balance sheets are considered together) the capacity to deliver on the promises made or to pay damages in the event that they fail to so deliver.'¹²⁰

208 Owen Hayford suggests that there are 3 possible views on how the Courts may apply PL to a claim involving a strict contractual obligation:¹²¹

208.1 PL may apply only to claims where the plaintiff has pleaded a breach of an express or implied contractual promise to take care. Most of the judicial decisions to date demonstrate reluctance by the Courts to apply PL on this basis. The Courts are showing a preference to look at the underlying facts of a claim, rather than just the way the claim has been pleaded. This seems consistent with the legislature's reference to claims 'arising from' a failure to take reasonable care.

208.2 Claims which factually arise from a breach of a duty of care. This limits the scope of the legislation to circumstances where a party has breached a duty of care, as well as breaching a strict contractual obligation. As Hayford says, this appears more limited than the term used in the legislation which broadly refers to claims '*arising from a failure to take reasonable care*' rather than (as in Queensland) a '*breach of a duty of care*';

208.3 Claims which factually arise from a failure to exercise reasonable care. On this view, the claim is subject to PL provided that the claim, in substance, arose from a failure to take reasonable care, even though the defendant might be held strictly liable under the contract. This seems to be the most appropriate interpretation of the legislation. However, it obviously has major implications because it effectively means that PL can erode the liability of a contracting party by limiting that liability by reference to the comparative responsibility of other concurrent wrongdoers. This may result in the rather strange position where a plaintiff may try to prove that a defendant did not fail to take reasonable care, and was solely liable for breach of contract.

209 For those parties who are being pursued for claims exclusively in contract or under statute, where those claims do not arise out of a failure to take reasonable care (but, for instance, exclusively from some contractual warranty), then PL would not apply to that party. For example, defendants D1 and D2 each may have caused the same loss to the plaintiff. D1 is a professional who is subject to a claim arising from a failure to take reasonable care, whereas D2 is a contractor where the liability does not arise out of a failure to take reasonable care but arises exclusively out of contractual

¹²⁰ Andrew Stephenson above n 49, 1.

¹²¹ Owen Hayford above n 49, 330-332.

obligations. In those circumstances, D1 and D2 will be concurrent wrongdoers. Proportionate liability provisions will apply in respect of D1 who can limit its liability to the amount apportioned against it by the judge. However, D2 will not be subject to proportionate liability and therefore will be subject to joint and several liability. Consider the circumstances where D1 is liable for 40% and D2 is liable for 60%. If D1 cannot pay the judgment sum to the plaintiff, then D2 (who is not subject to proportionate liability because the claim against it did not arise out of a failure to take reasonable care) will be liable for 100%. Even if D1 has assets and/or insurance, and D2 cannot meet its judgment liability, D1 (whose claim arose from a failure to take reasonable care) will only ever be required to pay 40% being its apportioned liability.

- 210 The difficulty arises where D2 is liable under, say, a contractual warranty, but the claim against it can be said to have arisen '*from a failure to take reasonable care*'. No doubt, D2 will say that PL should apply to the claim against it, and therefore its liability to the plaintiff is its apportioned liability only.
- 211 By contrast, s 28(1)(a) of the Qld Act defines an apportionable claim as arising from a '*breach of a duty of care*', and s 4(1)(b) of the SA Act limits contractual claims to situations where there is a '*breach of contractual duty of care*'. These provisions are more restrictive than the national approach (which is to apply PL to claims arising from a '*failure to take reasonable care*'), because they require that the defendant owes the plaintiff a duty of care and has breached that duty.
- 212 The broad application of '*arising from failure to take reasonable care*' raises some anomalies. For example, owners make a claim against the installer of defective carpet in a commercial building. If the defect was identifiable upon inspection, then the installer may claim that it arose from a failure to take reasonable care and therefore apportionable against other concurrent wrongdoers (for example, the interior designer). If the defect could not have been identified upon inspection, then the installer would be strictly liable for delivering defective carpet with no right to an apportionment.
- 213 Is a claim against an insurer in a policy dispute apportionable? In particular circumstances an insurer owes a duty of utmost good faith. Where the insurer breaches that duty, does that involve a failure to take reasonable care? Furthermore, assuming the insured party is seeking compensation from the insurer or possibly a refund of premium (and not just declaratory relief), would the relief being sought from the insurer constitute '*damages*' as contemplated by the PL legislation?
- 214 What if a builder breaches the statutory warranty implied into domestic building contracts under s 8(d) of the *Domestic Building Contracts Act 1995* (Vic) that: '*the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract*'? Does such a breach arise from a failure to take reasonable care and therefore attract PL protection under the Vic Act? If so, this might discourage claimants from pursuing their rights under this provision.
- 215 From a policy perspective, there is no reason why the installer, insurer, or builder should be entitled to limit its liability under PL legislation, and yet that appears to be the case under the current PL laws.

Consistency

- 216 The major areas of inconsistency appear to be:
- 216.1 the major departure from the national approach by the SA Act, which deals with '*apportionable liability*', and limits PL to liability in damages arising in tort, for breach of a contractual duty of care, or under statute;
 - 216.2 the Qld Act where an apportionable claim is an action in damages '*for breach of a duty of care*';
 - 216.3 the Qld Act which provides that, where an apportionable claim is made against a concurrent wrongdoer, and that wrongdoer contravenes s 38 FTA(Qld), then it is severally liable for the damages awarded against another concurrent wrongdoer to that apportionable claim, subject to the exclusion for claims against a '*consumer*';
 - 216.4 the meaning of '*damages*' under each PL law.
- 217 There are also various minor inconsistencies in drafting between the PL laws.

Options for dealing with strict contractual liability

- 218 In order for warranties, indemnities and other purely contractual assumptions of responsibility to be protected from PL, the options appear to be:
- 218.1 amend, or qualify, the definition of '*apportionable claim*' (in particular '*arising from a failure to take reasonable care*'). A starting point would be to consider the approaches taken under the SA Act and Qld Act. The problem remains, however, that PL may erode strict contractual liability where the defendant is also liable for a breach of a duty to take care, or more broadly, because the claim also arose from a failure to take reasonable care.
 - 218.2 specifically exclude strict contractual liability. It may be difficult to draft an exclusion so that strict liability is excluded but PL continues to apply to other contractual liabilities where they arise from a failure to take reasonable care;
 - 218.3 introduce an overriding provision which effectively ousts strict contractual liability under commercial agreements from PL. An example of this would be to limit PL to professional liability for the delivery, or failure to deliver, professional service. Most commercial agreements (other than consultancy agreements) would then fall outside the effect of PL;
 - 218.4 rely upon the Courts to interpret the legislation in accordance with this purpose. This would be uncertain and unpredictable. It is difficult to see how the courts will exclude PL where there are contractual warranties and the like, but the claim also arises from a failure to take reasonable care;
 - 218.5 require the courts to treat such contractual provisions as a significant factor when apportioning liability. This is not an answer. Rather than excluding

these strict contractual provisions from being subject to PL, this would merely emphasise their importance when the court apportions liability. The court would still need to apportion liability between concurrent wrongdoers. Such a modification would mean that the courts might potentially apportion a greater amount against the party liable for that contractual liability (but not the full amount, if other concurrent wrongdoers were also responsible).

- 218.6 allow parties to contract out of PL. As discussed below, this would be a very blunt way of dealing with the issue, and would be unfair on professionals.

RECOMMENDATIONS	
4	When determining whether a claim arose ' <i>from a failure to take reasonable care</i> ', courts be required to consider not only the claim as pleaded, but also consider the underlying facts of that claim.
5	Clarify whether: <ul style="list-style-type: none"> (a) proportionate liability only applies to claims under those sections of the ASIC Act, Corporations Act, TPA and state and territory FTAs which are referred to in the PL laws under the definition of '<i>apportionable claim</i>'¹²²; or (b) proportionate liability applies to claims under other statutory provisions (in those Acts or elsewhere) on the basis that the claims could also have been pursued under at least one of those designated sections, or (in respect of claims under the FTA) as a claim '<i>arising from a failure to take reasonable care</i>'.
6	Clarify whether the ' <i>failure to take reasonable care</i> ', must be a ' <i>failure</i> ' by the defendant who is the subject of the claim, or could alternatively be a ' <i>failure</i> ' by some other party.
7	Clarify, uniformly under all proportionate liability laws, the types of relief referred to as ' <i>damages</i> '.
8	In relation to mixed claims, clarify the meaning of, and distinction between, ss 1041L(2) and 1041N(2) of the Corporations Act (and equivalent provisions in the TPA and ASIC Act).

¹²² And in South Australia, '*apportionable liability*'.

(b) Definition of 'concurrent wrongdoer'

Introduction

219 For a defendant to limit its liability to the plaintiff, it must prove that it is a '*concurrent wrongdoer*' in respect of an apportionable claim and then ask the Court to make a comparison between its responsibility for the plaintiff's loss or damage and that of other '*concurrent wrongdoers*'. Essentially, the defendant must establish that the acts or omissions of another party '*caused, independently of each other or jointly, the damage or loss that is the subject of the claim.*'¹²³ Concurrent wrongdoers '*against whom judgment is given*' under PL legislation are not permitted to claim contribution or indemnity from each other.

220 The primary debate has been to determine whether, in order to establish that another party is a '*concurrent wrongdoer*', it is sufficient merely to prove that the other party caused that loss, as suggested by a plain reading of the legislation, or whether the defendant must prove that it is also legally liable to the plaintiff for the plaintiff's loss.

Legislation

221 The NSW Act provides as follows:

34 Application of Part

(1) ...

(2) In this Part, a **concurrent wrongdoer**, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) ...

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

222 Other than under the SA Act, all PL legislation (including the ASIC and Corporations Acts and the TPA) are essentially consistent with NSW in their definition of '*concurrent wrongdoer*'.¹²⁴

223 However, a major difference is that under the Qld Act and the SA Act the relevant persons must not have acted jointly, but acted independently of each other.¹²⁵

224 The SA Act applies the concepts of '*wrongdoers*' and '*wrongdoing*'. The SA Act relevantly provides as follows:

¹²³ Save for the Qld and SA Acts.

¹²⁴ ACT Act ss 107A and 107D; NT Act ss 3 and 6(1); Qld Act s 30; SA Act s 3(1); Tas Act s 43A(2); Vic Act s 24AH; WA Act s 5AI; ASIC Act s 12GP(3); Corporations Act s 1041L(3) and TPA s 87CB(3)

¹²⁵ Qld Act s 30(1) and SA Act s 3(2)(b).

3 Interpretation

(1)...

wrongdoer means—

- (a) a person who commits an act, or makes an omission, that causes or contributes to harm (including a person whose act or omission contributes to his or her own harm); or
- (b) a person who has a derivative liability for harm resulting from the act or omission of someone else;

Note—

A person may be considered a wrongdoer even though the person—

- has died; or
- has been wound up or has ceased to exist; or
- has become insolvent; or
- cannot be found.

Discussion

225 Justice Byrne identifies three questions required in order to ascertain whether a party is a concurrent wrongdoer:

225.1 Did the act or omission of each person cause the loss to the plaintiff? A question of fact.

225.2 Was the act or omission of each person a wrongful one? A question of law.

225.3 Is the plaintiff's loss in each case the same loss? A question of law and fact.¹²⁶

Causal responsibility and legal liability

226 As outlined earlier, the Courts generally concur with Justice Byrne that a concurrent wrongdoer is one of two or more persons who not only caused the loss or damage to the plaintiff, but are also legally liable for that loss or damage.

227 This is consistent with the PL regime as it applied to building actions, where the Court could only apportion liability against parties against whom the plaintiff had a cause of action. A defendant had to be held jointly and severally liable with others for there to be an apportionment.¹²⁷

228 If the definition of '*concurrent wrongdoer*' was restricted to the literal meaning of the legislation - a party was a '*concurrent wrongdoer*' provided it satisfied the sole

¹²⁶ Justice David Byrne above n 13, [24].

¹²⁷ For example *Building Act 1993* (Vic) s 131.

criterion of having caused the plaintiff's loss or damage - that would result in a major anomaly, and be contrary to the purpose of the legislation.

229 This is best explained by an example. P is an owner of a commercial property who suffers purely economic loss from defective building work. Assume that:

229.1 the notional apportionment of responsibility for the loss is 20% to the builder (D1), 30% to the architect (D2), and 50% to the builder's subcontractor (D3);

229.2 being a subcontractor to D1 in a commercial project, D3 does not owe P a duty of care for the loss; accordingly, P has no cause of action against D3.

230 Initially P only sues D1 (Figure 1). Who can D1 look to as concurrent wrongdoers in order to reduce its liability?



Figure 1

231 D1 asserts that, if the court finds that it is liable to P, then D2 and D3 also 'caused' P to suffer the loss. On a literal interpretation of the PL legislation, D1, D2 and D3 are therefore concurrent wrongdoers. If that is correct, then P can only recover 50% of its loss because it has no cause of action by which it can recover 50% of the liability from D3 (Figure 2). P is prevented from recovering loss from D3 even though it may have sufficient assets to meet the liability. This is contrary to the purpose of PL legislation which is to protect 'deep pocket' defendants from bearing liability for others who caused the plaintiff's loss but are impecunious.

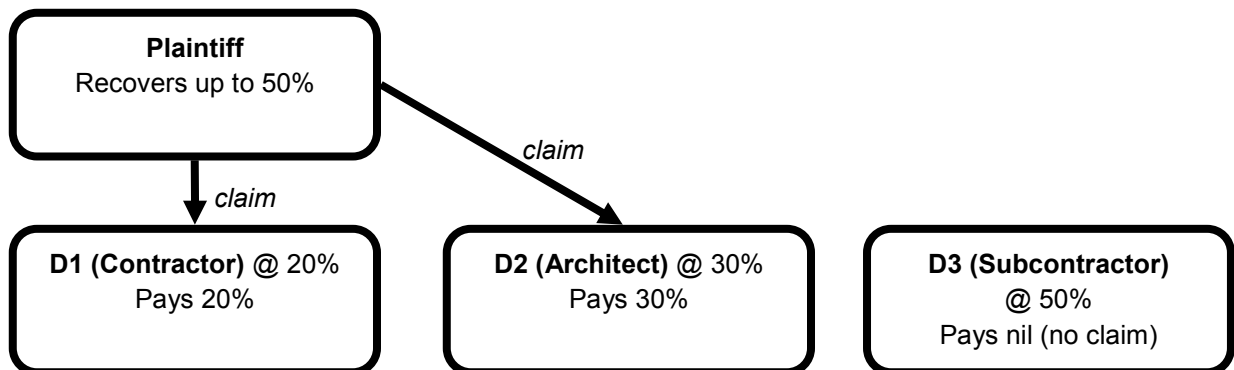


Figure 2

232 If, however, a 'concurrent wrongdoer' is defined as a party which not only caused the plaintiff's loss or damage but also is legally liable for it, then D1 can only look to D2 as a concurrent wrongdoer (and vice versa). The Court will apportion liability between

D1 and D2, at 40% and 60% respectively. In turn, D1 will have rights of recovery against D3 under their subcontract. D3 will be a third party in the proceeding (Figure 3).

