

**PROPORTIONATE LIABILITY: PROPOSALS TO ACHIEVE  
NATIONAL UNIFORMITY**

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### 1. Introduction and Executive Summary

- 1.1. Mr Tony Horan, of DLA Phillips Fox, Melbourne, prepared a Report in September 2007, entitled “Proportionate Liability: Towards National Consistency”. He provided invaluable background, setting out in detail the differences between the various versions of the proportionate liability legislation and analysing the range of comments that have been made about the legislation. He also made a number of recommendations aimed both at clarifying those aspects of the legislation which have caused concern among practitioners and the judiciary, and at reducing the differences between the various legislative statements. An index of Australian proportionate liability legislation is at Attachment A.
- 1.2. I was asked by the National Justice CEOs Group to review Mr Horan’s Report and, taking that Report as a starting point, put forward more detailed proposals that would provide a basis for making recommendations to the Standing Committee of Attorneys-General to achieve national uniformity of the proportionate liability legislation. The following is a summary of my proposals.

#### ***Proposal 1:***

The **guiding principle** which should inform all proposals for amendment to the proportionate liability legislation is that the purpose of the legislation is to be a replacement for joint and several liability, which provides for an equitable distribution of liability between concurrent wrongdoers according to their proportionate share of fault in damages claims involving property damage or purely economic loss.

A **principal consequence** of that purpose behind the legislation is that it is applicable only when two or more persons cause a single loss or damage to another through their breach of a tortious duty of care or of a contractual obligation which is concurrent and co-extensive with that tortious duty, or by a breach of the statutory prohibition on misleading conduct.

#### ***Proposal 2***

For the purposes of the legislation, an **apportionable claim** is one which arises only from:

- (a) a breach of a tortious duty of care, or from a breach of a contractual obligation which is concurrent and co-extensive with such a tortious duty;  
or
- (b) a breach of the statutory prohibition on misleading conduct.

***Proposal 3***

A **concurrent wrongdoer** is one of two or more persons who:

- (a) not only caused, but is also legally liable for, the loss or damage which is the subject of the apportionable claim, even if an act or omission of the plaintiff has extinguished that liability; and
- (b) caused that loss independently of each other or jointly.

***Proposal 4***

The legislation in all jurisdictions provide that a court be required to take into account the responsibility of all concurrent wrongdoers for the loss or damage claimed, whether or not those wrongdoers are parties to the litigation; but that it also follow the example of subsections 32(1) and (4) of the Queensland Act in seeking to ensure that as many parties as are reasonably possible are before the court;

***Proposal 5***

In order to ensure that a plaintiff has as much information as is reasonably possible to locate all possible concurrent wrongdoers, the legislation in all jurisdictions follow the example of subsections 32(2), (3) and (5) of the Queensland Act;

***Proposal 6***

The liability of any one defendant is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers to be **just and equitable** having regard to the extent of the defendant's responsibility for the loss or damage;

***Proposal 7***

That the legislation in all jurisdictions include a provision to ensure that proportionate liability 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, along the lines of that currently in subsection 15(2) of the Northern Territory Act, subsection 43C(2) of the Tasmanian Act and subsection 5AL(2) of the Western Australian Act;

***Proposal 9***

That the legislation in all jurisdictions follow the example of sections 11 and 12 of the South Australian Act dealing with plaintiffs who wish to bring a second set of proceedings against a concurrent wrongdoer who was not sued in the initial proceedings;

***Proposal 10***

That the proportionate liability legislation be excluded in respect of:

- vicarious liability and the liability of partners;
- intentional or fraudulent conduct;
- liability excluded by other legislation;
- damages for personal injury or death;
- agency;
- exemplary damages; and
- consumer claims.

**Proposal 11**

That the legislation in all jurisdictions prohibit parties to whom it would otherwise be applicable from contracting out of its terms; and

**Proposal 12**

That the necessary measures be taken to ensure that the proportionate liability legislation applies to any determination by a non-judicial body in the same way that it applies to courts.

**2. What is proportionate liability?**

2.1. Mr Horan accurately summarised the reasons for the enactment of proportionate liability (**PL**) when he wrote in his Report, at par 1, that it had

*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 that defendant, rather than for the total loss suffered by the plaintiff.*

2.2. In order to understand how PL operates, and to have a better appreciation of the reason for its introduction, it is instructive to consider the following hypothetical facts and consider how any dispute between the parties would have been resolved prior to the introduction of PL, compared with the result from the application of the PL legislation.

**2.3. Illustration – A failed company takeover**

2.3.1. Smith, Brown and Jones are the directors of Plaintiff Ltd (Plaintiff). Plaintiff asks them to prepare a report on Victim Pty Ltd (Victim), a company which Plaintiff has been considering taking over. When Smith, Brown and Jones have completed the report, Plaintiff instructs Bean & Counter (B & C), the company's accountants, to check the report. In the course of preparing that report, Smith, Brown and Jones are negligent in failing to notice some vital information about Victim's balance sheet, and B & C is also negligent in failing to notice the error made by Smith, Brown and Jones. Relying on the report, Plaintiff goes ahead and purchases sufficient shares in Victim to be able to compulsorily buy the remainder. Once the take-over is complete, Plaintiff discovers the error in the report, and further discovers that Plaintiff has paid an unrealistically high price for the shares in Victim. As a result of that transaction, Plaintiff goes into liquidation, and the liquidators seek to recover some of the company's losses in an action against Smith, Brown, Jones and B & C.<sup>1</sup>

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<sup>1</sup> This hypothetical is based loosely on the facts of *Duke Group Ltd v Pilmer (No 2)* (2000) 78 SASR 216.

2.3.2. As the law stood in 2001, the liquidators could have sued B & C alone. The effect of joint and several liability is that, if two or more, by their separate and independent conduct, cause a single injury to the plaintiff, the plaintiff may bring proceedings against any one or more of those who are liable. In this hypothetical, the liquidator would have sued B & C alone, as they would no doubt be insured against this liability, whereas the directors may well not have carried such insurance. B & C would have been entitled to join Smith, Brown and Jones as co-defendants, but on the assumption that none of them is insured against this liability, it is likely that none of them would be able to satisfy any judgment given against them, and B & C would be obliged to pay any part of the judgment not satisfied by any of the three directors.

2.3.3. Under PL, on the other hand, it would be necessary for the liquidators to sue not only B & C but also Smith, Brown and Jones, as each of those defendants will be liable for no more than the proportion of the total loss for which that defendant is responsible. In these particular circumstances, it is likely that Smith, Brown and Jones would be regarded as jointly liable, as it appears that they wrote the report together. In that case, for the purpose of determining shares of responsibility, their joint work might be regarded as having caused 75% of the loss, leaving B & C liable for the remaining 25%. If the liquidators sued B & C alone, they could recover no more than 25% of the total loss suffered.

#### 2.4. *Application of proportionate liability to actions in tort and contract*

2.4.1. One point which arises from the above illustration is that because PL was introduced to eliminate the effect of joint and several liability in some circumstances, PL is applicable in only those circumstances where, prior to that legislation, there might have been joint and several liability and where the one who was sued could claim contribution from those also liable.

2.4.2. Each of the possible defendants is liable in negligence, jointly and severally with the other defendants, to the one plaintiff. This is therefore the prime circumstance where PL will be applicable.

2.4.3. However, each of the various defendants is liable not only in negligence but also for breach of a contractual obligation to exercise reasonable care and skill in carrying out their respective duties as either a director of Plaintiff or as the accountants to Plaintiff. Because that contractual liability is concurrent with, and co-extensive with, each defendant's tortious liability, their obligations to contribute to any compensation paid by any one of them remains identical with that which they owed as joint and several tortfeasors.<sup>2</sup> If the PL legislation is to be effective in replacing joint and several liability it must be applicable when two or more defendants are liable either for the

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<sup>2</sup> See generally Balkin and Davis, *Law of Torts*, 3rd ed, 2004, para [29.31].

breach of a tortious duty of care, or for a breach of a contractual duty which is concurrent and co-extensive with that tortious duty.

