AGS

Commercial notes

Number 23 | 30 May 2007

Proportionate liability

Proportionate liability legislation has recently been introduced in all Australian states and territories.[1] The legislation replaces the doctrine of joint and several liability for claims for property damage or purely economic loss arising from a failure to take reasonable care. The legislation also extends to claims for damages under the misleading or deceptive conduct provisions of the jurisdictions' fair trading legislation.[2]

Proportionate liability has also been introduced at the federal level in relation to claims for damages under the misleading or deceptive conduct provisions of the *Trade Practices Act 1974* (Cth), the *Corporations Act 2001* (Cth), and the *Australian Securities and Investments Commission Act 2001* (Cth).[3]

Rather than adopting standard legislation, each jurisdiction has adopted legislation which, while similar in many respects, is slightly different. This article begins with a review of the Victorian legislation, before considering some of the differences in the legislation between jurisdictions and some consequences of the legislation.

Melbourne

Kenneth Eagle Senior Executive Lawyer
T 03 9242 1290 F 03 9242 1481
kenneth.eagle@ags.gov.au

Melbourne

Michael McKenzie Lawyer
T 03 9242 1254 F 03 9242 1317
michael.mckenzie@ags.gov.au

Summary of the Victorian legislation

What does the legislation cover?

Part IVAA of the *Wrongs Act 1958* (Vic) was introduced in 2003. It operates to 'apportion' liability for an 'apportionable claim' between 'concurrent wrongdoers' – each wrongdoer can only be held responsible for the 'portion' of the damage that it caused, thereby avoiding a situation where the plaintiff can recover its entire loss from a single defendant.

What is an 'apportionable claim'?

The legislation only applies to 'apportionable claims'. These are defined in s 24AF(1) to be:

— claims for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care, or

— a claim for damages for a contravention of the misleading or deceptive conduct provisions in s 9 of the *Fair Trading Act 1999* (Vic).

Damages is defined broadly to cover 'any form of monetary compensation': s 24AE.

This issue

Summary of Victorian legislation 1
Some differences between the legislation in different jurisdictions 3
Some consequences of the legislation 4
Summary 6

The material in these notes is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in these notes. © AGS All rights reserved

Importantly, claims relating to:

- an injury
- transport accidents
- workers' compensation
- victims of crime
- equal opportunity complaints

are all excluded from the application of the legislation: ss 24AG(1) and (2). There is also scope for further exclusions by regulations: s 24AG(3).

If a proceeding involves more than one 'apportionable claim' arising out of different causes of action, liability is to be determined as if the claims were a single claim: s 24AF(2). If a proceeding involves claims that are 'apportionable' as well as claims that are not 'apportionable', the 'non-apportionable' claims continue to be treated in accordance with the otherwise applicable rules: s 24AI(2).

Who is a concurrent wrongdoer?

A 'concurrent wrongdoer', in relation to a claim, is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim: s 24AH(1).

Importantly, it doesn't matter if the concurrent wrongdoer 'is insolvent, is being wound up, has ceased to exist, or has died': s 24AH(2).

Importantly, it doesn't matter if the concurrent wrongdoer 'is insolvent, is being wound up, has ceased to exist, or has died'.

What is proportionate liability?

The liability of a defendant who is a concurrent wrongdoer in relation to a claim 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: s 24AI(1)(a).

In apportioning responsibility between different concurrent wrongdoers 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 because the person is dead or, if the person is a corporation, the corporation has been wound-up: s 24AI(3).

A defendant against whom judgment is given under the proportionate liability provisions as a concurrent wrongdoer in relation to an apportionable claim:

- cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim
- cannot be required to indemnify any such wrongdoer: s 24AJ.

Exclusions

An interesting exception to these provisions relates to fraud. 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: s 24AM.

The legislation specifically notes that it does not override principles relating to vicarious liability, agency liability, partnership liability or exemplary or punitive damages being awarded against a particular defendant: s 24AP.