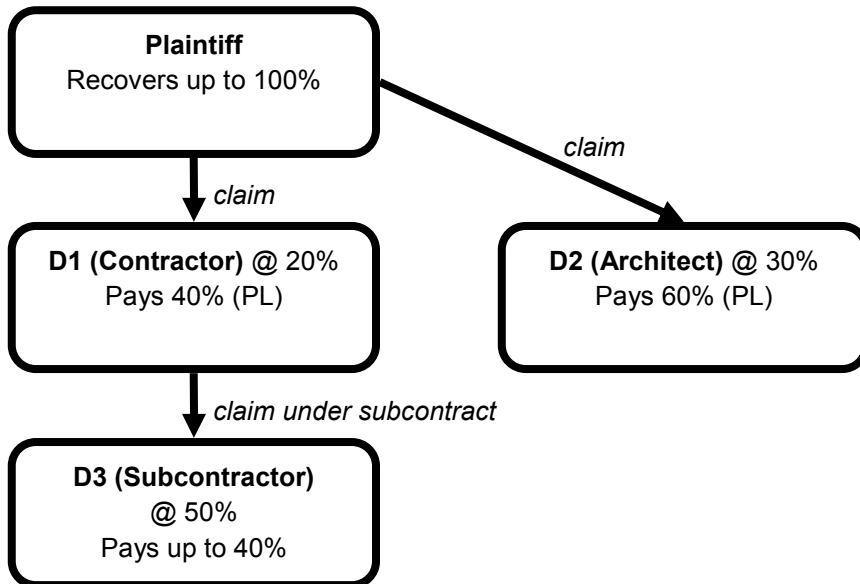


Figure 3

233 If, the court found that P's economic loss claim against D1 was *not* apportionable because it did not 'arise from a failure to take reasonable care', but by reason of a purely contractual liability, then:

- 233.1 D1 would be jointly and severally liable to the plaintiff for 100% of the loss;
- 233.2 assuming the claim against D2 was apportionable, D2 could have its liability limited by reference to D1, as a concurrent wrongdoer;
- 233.3 D1 would be prevented by the PL legislation from seeking contribution or indemnity from D2 as another concurrent wrongdoer;
- 233.4 D1 would, however, be entitled to pursue a recovery action against D3 under their subcontract (Figure 4).

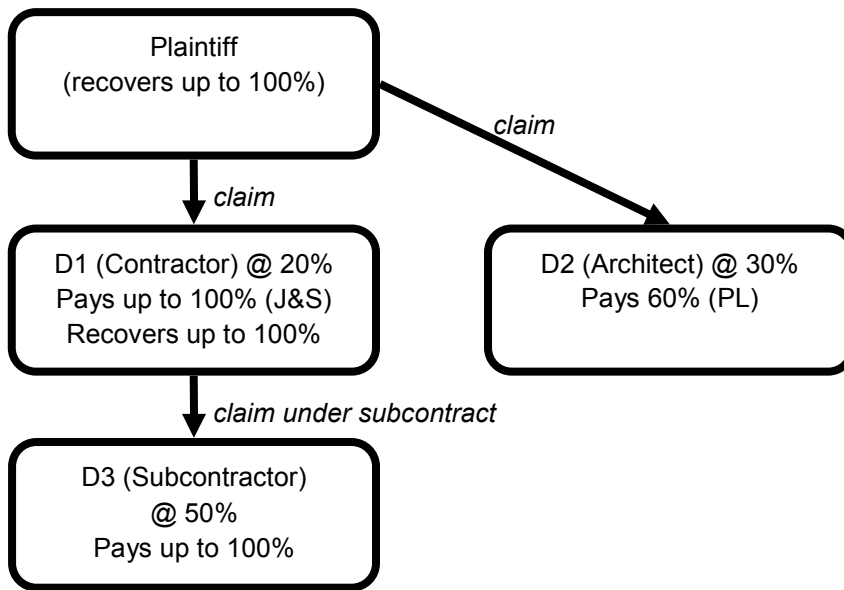


Figure 4

234 If P's claim had been for property damage, then P probably would have a cause of action against D1, D2 and D3, assuming that the loss was reasonably foreseeable. If, say, PL was limited so that it only applied to claims against professionals, then the claims against D1 and D3 would not be apportionable claims, and D2 would be the only party entitled to an apportionment of liability. D2 could have its liability limited by reference to the comparative responsibility of D1 and D3. D1's rights against D3 under the subcontract would be unaffected, as well as having rights to recover contribution from D3 under statute (Figure 5).

235 P would have the same right of action against D3 in a claim for pure economic loss, where D3 had provided P with a collateral warranty or in some other way had become legally liable to P for the loss.

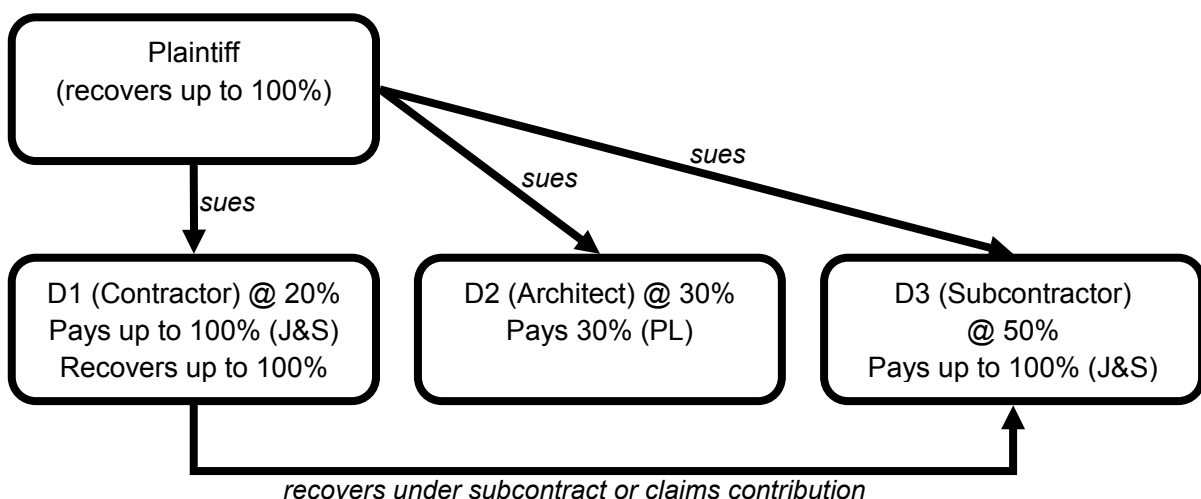


Figure 5

- 236 In each case, P is pursuing an apportionable claim against D2, so not only is D2 entitled to limit its liability by reference to other concurrent wrongdoers, but it is not exposed to a claim for contribution or indemnity from the other responding parties.
- 237 It has been suggested that, by limiting concurrent wrongdoers to those parties who are legally liable to the plaintiff, this may remedy the problem of PL undermining contractual warranties and indemnities, because parties in the position of the subcontractor in the above example are not concurrent wrongdoers. While it resolves one aspect of this problem, it is not a complete answer.
- 238 Other situations where PL will still impact upon contractual rights include:
- 238.1 where contractors and others, such as professionals, are concurrent wrongdoers. For example, if the plaintiff is pursuing an apportionable claim against the builder, and the builder and the architect are concurrent wrongdoers, then (notwithstanding that the builder's subcontractor cannot also be a concurrent wrongdoer) the court must apportion liability between the builder and the architect. The builder may be held liable for less than 100%, notwithstanding that it provided a contractual warranty to the plaintiff, because some liability may be apportioned against the architect. Let us say that the judgment is for \$2 million, with 40% apportioned against the builder (\$800,000) and 60% apportioned against the architect (\$1.2 million). However, the architect's limit of insurance (and assets) is \$1m. Why should the effect of PL be that the plaintiff receives a shortfall of \$200,000, even though the builder provided the contractual warranty?
- 238.2 in relation to property damage claims, subcontractors may be legally liable to a plaintiff because the only requirement for owing a duty of care is that the loss caused by the subcontractor is reasonably foreseeable. Therefore, in a property damage claim, a contractor can limit its liability by reference to a subcontractor notwithstanding that the contractor may have provided a 'no fault' contractual indemnity to the plaintiff in relation to the loss.
- 238.3 a concurrent wrongdoer (such as a supplier or manufacturer) might be legally liable to a plaintiff because it provided some form of collateral warranty. In that case, the court will be obliged to apportion liability as between the contractor (who had the contract with the plaintiff) and that other concurrent wrongdoer.
- 239 Traditionally, proprietors have sought collateral warranties and the like from subcontractors, suppliers, importers, manufacturers etc. These warranties are relevant in determining whether such parties owe a duty of care to a proprietor. Therefore, these arrangements may create legal relationships which may result in such parties being treated by the courts as concurrent wrongdoers.
- 240 The effect of this is that:
- 240.1 contracting parties can avoid the obligation to honour no fault warranties on goods and services delivered.

- 240.2 principals may be forced to seek redress from third parties, and bear the risk if they have no assets.
- 240.3 principals may be disinclined to seek warranties etc from subcontractors, suppliers, importers and manufacturers.
- 241 These consequences, and the associated cost and uncertainty to commercial conduct do not fulfil the purpose of the legislation which was to permit professionals to maintain affordable PI insurance.
- 242 Some further issues arise:
- 242.1 Is it necessary for the concurrent wrongdoer both to be causally responsible and legally liable for the loss? Would it be sufficient just to require that the concurrent wrongdoer was legally liable for the loss?
- 242.2 If a concurrent wrongdoer is someone who is both causally responsible and legally liable for the loss, does that mean that a plaintiff could artificially avoid PL by arranging for a party *no longer* to be liable to the plaintiff?
- 243 Subject to one qualification mentioned below, '*concurrent wrongdoers*' should be defined as those who each caused the loss to the plaintiff which is the subject of the claim *and* are legally liable for that loss. If the definition is limited to causal responsibility only, then we face the problems mentioned above where a plaintiff does not have a right of action to recover losses from solvent concurrent wrongdoers. If the definition of '*concurrent wrongdoers*' was limited to parties who were legally liable to a plaintiff, then potentially insurers and indemnifiers of a plaintiff may qualify as '*concurrent wrongdoers*' for the purposes of an apportionment in respect of another defendant. It appears that the legislature did not intend for the Courts to take into account the relative responsibility of parties who are legally liable for a loss purely on a legal basis.
- 244 This raises the difficult issue. When identifying '*concurrent wrongdoers*', whose comparative responsibility should be taken into account when apportioning liability against a particular defendant, a distinction needs to be drawn between:
- 244.1 a party, such as a contractor or a service provider, whose acts or omissions may not have directly *caused* the loss but they are indirectly responsible to the plaintiff for the loss having being caused by others (such as by subcontractors, suppliers, manufacturers etc); and
- 244.2 parties, such as insurers, guarantors and the like, who may be legally liable for the loss, but neither directly or indirectly caused the loss.

Plaintiff avoids PL because concurrent wrongdoer ceases to be liable

- 245 If '*concurrent wrongdoers*' are those who are causally responsible and legally liable for the plaintiff's loss or damage, is it possible for the plaintiff artificially to avoid PL by:
- 245.1 releasing a party from liability (for example, as part of a tripartite agreement involving a novation of rights and liabilities);

- 245.2 settling with a party including terms of release; or
- 245.3 allowing its right of action against a party to lapse and become statute barred?
- 246 While the plaintiff should be entitled to deal with its own rights as it wishes, in doing so it should not be entitled adversely to affect the right of a defendant to limit its liability by reference to concurrent wrongdoers, particularly where they are impecunious.
- 247 Therefore, the definition of concurrent wrongdoer should require that a party is causally responsible *and* legally liable for the plaintiff's loss, even if an act or omission by the plaintiff has extinguished that liability.

Loss or damage that is the subject of the claim, which is caused independently or jointly

- 248 Queensland and South Australia limit the definition of concurrent wrongdoer to one of two or more persons who '*independently of each other*' caused the loss and damage. If the persons jointly caused the loss and damage, then they are not concurrent wrongdoers and therefore their comparative liability may not be taken into account when apportioning liability. This may cause difficulties where PL claims are made under the Qld or SA Act and a Commonwealth Act in the one proceeding, and the court is required to deal with this inconsistency.

RECOMMENDATIONS

- 9 The definition of '*concurrent wrongdoer*' be amended so that it refers to a party which not only caused, but is also legally liable for, the loss or damage which is the subject of the apportionable claim, and irrespective of whether that liability was subsequently extinguished by reason of an act or omission of the plaintiff.

(c) Obligation to notify of other concurrent wrongdoers

Introduction

- 249 Other than under the Vic Act, all PL laws require a defendant to notify the plaintiff of an intention to attribute liability against parties who have not been joined to the proceeding. In those jurisdictions, a defendant can seek an apportionment by reference to non-party concurrent wrongdoers. Therefore, in order that the plaintiff can decide whether to pursue an action against those non-parties, it needs to receive proper notice about the non-party wrongdoers.
- 250 The Vic Act is silent on the issue. No doubt, the legislature saw no need for such a requirement, given that under subsection 24A(3) the court is only permitted to take into account the comparative responsibility of a non-party who has died or is a corporation which has been wound up.
- 251 There is no requirement under PL legislation for a defendant to notify a non-party concurrent wrongdoer.

Legislation

- 252 The NSW Act provides as follows:

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

- (1) If:
- (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the **other person**) may be a concurrent wrongdoer in relation to the claim, and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person, and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and
 - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,
- the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

253 The ACT, NT, Tas, WA and Commonwealth Acts essentially contain the same provision as NSW, whereas Victoria, Queensland and South Australia diverge.¹²⁸ The heading for the NSW is '*Duty of defendant to inform plaintiff about concurrent wrongdoers*' whereas the provision itself imposes no specific duty, but permits the Court to exercise its discretion in awarding costs against a defendant who fails to notify a plaintiff of others who may be concurrent wrongdoers (one would assume, in a timely manner).¹²⁹

Discussion

Notifying the plaintiff

- 254 As mentioned above, s 35A of the NSW Act (and interstate equivalents) does not impose on a defendant a duty to notify a plaintiff regarding other concurrent wrongdoers, but provides a costs sanction where such notice is not given '*as soon as practicable*'.
- 255 The duty comes from the usual Court Rules, and the rules of natural justice, that require a defendant to provide the plaintiff with proper particulars of its defence. In this case, the plaintiff is entitled to know the facts and other matters by which the defendant says that its liability should be reduced by reference to the comparative responsibility of other concurrent wrongdoers. Accordingly, the primary sanction for the defendant who delivers an inadequate pleading as to an apportionment would be that the plaintiff may ask the Court to strike out that pleading.
- 256 Where a defendant delays giving the plaintiff such notice, the usual court rules and case law would apply in respect of late amendments to pleadings.
- 257 It seems to me that the costs sanction imposed by PL legislation is additional to the primary rights of the plaintiff in respect of a defendant's pleading.
- 258 Some commentators have expressed concern that defendants may deliberately delay providing notice (or adequate notice) to a plaintiff in order to achieve a strategic advantage in the litigation. I do not see this as a major problem specifically with the PL legislation. As Justice Hammerschlag explained in *Ucack*, the failure by a defendant to provide proper particulars of a concurrent wrongdoer can be treated like any other shortcoming in a defence; the Court Rules can be used by the plaintiff to force the defendant to provide proper particulars or have that part of the defence struck out.
- 259 As mentioned earlier, in *Ucack*, his Honour held that, in respect of other concurrent wrongdoers, a defendant must plead the following elements:¹³⁰

¹²⁸ ACT Act ss 107G; NT Act s 12, Qld Act s 32; SA Act s 10; Tas Act s 43D; WA Act s 5AKA, ASIC Act s 12GS; Corporations Act s 1041O and TPA s 87CE.