2.4.4. Prior to the introduction of PL, joint and several liability and the right to claim contribution from others did not apply if one of the defendants owed obligations to the plaintiff in contract which were not concurrent and co-extensive with a tortious duty of care.<sup>3</sup> Given that, it can be assumed that the introduction of PL was not intended to affect the rights or obligations of parties who had not been regarded as jointly and severally liable prior to that introduction. Additionally, it can be assumed that PL does not apply where a defendant owes to a plaintiff a contractual obligation which is more extensive than one which is concurrent and co-extensive with a tortious duty of care.

## 2.5. *Proportionate liability and the statutory prohibition on misleading or deceptive conduct*

2.5.1. A second point which arises out of the illustration is that at least one of the defendants, as well as being liable in negligence, might also have been sued by the plaintiff for a breach of either section 52 of the TPA or the equivalent of that section in the Corporations Act, the ASIC Act, or the Fair Trading legislation of the States and Territories.

2.5.2. Prior to the introduction of PL, the courts had not assimilated breach of the statutory prohibition on misleading conduct with liability in tort. A plaintiff might sue one defendant under that legislation, and leave that defendant to do what it could to seek some sort of recompense from any others who might have been to some extent liable for the loss suffered by the plaintiff. The furthest that the courts went in permitting defendants some measure of sharing of the burden of losses was that, in a case where one defendant was liable to a plaintiff for breach of section 52, and another defendant, who was also responsible for the plaintiff's damage, was liable solely in negligence, one defendant might seek equitable contribution from the other.<sup>4</sup> Alternatively, if the plaintiff sued both defendants in the one action, the court might give judgment separately against each, the amount depending on the court's assessment of their respective share of responsibility for the plaintiff's loss.<sup>5</sup>

2.5.3. On the introduction of PL, it would clearly have been unsatisfactory to allow a plaintiff to avoid the application of the legislation by framing an action against one defendant only, based solely on a breach of the statutory prohibition against misleading conduct. The PL legislation brings within its umbrella not only those who are in breach of a tortious duty of care, or a

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<sup>3</sup> *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1992) 11 BCL 74 at 149-52 per Giles J.

<sup>4</sup> *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

<sup>5</sup> See Balkin and Davis, above, n 3, para [29.31].

contractual obligation which is concurrent and co-extensive with that tortious obligation, but also any who have caused damage by a breach of the statutory prohibition on misleading conduct.

## 2.6. Conclusion on the nature of proportionate liability

2.6.1. In light of the purpose of the PL legislation, which was to be a replacement for joint and several liability in damages claims involving property damage or economic loss, it follows that PL is applicable only when two or more persons cause a single loss or damage to another through their breach of a tortious duty of care or of a contractual obligation which is concurrent and co-extensive with that tortious duty, or by a breach of the statutory prohibition on misleading conduct.

## 3. What is an “apportionable claim”?

3.1. The PL legislation, as it stands, applies only to what is called an “apportionable claim” which, in all States and Territories other than Queensland and South Australia, is defined (with some minor variations) as a “claim for economic loss or damage to property ... arising from a failure to take reasonable care” and a similar claim for damages for a contravention of the statutory prohibition on misleading conduct contained in each jurisdiction’s Fair Trading legislation<sup>6</sup> and in the Commonwealth TPA, Corporations Act and the ASIC Act.

3.2. Mr Horan can foresee at least two problems arising from this form of words. One is that plaintiffs might resort to “artificially constructed claims and dispute technical pleadings issues” (see par 192) in order to avoid the application of the legislation. The other is that the phrase “arising from a failure to take reasonable care” might be read as including strict contractual obligations, in which case the legislation might “interfere with arms’ length contractual relations” (see par 206), a circumstance which Mr Horan rightly considers undesirable. His solution to both of these problems is Recommendation 4, under which:

*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.*

3.3. I suggest that, rather than imposing further refinements on the interpretation and application of a phrase which has no clear existing meaning, the legislation should be amended to define an “apportionable claim” as one which arises only from (a) a breach of a tortious duty of care, or from a breach of a contractual obligation which is concurrent and co-extensive with such a tortious duty, or (b) a breach of the statutory prohibition on misleading conduct. This formulation is similar to, but slightly more extensive than, section 28(1) of the Queensland Act and very much the same as section 4(1) of the South Australian Act.

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<sup>6</sup> ACT, s 107B; NSW, s 34; NT, s 4(2); Tas, s 43A(1); Vic, s 24AF; WA, s 5AI.

3.4. The advantages of this approach are that

- it confines the application of the PL legislation to those claims which were the only ones intended to be affected by it (see para 2.6.1);
- it uses a form of words which is familiar to the law<sup>7</sup> and should not give rise to the plethora of meanings suggested by Mr Horan and others; and
- it would provide the clarification which Mr Horan seeks, in Recommendation 6, in that the suggested formulation would apply only to the person(s) who came under the stated duty.

3.5. The proposed formulation would also provide the clarification sought by Mr Horan in Recommendation 7 as to the types of relief available under the legislation. If an “apportionable claim” were limited as specified above, “damages” could be defined as any form of monetary compensation that is otherwise available for the breach of the stated duty.

3.6. Mr Horan raised the possibility of a change to the legislation similar to that suggested here. At par 218 he wrote:

*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.*

3.7. Provided PL applies only to breaches of a contractual obligation which are concurrent and co-extensive with a tortious duty of care, the question for a court would be only whether the defendant owed such a tortious duty, and whether any contractual obligation was concurrent or co-extensive with that duty. If the defendant were under a strict contractual duty, that fact alone would be sufficient to prevent PL applying. Whether a defendant had in fact failed to take reasonable care would be irrelevant.

3.8. *Conclusion on the meaning of “apportionable claim”*

3.8.1. It is recommended that the phrase “apportionable claim” be confined to one which arises only from:

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<sup>7</sup> It is familiar to the case law on joint and several liability and contributory negligence.

- (a) a breach of a tortious duty of care, or from a breach of a contractual obligation which is concurrent and co-extensive with such a tortious duty, or
- (b) a breach of the statutory prohibition on misleading conduct.

#### 4. Who is a “concurrent wrongdoer”?

##### 4.1. Difficulties with the current legislation

- 4.1.1. Mr Horan accurately summarises one of the major difficulties with the current legislation, in his comments in pars 219 and 220. He writes:

*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.'*<sup>8</sup> Concurrent wrongdoers 'against whom judgment is given' under PL legislation are not permitted to claim contribution or indemnity from each other.

*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.*

- 4.1.2. After considerable discussion, Mr Horan concludes with Recommendation 9 which reads, in part:

*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.*

- 4.1.3. While I completely agree with the reasoning that leads Mr Horan to that conclusion, I suggest that if my recommendation on the definition of apportionable claim is adopted then the only possible meaning of a concurrent wrongdoer is one who is in breach of that duty, and therefore legally liable for the damage claimed. Therefore, notwithstanding the two following issues, there is no need to separately define a concurrent wrongdoer.

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<sup>8</sup> Mr Horan notes, in par 223, that “under the Qld Act and the SA Act the relevant persons must not have acted jointly, but acted independently of each other.”

4.2. *What if a concurrent wrongdoer ceases to be liable?*

- 4.2.1. One further issue concerns a situation where a person who was at one time within the definition of concurrent wrongdoer subsequently ceases to be liable to the plaintiff. I can do no better than quote, and adopt, Mr Horan's arguments and conclusion, at pars 244-247.

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.*

4.3. *Wrongdoers who act jointly*

- 4.3.1. I have noted above that the definition of concurrent wrongdoer, in all jurisdictions other than Queensland and South Australia, refers to parties who caused the plaintiff's loss "independently of each other or jointly". Those two States refer to parties who have caused the plaintiff's loss independently of each other, but there is no reference to parties acting jointly. As Mr Horan observes, at par 248, this difference could cause problems of application if a plaintiff sues, say, under the Queensland Act and a Commonwealth Act in the one proceeding.

