

PROPORTIONATE LIABILITY AND CONTRACT CERTAINTY

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The current Australian proportionate liability regime, or perhaps I should say regimes since once again we have significant variations in the way in which this reform has been introduced in the various Australian state and territories, is proof for the insurance industry of the truth of the old adage, be careful what you wish for because you might get it. Well, after more than a decade of lobbying and several false starts², we now have proportionate liability governing damages claims for financial loss and property damage in all the major Australian jurisdictions, and it is going to be up to all of us with a stake in the system to make it work. Enough reservations have been expressed by enough highly respected and experienced commentators to give anyone pause³. Nevertheless, we are committed to this reform of the fundamental basis of damages liability and the philosophical justifications for it have not gone away, even if the liability insurance crisis which finally prompted its implementation seems now to be only a distant memory.

INTRODUCTION

The fundamental purpose of proportionate liability legislation, which as indicated was motivated at least in part by liability insurance considerations, was to remedy the perceived injustice of solidary liability where it had the effect of permitting a Plaintiff to collect the full amount of its damage from any liable Defendant whose tortious conduct had contributed to the Plaintiff's undifferentiated loss, even in a minor degree, irrespective of the extent to which other tortfeasors might also have been found to have contributed to that loss. The Plaintiff could recover in full from the "deep pocket" Defendant who had been found liable, leaving that Defendant to recover in contribution claims from the others. Accordingly, the risk of the other tortfeasors (including perhaps the ones primarily responsible for the loss) being insolvent or inaccessible rested upon the paying Defendant, rather than on the Plaintiff. While this might be an acceptable situation from a public policy point of view in the case of personal injury actions, by

¹ This is an expanded and updated version of the writer's paper entitled Proportionate Liability Legislation: Toward Restoring Certainty in Contractual Risk Allocation, presented at a Major Projects Conference in the Melbourne office of Clayton Utz in 2003.

² The issue was canvassed extensively in the Davis Report as far back as 1996, long before the so-called "insurance crisis" of 2002 which provided the catalyst for eventual implementation. See Davis, Inquiry into the Law of Joint and Several Liability (Commonwealth of Australia 1994-1995): Reports of Stages 1 and 2.

³ See for example Proportionate Liability, Some Creaking in The Super Structure, paper presented by the Honourable Justice David Byrne to the Judicial College of Victoria, 19 March 2006.

2002 it was becoming increasingly difficult to justify it in the case of economic loss and property damage claims and commercial tort litigation generally.⁴

Proportionate liability, as is now generally well known, operates in principle by replacing the old common law rule of joint and several liability of civil wrongdoers with one which requires the court to allocate liability for a loss between all of the "concurrent wrongdoers" whose actions have caused or contributed to it, according to their respective shares of responsibility for it. The court, therefore, must carry out essentially the same exercise which it has always done in determining contribution proceedings between joint tortfeasors, however, it is now precluded from entering judgment against any concurrent wrongdoer for an amount in excess of the share of responsibility which it has apportioned to them. All very simple and difficult to argue with in principle; diabolically difficult and, as we shall see, riddled with potential unintended consequences in practice.

The majority of the concerns which have been expressed about the practical application of the proportionate liability provisions, and their impact upon the cost and disposition of cases, seem to centre around the following considerations:

- Questions of just what factors determine the extent of a defendant's responsibility for the plaintiff's loss, in an apportionable claim, In particular, the degree to which the parties to a contract involving the assumption of a duty of care or responsibility for breach of it by one party can pre-empt the apportionment, by the terms of their contract. In other words, if the legislation does not permit the parties simply to contract out of its application, can they nevertheless by the terms of their contract define (as between themselves), what the respective degrees of responsibility of concurrent wrongdoers for a loss will be, in some or all circumstances. Must a Court then take that contractual allocation of risk into account in determining what degree of responsibility for a Plaintiff's loss it would be fair to apportion to a defendant, and what damages can therefore be awarded against that Defendant;
- The related question of whether indemnity provisions in contracts between tortfeasors are overridden by the legislation, where it prohibits a concurrent wrongdoer in an apportionable claim from being required to indemnify another for more than the first concurrent wrongdoer's apportioned share of responsibility. In other words, does the indemnity prohibition apply only to common law indemnities or does it also catch contractual ones?