¹²⁹ also under equivalent provisions in the ACT, NT, Tas, WA, ASIC and Corporations Acts and the TPA.

¹³⁰ *Ucack* [2007] NSWSC 367, [35] and [41]. In this context, Hammerschlag J refers to the views expressed by Justice Robert McDougall above n 60, 400.

- 259.1 the existence of that person;
- 259.2 the relevant acts of omissions by that person; and
- 259.3 the facts which would establish a causal connection between that act or omission and the loss which is the subject of the apportionable claim against the defendant.

260 I have one further suggestion. I assume that the purpose of giving notice is in order for the plaintiff to decide whether to pursue a claim against that concurrent wrongdoer. It would be unfair for the defendant to be entitled to an apportionment by reference to a non-party, but prevent the plaintiff from pursuing a legitimate claim against that non-party. Therefore, the defendant should also be required to give the plaintiff any details it has of the concurrent wrongdoer's whereabouts, so that the plaintiff may locate that party and serve proceedings if it wishes.

261 The PL laws permit the courts to take into account impecunious concurrent wrongdoers who cannot be located. Therefore, if a defendant is unable to provide details of the location of a concurrent wrongdoer, its rights to an apportionment should remain. However, the defendant should at least be required to provide such details as it has in its power, possession or control and, possibly, after reasonable inquiry.

262 Accordingly, I see no need to reform this aspect of the current PL laws (leaving aside the Vic Act), save for an additional requirement that the defendant should provide any details it has regarding the location of the non-party concurrent wrongdoer

Notifying non-party concurrent wrongdoers

263 Should non-party concurrent wrongdoers be notified that the Court is considering their relative liability to the plaintiff? Moreover, should such non-parties have standing to intervene in the proceeding in order to defend the allegations against them? A non-party might wish to be notified because:

- 263.1 the non-party concurrent wrongdoer may be vulnerable to a subsequent damages claim against it by the plaintiff, either by being joined as a further defendant in the proceeding, or by being pursued in a successive proceeding;
- 263.2 the non-party's reputation will be the subject of attack in the initial proceeding, as the defendant(s) seeks to lay off responsibility for the plaintiff's loss.

- 264 Justice Byrne suggests that:
- 264.1 a non-party should be notified and given the opportunity to respond;
- 264.2 a non-party should be entitled to apply to have itself joined to protect its interests.¹³¹
- 265 I support the first but not the second proposal.
- 266 Successive proceedings would be less likely if a non-party concurrent wrongdoer had to be notified, and therefore might become involved in the litigation underway, at least in settlement negotiations.
- 267 There is no requirement (other than in Victoria) that a concurrent wrongdoer must have been located before a defendant is entitled to an apportionment by reference to that party. From the materials I have seen, I do not see any policy reason why a defendant should only be entitled to have its liability apportioned by reference to non-party concurrent wrongdoers who have been located. Therefore, there cannot be an absolute requirement for the defendant to locate the concurrent wrongdoer. The appropriate obligation to be imposed upon the defendant may be that it should use its reasonable endeavours to notify the concurrent wrongdoer.
- 268 A procedural problem confronting Victorian courts and tribunals is how to deal with a concurrent wrongdoer who is a party to the litigation purely for the purposes of apportionment, where the plaintiff makes no claim against it. If non-party concurrent wrongdoers were similarly entitled to have standing to be heard before a court, even though the plaintiff was pursuing no claim against them, the same difficulties would arise. I have discussed these difficulties under Part (d) below. In my view, this should be avoided.

RECOMMENDATIONS

- 10 As part of its defence to an apportionable claim, a defendant be required to provide notice to the plaintiff of any alleged concurrent wrongdoer by pleading those matters referred to by Justice Hammerschlag in *Ucack v Avante Developments Pty Ltd* [2007] NSWSC 367; namely:
- the existence of that person;
 - the relevant acts of omissions by that person; and
 - the facts which would establish a causal connection between that act or omission and the loss which is the subject of the apportionable claim against the defendant.

¹³¹ Justice David Byrne above n 13, [49] - [50].

11	The defendant also be required to provide the plaintiff with those details of the whereabouts of the concurrent wrongdoer which the defendant has in its power, possession or control.
12	<p>Where a defendant wishes to have liability apportioned in respect of a person who is not a party to the litigation, it must notify that person by serving a copy of the plaintiff's statement of claim and the defendant's defence, in which the defendant alleges that the person is a concurrent wrongdoer.</p> <ul style="list-style-type: none"><li data-bbox="451 689 1343 763">• Clarify exceptions where a defendant will not be required to give notice (such as where a person has ceased to exist).<li data-bbox="451 797 1343 871">• Clarify the nature of the obligation upon a defendant to locate and notify the person.<li data-bbox="451 904 1343 936">• Clarify what sanctions may be imposed for non-compliance.

(d) Having regard to non-parties when apportioning liability

Introduction

- 269 Should a defendant be entitled to seek apportionment by reference to a non-party? If so, then what procedure should be adopted?
- 270 This raises the question whether it is better to require that concurrent wrongdoers must be a party to a proceeding in order to be taken into account when the Court apportions liability, or whether to allow apportionment in respect of non-parties.
- 271 In broad terms, s 24AI of the Vic Act requires that concurrent wrongdoers (unless they are dead or have been wound up) must be brought before the Court (**Vic Model**).
- 272 By contrast, PL legislation outside Victoria permits a court to take into account concurrent wrongdoers who are not parties to the proceeding when apportioning liability (**National Model**).

Legislation

- 273 The current PL regime permits the Court, when apportioning liability against defendants and other responding parties (such as third parties), to take into account someone who is not a party to the proceeding. All PL Acts, save for in Victoria, specifically acknowledge that:
- 273.1 PL applies to an apportionable claim irrespective of whether all concurrent wrongdoers are parties to the proceeding; and
- 273.2 in apportioning liability, the court may take into account the comparative responsibility of concurrent wrongdoers who are not parties to the proceeding.¹³²
- 274 The main differences are as follows:
- 274.1 the NSW, ACT, NT, Qld Acts, the ASIC Act, Corporations Act and the TPA each say that the Court 'may' have regard to non-parties;
- 274.2 Victoria effectively says that the Court must have regard to certain types of non-parties. Section 24AI(3) of the Vic Act provides that: *'In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up;'* (my emphasis)

¹³² NSW Act ss 35(3)(b) & (4); ACT Act ss 107F(2)(b) & (4); NT Act ss 10 & 13(2)(b); Qld Act ss 31(3) & (4); SA Act s 8(2)(b); Tas Act ss 43B(3)(b) & (4); WA Act s 5AK(3)(b) & (4); ASIC Act s 12GR(3)(b) & (4); and Corporations Act ss 1041N(3)(b) & (4); TPA s 87CD((3)(b) & (4).

- 274.3 the Tas Act and the WA Act each says that a court '*is to have regard*';¹³³
- 274.4 the SA Act refers to the Court '*having regard*' to the extent of responsibility of other wrongdoers including non-parties to the proceeding.¹³⁴

Discussion

National consistency

- 275 Clearly the preferred position is that there should be one model nationally regarding whether the Courts may take into account non-party concurrent wrongdoers when apportioning liability.
- 276 Presently, both models will often apply in Victorian claims, where a plaintiff makes claims for breach of contract, in negligence and for misleading and deceptive conduct under the FTA(Vic), but also alleges misleading and deceptive conduct in contravention of s 52 TPA. This is common in cases involving negligent professional advice.
- 277 In this situation, a defendant must join others to the proceeding in order to limit its liability in respect of claims against it which are subject to Victorian law. However, for the TPA claim, the defendant is not required to join others to the proceeding; the defendant is merely required to lead evidence regarding other parties' comparative responsibility for the loss. In the one proceeding, litigants must take into account both the Vic Model, as well as the National Model as it applies to claims under the TPA. This might have costs consequences if the only claim that is successful is the TPA claim and therefore the court finds that the joinder of the party was unnecessary.
- 278 It is unclear how the Courts will distinguish between the various claims when making an apportionment. While the common law and FTA claims must be dealt with together as if they were a single claim, the TPA claim sits apart.
- 279 In order that there be national consistency, all jurisdictions should agree on whether a court '*may*' or '*must*' have regard to the comparative responsibility of concurrent wrongdoers who are not parties to the litigation. To achieve greater certainty for litigants, I recommend that courts '*must*' take into account comparative responsibility, as is the case under s 43B(3)(b) of the Tas Act and s 5AK(3)(b) of the WA Act.

Vic Model or National Model?

- 280 In apportioning liability, should the Court:
- 280.1 under the Vic Model, only take into account concurrent wrongdoers who have been joined as parties to the proceeding (leaving aside parties which are dead or have been wound up), or

¹³³ Tas Act, s43B(3)(b); WA Act, s5AK(3)(b).

¹³⁴ SA Act, s8(2).

280.2 take account of concurrent wrongdoers even if they are not parties to the proceeding as per the National Model?

281 Essentially, the main arguments in support of the Vic Model are that:

281.1 it reduces the likelihood of successive proceedings;

281.2 the defendants, rather than the plaintiff, do the work and bear the cost of joining parties; and

281.3 the Court is better placed to apportion liability because all concurrent wrongdoers are brought before the Court.

282 The main arguments in support of the National Model are that:

282.1 the plaintiff, rather than the defendants, can decide who they wish to join as parties to the proceeding and, in this way, have greater control over the proceeding including its cost and duration;

282.2 all parties to the proceeding are facing a compensation claim from the plaintiff, whereas under the Vic Model some parties may be joined purely for the purposes of apportionment and in circumstances where no claim (for compensation or other relief) is being pursued against them;

282.3 the Vic Model can result in the 'cascading joinder' of parties, where newly joined defendants are successively joining additional concurrent wrongdoers to a proceeding;

282.4 under the Vic Model, a party who has been joined as a concurrent wrongdoer can be unsure whether the plaintiff intends to pursue a compensation claim against it;

282.5 as outlined in *Vollenbroich*, if a defendant wishes to settle with the plaintiff in an ongoing proceeding under the Vic Model, it may be required to remain as a party to the proceeding.

283 Justice McDougall appears to support the Vic Model. He describes the problems with apportioning responsibility against non-parties as follows:

'But it is to carry out that task without hearing from the non-party, and in circumstances where the defendants have a very real interest in fixing that non-party with as much of the responsibility as possible. Whilst the plaintiff has a competing interest, in seeking to fix the defendants with as much responsibility as possible (which will minimise the responsibility of the non-party), the plaintiff may lack the information or resources available to the defendants. Regardless, the court will be unlikely to have the benefit of hearing from the non-party.

There are at least two immediately obvious consequences. The first is that the court's orders may tend to understate the responsibility of the concurrent wrongdoers who are defendants, compared to the responsibility that might have been allocated had all concurrent wrongdoers been defendants. This will diminish the amount of damages recoverable by the plaintiff in the action. The second is that the non-party will not be bound by the assessment, in proceedings to which it was not a party, of its responsibility. If, therefore, the

plaintiff sues that non-party in subsequent proceedings, the plaintiff will be required to run the entirety of its case... but with the risk that the defendant against whom that case is run will be able to minimise the extent of its responsibility. The consequence might be that the plaintiff, although it has sued all concurrent wrongdoers, does not recover the full amount of its loss, even though there can be no doubt that, between them, those wrongdoers caused the whole of that loss.

The answer appears to be that the plaintiff should seek to identify all concurrent wrongdoers and to join them all in the one action, so that they can fight out among themselves the amounts of their several liabilities to the plaintiff. Undoubtedly, that is what Parliament intended should happen. But the plaintiff may not always be aware of the identity of all concurrent wrongdoers.¹³⁵

- 284 A number of commentators have supported the Vic Model on the basis that the defendants do the work and incur the cost of bringing all concurrent wrongdoers before the court so a proper apportionment can be made with all present before the court (save for parties which are dead or have been wound up).
- 285 Under the National Model, a defendant must plead and lead evidence regarding other defendants and non-parties, in seeking to have a Court reduce the liability apportioned against that defendant (*Ucack, Nemeth, Woods*). Presumably, the non-parties may be subpoenaed to give evidence. The Court will need to consider how much weight to give the evidence which is lead regarding the relative culpability of non-parties.
- 286 To avoid costs penalties and applications to strike out its defence, the defendant must advise the plaintiff of these other concurrent wrongdoers. It is then a matter for the plaintiff to decide whether to join those other parties, or face the risk of a shortfall in recovery of its loss. Obviously, a plaintiff will choose not to pursue a claim against a concurrent wrongdoer which has no assets or insurance. Under the National Model, the plaintiff can make pragmatic, strategic decisions about the costs and benefits of joining more defendants.¹³⁶ For example, a plaintiff may assess the liability of a concurrent wrongdoer at, say, a maximum of 10%. The plaintiff may decide not to pursue a claim against that party because the costs are greater than the benefits. The costs would not only be the costs and risks of pursuing that claim, but also the strategic cost of adding another defendant to the proceeding, which may be seen as reducing the focus on the plaintiff's primary targets and make it more difficult to settle.
- 287 By contrast, under the Vic Model, the defendant has the burden (and strategic advantage) of joining others to the proceeding in order to have its liability limited by reference to the responsibility of the other concurrent wrongdoers for the plaintiff's loss. Here, a defendant has the incentive to join other parties in order to limit its liability to the plaintiff. The plaintiff has little control over the expansion of the litigation. In a paper delivered by Justice Byrne on 5 September 2007, he referred to the effect of PL under the Vic Model as follows:

¹³⁵ Justice Robert McDougall above n 60, 397-398.

¹³⁶ Other than under s 32(1) of the Qld Act which requires a plaintiff to make a claim against all persons who may be liable.

'Following the introduction of proportional liability there is now a powerful incentive for defendants to bring in any other party which might be considered responsible in part for the plaintiff's loss. This has already and will continue to have the consequence that the trial of construction disputes will have all the complications of a multi-party trial.'¹³⁷

- 288 His Honour's comments apply not only to construction disputes but potentially any apportionable claim under the Vic Model.
- 289 Under the Vic Model, the typical process would be:
- 289.1 it is in the plaintiff's interest only to sue one or more deep pocket defendants, even if they are minimally to blame. In the absence of other defendants (save for those who are dead or have been wound up), the plaintiff can recover its full loss from the deep pockets;
 - 289.2 the deep pocket defendants will then apply to have other concurrent wrongdoers joined to the proceeding exclusively for the purposes of an apportionment;
 - 289.3 the plaintiff will then decide whether it will in turn make claims against these joined concurrent wrongdoers in order to recover that part of its loss which is allocated against them. The plaintiff is not required to do so, although it probably will for reasons of efficiency and avoiding the risk of suffering a shortfall in recovery. However, the plaintiff may choose not to pursue a claim against a joined party, on the basis that the joined party is not liable, and the plaintiff wants to avoid the risk on costs of pursuing a claim against it.
- 290 Each time a further concurrent wrongdoer is joined, it will in turn decide whether there are other concurrent wrongdoers who should be joined to the proceeding.
- 291 This process of cascading joinder of concurrent wrongdoers, and subsequent claims by the plaintiff against them, can result in delay, additional costs and procedural complexity. On each occasion where a further party is joined to the proceeding, there is likely to be a new series of interlocutory issues: amended claims; the plaintiff deciding whether to pursue a claim against the joined party; and the newly joined party deciding whether it, in turn, should join others as concurrent wrongdoers. It is also difficult to settle a dispute during this process.
- 292 The same approach was taken in Victoria for PL in respect of building actions under the now repealed s 131 of the *Building Act* 1993. What was experienced under that system was a tendency for defendants to join a multitude of extra parties as defendants in order to limit their liability. The joinder of further defendants results in the expansion of the litigation, delay in prosecution and resolution, and greater difficulties in reaching settlements because of the increased number of participants.