- 4.3.2. Even if the only possible wrongdoers in a particular case have acted jointly – that is, they have taken "concerted action to a common end"<sup>9</sup> – the law prior to the introduction of PL did not differentiate between, on the one hand, joint and several liability and, on the other hand, joint liability. Since

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<sup>9</sup> *The Kursk* [1924] P 140 at 152 per Bankes LJ; see further Balkin and Davis, above, n 3, par [29.25].

the purpose of the PL legislation was/is to replace joint and several liability with proportionate liability in cases of purely economic loss and property damage, there would seem to no reason for excluding joint liability from the PL scheme.

- 4.3.3. Furthermore, there may be occasions – for example, the illustration at 2.3.1– where a group of people act jointly, and another, acting independently, is also a cause of the loss to the plaintiff. There is no reason for excluding PL in that situation, and allowing a plaintiff to sue one defendant alone (and rely on the application of the previous law relating to joint and several liability), simply because the others who were equally liable for the plaintiff’s loss were acting jointly.

#### 4.4. *Conclusion on a definition of ‘concurrent wrongdoer’*

- 4.4.1. The phrase “concurrent wrongdoer” does not need to be defined for the purpose of ensuring that it encompasses only those who not only caused the damage, but also who are in breach of an existing duty and therefore legally liable to the plaintiff. However, it may need to be defined, in order to ensure that it includes those *who at any time* were legally liable to the plaintiff. Given that, I propose that all jurisdictions include a definition of concurrent wrongdoer that is one of two or more persons who:

- not only caused, but is also legally liable for, the loss or damage which is the subject of the apportionable claim, even if an act or omission of the plaintiff has extinguished that liability; and
- caused that loss independently of each other or jointly.

## 5. **Whether the responsibility of non-parties is to be considered**

### 5.1. *The legislation*

- 5.1.1. The PL legislation in all jurisdictions other than Victoria provides for the court, when apportioning liability, to have regard to concurrent wrongdoers who are not a party to the proceedings. The only difference between the various formulations is that the legislation in South Australia, Tasmania and Western Australia effectively *requires* the court to take account of the responsibility of concurrent wrongdoers, whether they are a party to the proceedings or not,<sup>10</sup> while that in the other jurisdictions allows the court a discretion in deciding whether to take account of the conduct of non-parties.<sup>11</sup> This latter approach is described by Horan as ‘the national approach’.

<sup>10</sup> SA, s 8(2)(b); Tas, ss 43B(3)(b), (4); WA, s 5AK(3)(b), (4).

<sup>11</sup> ACT, ss 107F(2)(b), (4); NSW, ss 35(3)(b), (4); NT, ss 10, 13(2)(b); Qld, ss 31(3), (4); ASIC Act s 12GR(3)(b), (4); Corporations Act ss 1041N(3)(b), (4); TPA s 87CD((3)(b),1 (4).

- 5.1.2. Victoria takes a different approach altogether, subsection 24AI(3) providing 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.

### 5.2. *The problems with the Victorian model*

- 5.2.1. One of the major drawbacks of the Victorian model is that a defendant may join a further party, purely for the purpose of lessening the extent of the defendant's liability, even though the plaintiff may not necessarily make any claim against the added party. If a party is not joined – perhaps because it is in liquidation – the court has no power to consider the extent of that party's responsibility for the total loss, and reduce the amounts that other defendants may have to pay by way of damages.<sup>12</sup> Equally, a plaintiff may decide not to pursue a claim against one possible party because the plaintiff has assessed that party's liability as a maximum of, say, 10% and the costs and risks of pursuing that claim are greater than the possible benefits. Nevertheless, it would be in the interests of the other defendants to join that party and gain at least some reduction in the extent of their liability.<sup>13</sup>
- 5.2.2. A further drawback of the Victorian model, which came to light in *Vollenbroich v Krongold Constructions Pty Ltd*<sup>14</sup> is that, if one defendant wishes to settle with the plaintiff, it may be necessary to remain a party to the proceedings, so that the liability of the other parties is not inadvertently increased.

### 5.3. *Support for the national model*

- 5.3.1. After considering both the Victorian model and the national model, Mr Horan concludes, at par 296, that he prefers the national model. I concur with that conclusion, but for reasons rather different from those which Mr Horan advances.
- 5.3.2. The PL legislation was introduced to protect at least some defendants against having to shoulder an unfair burden of liability. For a court not to take account of the liability of a concurrent wrongdoer simply because the plaintiff has decided not to proceed against that party appears to diminish that protection. The best way of protecting each concurrent wrongdoer is to

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<sup>12</sup> See *Woods v De Gabrielle* [2007] VSC 177 at [63] per Hollingworth J, and Mr Horan's comment on that aspect of the case at par 295.

<sup>13</sup> See the examples given by Mr Horan at pars 286 and 287.

<sup>14</sup> [2006] VCAT 1710.

ensure that the degree of responsibility of each of them is considered by a court.

- 5.3.3. A further reason for proposing the repeal of subsection 24AI(3) of the Victorian Act is to do away with the anomalous position revealed by the *Vollenbroich* decision of a defendant being required to remain a party to proceedings even after the plaintiff has settled the action against that defendant.

#### 5.4. *The possibility of subsequent proceedings*

- 5.4.1. Mr Horan suggests, at par 297, that a particular difficulty of the national model is the greater risk of subsequent litigation. He points out that if a court takes account of the proportion of responsibility of a wrongdoer who is not before the court, the plaintiff will presumably have to take action against that wrongdoer at some later stage in order to recover a portion of the damages. However, he goes on, at par 300, to seek to eliminate that possibility by proposing that a plaintiff should not be entitled to pursue a concurrent wrongdoer in a subsequent action, where it had the opportunity to pursue that claim in the original proceeding. A means of bringing about that result which is noted in passing by Mr Horan<sup>15</sup> but not made the subject of a specific Recommendation at this point, is that

*Once the plaintiff is on notice about a non-party concurrent wrongdoer, 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.*<sup>16</sup>

- 5.4.2. This no doubt assumes that a plaintiff will only elect not to pursue a claim against a non-party where the value of the claim is likely to be less than the expense of adding that wrongdoer to the litigation.
- 5.4.3. However, there may be all manner of reasons for a plaintiff not proceeding against a particular concurrent wrongdoer, and whenever any wrongdoer is not before the court, the determination of its share of responsibility remains a matter of conjecture. Furthermore, the PL legislation was enacted for the benefit of defendants, and it is difficult to see why it should be the plaintiff who decides who is (and who is not) to be the subject of proceedings, and consequently able to bring evidence as to the degree of their responsibility.
- 5.4.4. A better means of ensuring that all those who are concurrent wrongdoers at least have the opportunity to appear and argue their level of responsibility

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<sup>15</sup> See par 301.1.

<sup>16</sup> This idea is picked up in Recommendation 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.

is the provisions contained in the Queensland Act, in subsections 32(1) and (4). Subsection 32(1) – which is not mirrored in any of the other legislation – provides:

A person (*claimant*) who makes a claim to which this part applies is to make the claim against all persons the claimant has reasonable grounds to believe may be liable for the loss or damage.

5.4.5. Subsection 32(4) then provides the sanction for a claimant’s failure to comply with this obligation. On the application of another concurrent wrongdoer, the court may make such orders as it considers just and equitable on:

- (a) apportionment of damages proven to have been claimable;
- (b) costs thrown away as a result of the failure to comply.

5.4.6. Mr Horan, at par 342, under the heading of “Successive Proceedings”, notes this provision and, while acknowledging that it

*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.*<sup>17</sup>

5.4.7. While I acknowledge the force of these comments, I maintain that the above provisions in the Queensland Act have the twin advantages of:

- limiting the possibility of successive actions; and
- limiting the circumstances in which a court will be forced to assess a particular party’s proportion of responsibility based on conjecture alone.