⁴ It is worth noting that Victoria and some other jurisdictions have had proportionate liability in so called "building actions", being claims for loss or damage arising out of or concerning defective building work, for a considerably longer time. See *Building Act 1993 (Vic)* Division 2, specifically section 129.

- If the legislation permits contracting out, or does allow contractual allocation of risk provisions to influence the determination of a concurrent wrongdoer's appropriate share of responsibility for a loss, what effect does that have upon the response of general liability and professional indemnity insurance policies, in light of insurers' longstanding practice of excluding from coverage liabilities assumed by the insured under the express terms of a contract, where they would not have attached to the insured in the absence of that contract? and
- What may be the procedural and evidentiary difficulties, and the consequent impact upon the cost and complexity of litigation and the Court's management of cases, of such a radical shift in the underlying dynamics of litigation?

All these issues present far too much material to be canvassed in one paper, however, there have now been cases addressing at least some of the issues and quite an extensive amount written.⁵ There is also the experience of the building legislation cases to guide us, along with that of other jurisdictions. This paper, therefore, will focus upon an aspect of proportionate liability regimes which is of particular interest to the writer: the question of their interaction with contract law and possible impact upon contract certainty in the allocation of risk and responsibility for losses under major commercial contracts, where concurrent wrongdoers may be involved in the contract performance.

Appended at the end of this paper is a comparison table, summarizing the key aspects of the proportionate liability of the regimes of the Australian States and Territories. This may be of assistance to readers in comparing other aspects of the legislation between different jurisdictions, as well as the contracting out provisions.

I will address this question specifically in the context of the Victorian legislation, however, my comments will be applicable to a greater or lesser extent in other jurisdictions, except for NSW, WA and Tasmania where contracting out of the legislation is expressly permitted. In Queensland, contracting out is expressly prohibited (which may or may not affect a Court's consideration of the issue) while the other states and the Commonwealth are silent on the point. The relevant Victorian provisions found in Part IVAA of the *Wrongs Act 1958 (Vic)*.

⁵ See for example McDonald, Proportionate Liability in Australia: The devil in the Detail (2005) 26 Australian Bar Review 29; Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (2)[2006] VSC 117; Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd [2000] VSC 102; NBD Bank v South Italy Tiling SA [1997] SADC 3596; Commonwealth Bank of Australia v Witherow 17 Feb 2006 [2006] VSCA 45. See also D Aghion & AG Uren, Proportionate Liability: An Analysis of the Victorian and Commonwealth Legislative Schemes, paper delivered to the Commercial Bar Association, 18 August 2005.

THE LEGISLATION

The critical elements of the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Vic)*, are the following:

Section 24AE Definitions:

- (1) *"Apportionable Claim" means a claim to which this Part applies;*
- (2) *"Damages" includes any form of monetary compensation;*

Section 24AF Application of Part

- (1) *This Part applies to -*
 - (a) *a claim for economic loss or damage to property in an action for damages (whether in contract, tort under statute or otherwise) arising from a failure to take reasonable care; and*
 - (b) *a claim for damages for a contravention of Section 9 of the Fair Trading Act 1999.*
- (2) *If a proceeding involves two or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.*
- (3) *A provision of this Part that gives protection from civil liability does not limit or otherwise effect any protection from liability given by any other provision of this Act or by another Act or law.*

Section 24AH Who is a Concurrent Wrongdoer?

- (1) *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.*

Section 24AI Proportionate Liability for Apportionable Claims

- (1) *In any proceeding involving an apportionable claim -*
 - (a) *the liability of a defendant who is a concurrent wrongdoer in relation to that 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; and*

- (b) *judgment must not be given against the defendant for more than that amount in relation to that claim.*
- (2) *If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim -*
- (a) *liability for the apportionable claim is to be determined in accordance with this Part; and*
- (b) *liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.*
- (3) *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.*

It is important to bear in mind, that there have been few cases on this new legislation and in interpreting it we have to proceed largely from first principles and in light of the legislative intention, as evidenced by the Explanatory Memorandum and parliamentary debate. It is in this context that the likelihood of the *Wrongs Act* amendments being interpreted so as to override contractual risk allocation provisions in contracts must be determined, and the likely effectiveness of any possible counter measures assessed.