¹³⁷ Justice David Byrne, 'The Future of Litigation of Construction Law Disputes', a paper presented to the Melbourne Law Masters Graduate Program in Construction Law, 5 September 2007.

- 293 Under the National Model, the plaintiff has an incentive to join 'deep pockets', and also perhaps those other concurrent wrongdoers with assets or insurance whom the 'deep pocket' defendants are likely to identify for the purposes of an apportionment (given that the plaintiff will inevitably have to join them at some point). Upon a defendant notifying the plaintiff of another concurrent wrongdoer, the plaintiff can assess the cost and benefit of pursuing that party by having it joined to the proceeding. While this process also has its complexity, it seems to be a simpler process, where the plaintiff rather than the defendants have control over this aspect of the proceeding. Clearly, the intention of parliament was for PL to benefit defendants. In balancing the interests of plaintiffs and defendants, it seems not unreasonable to prefer a model which gives the plaintiff, rather than defendants, greater control over the magnitude of the litigation.
- 294 A serious practical problem with the Vic Model arises from the fact that a plaintiff may choose not to make a claim against a concurrent wrongdoer which has been joined to the proceeding. This is best explained by an example. A financial adviser joins an accountant to a proceeding in order to limit its liability to the plaintiff. What if the plaintiff decides not to make a claim against the accountant? In that case, the accountant is a party to a court proceeding but is not the subject of any claim against it for compensation. The financial adviser is not permitted to claim contribution, and the plaintiff has chosen not to pursue a claim. What determination, if any, is the court to make in respect of that accountant? How, and with whom, can the accountant settle the proceeding? How can the accountant make settlement offers? How does the court deal with the accountant's defence costs? In what circumstances should the financial adviser or the plaintiff pay the accountant's costs? Does the accountant's professional indemnity insurance policy respond, given that there is no compensation claim being pursued against it? How does the accountant participate in settlement negotiations, such as at mediation? Given that no remedy is being pursued against the accountant (whose purpose is as a 'catalyst' in order for the court to apportion liability in respect of the financial adviser), what is the accountant expected to achieve by defending the action against it? Accordingly, parties such as the accountant are better off under the National Model.
- 295 In *Chandra* (a NSW case), the non-party concurrent wrongdoer was the party who was held responsible for the fraud, Mr Pan. If that matter had been run in Victoria, the solicitor defendant would have been required to find and serve Mr Pan so that he became a party to the proceeding. This seems to be an expensive and unnecessary cost. Similarly, in *Woods*, it was necessary for the defendants to apply to have SPM joined because, as Justice Hollingworth stated: '*Although SPM is in liquidation, its winding up has not been completed, so it would have to be joined as a party by virtue of s24A(3) of the Wrongs Act, if the other defendants wish to rely upon the apportionment regime.*'¹³⁸ Under the National Model, such joinder applications can be avoided.
- 296 I prefer the National Model. Under that Model:

¹³⁸ *Woods* [2007] VSC 177, [63]

- 296.1 plaintiffs, rather than defendants, have control over the decision whether to join other parties. The plaintiff can balance the costs, risks and benefits of pursuing claims against other concurrent wrongdoers, thereby having greater control over the magnitude, complexity and duration of the litigation;
- 296.2 parties are not joined to a proceeding purely to benefit another's claim for apportionment;
- 296.3 where one party settles, they need not remain as a party; and
- 296.4 the Courts are less likely experience rolling applications to join additional parties.
- 297 The National Model has its own difficulties. In particular, there is a greater risk of subsequent litigation because the court may take into account concurrent wrongdoers who are not parties to the litigation. As discussed below, other measures can be considered in order to encourage a plaintiff to pursue all claims in the one proceeding.

Plaintiff's obligation to pursue a claim against concurrent wrongdoer

- 298 It does not appear fair under either model that a joined party (Vic Model) or a concurrent wrongdoer who has not been joined (National Model) might be unsure whether the plaintiff will pursue a claim against it. This uncertainty can adversely affect that party's financial affairs, insurance and personal affairs. It is also important for the effective administration of justice that the plaintiff should make a timely decision whether to pursue a claim against that party.
- 299 Under the Vic Model, plaintiffs have argued that they do not have to pursue a formal claim against the joined concurrent wrongdoer, but can still be entitled to receive judgment for whatever amount is apportioned against the joined party. This raises the questions:
- 299.1 Should a plaintiff be entitled to judgment against a joined concurrent wrongdoer (under the Vic Act) without pursuing a claim against it? This is contrary to the rules of natural justice; the joined party should be entitled to know that the plaintiff is pursuing a claim against it, and faces a potential liability to pay damages.
- 299.2 Should a plaintiff be required, at least, to put the joined party on notice that it seeks judgment for the amount of loss apportioned against it? The defendant has sought an apportionment by referring in its defence to that concurrent wrongdoer's liability to the plaintiff. The plaintiff is effectively adopting that pleading in making its claim against the concurrent wrongdoer. However, while the concurrent wrongdoer might not choose to attack the defendant's defence (because the defendant makes no claim against it), the concurrent wrongdoer should be entitled to challenge the plaintiff's (albeit adopted) claim. Such 'notice' should therefore be made by a formal pleading delivered by the plaintiff, even if its simply adopts another party's claim.

299.3 Should the plaintiff be required to plead out a formal claim against the joined party? This would clarify that the plaintiff is making a claim against the concurrent wrongdoer and the basis for that claim.

300 In my view, under either the Vic or the National Model, the plaintiff should *not* be entitled to rely upon its statutory entitlement under PL legislation to pursue a subsequent action against a party where it had the opportunity to pursue that claim in the original proceeding. Measures should be introduced to prevent a plaintiff from pursuing successive proceedings.

301 Two options are:

301.1 Once the plaintiff is on notice about a non-party concurrent wrongdoer (or under the Vic Model, a joined concurrent wrongdoer who is not the subject of a claim by the plaintiff), the plaintiff should have a specified period within which to elect whether to pursue a claim against it, or lose its rights to do so.

301.2 A concurrent wrongdoer should be entitled to require the plaintiff to elect whether it will make a claim against it in the initial proceeding.

Victorian issues

302 Section 34(4) of the NSW Act states that it does not matter if the concurrent wrongdoer is '*insolvent, is being wound up or has ceased to exist or died*'. The Vic Act deals with this issue twice:

302.1 largely mirroring the NSW provision, s 24AH(2) provides that it does not matter that a concurrent wrongdoer is '*insolvent, is being wound up, has ceased to exist or has died*'; and

302.2 section 24AI(3) provides that, in apportioning responsibility between defendants, the court must not take into account non-parties save where the party '*is dead or, if the person is a corporation, the corporation has been wound-up.*'

303 It is unclear why the Act draws a distinction in this way between '*concurrent wrongdoers*' and those non-parties who may be taken into account on an apportionment, nor why the particular types of parties are slightly different. I have not been able to find any reference in legislation to the phrase "*has been wound-up*"; its meaning remains unclear.

304 Section 24AI(3) of the Vic Act refers to the comparative responsibility of any '*person*', rather than necessarily a concurrent wrongdoer. It is unclear whether this has significance.

305 Another issue relates to the procedural requirements necessary in order for a party to be taken into account on an apportionment. Section 24AI(3) says that the court must not have regard to the comparative responsibility of a person '*who is not a party to the proceeding*'. It may be that all a defendant needs to do, for the purposes of s 24AI(3), is to file with the court a third party notice and statement of claim naming the relevant

person. Query whether service on that person is also required. One would expect that, in judge managed lists, the presiding judge will require service on the joined party.

306 Section 24AI(1)(a) of the Vic Act provides that:

'the liability of a defendant who is current wrongdoer...is limited to an amount reflecting that 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;...' (my emphasis)

307 By contrast, s.24AI(3) provides that:

'In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up...' (my emphasis)

308 Taken literally, this appears to mean that if there is only one defendant there is no need under the Vic Act to join a concurrent wrongdoer in order to have that wrongdoer's responsibility taken into account, but the reverse applies if there are two or more defendants.

309 This is an unlikely result and I assume it was not the intention of the legislature.

RECOMMENDATIONS	
13	Victoria embrace the National Model by which a defendant may refer to the comparative responsibility of a non-party concurrent wrongdoer in seeking an apportionment of liability.
14	All jurisdictions reach agreement on whether a court ' <i>may</i> ' or ' <i>must</i> ' have regard to the comparative responsibility of concurrent wrongdoers who are not parties to the litigation. In order to provide litigants with greater certainty, courts be required to take into account comparative responsibility, as is the case under s 43B(3)(b) of the Tas Act and s 5AK(3)(b) of the WA Act.
15	In relation to the Vic Act: <ul style="list-style-type: none"> • the discrepancy between ss 24AH(2) and 24AI(3), regarding the types of concurrent wrongdoers who need not be parties to the proceeding, be resolved; • section 24AI(3) be amended to incorporate the phrase 'is being wound up' rather than 'has been wound up'; • the tension between ss 24AI(1) and 24AI(3) be resolved, to clarify whether s 24AI(1) means that a sole defendant may have liability apportioned without requiring the joinder of other concurrent wrongdoers.

For recommendations to prevent a plaintiff from unnecessarily pursuing subsequent proceedings, see Part (f) Successive Proceedings.

For recommendations regarding the cross-over between federal and state or territory law, see Part (h) Interaction between the TPA, ASIC Act and Corporations Act and state legislation.

(e) Excluding concurrent wrongdoers from proportionate liability

Introduction

- 310 The primary concern here is that the PL regime would be more effective if it was nationally consistent.
- 311 There appear to be three general categories of claims which are excluded from PL:
- 311.1 claims and liability beyond the usual liability to compensate for negligence. This includes claims involving intentional or fraudulent conduct, and liability for exemplary or punitive damages. It has been suggested that the reason for this exclusion is that the legislature views this more seriously than negligence and that this disentitles a party to the protection of PL. There is another explanation which is consistent with the objectives of the legislation. Claims alleging intentional or fraudulent conduct, and liability for exemplary or punitive damages, are excluded under most PI insurance policies. Accordingly, if the purpose of PL legislation is to maintain available and affordable PI insurance, then it is unnecessary to extend PL to include claims and liabilities which would not be covered by such insurance.
 - 311.2 claims involving particular legal relationships; namely, vicariously liability, principal and agent, and partnerships. It makes sense that the Courts are not asked to apportion liability between parties in such relationships.
 - 311.3 claims specifically excluded by statute, including a consumer carve out in some jurisdictions. For policy reasons, the legislature has determined that particular categories of claims and liability are not to be the subject of PL.

Legislation

- 312 The following is a summary of the various exclusions applying to PL:
- 312.1 intentional or fraudulent conduct: ACT, NSW, NT, Qld, SA, Tas, Vic (fraud only), WA, ASIC and Corporations Acts and TPA;¹³⁹
 - 312.2 excluded by other legislation: ACT, NSW, NT, Qld, Tas, Vic, WA, ASIC and Corporations Acts and TPA;¹⁴⁰
 - 312.3 vicarious liability and the liability of a partner: ACT, NSW, NT, Qld, SA, Tas, Vic, WA, ASIC and Corporations Acts and TPA;¹⁴¹

¹³⁹ NSW Act s 34A(1)(a) & (b); ACT Act s 107E(1); NT Act s 7(1); Qld Act ss 32D & 32E, SA Act s 3(2)(c) and Example; Tas Act s 43A(5); Vic Act s 24AM; WA Act s 5AJA(1)(a) & (b); ASIC Act s 12GQ(1)(a) & (b); Corporations Act s 1041M(1)(a) & (b); and TPA s 87CC(1)(a) & (b).

¹⁴⁰ NSW Act s 39(c); ACT Act s 107B(4) & 107K(d); NT(c) Act s 14(c); Qld Act s 28(4) & (5); Tas Act s 43G(1)(c); Vic Act ss 24AF(3) & 24AG(2) & 24AP(e); WA Act ss 5AJA(1)(c) & 5AO(c); ASIC Act s 12GW (c); Corporations Act s 1041S(c); and TPA s 87CI(c).

- 312.4 agency: ACT, Qld, Vic;¹⁴²
- 312.5 exemplary or punitive damages: Qld, SA (exemplary damages only), Vic;¹⁴³
- 312.6 claims arising from personal injury: ACT, NT, Qld, SA, Vic, WA;¹⁴⁴
- 312.7 the right to contract out: NSW, Tas, WA.¹⁴⁵

Additional exclusions – ACT, Northern Territory, Queensland and South Australia

- 313 Section 107B of the ACT Act also excludes a '*consumer claim*', which is defined by s 107C(1) as a claim by an individual '*relating to*':
 - 313.1 goods or services for the claimant's '*personal, domestic or household use or consumption*' acquired by the claimant from the defendant, or supplied to the claimant by the defendant; or
 - 313.2 financial advice supplied by the defendant to the claimant.
- 314 However, s 107C(2) provides that such claims are not a 'consumer' claim where the claimant acquired the goods or services for the purpose of: resupply, transformation in the process of manufacture or production, or repairing or treating other goods or fixtures on land.
- 315 While PL applies to a damages claim for a contravention of section 42 'Misleading or deceptive conduct generally' of the CA&FTA(NT), PL does not apply to a claim arising from a contravention of Part 4 'Product Safety and Product Information' of that Act (which deals with safety standards, dangerous goods, product recall and product information standards).
- 316 Section 28(3)(b) of the Qld Act excludes claims by a '*consumer*', which is defined by s 29 as being an individual making a claim '*based on rights relating to goods or services*':
 - 316.1 acquired for personal, domestic or household use or consumption, or
 - 316.2 that relate to professional advice given to the individual other than for a business.

¹⁴¹ NSW Act s 39(a) & (b); ACT Act s 107K; NT Act s 14(a) & (b); Qld Act s 32I(a) & (c); SA Act s 3(1) 'derivative liability'; Tas Act s 43G(1)(a) & (b); Vic Act s 24AP(a) & (c); WA Act s 5AO(a) & (b); ASIC Act s 12GW (a) & (b); Corporations Act s 1041S(a) & (b); and TPA s 87CI(a) & (b).

¹⁴² ACT Act s 107K(b); Qld Act s 32I(b); and Vic Act s 24AP(b).

¹⁴³ Qld Act s 32I(d); SA Act ss 3(1) 'notional damages', 3(3) & 8(6); and Vic Act s 24AP(d).