Some differences between the legislation in different jurisdictions

As noted above, there are a number of differences between the proportionate liability legislation adopted by each jurisdiction. No two jurisdictions have adopted exactly the same legislation. What follows is a brief consideration of some of the more significant differences.

Is the 'liability' of persons who are not party to the litigation relevant?

In New South Wales, Queensland, the two territories, and under the federal Acts, a court *may* have regard to the liability of persons who have not been joined in the action.[4] In South Australia, Tasmania and Western Australia the Court *must* have regard to the liability of such persons.[5] In these jurisdictions, it will be important that the plaintiff has identified and joined all relevant parties, to ensure that it is able to fully recover.

In all jurisdictions except Victoria, a defendant is required to identify to the plaintiff any other concurrent wrongdoers who are not parties to the litigation – presumably to give the plaintiff the opportunity to join such other entities.[6]

As noted above, in Victoria the court *must not* have regard to persons who are not parties to the litigation, unless they are dead or (being a corporation) have been wound up.[7] Therefore, in Victoria, it will be the defendants who will be seeking to ensure that all relevant persons have been joined as parties to the proceedings.

No two jurisdictions have adopted exactly the same legislation.

It is also relevant to note that a person does not appear to need to have been joined by the plaintiff as a co-defendant in the litigation. It is enough that the person is a 'party', for example, after having been joined by a defendant.

Does the legislation apply to persons who jointly caused loss?

In all jurisdictions except Queensland and South Australia, the legislation applies to persons who independently of each other *or jointly* caused the loss or damage claimed.[8] In Queensland and South Australia the legislation only applies to persons who independently of each other caused the relevant loss or damage.[9]

Are 'consumer claims' caught?

In Queensland and the two territories, consumer claims are expressly excluded by the legislation.[10] In all other jurisdictions, these claims are not expressly excluded, so are presumably caught by the legislation.

Other exclusions

As noted above, in Victoria, a 'fraudulent' wrongdoer is not able to take advantage of the proportionate liability regime. In all other jurisdictions, in addition to a 'fraudulent' wrongdoer, an 'intentional' wrongdoer is also precluded from taking advantage of these provisions.[11]

Can you 'contract out' of the legislative regime?

New South Wales, Tasmania and Western Australia permit parties to 'contract out' of the proportionate liability regime.[12] In other words, in these jurisdictions contracting parties can include a clause in the contract providing that the relevant proportionate liability regime will not apply to any claims between the parties arising under the contract. While a clause that expressly states that the relevant legislation is excluded would be preferable, a clause providing for how liability will be apportioned in relation to an apportionable claim (e.g. an indemnity that makes a head contractor responsible for losses associated with the acts or omissions of its subcontractors) would probably also have the same effect.

Queensland prohibits 'contracting out'.[13] The other jurisdictions are silent about whether contracting out is permitted or prohibited. This raises the question of whether 'contracting out' is allowed in these jurisdictions. In Victoria, it has

been argued that 'contracting out' is not allowed because the *Wrongs Act 1958* (Vic) (which contains the proportionate liability provisions) expressly allows 'contracting out' in relation to a number of its other provisions. As there is no reference to 'contracting out' of the proportionate liability provisions, this may suggest that it is not allowed.

Importantly, if 'contracting out' is prohibited in a jurisdiction, clauses providing for how liability will be apportioned in relation to an apportionable claim, such as the indemnity example above, may be ineffective in that jurisdiction on the basis that such clauses could be regarded as an attempt to 'contract out'.

Some consequences of the legislation

Applicable law and 'contracting out'

Since the legislation is not uniform, the question of which state or territory statute applies to the action may make a considerable difference to the outcome of a case. Private international law rules governing such things as applicable law will be relevant. 'Application of laws' clauses in contracts may assist in relation to those claims that arise under a contract, but this will not help in relation to 'non-contractual' claims.

In this context, if parties wish to 'contract out' of the proportionate liability regime an option might be to select as the applicable law of a contract the law of a state that explicitly allows this to be done (i.e. New South Wales, Tasmania or Western Australia).