## 5.5. *Compulsion or discretion?*

5.5.1. Although Mr Horan makes a recommendation on this issue (Recommendation 14), he does not provide any analysis of whether PL legislation should require a court to take account of the proportionate responsibility of a non-party concurrent wrongdoer, or whether it should merely have a discretion to do so.

5.5.2. I agree with Mr Horan’s recommendation, which is that courts should be required to take account of the non-party’s share of responsibility.

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<sup>17</sup> Unfortunately, I have been unable to trace where Mr Horan discusses these other ways.

5.5.3. The purpose of the PL legislation is to protect defendants who, under the previous joint and several liability regime, may be found liable for the whole of a plaintiff's loss, despite being responsible for only a minor part of that loss, simply because they were insured against that liability. I have also stressed that PL should apply only when two or more defendants have caused a single loss or damage to another through their breach of a tortious duty of care or of a contractual obligation which is concurrent and co-extensive with that tortious duty, or by a breach of the statutory prohibition on misleading conduct.

5.5.4. If PL is limited to such circumstances, it is difficult to believe that a plaintiff will be unaware of the identity of the possible defendants against whom it may take proceedings. If that is the case, it would appear that the only reason for a plaintiff to commence proceedings against one person only is in order to avoid the application of the PL legislation. As soon as that one defendant brings forward allegations designed to show that there was at least one other who may also be liable to the plaintiff, justice demands that the court must take account of any others who are also responsible for the loss, so that the respective proportions of each can be assessed.

#### 5.6. *Conclusion on the consideration of non-parties*

5.6.1. In the light of the above, I propose that:

- Victoria repeal subsection 24AI(3); and
- All jurisdictions provide that a court be required to take into account the responsibility of all concurrent wrongdoers for the loss or damage claimed, whether or not those wrongdoers are parties to the litigation; and
- All jurisdictions follow the example of subsections 32(1) and (4) of the Queensland Act in seeking to ensure that as many parties as is reasonably possible are before the court.

## 6. **How are defendants to be added to an action?**

### 6.1. *The legislation*

#### 6.1.1. *The common form of legislation*

6.1.1.1. All jurisdictions other than Victoria, Queensland and South Australia make very similar provision for a defendant to notify the plaintiff about non-parties whom the defendant has reasonable grounds to believe are concurrent wrongdoers. The legislation does not place a direct obligation on the defendant to notify the plaintiff, but provides (in essence) that a failure to provide such information as the

defendant might reasonably have may render that defendant liable to the plaintiff for any costs which the plaintiff has unnecessarily incurred as a result.<sup>18</sup> In the following discussion, I have referred to this legislation as the “common form”.

### 6.1.2. *Victoria*

6.1.2.1. Victoria has nothing similar because, under subsection 24AI(3) of the *Wrongs Act 1958*, the court is permitted to take into account the comparative responsibility of only those non-parties who have died or have been wound up. It has been proposed in the preceding section of this Report that Victoria repeal subsection 24AI(3), and the following discussion is based on the assumption that that proposal is accepted.

### 6.1.3. *South Australia*

6.1.3.1. Section 10 of the South Australian legislation differs only slightly from the common form. One point of difference is that subsection 10(1) expressly imposes an obligation on a defendant to provide the plaintiff “with information that is in the defendant’s possession, or reasonably available to the defendant (and not equally available to the plaintiff)” about the identity of any possible concurrent wrongdoer and the circumstances giving rise to that possible liability. The other point of difference is that paragraph 10(1)(a) obliges a defendant to provide to the plaintiff, not only the identity of the possible concurrent wrongdoer, but also the whereabouts of that person. The sanction for failure to comply with this obligation is that the defendant may be ordered to pay any costs which could have been avoided if the information had been provided (see subsection 10(2)).

### 6.1.4. *Queensland*

6.1.4.1. Subsections 32(2) and (3) of the Queensland Act provide:

- (2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has—
- (a) that is likely to help the claimant to identify and locate any other person (not being a concurrent wrongdoer known to the claimant) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and

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<sup>18</sup> See ACT, s 107G; NSW, s 35A, NT, s 12; Tas, s 43D; WA, s 5AKA, ASIC Act, s 12GS; Corporations Act s 1041O and TPA s 87CE.

- (b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.

(3) The concurrent wrongdoer must give the information to the claimant in writing, as soon as practicable after becoming aware of the claim being made or of the information, whichever is the later.

6.1.4.2. As in South Australia, this provision expressly imposes an obligation on the defendant to provide the relevant information, and requires the defendant to provide information that is likely to assist, not only in identifying another possible defendant, but also in locating such a party. However, the sanction for failure to comply with this obligation is that a court may, if it considers it just and equitable to do so, order that the defaulting concurrent wrongdoer is severally liable for any award of damages made (see paragraph 32(5)(a)) and that it pay “costs thrown away as a result of the failure to comply” (see paragraph 32(5)(b)). An order that a concurrent wrongdoer is severally liable would mean that that party no longer has the protection of the PL legislation, and may face a damages award for an amount much greater than the proportion for which that defendant would be liable under the PL provisions.

## 6.2. *Mr Horan’s comments on the legislation*

6.2.1. After some discussion of the common form of the legislation, Mr Horan writes, at par 262, that he sees

*no need to reform this aspect of the current PL laws ... save for an additional requirement that the defendant should provide any details that it has regarding the location of the non-party concurrent wrongdoer.*

6.2.2. This overlooks the fact that, as noted above, both South Australia and Queensland already make provision for a defendant to provide such information as it has about the whereabouts of a possible concurrent wrongdoer.

6.2.3. Furthermore, despite having said, at par 262, that he sees no need to reform “this aspect of the current PL laws”, Mr Horan proceeds, in Recommendation 10, to specify three matters which a defendant be required to provide to a plaintiff concerning a possible concurrent wrongdoer, namely:

- the existence of that person;
- the relevant acts or 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.

6.2.4. I suggest that, although this list of matters is taken from the judgment of Hammerschlag J in *Ucack v Avante Developments Pty Ltd*<sup>19</sup> (as Mr Horan acknowledges), it is deficient in that it requires a plaintiff merely to demonstrate a causal connection between the conduct of the possible additional defendant and the plaintiff's loss, whereas I have proposed at para 4.4 – relying on Mr Horan's Recommendation 9 – that a concurrent wrongdoer be one who has not only caused, but is also legally liable for, the plaintiff's loss or damage.

6.2.5. To my mind, the provision in subparagraph 35A(1)(a)(ii) of the NSW Act, as representative of the common form of the legislation, and the similar provisions in paragraph 10(1)(b) of the South Australian Act and paragraph 32(2)(b) of the Queensland Act, with their common requirement that an existing defendant provide information about the circumstances that make a possible further defendant a concurrent wrongdoer in relation to the claim, more accurately capture the information that a plaintiff will need, in order to decide whether to add a further defendant.

### 6.3. *Conclusion on a defendant's obligation to inform the plaintiff of other possible defendants*

6.3.1. I propose that all jurisdictions adopt the provisions of subsections 32(2), (3) and (5) of the Queensland Act, the advantages being that they:

- explicitly put an obligation on a defendant to provide a plaintiff with all relevant information about other possible concurrent wrongdoers, rather than leaving that obligation to be implied from the provision of a costs sanction;
- specify all of the information to be provided to a plaintiff to best enable that party to join all those responsible for the loss or damage claimed; and
- provide, in subsection 32(5), for the possibility of a court imposing a double sanction for failure to fulfil the obligation, to encourage compliance.

6.3.2. I consider that Recommendation 10 of Mr Horan's Report is not necessary, as the proposals contained there are already adequately provided for in all the existing legislation.

6.3.3. I further consider that Mr Horan's Recommendation 11 – that a defendant be required to give the plaintiff such details as the former has concerning the

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<sup>19</sup> 2007] NSWSC 367

whereabouts of another possible concurrent wrongdoer – is not necessary, if my proposal that other jurisdictions adopt the approach taken in subsections 32(2), (3) and (5) of the Queensland Act is accepted.