¹⁴⁴ ACT Act s 107B(3)(a); NT Act ss 3 definition of 'economic loss' and 4(3)(a); Qld Act s 28(3)(a); SA Act ss 3(2)(a)(i) & 8(6); Vic Act s 24AG(1); and WA Act s 5AI(1)(a).

¹⁴⁵ NSW Act s 3A(2); Tas Act s 3A(3) and WA Act s 4A.

- 317 Section 32F of the Qld Act provides that a concurrent wrongdoer who engages in misleading or deceptive conduct in contravention of s 38 FTA (Qld) is severally liable in respect of the apportionable claim in the proceeding.
- 318 The SA Act excludes PL as between persons of the same 'group'.¹⁴⁶ 'Group' is defined as:
- 318.1 vicarious liability, including a partner's liability for the act or omission of another partner;
 - 318.2 the liability of a person for breaching a non-delegable duty of care for the act of another;
 - 318.3 the direct liability of an '*insurer or indemnifier*' to a claimant in respect of the act or omission of the insured or indemnified person;
 - 318.4 the liability of a nominal defendant under third party motor vehicle insurance.
- 319 The SA Act also excludes: criminal proceedings; an '*agreement for an indemnity that would not have been enforceable apart from*' the SA Act; and a liability which is subject to PL under s 72 *Development Act 1993* (SA).¹⁴⁷
- 320 Under s 24AM of the Vic Act, a defendant who is found liable for damages for an apportionable claim, and there is a finding of fraud against it, is jointly and severally liable for the '*damages awarded against any other defendant in the proceeding*'. I suspect that it was not the legislature's intention that the provision:
- 320.1 does not require that the fraud be connected with the apportionable claim; and
 - 320.2 imposes joint and several liability on the fraudulent party, even if that would not otherwise have been the case at law, and secondly, in relation to '*any other defendant in the proceeding*', which would appear to include defendants who may have been the subject of separate claims by the plaintiff.

Discussion

- 321 The above summary of exclusions under the various PL Acts demonstrates the labyrinthine nature of this legislation. The complexity and inconsistencies between jurisdictions will no doubt present major challenges for contracting parties, disputing parties, their lawyers and the Courts, especially in proceedings which involve more than one jurisdiction.

¹⁴⁶ SA Act ss 3(1) definition of 'derivative liability', 8(3)(a) & (c).

¹⁴⁷ SA Act s 4(2).

- 322 Obviously the exclusions outlined above should be harmonised. Consistent with the overriding purpose of PL legislation, a uniform set of exclusions could be developed which refer to liabilities which are typically *not* covered by PI insurance policies. The availability and affordability of PI insurance will not be affected by liabilities imposed on defendants which fall outside PI insurance cover (such as an order for punitive damages).
- 323 As mentioned above, under the ACT and Qld Acts, claims against a '*consumer*' (as defined) have been excluded. Under the NT Act, a more restricted exclusion applies to claims involving product safety, dangerous goods etc. These exclusions were obviously made for policy reasons. I make no comment about their utility. The key question is whether these particular exclusions will have any adverse impact upon the availability of affordable PI insurance.

RECOMMENDATIONS

- 16 Exclusions be made uniform, and to reflect the categories of liability which would not typically be covered by PI insurance.

(f) Successive proceedings

Introduction

324 It is a clear imperative that, where possible, a plaintiff should pursue all claims in the one proceeding, rather than in successive proceedings. The High Court made the following comment about bringing finality to litigation:

'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.'¹⁴⁸

325 However, the legislature has shown an intention in PL legislation to permit a plaintiff to pursue a subsequent proceeding against a concurrent wrongdoer who was not a party to the initial action. If the plaintiff was unaware of the concurrent wrongdoer at the time of the first proceeding, or was unable to locate or pursue a claim against it in that proceeding, should the plaintiff be prevented from pursuing a subsequent action?

326 I suspect that most of the concerns regarding this issue surround situations where a plaintiff was in a position to pursue a claim against a concurrent wrongdoer in an initial action but elected not to do so. In that situation, why should the plaintiff be entitled to issue a second proceeding?

327 A major concern is what impact the findings in the first proceeding might have on the second proceeding. It would save costs and resources if a second court was bound by some of the first court's determinations. On the other hand, it would be unfair to the defendant in the second proceeding to be bound by decisions made in its absence by the first court.

Legislation

328 The NSW Act provides as follows:

37 Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

¹⁴⁸ *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, [34] (Gleeson CJ, Gummow, Hayne And Heydon JJ).

38 Joining non-party concurrent wrongdoer in the action

- (1) ...
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

329 With slight variations, all jurisdictions have the same provisions, save for South Australia.¹⁴⁹

330 However, the Qld Act includes the following additional provision:

32H Concurrent wrongdoer may seek contribution from person not a party to the original proceeding

Nothing in this part prevents a concurrent wrongdoer from seeking, in another proceeding, contribution from someone else in relation to the apportionable claim.

331 Under s 32(1) of the Qld Act, the plaintiff must make claims '*against all persons the claimant has reasonable grounds to believe may be liable for the loss or damage*'.

332 The SA Act states that judgment for damages against one person is not a bar to an action being brought against another person. However, the Act:

332.1 discourages subsequent actions by making a general rule that a plaintiff is only entitled to costs in the first action, and

332.2 provides that the first court's judgment determines in subsequent actions: the plaintiff's overall damages, the PL of the '*wrongdoers*' in that first action, and any contributory negligence by the plaintiff.¹⁵⁰

Discussion

How successive proceedings may operate

333 The plaintiff has an inherent interest in bringing all parties to an initial proceeding to avoid a discrepancy between apportionment against a particular non-party concurrent wrongdoer, and what ultimately the plaintiff might recover from that party in a subsequent proceeding when all the evidence is produced and that concurrent wrongdoer is properly represented.

334 As pointed out by Justice Byrne, there is uncertainty surrounding how these provisions work in practice.¹⁵¹ Under the National Model, if a Court awarded

¹⁴⁹ ACT Act ss 107I & 107J(2); NT Act ss 11(2) & 16; Qld Act ss 32B & 32C(2); Tas Act s 43E & 43F(2); Vic Act ss 24AK & 24AL(2); WA Act ss 5AM & 5AN(2); ASIC Act ss 12GU & 12GV(2); Corporations Act ss 1041Q & 1041R(2); and TPA ss 87CG & 87CH(2).

¹⁵⁰ SA Act ss 11 & 12.

judgment for \$100,000 and apportioned 25% liability against three defendants (W, X and Y) and one non-party concurrent wrongdoer (Z), and the plaintiff recovered \$30,000 of that judgment, how would the court deal with a successive proceeding against Z? It seems to me that the following may happen:

- 334.1 The second court is not bound to find that the plaintiff suffered loss of \$100,000. However, let us say that, having made its own determination on the evidence, the second court agreed with that assessment.
- 334.2 The second court will apportion liability against Z (now the sole defendant) and against non-party concurrent wrongdoers, W, X and Y (assuming that the court agrees that they are concurrent wrongdoers in relation to the apportionable claim made against Z in the second proceeding). Let us say that the court apportions 40% against Z and 20% against each of W, X and Y. Z is therefore liable for up to \$40,000. W, X and Y are each liable in the first proceeding for \$25,000.
- 334.3 The court is not permitted to order Z to pay more than the plaintiff's loss, taking into account the \$30,000 '*previously recovered*'. Therefore, Z cannot be liable to pay more than \$70,000. This is not a problem because Z's liability is \$40,000.
- 334.4 However, the plaintiff is still entitled to \$70,000 from W, X and Y. The plaintiff is now also entitled to \$40,000 from Z. By what mechanism does one ensure that the plaintiff's recovery is limited to the loss, given that the plaintiff's rights to recover that loss arise in two proceedings for an aggregate which exceeds the loss?
- 335 The situation would be even more complicated if the second court determined that, on the evidence, the plaintiff suffered loss of, say, \$120,000, rather than \$100,000.
- 336 It appears that the less active the plaintiff has been in recovering the first judgment amount from W, X and Y, the greater the amount that the plaintiff can (alternatively) recover from Z.
- 337 A plaintiff may therefore be tempted to issue a proceeding against minor defendants in the first instance, using that proceeding as a fishing expedition, before pursuing the major wrongdoer in a subsequent action.

'Previously concluded' proceedings

- 338 Section 38(2) of the NSW Act states that the court may not give leave to join '*any person who was a party to any previously concluded proceedings in respect of the apportionable claim*'. Presumably, this provision should not only be referring to joinder applications either by a plaintiff or by a defendant, but also to a situation where the plaintiff names that person as a party in the initiating process. Under the National Model, even if that party is not joined, the Court may still take its

¹⁵¹ Justice David Byrne above n 13, [33]

'*comparative responsibility*' into account on an apportionment, provided the person is a concurrent wrongdoer. That is not the case under the Vic Model.

- 339 In *Vollenbroich*, Senior Member Walker took the view that once judgment had been given against a party (even if the proceeding was ongoing against other defendants), the proceeding had been '*concluded*' as contemplated by s 24AL(2) of the Vic Act [s 38(2) of the NSW Act]. Therefore, by operation of that provision, the defendant could not again be 'joined', including a joinder application by other defendants seeking contribution against it in the same proceeding.
- 340 There are occasions where these provisions will be required; for example, where a plaintiff pursues a civil action against a party in an exclusive jurisdiction, and then needs to pursue others who are also liable for the loss. This could be in an arbitration (on the basis that the applicant cannot join concurrent wrongdoers who were not parties to the arbitration agreement) or a specialist Tribunal where joinder of others may not be possible. In these cases, the PL laws need to provide a workable mechanism for dealing with subsequent actions.

Vic Model

- 341 Under the Vic Model, successive proceedings are less likely to happen given the obligation by a defendant to join other concurrent wrongdoers to the initial proceeding in order to be entitled to an apportionment.

Qld Act

- 342 Under s 32(1) of the Qld Act, a claimant is required to make claims against all persons whom the plaintiff reasonably believes may be liable for the loss. While this may be a useful way of preventing successive actions by a plaintiff, it may have the effect of unnecessarily inflating the magnitude of the litigation. There are many reasons why a plaintiff may choose not to sue a particular party, including personal reasons, impecuniosity, commercial relationships etc. While I assume that the perceived benefit was that this would discourage a multiplicity of claims, there are other ways to discourage successive claims without encouraging inflated litigation.

Options

- 343 As discussed earlier in this section, the PL laws, and possibly the Court Rules and procedures, should encourage a plaintiff to pursue all claims in the one proceeding. Where a plaintiff reasonably had the opportunity to pursue a claim in one proceeding, it should be prohibited from pursuing a subsequent claim. Should a plaintiff require leave of the court, with affidavit evidence, before being entitled to pursue a subsequent action?
- 344 Under the National Model, once the defendants have given the plaintiff notice of non-party concurrent wrongdoers (and the notice should provide sufficient information for this purpose), the plaintiff should be obliged, within a reasonable time, either to join them or forgo its rights to do so in a subsequent action.

- 345 As outlined above,¹⁵² it appears that the SA Act may have some answers to these issues, by requiring the second court to be bound by some of the first court's determinations and imposing a general rule that the plaintiff does not receive its costs in a second proceeding. However, that approach raises questions of fairness. Why should the defendant in the second action be bound by determinations in a previous action?

RECOMMENDATIONS	
17	As a general recommendation, plaintiffs be discouraged from pursuing concurrent wrongdoers in successive proceedings. <ul style="list-style-type: none"> • Plaintiffs could be prohibited from pursuing a subsequent action without leave of the Court.
18	Once a concurrent wrongdoer has been properly identified, the plaintiff be given a specified period within which to pursue a claim against it in the current proceeding, or lose the right to do so.
19	Non-party concurrent wrongdoers be permitted to serve on the plaintiff a notice requiring it to elect whether or not to pursue a claim against that party in the current proceeding, with the effect that the plaintiff would then be barred from making that claim in a subsequent proceeding. ¹⁵³
20	Consideration be given to implementing more widely ss 11 & 12 of the SA Act, which binds the court in a subsequent proceeding to certain earlier findings, and as a general rule does not permit a plaintiff's costs in a subsequent action.
21	Clarify the meaning of ' <i>concluded proceedings</i> ' under s 38(2) of the NSW Act (and equivalent).

¹⁵² paragraph 332

¹⁵³ In notifying a non-party concurrent wrongdoer, the defendant could be required to include a notice that the concurrent wrongdoer is entitled to put the plaintiff to an election whether or not to make a claim.

(g) Transitional provisions

Introduction

- 346 The main differences in the PL transitional provisions are between:
- 346.1 PL under the Vic Act, which applies to proceedings commenced on or after 1 January 2004,
 - 346.2 PL under the NSW Act, which applies to proceedings commenced on or after 1 December 2004 provided that the causes of action accrued on or after 26 July 2004, provided; and
 - 346.3 PL legislation elsewhere, including Commonwealth PL laws, where PL provisions apply to causes of actions which accrued after the proclamation date.

Legislation

347 The following table summarises the commencement for the various PL Acts:

	Commencement	Date	Source
ACT	cause of action happening on or after	8/3/05	<i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004, s 4</i>
NSW¹⁵⁴	(a) cause of action happening on or after and (b) proceeding commenced on or after	(a) 26/7/04 (b) 1/12/04	<i>Civil Liability Amendment Act 2003, s 3 (Schedule 2)</i>
NT	cause of action happening on or after	1/6/05	<i>Proportionate Liability Act 2005</i>
Qld	cause of action happening on or after	1/3/05	<i>Professional Standards Act 2004, s 76</i>
SA	cause of action happening on or after	1/10/05	<i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001, Pt 3 (ss 8-11)</i>
Tas	cause of action happening on or after	1/6/05	<i>Civil Liability Amendment (Proportionate Liability) Act 2005, s 5</i>
Vic	proceeding commenced in	1/1/04	Wrongs and Limitations of Actions Acts

¹⁵⁴ According to Hammerschlag J in *Bestcare* [2007] NSWSC 354.

	a court on or after		(Insurance Reform) Act 2003, s 3
WA	cause of action happening on or after	1/12/04	<i>Civil Liability Amendment Act 200</i> , Pt 3 (ss 6-10)
C'th Acts	cause of action happening on or after	26/7/04	<i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i> , s 3 (Sch 3(6))

Discussion

- 348 Under non-Victorian PL legislation, parties may seek to avoid the effect of the legislation by suing solely in contract in circumstances where the right of action accrued (with the breach of contract) prior to the commencement date, even though rights of action in negligence may have accrued (when the damage first happened) after that date.
- 349 The Vic Act applies to proceedings commenced after 1 January 2004. Accordingly, to the extent to which parties entered into contracts or engaged in other conduct prior to that date, at a time when PL did not apply, the legislation is retrospective in relation to such transactions and conduct.
- 350 There is tension between the Commonwealth and Vic Act transitional provisions. Where a proceeding is commenced after 1 January 2004 under Victorian law and under ss 52 and 82 of the TPA, and the cause of action under the TPA accrued before 26 July 2004, then PL will only apply to the claims under Victorian law.
- 351 Justice Middleton considered transitional issues as they affect provisions under the Corporations Act in *Dartberg*.¹⁵⁵
- 352 With the passage of time, the transitional provisions will diminish as an issue. I do not propose to make any recommendations.