It is quite true, as the title of the bill itself⁶ and the Premier's second reading speech make clear, that the intention behind this legislation was to mitigate the exposure of liability insurers, especially professional indemnity insurers, in the hope of curtailing the cost and enhancing the availability of such insurance especially to professional service providers. Law reforms replacing solidary liability with proportionate liability have been an objective of insurers and other "deep pocket" defendants, such as governments and major financial institutions, in various jurisdictions around the common law world for a number of years now.⁷ It may confidently be assumed that the intention behind this legislation was to assist liability insurers, in cases not involving death or personal injury, by ameliorating the exposure of their insureds to liability.

⁶ *Wrongs and Limitation of Actions Act (Insurance Reform) Bill* 21 May 2003.

⁷ Hawke, *Proportionate Liability: The Enquiry Into the Law of Joint and Several Liability Parts 1 & 2*. (1997) Vol 20 No.5 *Australian Insurance Institute Journal* 26 and (1998) Vol 21. No 1 *A.I.I.J.* 14; Davis, *Inquiry into the Law of Joint and Several Liability (Commonwealth of Australia 1994-95): Reports of Stages One and Two*. See also Davis, *Draft Model Provisions to Implement the Recommendations of the Enquiry into the Law of Joint and Several Liability* (July 1996) and the references cited in those publications.

As the Davis Report⁸ foreshadowed it is likely that such a change will, indeed, have a positive effect upon the cost and availability of professional indemnity insurance. This is due to the fact that under a proportionate liability regime, insurers can confidently rate a professional's risk for professional indemnity premium calculation purposes by reference only to that professional's own claims experience history and the inherent risks of his or her profession, without having also to take into account the possibility of that professional being made jointly and severally liable for the incompetence of any other uninsured service providers with whom he or she may become involved on a project. The same applies, of course, to the risk assessments of government instrumentalities and major corporates who may also be involved in carrying out some of the activities of a project: the risks associated with their activities will be limited to their actual level of responsibility for the loss or damage caused. The risk of them nevertheless being impleaded even where that responsibility is minimal, and then being effectively fixed with liability for the entire claim merely because the parties responsible for most of it are without assets or insurance, is likewise eliminated. To that extent, the legislation may be assumed to be operating as intended.

THE NATURE OF THE PROBLEM

The question which arises is, therefore, to what extent in order to give effect to these objectives it was intended and is likely to be held that the legislation should operate to override or modify contractually assumed allocations of risk, as between joint venturers or arms length contracting parties, where the contract itself intends to prescribe those parties' respective degrees of "responsibility" for a loss. Due to the nature of the coverage provided under professional indemnity insurance, it seems clear that to the extent that a contractual obligation to indemnify or to assume loss is coterminous with a tortious liability for breach of a Duty of Care, it will indeed be limited by the legislation and this is the clear intention, in order to reduce the exposure of liability insurers as indicated above.

Most insurers would be comfortable with a construction of the legislation limited to this, since liability policies generally exclude any liabilities assumed by the insured under the express terms of a contract, unless those liabilities would have attached to the insured even in the absence of that contract. In other words, while insurers do not normally distinguish between liabilities arising in contract⁹, tort or under statute, they only indemnify in respect of a contractual liability to the extent that it is coterminous with liability arising out of breach of a Duty of Care or, to use the language of the legislation itself, "arising from a failure to take reasonable care".

⁸ Supra, Report Stage 2.

⁹ eg under the terms of a retainer.

The difficulty for contracting parties, especially in the construction and engineering professions, is that except in the rare situations where a structure is state of the art, liability under a strict warranty to perform work:

1. to the standard to be expected of a reasonably competent contractor; or
2. to a design prepared to the standard expected of a reasonably competent engineer;

will in fact be coterminous with liability arising out of a failure to take reasonable care, by the very nature of the warranty given.

Arising from a failure to take Reasonable Care

In the case of express warranties, to perform works by a certain date, a failure to fulfil this will not necessarily arise out of any breach of Duty of Care on the part of the Contractor giving it, or on the part of any other person involved in the works, and in that situation it would be possible to argue that a claim under the warranty fell outside the scope of Section 24AF(1) and was not an "apportionable claim" for the purposes of the legislation. There would be no "concurrent wrongdoers" involved. Of course, in such a situation it is quite possible that the force majeure provisions of the contract would also apply, possibly absolving the Contractor from liability in respect of the warranty claim in any event.