#### 6.4. *An obligation to notify other possible defendants?*

6.4.1. The preceding discussion in this Section has been concerned with a defendant's obligation to notify the plaintiff of any other persons whom the defendant believes to be concurrent wrongdoers. However, at pars 263 to 268 of his report, Mr Horan deals with a related issue of whether a non-party is entitled to be notified of the fact that it has been alleged that it is a concurrent wrongdoer. He concludes, in Recommendation 12, that:

*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.*

6.4.2. This Recommendation is also unnecessary. While Mr Horan would put the onus on a defendant to notify others whom that defendant reasonably believes are also liable to the plaintiff, I have proposed that the plaintiff should bear the onus of ensuring that all defendants of whom it is aware are at least notified of the fact of the proceedings against them. I proposed at para 5.6.1 that all jurisdictions follow the example of subsections 32(1) and (4) of the Queensland Act in seeking to ensure that as many parties as is reasonably possible are before the court. I consider that it is far preferable for a plaintiff to have the responsibility of ensuring that all relevant parties are before the court, rather than that possibly a number of defendants each take some responsibility for that task.

### 7. **How is responsibility to be apportioned?**

7.1. Mr Horan did not consider this issue. However, I note that the language used in PL legislation for apportioning responsibility among defendants varies to some extent. The form of words used in all jurisdictions other than Queensland and South Australia is that in any proceedings involving an apportionable claim, the liability of any one defendant is limited to:

an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.<sup>20</sup>

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<sup>20</sup> See ACT, s 107F(1)(a), NSW, s 35(1)(a), NT, s 13(1)(a), Tas, s 43B(1)(a), Vic, s 24AI(1)(a), WA, s 5AK(1)(a), ASIC Act, s 12GR(1)(a), Corporations Act, s 1041N(1)(a), TPA, s 87CD(1)(a).

7.2. However, in Queensland the amount to which a defendant's liability is limited is described as being that which the court considers "just and equitable",<sup>21</sup> while in South Australia the limitation is described as that which the court considers "fair and equitable".<sup>22</sup>

7.3. It is highly likely that no difference in meaning was intended by this minor variation in wording. Nevertheless, the legislation dealing with the right of those jointly and severally liable to claim contribution from other tortfeasors universally around Australia, refers to such amount "as may be found by the court to be *just and equitable* having regard to the extent of [the other party's] responsibility for the damage."<sup>23</sup> As a consequence, I propose that all of the PL legislation adopt the formulation used in Queensland to:

- forestall any possible argument that the PL legislation intends some measure of responsibility different from that in the previous legislation; and
- provide courts with a ready source of existing judicial discussion of the meaning of the relevant phrase.

## 8. Liability between defendants

8.1. At par 407, Mr Horan writes:

*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.*<sup>24</sup>

8.2. However, he continues in the same paragraph to ask whether one concurrent wrongdoer should be entitled to maintain contractual rights of recovery from another concurrent wrongdoer. He notes, at par 413, that the legislation in the Northern Territory, Tasmania and Western Australia contains a subsection, under which:

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.<sup>25</sup>

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<sup>21</sup> Qld, 31(1)(a).

<sup>22</sup> SA, s 8(2).

<sup>23</sup> Emphasis supplied. For references to the legislation, see, eg, Balkin and Davis, above, n 3, para [29.35], n 160.

<sup>24</sup> As Mr Horan noted at pars 373-377, the relevant provisions are: ACT, s 107H, NSW, s 36, NT, s 15(1), Qd, s 32A, SA, s 9, Tas, s 43C(1), Vic, s 24AJ, WA, s 5AL(1), ASIC Act s 12GT, Corporations Act s 1041P, TPA s 87CF.

<sup>25</sup> See NT, s 15(2), Tas, s 43C(2), WA, s 5AL(2).

- 8.3. After further consideration of what is described as the preservation (or otherwise) of contractual rights between defendants, Mr Horan concludes, in Recommendation 25, that

*Contractual rights to claim contribution or indemnity by one concurrent wrongdoer against another be preserved,*

and that one option to achieve that end is to include the subsection in the Northern Territory, Tasmania and Western Australia Acts (see para 8.2) in the legislation of all other jurisdictions.

- 8.4. While this Recommendation may be supported out of an abundance of caution, it is suggested that it is difficult to contemplate any circumstances in which such a subsection may be applicable.
- 8.5. The contractual rights being discussed are between two parties who subsequently turn out to be concurrently liable in negligence to the same plaintiff for differing proportions of the loss or damage that the plaintiff has suffered. However, if two parties have entered into an agreement between themselves as to their respective liability to a third party, it is highly likely that the very fact of their having entered into that agreement will result in one or other of the contracting parties no longer being under a duty of care, or otherwise liable, to the plaintiff.
- 8.6. There is, for instance, a series of decisions at first instance in Australia in which a building owner has been denied the right to sue a sub-contractor of the prime contractor in negligence for the purely economic loss resulting to the owner from the carelessness of the subcontractor, on the basis that the sub-contractor does not owe a duty of care to the owner.<sup>26</sup> The reason for the denial of a duty of care is that, the parties having structured their relationship in such a way as to preclude any contractual liability between owner and sub-contractor, because of the operation of the doctrine of privity of contract, it would be inconsistent with their presumed intentions to impose a duty of care in negligence on the sub-contractor.
- 8.7. Although I am not aware of any decisions denying a duty of care in similar but factually different circumstances, I can see no obvious reason for the courts to strive to impose a duty of care which is contrary to the contractual arrangements arrived at between two parties who must (in order to be concurrent wrongdoers within the meaning of the PL legislation) have been acting independently of one another.<sup>27</sup>

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<sup>26</sup> The cases are referred to in Balkin and Davis, above, n 3, para [13.70], n 212.

<sup>27</sup> See the definition of “concurrent wrongdoer” at 4.4.1. If the two potential defendants had been acting jointly, their liability between themselves will be determined by the fact of that joint action, and not by the PL legislation.

### 8.8. *Conclusion on liability between defendants*

8.8.1. Despite my view that it is difficult to contemplate circumstances where two concurrent wrongdoers may have entered into an arrangement to allocate responsibility for any loss caused to a third party, I suggest that it would be a wise precaution to adopt Mr Horan's Recommendation 25. I therefore propose that the legislation in all jurisdictions include a provision along the lines of that in the subsections in the Northern Territory, Tasmania and Western Australia Acts (see para 8.2).

## 9. **Subsequent proceedings**

### 9.1. *Introduction*

9.1.1. I proposed at 5.6.1 that the PL legislation be amended to ensure that, in the initial proceedings commenced by the plaintiff:

- the court take account of the liability of all concurrent wrongdoers then known to the parties, whether or not any one or more of them was before the court; but that
- all jurisdictions follow the approach taken in subsections 32(1) and (4) of the Queensland Act of imposing an obligation on the plaintiff to include in its claim "all persons [whom] the claimant has reasonable grounds to believe may be liable for the loss or damage."

9.1.2. One of the reasons for including the second of those proposals was to minimise the risk of the plaintiff needing to bring subsequent proceedings.

9.1.3. Nevertheless, circumstances may arise in which a plaintiff will wish to pursue such proceedings, such as where it is only after the initial proceedings have concluded that the plaintiff discovers that there was another person who is likely to be a concurrent wrongdoer, and the plaintiff has not been able to recover the full amount of its judgment in the initial proceedings from the original defendants. In the context of existing PL legislation, a far more common circumstance in which a plaintiff may want to pursue subsequent proceedings is if one of the concurrent wrongdoers is not a party to the initial proceedings.<sup>28</sup>

### 9.2. *The common form of the legislation*

9.2.1. The legislation in all jurisdictions other than South Australia permits such subsequent proceedings, the only sanction being that a plaintiff cannot recover in the second proceedings an amount of damages which would result

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<sup>28</sup> See my proposal at 5.6.1, that all jurisdictions provide that a court be required to take into account the responsibility of all concurrent wrongdoers for the loss or damage claimed, whether or not those wrongdoers are parties to the litigation.

in the plaintiff receiving combined compensation which is more than the loss or damage actually sustained.