RECOMMENDATIONS

None made.

¹⁵⁵ *Dartberg* [2007] FCA 1216, [18]

(h) Interaction between TPA, ASIC Act and Corporations Act and state legislation

Discussion

- 353 I have addressed a number of matters relevant to this issue under Part (a) Definition of 'Apportionable Claim'.
- 354 Justice Middleton's decision regarding the interaction between state and federal law, and the effect of s 79 of the *Judiciary Act* 1903 (Cth) is summarised above.¹⁵⁶
- 355 The primary concern appears to be that there is no apparent cross-over between PL claims under state or territory law and under Commonwealth law. Therefore, when claims are made under both federal and state or territory law in the one proceeding, there is uncertainty how the courts will deal with the apportionment (or apportionments) of liability.

RECOMMENDATIONS

- 22 The courts be given the power to treat claims for contravention of s 52 of the TPA (and equivalent provisions under the ASIC and Corporations Act), and claims which are apportionable under state or territory proportionate liability legislation, as a single apportionable claim.

For recommendations regarding how apportionable claims might include claims under other provisions of these statutes, see Part (a) Definition of 'apportionable claim'

¹⁵⁶ paragraph 141.

(i) Preserving contractually assumed risk allocations including contracting out

Introduction

- 356 Serious concern has been expressed, particularly from the business sector and some sectors of government that PL may have a detrimental impact upon the contractual allocations of risk, and this is causing significant uncertainty particularly amongst parties involved in major projects and service agreements. This issue has been addressed to some extent earlier in this review in my discussion regarding the background and purpose of PL.
- 357 It is unarguable that arms' length contractual arrangements should be preserved. As previously mentioned: *'It is a basic principle of the law that people should honour their contracts; that idea "forms part of our idea of what is just"'*.¹⁵⁷
- 358 The debate surrounds how that might be achieved while preserving PL in such a form that it can still meet its purpose.
- 359 In the Victorian Discussion Paper,¹⁵⁸ the Victorian Department of Justice expressed concern that PL under the Vic Act may be used by parties, who have given 'no fault' guarantees or indemnities, in order to limit their liability and avoid those obligations. Why should PL override such private treaties?¹⁵⁹
- 360 It has been suggested that all jurisdictions should include a right for parties to contract out of PL. In this way, PL can be avoided in respect of contractual arrangements.
- 361 The types of agreements which are the subject of this concern mainly involve large transactions where major corporates or government departments or authorities require guarantees, indemnities and security to protect themselves from loss. These are not usually contracts for the delivery of professional services, although they may include the procuring of such services from others.

¹⁵⁷ Justice Robert McDougall above, n 60, 403; and *Baltic* (1991) 22 NSWLR 1, 9.

¹⁵⁸ above, paragraph 71

¹⁵⁹ The Victorian Supreme Court recently provided some guidance on this issue in a multi-party dispute, involving a sophisticated construction project and a line of contracts running from the proprietor down to the geotechnical engineer (*Aquatec-Maxcon* [2006] VSC 117). Justice Byrne found that the structure and form of the project's contractual arrangements meant that each party did not owe a duty of care other than to the party with whom it contracted. Proportionate liability under the *Building Act 1993* (Vic) s 131 therefore did not apply because each party in turn was only liable (in contract) to the party immediately above it in the contractual chain. While this case may have some relevance under PL legislation in commercial building disputes, it may not be relevant either in property damage claims (where all defendants would owe the plaintiff a duty of care, provided that the loss was reasonably foreseeable) or domestic building claims by subsequent purchasers (where, on the basis of *Bryan v Maloney* [1995] HCA 17, all defendants may owe the subsequent purchaser a tortious duty of care).

362 The primary objection to this proposal is that the right to contract out would also apply to professional services agreements. The purpose of PL legislation is to prevent professionals from being treated as 'deep pockets'. By requiring a professional to agree to contract out of PL, corporate and government clients would effectively be regaining an entitlement to treat professionals as 'deep pockets'. The difference would be that, because the professional *assumed* joint and several liability by contracting out of PL, that additional liability would not be covered by PI insurance. The professional would effectively face personal uninsured liability to the extent that other defendants are impecunious.

363 For this reason professional groups have opposed contracting out as a solution, because it defeats the intention of the PL legislation of ensuring that professionals have access to available and affordable PI insurance to cover the claims against them. In its submission to the NSW Attorney-General dated February 2007, the Association of Consulting Engineers Australia (**ACEA**) stated:

'...public and private sector clients are applying pressure on consulting engineering firms to contract out of PL legislation. In addition, through the use of onerous contract terms, clients are seeking to make the consulting engineering firm liable for risks beyond those that they would normally have within their responsibility, control or management.

'This practice not only threatens the sustainability of our industry but also potentially exposes the community to uncertain and unmanageable risk and liability. Ultimately, the practice defeats the purpose of the PL legislation.

...

'Consulting engineering firms, regardless of size, have in common that they are service providers and so typically have limited assets.'¹⁶⁰

364 The Royal Australian Institute of Architects (**RAIA**) has taken a firm position on this issue:

'In the industry in which the RAIA is concerned, amendment to allow contracting out would largely result in allocation of risk not through a real "freedom of contract" but according to the relative bargaining power between parties. In our view and experience, the law of proportionate liability would then not often apply...'¹⁶¹

365 In an earlier submission, made to the Negligence Review Panel chaired by Justice Ipp on 2 September 2002, the Institute of Chartered Accountants in Australia (**ICAA**) stated:

'Claims against members of the accountancy profession in Australia have run into millions and even billions of dollars...In the event of corporate failure, almost inevitably attention focuses on the role of the auditor, not least because the audit firm is perceived as a potential 'deep pocket' from which to recover losses.

¹⁶⁰ ACEA, 'Proportionate Liability Legislation: Submission on national consistency', submission to Bob Debus, NSW Attorney-General, February 2007.

¹⁶¹ RAIA, 'Department of Justice proposal to amend Part IVAA of the Wrongs Act 1958', letter to Department of Justice, Victoria, 15 February 2006 (**RAIA Submission**).

...

'Other professions share many of our concerns with regard to the problem of unlimited professional liability and share a similar interest in progressing reform objectives. The accountancy profession has, however, been to the fore in calls for reform as members of the accountancy profession have been exposed to liability claims of a magnitude not experienced by other professions.¹⁶²

- 366 Contracting out is presently permitted in NSW, Tasmania and Western Australia. It is imperative that there be national consistency to prevent forum shopping.
- 367 A related issue is the concern that PL legislation in some jurisdictions may presently prevent parties from relying for contractual indemnities, guarantees and similar rights on the basis that the legislation prohibits contribution or indemnity claims by one concurrent wrongdoer from another.

Legislation

- 368 Queensland prohibits contracting out.¹⁶³
- 369 The ACT, Northern Territory, South Australia, Victoria and the Commonwealth do not expressly allow or prohibit contracting out.
- 370 It seems likely that, in the absence of any express right, parties who are subject to the ACT, NT, SA and Vic Acts probably are not permitted to contract out, although this issue remains uncertain.
- 371 Western Australia, NSW and Tasmania expressly permit contracting out.¹⁶⁴ Unless other jurisdictions follow suit, this may result in forum shopping. Parties in other states may designate that the law of NSW, WA or Tasmania applies to their contract and then exclude PL under that agreement.
- 372 The relevant section of the NSW Act provides as follows:

3A	Provisions relating to operation of Act
(1)	...
(2)	This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.
(3)	Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

¹⁶² ICAA, submission to the Negligence Review Panel chaired by Justice Ipp, 2 September 2002.

¹⁶³ Qld Act s 7(3).

¹⁶⁴ NSW Act s 3A(2); Tas Act s 3A(3) and WA Act s 4A.

373 In respect of claims for contribution or indemnity between concurrent wrongdoers, the NSW Act provides as follows:

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
- (b) cannot be required to indemnify any such wrongdoer.

374 The ACT, Qld, Vic, ASIC, Corporations Acts and the TPA have the same provision.¹⁶⁵

375 The NT, Tas and WA Acts follow the same form, but include an additional sub-section as follows: '(2) *Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from, or to indemnify, another concurrent wrongdoer in relation to an apportionable claim*'.¹⁶⁶

376 Section 15 of the NT Act falls under Division 4 'After judgment given in proceedings'.

377 The SA Act stands apart. Under s 9, the Act provides that, where PL has been applied to a 'wrongdoer':

- 377.1 no order for contribution between wrongdoers may be made (unless they are members of the same 'group');
- 377.2 no contribution claim may be made by a wrongdoer whose liability is limited against a wrongdoer whose liability is not limited, and
- 377.3 a wrongdoer whose liability is not limited can only seek contribution from a wrongdoer whose liability is limited (up to that limit) and only after it has fully satisfied its judgment debt.

Discussion

378 The Victorian Discussion Paper summarised the issue regarding contractual allocation of risk as follows:

'8. In particular, it is not known how PL will affect risk allocation arrangements for major commercial transactions in Victoria; and whether PL can be used by contracting parties to avoid their contractually assumed liability. The key concerns that arise presently for businesses in the absence of judicial consideration are:

¹⁶⁵ ACT Act s 107H; Qld Act s 32A; Vic Act s 24AL; ASIC Act s 12GT; Corporations Act s 1041P; and TPA s 87CF.

¹⁶⁶ NT Act s 15(2); Tas Act s 43C(2); WA Act s 5AL(2).

- the potentially significant financial consequences that may flow from an adverse judicial ruling on the ability of parties to allocate risk pursuant to contract; and
- the prolonged uncertainty for contractual position for risk allocation both in existing and future commercial arrangements until the Victorian Supreme Court provides a definitive interpretation of Part IVAA.

'9. This position in turn has the potential to significantly increase the current risk management costs of a project particularly associated with insurance, performance bonds and contractual indemnities or guarantees from third parties.

...

'20. A fundamental characteristic of contract and the risk allocation philosophy which underpins it is that all project risk should be distributed in accordance with the terms of the contract between the parties. It also reflects the generally recognised position that the law of contract is a 'higher' law than of torts and that parties ought to be able to vary or exclude rights or liabilities unless otherwise prohibited by law or on public policy grounds.

'21. However, under section 24A(1) of the Act there is the potential for courts to construe the relevant provisions in such a way so as to override the contractual allocation of risk between parties to a contract and instead simply determine 'responsibility' in the narrow sense of what actions or omissions were attributable to each party that contributed in fact to the plaintiff's loss.'

- 379 The Paper raised two possible solutions for consideration:
- 379.1 amend the Vic Act to allow parties to contract out of PL similar to that available under the NSW and WA Acts;
 - 379.2 amend the Vic Act to require that, when apportioning liability, the courts must have regard to contractually assumed responsibilities.
- 380 A third option has been put forward, which is seen as middle ground between contracting out and leaving contractual liability subject to an apportionment by the Court. This proposal involves limiting the application of PL legislation only to claims involving professionals and the delivery of professional services, on the basis that this is consistent with the purpose of the legislation.
- 381 There are a number of other ways in which a contract may be utilized to affect the application of PL, including the following:
- 381.1 The agreement nominates the law of a state where the PL legislation expressly permits contracting out, and the parties agree to contract out. This is forum shopping.
 - 381.2 The parties agree to a pre-determined allocation of liability between them in respect of an apportionable claim being made against one of them. It remains unclear to what extent the courts will observe that agreement when apportioning liability.
 - 381.3 One party agrees to indemnify the other in relation to particular liabilities. It is unclear whether a contractual indemnity is prohibited under the current PL Acts (except for South Australia).

- 381.4 If PL does not apply to arbitration, then parties could avoid PL by agreeing to arbitrate disputes (as discussed below, it remains unclear whether arbitration is subject to PL laws¹⁶⁷).

Contracting out

- 382 The proposal from business and some parts of the public sector is to introduce contracting out in all states and territories. Clearly, this would ensure that contractual arrangements are not subject to PL, provided that the contracting parties have previously agreed to contract out.
- 383 Contracting out is acceptable between two parties of equal bargaining power. However, it is unfair between parties where one party is in a dominant position.
- 384 It is reasonable to say that most liability exposure for professionals (other than for government officers, such as municipal engineers or town planners) arises from claims alleging breach of their professional services agreements with their clients. If that is correct, then the question is whether, and to what extent, contracting out might have an impact on PL as it applies to professional services agreements.
- 385 The following is an example of the sort of one-sided exclusion clause which is being imposed upon professionals under the law of those states which permit contracting out:
- 'The Architect agrees that Part 4 of the *Civil Liability Act* 2002 (NSW) is excluded from operation with respect to any dispute, claim, action or any matter whatsoever brought by the Proprietor against the Architect, arising out of or in connection with the Contract.'
- 386 The relative bargaining positions between professionals and their corporate or government clients (who will require the professional to contract out) will generally favour the client. If a government department or a major national corporation says that their lawyers, accountants, architects or engineers must contract out of PL, then they must agree to do so or not be engaged. Professionals who agree to contract out will most likely not be covered by their PI insurance for the joint and several liability occasioned by the contracting out. If the corporate and government sectors take advantage of such a reform of the PL legislation, by requiring that their consultants contract out of PL, this may effectively eliminate PL from applying to professionals in those sectors. Given the potential for large claims, and reliance upon the professional's 'deep pocket', these are probably the sectors where professional groups see themselves as most vulnerable.
- 387 The general consensus seems to be that, since 1994, PL for building actions under s 131 of the *Building Act* 1993 (Vic) has worked reasonably smoothly without parties being entitled to contract out. As mentioned above,¹⁶⁸ the approach taken by Justice

¹⁶⁷ see Part (k) Arbitration and EDR schemes

¹⁶⁸ above, n 159

Byrne J in *Aquatec-Maxcon*¹⁶⁹ was to uphold the integrity of the contractual chain so that the issue of PL fell away. It should be noted that the new PL regime, with its reference to claims '*arising from a failure to take reasonable care*' is more likely to have an impact on contractual structures than PL under the building legislation. However the point remains that we face this tension between:

- 387.1 major corporate and government interests who see the new PL regime as seriously damaging the commercial need for risk allocation under commercial contracts to be certain and therefore upheld by the Courts, and
- 387.2 the equally forceful arguments put by professional groups that, by permitting contracting out, the legislature would effectively defeat the purpose of PL itself.

388 In those states where PL under building legislation has been repealed, professional groups within the building industry have argued that, by introducing the right to contract out in current PL legislation, those groups are effectively being denied the PL protection which they received under the previous PL regime.

389 Queensland and the ACT have carved out consumer claims from PL. If the right to contract out was introduced nationally, and the corporate and public sectors required professional service providers to contract out (which would be expected), then the scope and effectiveness of PL may become very limited, particularly in those states.

390 This is not necessarily a concern for PI insurers because their policies typically exclude the risk assumed when a party agrees to contract out of PL. That risk is the difference between joint and several liability and PL (which could be the difference between 10% and 100% liability). The interest group directly at risk are professionals and, indirectly, the purchasers of professional services.

391 The RAIA considers that the introduction nationally of the right to contract out would result in:

- higher insurance costs;
- decreased availability of insurance for higher risk services;
- professional risks being uninsured, placing clients and professionals at risk;
- professional services being withdrawn;
- people leaving the professions for safer options;
- higher risk services not being available to the community.¹⁷⁰

¹⁶⁹ *Aquatec-Maxcon* [2006] VSC 117

¹⁷⁰ RAIA Submission above, n 161, 3.