In deciding whether to do this, consideration of all of the other potentially applicable legislation in the relevant jurisdiction is required (e.g. unfair contracts legislation etc.). There may be a risk that a court would refuse to give effect to the parties' choice of law if it determined that that choice was for the specific purpose of avoiding the proportionate liability legislation (i.e. where there is no obvious connection between the chosen law and the location of the parties, or the subject matter or performance of the contract).[14] This risk is arguably reduced if the relevant claim is brought in courts of the same jurisdiction. That is, it would be reasonable to expect that a court, say, in New South Wales would be less likely to raise objection to the parties to a contract choosing the law of New South Wales to govern the contract.[15]

There may be a risk that a court would refuse to give effect to the parties' choice of law if it determined that that choice was for the specific purpose of avoiding the proportionate liability legislation.

Claims in both tort and contract

A further complication could arise where a matter with multiple wrongdoers involves claims in both tort and contract. For example, consider a situation where a principal suffers loss as a result of the failure to exercise reasonable care by both a head contractor and one of its subcontractors. The principal intends to bring claims in both tort and contract to recover the loss. The contract is expressed as being subject to the law of NSW and provides for the 'contracting out' of the NSW proportionate liability legislation, with the head contractor being liable for any losses caused by its own breach of contract or lack of care, but also all losses caused by the failure to exercise reasonable care on the part of any subcontractor. If the relevant 'tortious event' occurred in Victoria, the claim in tort would be subject to the laws of Victoria,[16] which, as mentioned above, may not permit 'contracting out'.

In light of the contractual provision for the head contractor to be liable for all losses, whether caused by itself or its subcontractors, the principal should be able to obtain full recovery against the head contractor by suing in contract provided the parties' choice of NSW law is adopted by the court (notwithstanding the 'contribution' of the subcontractor). In this situation, the fact that the principal could get only partial recovery against the head

contractor in relation to a tort claim (in accordance with Victoria's proportionate liability legislation) ought not to concern the principal, as it has already recovered all the losses it has suffered. However, a problem would arise if the court decided not to give effect to the parties' choice of law – see discussion above. In particular, the principal would need to be aware that it may not recover anything from the subcontractor for reasons which are explained next.

Does the legislation 'create' liability?

The legislation also raises an interesting question of whether the legislation 'creates' liability which otherwise would not have existed, or conversely creates a situation where a plaintiff can only recover part of its loss, as it does not have a valid claim against all 'concurrent wrongdoers'.

Take again the example of a principal who suffers loss as a result of a failure to exercise reasonable care by both a head contractor and one of its subcontractors. Previously, the principal could have sued the head contractor in tort for the entire loss notwithstanding that the subcontractor's actions also contributed to the loss. Alternatively, provided a standard indemnity making the head contractor responsible for losses associated with the acts or omissions of subcontractors had been included in the contract, a claim could have been made under that indemnity. The head contractor, in turn, would have been able to itself sue the subcontractor, for contribution based on the extent to which the subcontractor had been responsible for the loss.

The legislation also raises an interesting question of whether it 'creates' liability which otherwise would not have existed, or conversely creates a situation where a plaintiff can only recover part of its loss.

Under the proportionate liability legislation, the head contractor, when sued by the principal, would be able to 'point' to the subcontractor, as someone who had, at least partially, caused the relevant loss or damage. The head contractor would therefore only be held liable for its 'proportion' of the claim. In our example, the principal will not have a contract with the subcontractor on which it could sue. But equally, as the law now stands, it probably does not have an action in negligence against the subcontractor, as there is unlikely to be a 'duty of care' owed by the subcontractor to the principal.[17]

One view that has been expressed is that this legislation 'creates' a claim by the principal against the subcontractor which otherwise would not have existed – as otherwise the result that the plaintiff would be left without full recovery is 'unduly harsh and is unlikely to have been the intention of the legislation'.[18] However, this is not expressly stated in the legislation.