9.2.2. Section 37 of the New South Wales Act, which is followed with only minor variations in all the other jurisdictions,<sup>29</sup> provides:

**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.

*9.3. Problems with the application of this common form of legislation*

9.3.1. Mr Horan notes, at pars 333 to 337, that this provision suffers from a number of flaws:

- the court conducting the second proceedings is not bound by a finding of the first court as to:
  - the amount of the defendant's loss;
  - the liability of a particular defendant to the plaintiff; or
  - the proportions of the liability of any of the defendants.
- the amount that a plaintiff might recover in the second proceedings must take into account only the amount *actually recovered* in the first proceedings, and not the amount of the *judgment* in those first proceedings.

9.3.2. However, South Australia has adopted a much more sophisticated approach to the treatment to be given to subsequent proceedings, and has eliminated each of the above drafting flaws. In view of the fact that the proposal I have made in Section 5 is designed to minimise the risk of there being any subsequent proceedings in any event, I propose that all jurisdictions adopt provisions similar to sections 11 and 12 of the South Australian Act.

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<sup>29</sup> ACT, ss 107I; NT, s 16; Qld, s 32B; Tas, s 43E; Vic, s 24AK; WA, s 5AM; ASIC Act s 12GU; Corporations Act ss 1041Q; TPA s 87CG.

9.3.3. This proposal, together with my proposals in Section 5, would provide an alternative solution to Mr Horan’s Recommendations 17 to 21.

## 10. Exclusions from the proportionate liability scheme

10.1. In par 312 of his Report, Mr Horan lists the various circumstances in which the PL legislation is to be excluded. As he points out, the exclusions are far from uniform. However, Recommendation 16 is merely that: “Exclusions be made uniform”, with no indication of which particular changes he would support.

### 10.2. *Vicarious liability and the liability of partners*

The legislation in all jurisdictions excludes from its ambit both vicarious liability and the liability between partners.<sup>30</sup> I propose that this exclusion remain.

### 10.3. *Intentional or fraudulent conduct*

10.3.1. The PL legislation in all jurisdictions other than Victoria does not apply to a concurrent wrongdoer who either intentionally or fraudulently caused the loss or damage being claimed.<sup>31</sup> Victoria, however, provides, in section 24AM, that:

Despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding.

10.3.2. As Mr Horan rightly points out at par 320, this provision goes much further than necessary, as it imposes joint and several liability on the defendant, whether or not the fraud had any connection to the apportionable claim, and whether or not the defendant would otherwise have been jointly and severally liable. I propose that section 24AM be repealed and replaced with a provision in the same form as that in all the other jurisdictions.

### 10.4. *Liability excluded by other legislation*

10.4.1. All jurisdictions other than South Australia exclude a concurrent wrongdoer from relying on the PL legislation if the latter is excluded by

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<sup>30</sup> ACT, s 107K; NSW, s 39(a), (b); NT, s 14(a), (b); Qld, s 32I(a), (c); SA, s 3(1) ‘derivative liability’; Tas, s 43G(1)(a), (b); Vic, s 24AP(a), (c); WA, s 5AO(a), (b); ASIC Act, s 12GW (a), (b); Corporations Act, s 1041S(a), (b); TPA s 87CI(a), (b).

<sup>31</sup> ACT, s 107E(1); NSW, s 34A(1)(a), (b); NT, s 7(1); Qld, ss 32D, 32E, SA, s 3(2)(c); Tas, s 43A(5); WA, s 5AJA(1)(a),(b); ASIC Act, s 12GQ(1)(a), (b); Corporations Act, s 1041M(1)(a), (b); TPA, s 87CC(1)(a) and (b).

other legislation.<sup>32</sup> It may be assumed that the South Australian drafter felt that there was no need to repeat what was contained in other legislation. Nevertheless, I propose that, for the avoidance on any possible doubt, and in the interests of national uniformity, South Australia include a provision along the lines of subsection 28(4) of the Queensland Act, that the PL legislation “does not apply to a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several.”

#### 10.5. *Damages for personal injury or death*

10.5.1. All the State and Territory legislation on PL, other than that in New South Wales and Tasmania, expressly excludes a claim arising out of personal injury.<sup>33</sup> No doubt the drafters in New South Wales and Tasmania felt that the fact that an apportionable claim is limited to one for “economic loss or damage to property”<sup>34</sup> was sufficient to exclude claims for damages for personal injury or death. Nevertheless, I propose that, for the avoidance on any possible doubt, and in the interests of national uniformity, New South Wales and Tasmania include a provision expressly excluding claims for damages for personal injury or death.

#### 10.6. *Agency*

10.6.1. The PL legislation in the ACT, Queensland and Victoria provides that it does not prevent “a person from being held jointly and severally liable for the damages awarded against another person as agent of the person.”<sup>35</sup> It appears that the South Australian legislation is to the same effect, in that it excludes PL as between members of the same group, and a group is defined for these purposes as including one who is vicariously liable for the acts of another.<sup>36</sup> It is suggested that the law of agency, and the rights and liabilities of principal and agent, are so far removed from the circumstances in which the PL legislation is intended to operate that the above express provision is no more than a wise precaution, and states a proposition which drafters in other States and Territories may have felt to be unnecessary. Nevertheless, I propose that, for the avoidance on any possible doubt, and in the interests of national uniformity, New South Wales, the Northern Territory, Tasmania and Western Australia include a provision along the lines of that in the ACT, Queensland and Victoria.

<sup>32</sup> ACT, ss 107B(4), 107K(d); NSW, s 39(c); NT, s 14(c); Qld, s 28(4), (5); Tas, s 43G(1)(c); Vic, ss 24AF(3), 24AG(2), 24AP(e); WA, ss 5AJA(1)(c), 5AO(c); ASIC Act, s 12GW (c); Corporations Act, s 1041S(c); TPA, s 87CI(c).

<sup>33</sup> ACT, s 107B(3)(a); NT, ss 3, definition of ‘economic loss’, 4(3)(a); Qld, s 28(3)(a); SA, ss 3(2)(a)(i), 8(6); Vic, s 24AG(1); WA Act s 5AI(1)(a). TPA, s 82(1AAA) does not permit a claim for damages for personal injury or death arising from a breach of s 52.

<sup>34</sup> See NSW, s 34(1)(a),(b); Tas, s 43A(1)(a), (b).

<sup>35</sup> ACT, s 107K(b); Qld, 32I(b); Vic, s 24AP(b).

<sup>36</sup> SA, ss 3(1), definition of ‘derivative liability’, 8(3)(a). For the circumstances in which a principal may be vicariously liable for the acts of an agent, see, eg, Balkin and Davis, above, n 3, pars [26.11]-[26.14].

### 10.7. Exemplary damages

10.7.1. Exemplary damages are expressly excluded from the ambit of the PL legislation in Queensland, South Australia and Victoria.<sup>37</sup> As with some of the above express exclusions, it is likely that the drafters of the legislation in the other jurisdictions thought that such an express exclusion was scarcely necessary. Exemplary damages are not available for a breach of contract<sup>38</sup>, nor for an action for damages for breach at least of section 52 of the TPA<sup>39</sup> (and presumably the same applies to the equivalent provisions in the ASIC Act and the Corporations Act). The only other circumstance in which an action may be commenced under the PL legislation is in negligence, and it is only in very rare circumstances that a court will award exemplary damages in a negligence action, and then only when the plaintiff has suffered personal injury.<sup>40</sup>

10.7.2. Despite these restrictions on the award of exemplary damages, I propose that, for the avoidance on any possible doubt, and in the interests of national uniformity, all jurisdictions include a provision expressly excluding an award of exemplary damages from a claim under the PL legislation.