In a situation where a warranty to complete work on time was breached not as a result of any negligence on the part of the Contractor giving it, but due to lack of reasonable care on the part of another contractor or sub-contractor, an interesting question of construction of sub-section 24AF(1) would arise. That is, of course, whether the words "arising from a failure to take reasonable care" should be construed widely, to include the situation where the failure is that of a person other than the person against whom the damages claim for economic loss or property damage is being brought, or narrowly so that the Part only applies where the person against whom the claim under the warranty is brought is the same person whose failure to take reasonable care has given rise to the loss.

It is relevant to consider the actual terms of Section 24AF, which reads as follows:

24AF Application of Part

(1) *This Part applies to -*

- (a) *a claim for economic loss or damage to property **in an action for damages** (whether in contract, tort under statute or otherwise) **arising from a failure to take reasonable care; and***
- (b) *a claim for damages for a contravention of Section 9 of the Fair Trading Act 1999.*

- (2) *If a proceeding involves two or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.*
- (3) *A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law. (Our emphasis)*

The interpretation question needs to focus on sub-paragraph 24AF(1)(a), and there are two questions in interpreting it:

1. whether the focus is upon economic loss or damage to property "arising from" a failure to take reasonable care, or whether it is the action for damages which must arise from such a failure in order for the Part to apply and the claim to become an apportionable one. The first interpretation of the sub-section would arguably give it a wider field of operation, while the second would require a closer connection between the cause of action and the breach of duty, arguably a coterminous liability in tort and contract; and
2. the breadth of meaning to be ascribed to the words "arising out of" in the context of this particular legislation and its objectives, as opposed to other areas of law where this phrase has been significant.

This is a point of some subtlety and it is not possible to state with confidence how a court would determine it. On the one hand, there is extensive case law dealing with the construction of phrases such as "arising from", primarily in the context of insurance law and the doctrine of proximate cause, and it is generally accepted that the words have a wider meaning than the immediate basis of a cause of action.¹⁰ On the other hand, consideration of the intention of the legislation as discussed above might prompt a court to prefer a narrower interpretation of the phrase in this context, restricting the application of the Part

¹⁰If the policy states that the insured is covered against losses "arising out of" the insured perils, there is no requirement that the loss be proximately caused by the peril: *Government Insurance Office (NSW) v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437; *SGIC v Stevens Bros Pty Ltd* (1984) 154 CLR 552; *Dickson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500; *Transport Accident Commission v Jewell* [1995] 1 VR 300, Tadgell J at [306]; also *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242, 245.

What is required where "arising out of" is used is that there be some "non-coincidental nexus" between the peril and the loss: *Lamont, Hodgkinson and Jorgenson v Motor Accidents Board* [1983] 1 VR 88, Tadgell J at [96]; *Transport Accident Commission v Hoffman* [1989] 1 VR 197, Young CJ and McGarvie J at [201].

If the word "directly" appears before "arising out of" (as it does in many motor accident insurance statutes following *Dickson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500) the effect of the expression is changed. The added requirement then is a "direct and sufficient non-coincidental nexus": *Transport Accident Commission v Treloar* [1992] 1 VR 447, McGarvie and Gobbo JJ at [452]; *Transport Accident Commission v Jewell* [1995] 1 VR 300, Tadgell J at [307-8].

to a situation where the party liable on the warranty is also the party out of whose failure to take reasonable care the action for damages arises, since it is only in that situation that a professional indemnity insurer will be indemnifying and will benefit from the apportionment of liability.

Concurrent Wrongdoers

Such an argument is consistent with the definition of "concurrent wrongdoer" within the meaning of Section 24AH. That section reads:

24AH Who is a Concurrent Wrongdoer?

- (1) *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.*

In light of this definition, where an indemnity is obtained from a person not actually involved in the project, who has not been guilty of any acts or omissions in relation to it but whose liability arises only by way of the indemnity, it is clear that sub-section 24AI(1) will not apply. It follows that indemnity obligations of external parties such as guarantors and insurers are not abrogated by the legislation. By the same reasoning, in the case of a contractual indemnity given by, for example a Prime Contractor to the Principal, if the Prime Contractor itself were not in any way at fault but was liable to indemnify against a loss only because it had assumed responsibility for the actions of all other contractors and sub-contractors, then it would seem to be strongly arguable that in such a situation the Prime Contractor also would not be a "concurrent wrongdoer" within the meaning of Section 24AH and the proportionate liability regime in Section 24AI would not apply.