- 392 It appears that the so-called 'insurance crisis', which happened earlier this decade, has been curtailed. I have not carried out research on whether, and to what extent, the introduction of PL has attracted insurers back to the Australian PI market, and had the desired effect upon the availability and affordability of PI insurance. Therefore, it is difficult to ascertain to what extent a right to contract out might impact upon this market. It is, I suspect, too early to assess the impact of rights to contract out in NSW, Tasmania and Western Australia on PI insurance. It will be difficult to assess this because, as mentioned earlier in this review, where professionals agree to contract out of PL, they will most likely not be covered by their PI insurance for the additional (joint and several) liabilities which they will therefore have assumed.
- 393 If government is seriously considering the introduction of rights to contract out nationally, then an impact analysis should be carried out.
- 394 Finally, PL for misleading and deceptive conduct both under local and federal legislation is unaffected by the issue of contracting out. Given that most professionals provide advice, they are particularly vulnerable to this type of claim.

Arbitration

- 395 As discussed under Part (k) Arbitration and EDR below, if the courts determine that arbitrations are not subject to PL, then parties can enter arbitration agreements under the relevant state or territory law knowing that they have effectively ousted PL.

Taking contractual arrangements into account when apportioning liability

- 396 In his article, Justice McDougall questioned whether a party's contractual responsibility should be taken into account when the Court apportions liability.¹⁷¹
- 397 In my view, this may not satisfactorily answer the understandable position from proprietors that they should be entitled to expect that the contracting party is held fully responsible for their contractual promise.
- 398 For example, if there are apportionable claims against a supplier and a consultant, and the supplier has agreed to indemnify the plaintiff for all loss, the court will still need to apportion some percentage against the consultant if the court finds that the consultant was partly responsible. Therefore, the balance of the apportionment against the supplier must be less than 100%.
- 399 It seems to me that the only way to resolve this issue is for such contracting parties to have no entitlement at all to limit their liability under the PL legislation. In that way, the Court can consider the party's liability under its contract in the usual way. Liability to honour such contractual obligations needs to be carved out of PL legislation.
- 400 Therefore, I do not see that the option of requiring the court to take into account such contractual arrangements will resolve the issue, because the court must still go through the process of apportionment.

¹⁷¹ Justice Robert McDougall above n 60, 403.

Limiting PL to professionals delivering professional services

- 401 Professional services agreements are, by nature, promises to take care, and so should not extend a professional's liability beyond tortious liability. To the extent that a professional might artificially extend its liability by offering a 'no fault' warranty to a client, that would usually be excluded from cover under typical PI policies and therefore need not be subject to PL. The professional like anyone else should, as Justice McDougall says, stand by their contractual promise. Professional bodies, and possibly their PI insurers, may point out to professionals the risks of agreeing to give such 'no fault' warranties and indemnities as part of their risk management programs.
- 402 It is true that some larger professional practices, such as some national engineering firms, may agree to warrant their services. One would expect that this is a commercial decision, where they see a commercial advantage from doing so, and are prepared to bear the uninsured risk.

Limiting PL to a breach of a duty of care

- 403 An alternative may be to reform PL laws so that contracting out is not permitted in respect of contractual liabilities which are concurrent with liabilities in tort.
- 404 In that case, if a professional was held liable in negligence and for breach of contract (which is common) then PL would apply irrespective of any agreement by the professional to contract out. Therefore, the professional's liability would typically be covered by PI insurance.
- 405 The problem with this is that it does not resolve the dilemma that PL may erode contractual warranties provided by others. For example, if a contractor was held liable for breach of contract, then PL will also apply to the extent that the contractor was also held liable in negligence. The High Court in *Bryan v Maloney*¹⁷² makes it clear that a contractor can be held liable in negligence in a claim for pure economic loss. Therefore, in circumstances where a contractor had provided a contractual warranty, and was held liable concurrently in negligence and for breach of contract, PL would (under this proposal) apply and the court would be required to apportion liability.
- 406 It is the characteristic of being a professional, that is seminal to this issue. Therefore, any reform which ensures contractual warranties are excluded from PL, but affordable and available PI insurance is maintained for professionals, must distinguish between contracts for professional services and other contracts.

Contribution or indemnity between concurrent wrongdoers

- 407 Most PL Acts prevent a concurrent wrongdoer from seeking contribution or indemnity from another concurrent wrongdoer, obviously because each concurrent wrongdoer has attributed to it the portion of liability for which it is responsible. However, should a

¹⁷² *Bryan v Maloney* [1995] HCA 17

- concurrent wrongdoer be entitled to maintain contractual rights of recovery from a concurrent wrongdoer?
- 408 Section 36 of the NSW Act (and its interstate equivalents) provides that '*A defendant against whom judgment is given*' in relation to an apportionable claim, cannot be the subject of a contribution or indemnity claim from another concurrent wrongdoer. The provision does not clarify whether this includes contractual rights of contribution or indemnity. This is the source of uncertainty.
- 409 Graeme Uren QC and Daniel Aghion stated:¹⁷³
- 'On its face, that is what the section [s 24AJ Vic Act] seems to do, but it seems unlikely that Parliament would have intended to so drastically affect a party's commercial bargain. It also seems to be counter to the policy behind the legislation of responding to the perceived 'insurance crisis'. One of the ways in which commercial parties arrange their affairs is to require parties contracting with them to provide a full indemnity and to carry insurance for any loss. Why would the legislation cut across that arrangement, thereby increasing the risk of creating an uninsured defendant?'
- 410 There is an argument to say that these provisions may not, in fact, prohibit contractual claims for contribution or indemnity between concurrent wrongdoers. Professor McDonald suggests that, in all jurisdictions (including claims under the ASIC and Corporations Acts and the TPA), the intention of parliament was most likely to have been that contractual rights should not be interfered with by PL legislation.¹⁷⁴ In the absence of a clear statement to the contrary, it is reasonable to assume that these separate contractual rights are preserved. Moreover, the PL Acts appear to be referring to a *court* requiring another concurrent wrongdoer to contribute or indemnify, rather than a *contract* imposing that obligation.
- 411 Secondly, these provisions could be construed as only referring to claims for contribution or indemnity *made after* (as a consequence of) the Court having delivered a judgment, as distinct from such contractually based claims being made within the litigation itself. This is plausible given that the provision refers to a '*defendant against whom judgment is given*' not being permitted to make such claims against another concurrent wrongdoer. Accordingly, the intention of parliament may have been that the provision does not apply to contractual rights which arise prior to judgment.
- 412 Under the NT Act, this intention is clearer, as the relevant s 15, is within '*Division 4 - After judgment given in proceedings*'.
- 413 As mentioned above,¹⁷⁵ the NT, Tas and WA Acts include an additional subsection (2) which says: '*Subsection (1) does not affect an agreement by a defendant to*

¹⁷³ Graeme Uren QC and Daniel Aghion 'Proportionate Liability: An Analysis of the Victorian and Commonwealth Legislative Scheme' 2005, *Commercial Bar Association*, 20.

¹⁷⁴ Barbara McDonald above n 47, 44

¹⁷⁵ at paragraph 375.

contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.¹⁷⁶ This additional provision appears to clarify that contractual rights are preserved.

- 414 In NSW, Tasmania and Western Australia, the provisions which allow contracting out also would ameliorate this problem although, as discussed above,¹⁷⁷ these provisions create serious difficulties for professionals. The problem is already cured by subsections 43C(2) of the Tas Act and 5AL(2) of the WA Act.
- 415 One way to tighten this issue is to incorporate into the other PL Acts subsection (2) of the relevant provision, as found in the NT, Tas and WA Acts.

Options

- 416 To summarise, in order that contractual allocation of risk may be preserved, the following reform options may be considered:
- 416.1 Define 'concurrent wrongdoer' so that it also requires a concurrent wrongdoer to be legally liable to the plaintiff. For example, this will mean that, where a proprietor sues a head contractor, the court cannot apportion any liability against a subcontractor (assuming the subcontractor owes no duty of care to proprietor). Therefore, the contractual arrangements between the head contractor and the subcontractor remain unaffected by the apportionment between the contractor and other defendants.
- 416.2 Confirm that the statutory prohibition against claims for contribution or indemnity as between concurrent wrongdoers does not apply to contractual rights of contribution or indemnity.
- 416.3 Limit PL to professional services. This contains the problem by excluding commercial agreements, other than consultancy agreements which usually do not contain 'no fault' indemnities.
- 416.4 Specify in PL legislation that its purpose is to maintain affordable PI insurance for professional service providers, by eliminating their joint and several liability for damages claims involving property damage or economic loss.

RECOMMENDATIONS

- 23 The right to contract out of proportionate liability not be available, and the right be removed from NSW, Tasmanian and Western Australian law.

¹⁷⁶ NT Act s 15; Tas Act s 43C; WA Act s 5AL.

¹⁷⁷ from paragraph 382.

24	Alternatively to recommendation 23, a right to contract out may be introduced in all states and territories, on the basis that it is not permitted in relation to the liability of a professional or in respect of the provision of, or failure to provide, professional services.
25	<p>Contractual rights to claim contribution or indemnity by one concurrent wrongdoer against another be preserved.</p> <ul style="list-style-type: none"><li data-bbox="443 613 1343 831">• One option is to insert in s 36 of the NSW Act (and equivalent), the following subsection from the NT, Tas and WA Acts: 'Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim'.
Also see recommendations under Part (a) Definition of ' <i>apportionable claim</i> ' and Part (b) Definition of ' <i>concurrent wrongdoer</i> '.	

(j) Settling claims and offers of compromise

Introduction

- 417 Given that most civil cases settle before trial, and that settlement of disputes should be encouraged, it is important to consider the effect of PL upon the dynamics of negotiating and settling non-personal injury damages claims. Under a PL regime, the plaintiff rather than the defendants bears the risk of an impecunious concurrent wrongdoer, and defendants do not have the right to claim contribution or indemnity against each other (in the absence of agreement). These factors change the dynamics of negotiating a settlement, and also the structuring of terms of settlement and consequential court orders.
- 418 Some commentators have been pessimistic about perceived difficulties in achieving settlements where PL applies. However, it is worth recognising that it has always been notoriously difficult to achieve a settlement in multi-party commercial disputes. Notwithstanding this, the vast majority of civil claims do settle.
- 419 The Courts and Tribunals continue to show adeptness in finding creative solutions to procedural difficulties, especially when practitioners are grappling with new legislative schemes. The decision of Senior Member Walker in *Vollenbroich*¹⁷⁸ is an example.
- 420 Legal advisers face the challenge of ensuring that the terms of settlement protect their clients from subsequent claims for contribution from remaining defendants.
- 421 A key plank of the PL regime is that a defendant '*against whom judgment is given*' is prohibited from claiming contribution from other concurrent wrongdoers. If, however, a plaintiff settles with a defendant, releases it from the claim, and discontinues the proceeding against it, the defendant becomes vulnerable to contribution claims from other concurrent wrongdoers. To avoid this, a defendant may need to have judgment given against it as a term of the settlement. This can be difficult in jurisdictions where the consent of all parties to the proceeding is required before judgment can be given as part of a settlement.

Legislation

- 422 Section 36 of the NSW Act (referred to above in Part (i) Preserving contractually assumed risks including contracting out), is also relevant when settling disputes involving apportionable claims.¹⁷⁹ Section 36 provides that '*A defendant against whom judgment is given*' cannot be the subject of claims by other concurrent wrongdoers for contribution or indemnity.
- 423 Section 38(2) of the NSW Act (referred to above in Part (f) Successive proceedings), says that the Court will not grant '*leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim*'. With

¹⁷⁸ *Vollenbroich* [2006] VCAT 1710.

¹⁷⁹ And equivalent provisions: ACT Act s 107H; NT Act s 15; Qld Act s 32A; Tas Act s 43C; Vic Act s 24AJ; WA Act s 5AL; ASIC Act s 12GT; Corporations Act s 1041P; and TPA s 87CF.

slight variations, all PL Acts save for South Australia have the same provision.¹⁸⁰ As mentioned in Part (f), presumably section 38(2) not only refers to joinder applications, but also where a plaintiff names that person in an originating process.

Discussion

424 Before embarking on an analysis of the difficulties in settling claims involving PL, it is important to note that:

424.1 The fact that the plaintiff bears the risk of impecunious defendants acts as an incentive for the plaintiff to compromise their claim at mediation, or in negotiations generally. In a mediation, a plaintiff cannot sit back and say that the defendants must pay the claim because they bear all the risk. The plaintiff cannot be confident that each defendant (concurrent wrongdoer) will, at the end of a lengthy trial, still be able to meet a judgment debt. (I am not commenting on whether I think this is a fair thing or not. However, if PL only applied to professional services, the impact of this on plaintiffs would be reduced.)

424.2 Because there can be no contribution claims between defendants, a single defendant can negotiate and settle with a plaintiff independently of others. This simplifies the process of negotiation. There are no 'offers to contribute'. However, the trick is to settle in a way that prevents subsequent contribution or indemnity claims.

425 Jan O'Neill has commented that:

'The shifting of risk from defendants to plaintiffs also has the potential to affect the dynamics of settlement negotiations. For example, from a plaintiff's perspective, the new regime would appear to create a disincentive to settle until the plaintiff has identified and traced all potential wrongdoers and has sufficient information to be totally confident that no further defendants should be joined to the action...

...

'Interestingly, the legislation's supplementary protection of defendants from being joined to any future action (s87CH) [of the TPA] is differently worded - it protects 'any person who was a party to any previously concluded proceedings in respect of the claim'. This would seem to include any defendant who exited those proceedings via a settlement, but query the position where the proceedings as a whole (as distinct from the claim against the particular defendant) are not actually 'concluded' but still continuing against other defendants.'¹⁸¹

426 These comments strike at the heart of the problem with settling apportionable claims. If a defendant settles an apportionable claim with a plaintiff, and the proceeding has

¹⁸⁰ ACT Act s 107J(2); NT Act s 11(2); Qld Act s 32C(2); Tas Act s 43F(2); Vic Act s 24AL(2); WA Act s 5AN(2); ASIC Act s 12GV(2); Corporations Act s 1041R(2); and TPA s 87CH(2).

¹⁸¹ Jan O'Neill, 'Proportionate liability under the TPA - some practical issues' (2004) 20(6) Trade Practices Law Bulletin 79, 81-82.

been '*concluded*', then section 38(2) will operate to prevent that party from being joined (or, I would assume, sued) in a subsequent proceeding.

427 However, what happens when a defendant wants to settle with the plaintiff, but the proceeding against other defendants (concurrent wrongdoers and others) is ongoing? Obviously, the defendant will only agree to settle on the basis that the settlement with the plaintiff is 'once and for all', and the defendant is not vulnerable to being brought back into the proceeding by other defendants claiming contribution.

428 From the plaintiff's perspective, it takes a risk by settling with a defendant, because the settlement amount may ultimately be less than the amount apportioned against that defendant on judgment. However, there are obvious practical and strategic reasons for settling:

428.1 the plaintiff receives a settlement sum earlier, which may help to pay legal costs for the ongoing claims;

428.2 the plaintiff may avoid a costs risk of failing in its claim against that defendant;

428.3 the settlement may be seen as an encouragement to other defendants to follow suit;

428.4 other commercial or personal reasons.