### 10.8. Consumer claims

10.8.1. The ACT and Queensland provide a further exclusion from the PL legislation, of claims by a consumer.<sup>41</sup> The definition of “consumer” in each provision is similar, but not identical. The word is defined for these purposes as meaning an individual whose claim relates to goods or services acquired or supplied for the claimant’s personal, domestic or household use or consumption, or personal advice (in the ACT, the advice must be “financial”, while in Queensland it must have been given by a professional).<sup>42</sup>

10.8.2. Although these provisions are currently confined to these two jurisdictions, I propose that the remaining jurisdictions adopt the same limitation, although I also propose that the terms of the limitation be identical among all jurisdictions.

<sup>37</sup> Qld, s 32I(d); SA, s 3(3); Vic, s 24AP(d).

<sup>38</sup> See *Butler v Fairclough* (1917) 23 CLR 78 at 89 per Griffith CJ, *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at 6-7 per Gleeson CJ.

<sup>39</sup> *Musca v Astle Corp* (1988) 80 ALR 251 at 263 per French J.

<sup>40</sup> See Balkin and Davis, above n 3, para [27.11].

<sup>41</sup> See ACT, s 107B(3)(b); Qld, s 28(3)(b).

<sup>42</sup> ACT, s 107C(1); Qld, s 29, definition of ‘consumer’. ACT s 107C(2) stresses the personal nature of a consumer claim by expressly excluding a claim relating to goods or services which the claimant has held himself or herself out as acquiring them for the purposes resupply, use, transformation in the process of manufacture, or repair of other goods or fixtures.

10.8.3. The purpose of the PL legislation is to protect potential defendants against the possibility of being liable for 100% of a plaintiff's damages, despite having been responsible for only a minor proportion of that loss. However, such protection of potential defendants comes at a cost to those who seek compensation for losses which they have suffered as the result of another's negligence, or misleading conduct. Under the PL legislation, if a plaintiff wishes to be assured of compensation in full, it must seek out all the persons who may have contributed, by their acts or omissions, to the loss. One may question whether an individual, who has acquired goods or services for his or her own personal use, has the same resources to locate a number of defendants, and to commence litigation against each of them.

10.8.4. A further point is that, under joint and several liability, a plaintiff who claims to have suffered loss by the conduct of a number of defendants may negotiate with one only of those defendants to seek a compromise of the claim, and leave it to that one defendant to carry on its own negotiations subsequently with others who may have been liable to the original claimant. But if PL were to continue to apply to consumer claims, a possibly poorly resourced consumer would have to negotiate with each of those potentially liable, and the negotiations would necessarily relate not only to the fact of liability of each defendant but also the share of responsibility attributable to that defendant. It is difficult to imagine any consumer being prepared to take on that task, and it is likely that the consumer would instead bear the loss himself or herself.

10.8.5. A final comment is that the exclusion of consumer claims, as defined above, from the PL regime, is unlikely to be one that is often applied. It must be recalled that the whole scheme of PL is applicable only when two or more persons, by their independent or joint conduct, have caused one indivisible loss to the plaintiff. The illustration given at 2.3 was concerned with a business transaction. That is no accident, it is simply a reflection of the sort of circumstances in which PL is most likely to be applicable. To adopt an exclusion from PL for consumer claims is not, it is suggested, going to affect to any noticeable degree, the protection provided by the scheme.

#### 10.9. *The Queensland exclusion relating to misleading or deceptive conduct*

10.9.1. The Queensland Act contains a further, but much more restricted, exclusion from the PL scheme. Section 32F prevents a wrongdoer from seeking the protection of the PL legislation if he or she has engaged in misleading or deceptive conduct in breach of section 38 of the *Fair Trading Act 1989* (Qld). This appears to be intended to be a further protection for consumers, because the only persons who can bring proceedings for a breach of section 38 are "consumers" as defined in the *Fair Trading Act*. However, because of the general consumer carve-out in the Queensland PL legislation, referred to in 10.8.1, section 32F is available only to someone who is *not* a

consumer. I propose that section 32F be repealed, because it imposes a restriction on the availability of PL that is far greater than in any of the other jurisdictions.

10.10. *The Northern Territory exclusion concerning product safety standards*

10.10.1. Paragraph 4(3)(b) of the Northern Territory Act provides that a claim under the Consumer Affairs and Fair Trading Act (NT) (CA&FTA) arising from a contravention of Part 4 of that Act is not an apportionable claim. It is not easy to see in what circumstances a claim under section 91 of CA&FTA for damages for a contravention of Part 4 might, but for the above paragraph 4(3)(b), be an apportionable claim. Part 4 of the CA&FTA deals with product safety and product information, and applies only when there is a single defendant. The PL legislation, on the other hand, applies only when there are two or more wrongdoers. I propose the repeal of paragraph 4(3)(b) of the Northern Territory Act, as it appears to be unnecessary.

## 11. Contracting out

11.1. Currently the PL legislation in Queensland prohibits parties from contracting out of the scheme,<sup>43</sup> that in NSW, Tasmania and Western Australia expressly permits contracting out,<sup>44</sup> and the other examples of the legislation say nothing one way or the other. This is clearly an undesirable state of affairs, one major reason being that the law governing a particular transaction may be far from easy to determine. The High Court decided, in *John Pfeiffer Pty Ltd v Rogerson*,<sup>45</sup> that if a transaction is concerned principally with claims based on negligence, the liability of the parties will be determined by the law in force in the place where the negligence occurred. But even in laying down that rule, a majority of the Court acknowledged that it was “necessary to recognise that the place of the tort may be ambiguous or diverse.”<sup>46</sup> If the transaction is concerned with a claim under the Fair Trading legislation prohibiting misleading conduct, there is no clear High Court authority as to which State’s legislation may be applicable.

11.2. Furthermore, while the legislation remains in the current state of divergence, it would be possible for a party resident in one of the jurisdictions in which the PL legislation says nothing one way or the other about contracting out to in fact exclude the operation of the PL legislation by inserting in the contract a clause providing that the governing law of the contract is that of, say, Western Australia, and conferring on the courts of that State exclusive jurisdiction to hear and determine all disputes arising under the contract.

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<sup>43</sup> Qld, s 7(3).

<sup>44</sup> NSW, s 3A(2); Tas, s 3A(3); WA, s4A.

<sup>45</sup> (2002) 203 CLR 503.

<sup>46</sup> *Ibid* at [81] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

- 11.3. I propose that all of the legislation prohibit parties from contracting out. The principal reason – made clear in my illustration at 2.3.1 – is that joint and several liability can work a serious injustice on some parties, in that they may be responsible for only a minor portion of the total loss but, because they are covered by insurance and are the only ones able to satisfy the judgment, they (or their insurance company) end up providing all of the compensation. It was clearly in order to prevent that sort of injustice that PL was introduced. To permit contracting out would subvert that purpose, because it would clearly only be those who were likely to be plaintiffs in an action applying PL who would seek to contract out. Those for whose benefit the legislation was passed would scarcely be likely to voluntarily give up the advantage given them by the legislation.
- 11.4. Although the phrase “contracting out” might give the impression that it is concerned with parties of roughly equal bargaining power deciding to establish their own allocation of risk in relation to a particular transaction, it is in fact in this context concerned with one party, which has very considerable bargaining strength, forcing one or more of those with whom it deals to enter into an improvident bargain which denies the latter the right to rely on the PL legislation, even though that legislation has been enacted for that party’s benefit. It would be more accurate to describe contracting out of the PL legislation as giving a licence to those who have greater bargaining strength to unconscionably exercise their bargaining power in an attempt to gain a financial advantage.
- 11.5. Mr Horan refers, at par 387.1, to one argument against contracting out of PL:
- 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*
- 11.6. This concern falls away if it is accepted that PL is confined to those contractual obligations which are concurrent and co-extensive with a tortious duty of care. Such obligations are not relevant to “risk allocation under commercial contracts”, but solely with ensuring that, whether an obligation is expressed as tortious or contractual, since it has the same content irrespective of its classification, it is dealt with in the same way, however it may be described.
- 11.7. Furthermore, since the PL legislation was enacted in order to overcome the injustices of joint and several liability and to protect those who were victims of that injustice, it would follow a common pattern if it were to include a provision prohibiting contracting out. The *Insurance Contracts Act 1984* (Cth), one purpose of which is to protect those who take out insurance, includes sections 52 and 8 which, in the words of the High Court in *Akai Pty Ltd v The*

*People's Insurance Co Ltd*,<sup>47</sup> “manifest a legislative intent ... that there should be no power to contract out of the provisions of the Act”. Likewise section 68 of the *Trade Practices Act 1974* (Cth) prohibits corporations which supply goods or services to consumers from including a term in the contract that might exclude, restrict or modify the obligations imposed by the statute, in order to ensure that consumers enjoy the benefits of the terms implied into consumer contracts by that Act. And the *Contracts Review Act 1980* (NSW), which permits individuals to seek relief from unfair contracts, includes subsection 17(3), which is designed to prevent contracting out.