Another possible approach would be to argue that, despite earlier authority to the contrary, the subcontractor does owe a duty of care to the principal and therefore the principal does have a claim in negligence against the subcontractor.

Another possibility is that the definition of 'concurrent wrongdoer' should be 'read down' so that it only catches concurrent wrongdoers against whom the plaintiff would otherwise have a valid claim. Again, this is not expressly stated in the legislation, which requires no more than a causal link between the defendant subcontractor's act or omission and the plaintiff's loss to establish the former as a concurrent wrongdoer.[19] There is no overt requirement that the plaintiff also have a valid claim against the defendant.

A further possible 'solution' may flow from the acknowledgement in the legislation that it does not prevent vicarious liability claims being made.[20] In a situation involving an apportionable claim where liability is apportioned between a head contractor and a subcontractor, an argument might be run that the head contractor should be 'vicariously liable' for the proportion of the claim that is apportioned to the subcontractor. However, given two recent High Court decisions, there would appear to be significant difficulties with such an argument.[21]

The risk of an 'impecunious co-defendant'

The impact of the legislation is that the plaintiff (rather than an otherwise jointly liable defendant) now bears the 'risk' of one of the defendants being unable to satisfy a judgment against it. In effect, the 'deep-pocketed' defendant (whether it be an insurance company, or the Commonwealth) is 'protected' against the financial vulnerabilities of its co-defendants.

As noted above, where parties to a contract have decided not to or cannot 'contract out' of the proportionate liability scheme, a principal may only be able to recover part of a claim from the head contractor, but may be unable to seek recovery of the remainder from the subcontractor in an action in tort, despite the latter's acts or omissions being part of the cause of the loss. Given this potential situation, a principal will need to consider entering into a separate deed with a subcontractor in order to ensure that the principal has an established cause of action against the subcontractor, particularly where a subcontractor's role in a project is significant and/or high risk. Such a deed need provide only that the subcontractor promises *to the principal* that it will exercise due care in carrying out its obligations owed to the head contractor under the subcontract.[22] This could be done when, if the contract with the head contractor provides for it, approving the relevant subcontractor prior to them being engaged by the head contractor.

A principal will need to consider entering into a separate deed with a subcontractor in order to ensure that they have an established cause of action against the subcontractor.

The principal would also need to assess the financial viability of and/or insurance cover held by the subcontractor – as there is little point in having an enforceable claim against a subcontractor if the subcontractor does not have the means to meet it. This could be done as part of the assessment of the head contractor's original proposal, by requiring head contractors to provide such information for any subcontractors, or when assessing a request from a head contractor to 'approve' a new subcontractor.

Summary

The key points of this note are:

- Proportionate liability regimes have been introduced in all jurisdictions, covering claims for economic loss or damage to property, but not personal injury.
- Proportionate liability has particular relevance to contracts where subcontracting is contemplated.
- Agencies should consider whether or not they wish to 'contract out' of the applicable proportionate liability regime and whether this is possible under the law of the jurisdiction that governs their contract.
- Proportionate liability regimes could restrict the ability of an agency to recover its entire loss from a head contractor.
- Particularly for higher-risk subcontracts, agencies should consider entering into a separate 'duty of care deed' with the subcontractor, in order to ensure that they have an actionable claim directly against the subcontractor in relevant circumstances. This, in turn, will require agencies to pay attention to the insurance and financial viability of such a subcontractor.

For a detailed discussion of indemnities in Commonwealth contacting see AGS *Legal Briefing* No. 79, 26 July 2006.

***Kenneth Eagle** practises in the areas of commercial law, including competitive tendering and contracting, contract drafting, risk allocation and management, as well as intellectual property, including technology development and licensing agreements. In addition, he has gained expertise in the handling of complex legal issues and processes through his involvement in major privatisation and corporatisation projects.*

***Michael McKenzie** works in AGS' commercial team, advising government agencies on procurement, probity and general contracting and commercial matters including indemnities and risk allocation issues.*

AGS acknowledges the assistance of Emeritus Professor Jim Davis of the Australian National University in the preparation of this article.