429 As discussed above in relation to *Vollenbroich*,¹⁸² the defendant (D1) faces a quandary:

429.1 If the plaintiff discontinued its claim against D1, then no '*judgment can be given*' against it, as contemplated by s 24AJ of the Vic Act (s 36 of the NSW Act). Therefore, the Act no longer prevents other defendants from pursuing contribution claims against it. D1 could arguably be brought back into the proceeding;

429.2 If D1 obtained a judgment for the settlement sum, it would no longer be a party to the proceeding, and therefore (under the Vic Model) the Court could not take its comparative responsibility into account when apportioning liability against the remaining defendants. This is unfair on the remaining defendants, because D1's apportioned liability will be allocated against them.

430 Senior Member Walker resolved this issue by refusing to enter judgment, but ordering that D1 remain a party to the proceeding purely so that the Tribunal could apportion liability against it and the other concurrent wrongdoers.

431 The Tribunal's solution responded to a purely Victorian issue. It is another example where a party must artificially remain a party to a proceeding, even though no claim

¹⁸² from paragraph 112.

for any relief is made against it, in order to satisfy the unique requirement under the Vic Model that apportionment is only made against parties to the proceeding (unless dead or wound up).¹⁸³ One consequence of this is that D1 may be reluctant to leave the proceedings unattended (which is what the Tribunal contemplated would happen in *Vollenbroich*) because of a concern that the remaining parties may seek costs orders against it.

- 432 As mentioned earlier in this section, another difficulty arises in those jurisdictions where consent is required from the other litigants before judgment can be entered.
- 433 Alternatively, at the time of settling with the plaintiff, D1 could approach the other defendants and seek their consent to D1 remaining in the proceeding as a 'neutral' defendant, purely so that the Court can take D1 into account when apportioning liability in respect of the remaining parties, and on the basis that they would not seek costs against D1. The alternative would be for the defendants to pursue a contribution claim against D1, but that would be contested.
- 434 There is some uncertainty surrounding the meaning of s 24AL(2) of the Vic Act (s 38(2) of the NSW Act). Arguably, if the plaintiff had discontinued its claim against D1, other defendants might not have been permitted to pursue contribution claims against it on the basis that the proceeding against D1 was '*concluded*' as contemplated by that section of the Vic Act.
- 435 If *Vollenbroich* had been subject to the National Model, would things have been different? If that had been the case:
- 435.1 If the plaintiff discontinued the claim against D1, then D1 would no longer be a party to the proceeding. However, the other defendants would be entitled to ask the court to have regard to D1's comparative responsibility, under s 35(3)(b) of the NSW Act. There would be no need for the other defendants to pursue claims for contribution or indemnity against D1. However, they would not be prevented from doing so because judgment could never thereafter be '*given*' against D1 (that is, unless the discontinuance constitute a '*conclusion*' of the proceeding against D1, in which case, s 38(2) of the NSW Act might prevent a contribution claims from being pursued.)
- 435.2 If judgment were entered for the settlement sum, D1 would no longer be a party to the proceeding. The other defendants could ask the court to take D1's comparative responsibility into account when apportioning liability. The court is not being asked to make any determination in respect of a claim against D1, so the judgment remains unaffected. The court is being asked to take D1 into account when apportioning liability against others. As judgment had been given, s 37 of the NSW Act would prevent other defendants from pursuing claims for contribution or indemnity.

¹⁸³ The other situation is where a defendant joins an additional party, alleging that it is a concurrent wrongdoer, but the plaintiff chooses not to pursue a claim against it.

- 436 A potential difficulty with the National Model is that not all concurrent wrongdoers need to be parties to the proceeding. Therefore, court ordered mediation may not involve all concurrent wrongdoers. However, one would expect that the plaintiff would pursue claims in the initial proceeding against those concurrent wrongdoers with assets or insurance. Therefore, it may be that this issue does not in practice create an impediment to settlement.
- 437 The conclusions which I draw from these observations are:
- 437.1 The requirement under the Vic Model that the court may only apportion against parties to the proceeding (save for those who are dead or wound up) is a barrier to settling cases. Where a defendant wants to settle with a plaintiff in a multi-party civil action, it may have to remain nominally as a party, but with no claims against it, even after settlement.
- 437.2 The meaning of '*any previously concluded proceedings*' under s 38(2) of the NSW Act is unclear. Does it only refer to situations where the overall proceeding has been concluded, or does it refer to the conclusion of an action against one defendant even though the proceeding itself is ongoing? If the latter is correct, is a proceeding against a defendant '*concluded*' on a discontinuance or only on judgment?
- 437.3 In this analysis, I have assumed that a plaintiff and D1 are entitled to reach agreement to settle a claim for whatever amount they choose. That amount should have no bearing on the court's assessment of D1's '*comparative responsibility*' when apportioning liability for the purposes of entering judgement against the remaining defendants.
- 438 Settlement between the plaintiff and one defendant could raise another difficulty. As discussed above under Part (b) Concurrent Wrongdoer, the prevailing view is that the definition of '*concurrent wrongdoer*' should be one of two or more persons whose acts or omissions caused the plaintiff's loss or damage *and* are legally liable to the plaintiff for that loss or damage. If a defendant settles with a plaintiff, it is no longer liable to that plaintiff. Therefore, unless the definition of '*concurrent wrongdoer*' is qualified, upon settling with the plaintiff a defendant would no longer be a concurrent wrongdoer (under the above definition) and therefore could not be taken into account when the Court apportioned liability between the remaining defendants.
- 439 As mentioned in Part (b) above, the answer appears to be that the definition should be qualified so that a plaintiff's conduct cannot result in a party no longer being a concurrent wrongdoer for the purposes of any apportionment.
- 440 It remains unclear how offers of compromise may work.¹⁸⁴ Presumably, one defendant can settle with the plaintiff by making an offer of compromise to the plaintiff. However, the offer of compromise should be made on the basis that if accepted it will result in an entry of judgment in order to prevent rights of contribution

¹⁸⁴ Justice David Byrne above n 13, [74].

subsequent to settlement. The local Court Rules may not permit such a judgment to be made. The alternative is to prepare Calderbank offers.

- 441 Another question is whether concurrent wrongdoers can reach a settlement. The plaintiff sues D1 and D2. The two defendants cannot claim contribution from each other.¹⁸⁵ D1 and D2 wish to reach a form of settlement agreement by which they can both be represented by the one Counsel and firm of solicitors. Can this be done under the PL regime?¹⁸⁶ It appears to be possible, but it would require each defendant to amend their respective defences to the plaintiff's claim by withdrawing allegations that the claim was apportionable and that they were concurrent wrongdoers. If this can be achieved, then one party should be able to make a valid Calderbank offer to that effect, on the basis that settlement between the defendants would reduce the costs and duration of a hearing.

RECOMMENDATIONS

No additional recommendations.

¹⁸⁵ Arguably, the two defendants are entitled to claim contribution or indemnity from each other during a proceeding, because they are not (yet) defendants '*against whom judgment is given*' (s 36 of the NSW Act and equivalent). However, there seems to be little point in doing so given that upon judgment, the entitlement to make such claims falls away.

¹⁸⁶ Leaving to one side the Court's concern that Counsel should not appear for 2 clients whose interests may conflict: *Nangus Pty Ltd V Charles Donovan Pty Ltd (In Liquidation)* [1989] VR 184.

(k) Arbitration and EDR schemes

442 In various articles, commentators have expressed different opinions on whether PL applies to arbitrations.¹⁸⁷ The most comprehensive discussion of this topic that I have seen is by Michael Whitten of the Victorian Bar, who expresses the following views:

- 442.1 there is no authority to date on the question whether PL applies to arbitration;
- 442.2 for those jurisdictions where the PL legislation defines '*Court*' as including '*tribunal*',¹⁸⁸ there is a reasonable argument to say that '*tribunal*' would include arbitrations;
- 442.3 by contrast, the Commonwealth PL legislation refers solely to '*court*' (which is defined as the Federal Court, while also conferring jurisdiction on state courts) and therefore this PL legislation may not apply to arbitrations;
- 442.4 the fact that the definition of '*apportionable claim*' refers to an '*action for damages*', is an indicator that PL legislation applies to arbitrations;
- 442.5 arbitrators are required under the s 22 of the uniform *Commercial Arbitration Act* 1984 to make determinations '*according to law*' unless the parties to the arbitration agreement otherwise agree in writing, which may be construed as meaning that arbitrators must comply with PL legislation.¹⁸⁹

443 Conceivably, therefore, while an arbitrator may be required to apportion liability for claims made under state or territory law, the arbitrator might not have the power to apportion liability for claims made in the arbitration under the relevant sections of the Commonwealth PL laws, particularly damages awarded for contravention of s 52 TPA.

444 There is controversy over whether an arbitrator has the power granted under s 24AL of the Vic Act to order that other concurrent wrongdoers be joined as parties to an arbitration.¹⁹⁰ If so, then the requirement under the Vic Model for concurrent wrongdoers to be joined to a proceeding will have been satisfied. However, merely because a concurrent wrongdoer has been joined in order for the arbitrator to apportion liability in respect of the incumbent respondent, does that necessarily entitle the arbitrator to make an award of liability against the concurrent wrongdoers who have been joined under that power? The parties joined to the proceeding for the purposes of an apportionment under the Vic Act may argue that they were not parties

¹⁸⁷ For example, Graeme Uren & Daniel Aghion above n 173, 7; Justice Robert McDougall above n 60, 395 - 396; and Andrew Stephenson, above, n 49, 4.

¹⁸⁸ NSW Act s 3; Vic Act s 24AE; NT Act s 3, and Tas Act s 3.

¹⁸⁹ Michael Whitten 'Arbitration, Apportionment and Part IVAA of the Wrongs Act 1958 (Vic)' (Victorian Bar, 2007)

¹⁹⁰ Michael Whitten above, n 188.

to the arbitration agreement and therefore the arbitrator's power does not extend to making an award of liability against them, unless the *Commercial Arbitration Act 1984* permits the arbitrator to do so.

- 445 Under the National Model, an arbitrator could apportion liability by taking into account concurrent wrongdoers who are not parties to the arbitration. After the arbitrator makes the award, the claimant could then pursue claims against other concurrent wrongdoers in the courts to recover the balance of its loss. The claimant could assess the costs and benefits of pursuing that additional action. This raises concern over multiplicity of proceedings and inconsistent findings. However, these types of claims against other parties are not uncommon following the resolution of an arbitration between contracting parties.
- 446 If the courts determine that arbitrations are not subject to PL, then parties will use arbitration agreements under the relevant state or territory law effectively to contract out of PL.
- 447 It appears that the procedure for arbitrating an apportionable claim is more streamlined under the National Model. Under the Vic Model, the parties face the dilemma of whether, how, and on what basis, an additional concurrent wrongdoer should be joined as a party to the arbitration.
- 448 Unless this issue is resolved, the courts (particularly for claims under Victorian law) are likely to receive applications by respondents to have arbitrations stayed in lieu of litigation, arguing that their rights to PL may otherwise be prejudiced.

External Dispute Resolution Schemes

- 449 Some disputes are determined through industry based dispute resolution mechanisms, such as the Financial Industry Complaints Service Ltd (**FICS**). Does PL apply to such bodies and, if not, should that be changed either by legislation or private agreement by participants in the relevant scheme?
- 450 In order for ASIC to issue an Australian Financial Services Licence, the applicant must be a member of an external dispute resolution scheme (**EDR**), which is approved by ASIC to assist in the resolution of disputes between providers of financial services and their customers. FICS is an approved scheme. The FICS Annual Review 2005 stated:
- 'FICS is an alternative to the courts and provides resolution of complaints against the criteria of the relevant law, good industry practice, relevant industry codes and what is fair in all the circumstances. The process is informal and inquisitorial rather than adversarial. It is a national service and is free to consumers.
- 'ASIC issues Australian Financial Services Licences (AFSL) to providers of financial services. It is a condition of an AFSL that the licence holder must be a member of an approved EDR scheme such as FICS, if it is dealing with retail clients.
- 'At the end of 2005 there were in excess of 2,500 providers of financial services which have joined FICS as their EDR scheme. These are referred to as 'Members' of FICS.

'The FICS process aims, in the first instance, to resolve complaints by mutual agreement between the parties. If this is not possible, the complaint can be referred to the Panel or the Adjudicator who have the ability to make a formal determination which is binding on the Member [but not on the consumer].'

- 451 It remains unclear whether a determination by a Panel or Adjudicator is an arbitration under the *Commercial Arbitration Act 1984*. In *National Mutual Life Association of Australasia Ltd (t/a AXA Australia) v Financial Industry Complaints Service Ltd & Ors*, the plaintiff argued that the contract by which it was a member of FICS was an arbitration agreement.¹⁹¹ Justice Bongiorno did not decide on the point.
- 452 A FICS Panel has referred to PL in at least 2 determinations:
- 452.1 In reasons for decision on 2 August 2006, the National Panel Chair, Michael Arnold, noted that the member had submitted that it was entitled to an apportionment under the NSW Act as permitted under Rule 5 of the FICS Rules. Rule 5 permits FICS to deal with a complaint '*on its merits, and do what, in its opinion, is fair in all the circumstances*', having regard to, among other things, '*any applicable legal rule*'.
- 452.2 In a determination made on 15 June 2006, the National Panel Chair said that the Panel was satisfied that there should be an apportionment of liability '*in accordance with law*'.
- 453 The legal status of these determinations is unclear. It appears that Rule 5 does not require the Panel to apply the law, but to have regard to the law. Accordingly, in the above matters, the Panel has *chosen* to apply PL. That does not clarify:
- 453.1 whether, in fact, FICS is *bound* by PL laws, and
- 453.2 the effect of such determinations on rights of other concurrent wrongdoers and the rights of the complainant to recover the balance of its loss.
- 454 If, in fact, PL does not apply to Panel determinations, then a Panel or Adjudicator may require a member to compensate a complainant for the full amount of the complainant's loss, even though other parties may also have caused and been legally liable for that loss.
- 455 It seems therefore, that the dispute resolution arrangements under FICS may deny a member an entitlement at law to PL.

RECOMMENDATIONS

26 Clarify whether PL applies to arbitration.

27 Clarify whether PL applies to industry based EDR schemes such as FICS.

If PL applies to arbitration or for EDR schemes, then it should apply under the National Model.

¹⁹¹ [2006] VSC 121, [28]

(I) Summary judgment applications

- 456 Justice Byrne has noted that, because of a Court's obligation to apportion liability before giving judgment against a concurrent wrongdoer, it is not possible for the Court to enter default judgment against a defendant to an apportionable claim.¹⁹²
- 457 PL legislation, in particular s 39 of the NSW Act (and interstate equivalents) could be amended to include a provision stating that nothing in the PL provisions prevents a Court from entering judgment in default for the full amount of the plaintiff's loss, provided that the Court still accounted for that defendant's '*comparative responsibility*' for the purposes of apportioning other defendants' liability.

RECOMMENDATIONS

- 28 The courts' power to enter judgment in default be retained on the basis that the recipient is not then entitled to an apportionment of liability.

¹⁹²Justice David Byrne above n 13, [74]

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