- 11.8. It may be added that, in practice, to allow contracting out would be likely to be counter-productive. This conclusion may be illustrated by a set of hypothetical facts which is a variant on the illustration at 2.3.1.

Plaintiff Ltd (Plaintiff) seeks a report on its take-over target, Victim Pty Ltd (Victim) from a single director, Jones, and Plaintiff also requests its solicitors, Smith & Co, and its accountants, Bean & Counter (B & C) to each independently review Jones' report before it is presented to the Board of Directors. In instructing B & C to undertake its task, Plaintiff demands that the firm agree that the PL legislation does not apply to any action that Plaintiff might bring against B & C for any loss resulting from this transaction. The director, Jones, is negligent in preparing the report, but both B & C and Smith & Co are also negligent in failing to discover Jones' negligence.

Plaintiff might then sue B & C alone, on the assumption that as they have contracted out of the PL legislation, they will be jointly and severally liable to Plaintiff, and therefore liable to pay the total of the loss suffered by Plaintiff. However, while Plaintiff might get judgment against B & C for the total of its loss, it is very unlikely that it would be able to recover the full amount of that judgment.

- 11.9. One reason for that result is that, on these particular facts, B & C might have entered into a scheme under the local Professional Standards legislation, under which their liability is limited. It is unclear whether a limitation under the Professional Standards legislation can be overridden by a firm's express agreement, but there would appear to be little point in the scheme if that were possible.

- 11.10. A second reason relates to the limitations that insurers put upon many of their policies. If B & C were not within a Professional Standards scheme, then even though the firm would doubtless have carried insurance against the liability to their clients which the law imposed on them (which, since the advent of PL legislation, would be limited to their proportion of any loss), their insurance policy will also typically not cover the firm for any liability which they had

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<sup>47</sup> (1996) 188 CLR 418 at 433 per Toohey, Gaudron and Gummow JJ.

accepted over and above that which is provided for by the PL legislation.<sup>48</sup> Plaintiff would be left with a right of action against B & C which may well not be worth pursuing. If Plaintiff were then to bring proceedings against the director, Jones, and Smith & Co, their liability would necessarily be something less than 100% of Plaintiff's loss, because B & C would still be one of the concurrent wrongdoers in those proceedings. Even though B & C had "contracted out" of the PL legislation, such "contracting out" applies only to extend the remedy that Plaintiff might seek against B & C in legal proceedings – it does not affect the fact that B & C was, *vis-à-vis* Plaintiff, one of two or more persons who have caused a single loss or damage to another through their breach of a tortious duty of care.

## 12. Application of the legislation to proceedings other than judicial

- 12.1. Mr Horan observes, at par 442, that there is considerable doubt whether the State and Territory PL legislation applies to an arbitration, and he further notes, at par 453, that the same doubt attends the question of whether the PL legislation applies to determinations by Financial Industry Complaints Service Ltd of complaints concerning breaches of the ASIC Act.
- 12.2. I propose that the necessary measures be taken to ensure that the PL legislation applies to any determination by a non-judicial body in the same way that it applies to courts. The reason for this proposal is that in Section 11 of this Review it was proposed that parties be prohibited from contracting out of PL in the case of disputes that are heard by a court. Assuming that proposal is accepted, it is essential to ensure that the ban on contracting out is effective and that parties are not able to use an arbitration clause or other dispute resolution provision as a covert means of contracting out of the PL regime.<sup>49</sup> The means of achieving that end are different in relation to the State and Territory legislation on the one hand, and the Commonwealth legislation on the other.
- 12.3. So far as the State and Territory legislation is concerned, Mr Horan notes, at sub-par 442.2, that "for those jurisdictions where the PL legislation defines 'Court' as including 'tribunal', there is a reasonable argument to say that 'tribunal' would include arbitrations." I believe that, in the light of the discussion below about the applicability of arbitration clauses to the Commonwealth legislation, such an argument is irrefutable.
- 12.4. Since it is only New South Wales, the Northern Territory, Tasmania and Victoria<sup>50</sup> which currently so define the term "Court", I propose that the ACT

<sup>48</sup> See the comment in Mr Horan's Report, at par 390, that "PI insurers ... typically exclude the risk assumed when [an insured] agrees to contract out of PL."

<sup>49</sup> See the comment by Mr Horan at par 446, that if arbitrations are found not to be subject to PL, "parties will use arbitration agreements under the relevant state or territory law effectively to contract out of PL."

<sup>50</sup> NSW, s 3; NT, s 3; Tas, s 3; Vic, s 24AE.

and the remaining State jurisdictions amend their PL legislation to define “Court” as including any non-judicial tribunal. So far as the relevant **Commonwealth** legislation is concerned, it is suggested that no change to the legislation is necessary (nor, perhaps, is any amendment possible<sup>51</sup>) due to the decision of the High Court in *Government Insurance Office (NSW) v Atkinson Leighton Joint Venture*.<sup>52</sup>

12.5. Subsequently, the New South Wales Court of Appeal, in *IBM Australia Ltd v National Distribution Services Ltd*,<sup>53</sup> applied the principle stated in the Atkinson Leighton case to justify the conclusion that, since the Court had general jurisdiction with respect to claims under Part V of the TPA, the term to be implied from an arbitration clause also included authority to give relief under that Act.<sup>54</sup>

12.6. Provided a contract contains a sufficiently wide arbitration clause, it appears that such a clause will impliedly permit the arbitrator to give a defendant the relief available under the PL provisions of, not only the TPA, but also the ASIC Act and the Corporations Act. It has been posited that an arbitration clause ought, for these purposes, cover disputes associated with the contract and not merely those arising under the contract.<sup>55</sup> The same principles presumably apply to any other form of non-judicial dispute resolution which drives its authority from the consent of the protagonists.

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<sup>51</sup> Because of the Constitutional limits on the way in which the judicial power of the Commonwealth may be exercised.

<sup>52</sup> (1981) 146 CLR 206 at 246-7. Mason J, with the concurrence of Murphy J and Wilson J, came to the conclusion that “a term is to be implied [into a contract containing an arbitration clause] that an arbitrator is to have the authority to give a claimant such relief as would be available in a court of law having jurisdiction with respect to the subject matter”. This description of the views of Mason J is taken from the judgment of Emmet J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (no5)* (1998) 90 FCR 1 at 19

<sup>53</sup> (1991) 22 NSWLR 466.

<sup>54</sup> See the discussion of the *IBM* case by Emmett J in the *Hi-Fert* case, above, n 54.

<sup>55</sup> See Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aus ed, 2008, par [11.135].

<b>Index of ‘Proportionate Liability Legislation’</b>	
<b>Abbreviation</b>	<b>Legislation</b>
ACT Act	<i>Civil Law (Wrongs) Act 2002</i>
Commonwealth Acts	<i>Trade Practices Act 1974; Corporations Act 2001; Australian Securities and Investments Commission Act 2001</i>
NSW Act	<i>Civil Liability Act 2002</i>
NT Act	<i>Proportionate Liability Act 2005</i>
Queensland Act	<i>Civil Liability Act 2003</i>
SA Act	<i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</i>
Tasmanian Act	<i>Civil Liability Act 2002</i>
Vic Act	<i>Wrongs Act 1958</i>
WA Act	<i>Civil Liability Act 2002</i>