Notes

1 *Civil Liability Act 2002* (NSW), Pt 4; *Wrongs Act 1958* (Vic), Pt IVAA; *Civil Liability Act 2002* (WA), Pt 1F; *Civil Liability Act 2003* (Qld), Pt 2; *Civil Law (Wrongs) Act 2002* (ACT), Ch 7A; *Proportionate Liability Act 2005* (NT); *Civil Liability Act 2002* (Tas), Pt 9A; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), Pt 3.

2 Note that the situation is slightly different under the South Australian legislation. Unlike the other jurisdictions the South Australian legislation does not overtly extend to claims under South Australia's fair trading legislation. Instead, it applies to claims where the wrongdoer is negligent or innocent: see s 3(2) (SA) and in particular the example given.

3 *Trade Practices Act 1974* (Cth) (TPA), Pt VIA; *Corporations Act 2001* (Cth) (CA), Pt 7.10 Div 2A; *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), Pt 2 Subdivision GA.

4 Section 35(3)(b) (NSW), s 31(3) (Qld), s 107F(2)(b) (ACT), s 10 (NT), TPA s 87CD(3)(b), CA s 1041N(3)(b), ASIC Act s 12GR3(b).

5 Section 8(2)(b) (SA), s 43B(3)(b) (TAS), s 5AK(3)(b) (WA).

6 Section 35A(1) (NSW), s 32(2) (QLD), s 10(1) (SA), s 43D(1) (TAS), s 5AKA(1) (WA), s 12 (NT), s 107G (ACT), TPA s 87CE(1), CA s 1041O(1), ASIC Act s 12GS(1).

7 Section 24AI(3) (VIC).

8 Section 24AH (VIC), s 6(1) (NT), s 107D (ACT), s 5AI (WA), s 34(2) (NSW), s 43(A)(2) (TAS), TPA s 87CB(3), CA s 1041L(3), ASIC Act s 12GP(3).

9 Section 30(1) (QLD), s 3(2) (SA).

10 Section 28(3)(b) (QLD), s 107B(3)(b) (ACT), s 4(b) (NT).

11 Section 34A(1) (NSW), ss 32D and 32E (QLD), s 43A(5) (TAS), s 5AJA(1) (WA), s 7(1) (NT), s 107E(1) (ACT), s 3(2) (SA), TPA s 87CC(1), CA s 1041IM(1), ASIC Act s 12GQ(1).

12 Section 3A(2) (NSW), s 3A(3) (TAS) s 4A (WA).

13 Section 7(3) (QLD).

14 *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

15 Note that agencies who contract as 'the Commonwealth' will not be able to take the further step of contractually granting exclusive jurisdiction to the courts of the relevant state. This is because the Commonwealth cannot 'contract out' of the jurisdiction conferred or vested in the High Court or a state or federal court by or pursuant to sections 75 to 77 of the Constitution.

16 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

17 See, e.g. Balkin and Davis, *Law of Torts*, 3rd ed, 2004, para [13.70] and the cases cited at fn. 212.

18 Julie Wright and Barry Casey, 'Proportionate liability: what is it all about?' (2005) 14(4) *The Australian Corporate Lawyer* 10.

19 Section 24AH(1) (VIC), s 34(2) (NSW), s 43A(2) (TAS), s 5AI (WA), s 3 (SA), s 30(1)(QLD), s 6 (1) (NT), s 107D(1) (ACT), TPA s 87CI(a), CA s 1041S(a), ASIC Act s 12GW(a).

20 Section 24AP(a) (VIC), s 39(a) (NSW), s 43G(1)(a) (TAS), s 5AO(a) (WA), s 3(2)(a) (SA), s 32I(a) (QLD), s 14(a) (NT), s 107K(a) (ACT), TPA s 87CB(3), CA s 1041L(3), ASIC Act s 12GP(3).

21 In *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19, the plaintiff claimed damages from a head contractor for an injury caused by the negligence of one if its independent contractors. The majority of the High Court held that the defendant could not be held vicariously liable for the conduct of an independent contractor. And in *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 the High Court unanimously held that the Council was not liable to the respondent pedestrian, who had been injured by the negligence of one of the Council's independent contractors.

22 Cf. *McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 in which the House of Lords considered the effect of a 'duty of care deed' entered into between a construction company and the owner of the land on which the building was constructed, the purpose of that deed being to establish liability by the builder who (according to the law of negligence in England) does not owe a duty of care to the owner of the property.

POSTSCRIPT

In Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd *[2007] FCA 1216, the Federal Court considered the application of the Victorian proportionate liability provisions to an action for damages that involved claims under various pieces of Commonwealth legislation.*

The court held that the provisions did not apply to the legislation because of the operation of s 79 of the Judiciary Act 1903 *(Cth). Nonetheless, the court went on to comment that, where the provisions do apply, 'the concurrent wrongdoers must each have committed the relevant legal wrong against the applicant' (at [40]). In other words, the court seemed to be suggesting that a plaintiff must have a cause of action against a person for that person to be a 'concurrent wrongdoer'. A mere causal link between the person's acts or omissions and the plaintiff's loss is not enough.*

Although obiter*, this is an indication of how a court may deal with the example raised in this note of a principal who suffers loss as a result of the actions of both the head contractor and one of its subcontractors. Applying the Federal Court's approach, if the principal does not have a cause of action against the subcontractor, the subcontractor will not be a 'concurrent wrongdoer' for the purpose of the applicable proportionate liability legislation. Therefore, the legislation will not apply and the principal can seek to recover its entire loss from the head contractor.*

AGS contacts

AGS has national teams of lawyers specialising in risk and liability in a commercial context, including assisting agencies in undertaking risk assessments and preparing contracts. We also have a national team of litigation and dispute resolution lawyers who specialise in the law of negligence, including in a commercial context. For further information on the article in this issue, or on other risk or liability issues please contact John Scala, our Chief Counsel Commercial, Tom Howe QC, our Chief Counsel Litigation, the authors, or any of the lawyers listed below.

Canberra	Linda Richardson	02 6253 7207
	Andrew Miles	02 6253 7100
	Christopher Behrens*	02 6253 7543
Sydney	John Berg	02 9581 7624
	Simon Konecny	02 9581 7585
	Simon Daley*	02 9581 7490
Melbourne	Paul Lang	03 9242 1322
	Cathy Reid	03 9242 1203
	Susan Pryde*	03 9242 1426
Brisbane	Richard Silver	07 3360 5700
Perth	Lee-Sai Choo	08 9268 1137
	Teresa Ling*	08 9268 1157
Adelaide/Darwin	Andrew Schatz	08 8205 4201
	Sarah Court*	08 8205 4231
Hobart	Peter Bowen	03 6210 2104

* Litigation and dispute resolution

National

John Scala *Chief Counsel Commercial*
T *03 9242 1321* ***F*** *03 9242 1481*
john.scala@ags.gov.au

National

Tom Howe QC *Chief Counsel Litigation*
T *02 6253 7415* ***F*** *02 6253 7384*
tom.howe@ags.gov.au

Offices

Canberra
50 Blackall Street Barton ACT 2600

Sydney
Level 42, 19 Martin Place Sydney NSW 2000

Melbourne
Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane
Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth
Level 19, 2 The Esplanade Perth WA 6000

Adelaide
Level 18, 25 Grenfell Street Adelaide SA 5000

Hobart
Level 8, 188 Collins Street Hobart TAS 7000

Darwin
Level 3, 9–11 Cavenagh Street Darwin NT 0800

Web site

For a full review of AGS services, visit <www.ags.gov.au>.

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form.

For enquiries regarding supply of issues, change of address details:
T *02 6253 7052* ***F*** *02 6253 7313*
E *ags@ags.gov.au*

ISSN 1433-9549
Approved Postage PP 255003/05310