Once again, this is not inconsistent with the purpose of protecting insurers since professional indemnity insurance of the Prime Contractor alone would not respond in that situation. The argument is also consistent with the existence of sub-section 24AI(2), which contemplates both apportionable and unapportionable claims in the same proceeding. The proportionate liability regime is only to apply to the former.¹¹

Monetary Compensation

Another important issue in the construction of this legislation arises from the definition of "damages" in sub-section 24AF(1)(a), which in Section 24AE is defined to include "any form of monetary

¹¹ See for example *Aquatec-Maxcon Pty Ltd (ACN 002 250 482) V Barwon Regional Water Authority*, BC 200601653, Supreme Court of Victoria (Byrne J) 31 March 2006 and extensive related litigation. This case presents a classic scenario of how proportionate liability legislation may be expected to complicate commercial litigation, specifically an action to recover a liquidated sum under a Contract which was confused by apportionable claims against various professionals also involved in the works.

compensation". This definition elides the distinction between an action for damages and an action for debt, and there can be no doubt that a claim for liquidated damages under contract falls within the concept of "monetary compensation". By their very nature, liquidated damages must be compensatory in order to avoid being construed as unenforceable penalties.

It is also arguable that the phrase "any form of monetary compensation" is apt to include a contractual entitlement to indemnity, where the entitlement "arises out of" a failure to take reasonable care as discussed above. While it is possible to draw a conceptual distinction between compensating someone for a loss and indemnifying them against it, no reliance could be placed upon a court applying such a hair splitting distinction in the context of this legislation, at least not in a situation where the indemnity obligation was coterminous with a damages liability in tort, for the reasons outlined above.

It is possible, however, that in a scenario where a party's contractual indemnity obligations exceeded the liability which would otherwise have attached to them for their own breach of a Duty of Care, a court might be prepared to distinguish between an indemnity obligation and "monetary compensation" and hold that the requirements of sub-section 24AF(1)(a) had not been met. This argument is not inherently persuasive and would have to be run in tandem with the argument outlined above, that a claim under a contractual indemnity is not a claim in an action for damages arising from a failure to take reasonable care, and it is obviously stronger where the person liable under the contract to indemnify and the person whose breach of Duty of Care has proximately caused the loss or damage are not one and the same person.

Assumption of Responsibility

A final and in the writer's view persuasive argument, to avoid undue interference by the proportionate liability provisions with contractual risk allocation, focuses upon sub-section 24AI(1)(a). That sub-section reads:

24AI Proportionate Liability for Apportionable Claims

- (1) *In any proceeding involving an apportionable claim -*
- (a) *the liability of a defendant who is a concurrent wrong doer in relation to that 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.*

Let us focus here on the words "the court considers just having regard to the extent of the defendant's **responsibility** for the loss or damage". "Responsibility" must mean legal responsibility but the question is, is the court limited to considering only the extent to which the defendant's failure to take reasonable care has caused or contributed to the loss or damage, which it must have done for them to be a

"concurrent wrongdoer" or can the court, in deciding what the defendant's liability in relation to the apportionable claim should be, have regard also to any contractual assumption of responsibility to which the defendant may have committed itself?

It would not be inconsistent with the avowed purpose of the legislation, to mitigate the exposure of professional indemnity insurers, to construe the words "the defendant's responsibility" to include a contractually assumed responsibility for the consequences of other persons' failure to use reasonable care and to indemnify a counter party against any loss or damage arising from that. The prospects of success of such an argument could be enhanced, it is suggested, by including in the relevant contract, whether as between Joint Venturers or between a Principal and a Prime Contractor, an express stipulation that, for the purposes of sub-section 24AI(1)(a), the party indemnifying has assumed responsibility for loss or damage which may have been caused or contributed to by concurrent wrongdoers. A suggested form of words for such a clause might be along the following lines:

...it being agreed and understood that, for the purposes of Section 24A1 of the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003, the Prime Contractor is entirely responsible for any failure to take reasonable care on the part of any of its sub-contractors.

Other variations on this theme can readily be envisaged, tailored to the needs of various forms of contract. Of course, the risk of such a provision enlivening the contractual assumption of risk exclusion, in a liability or professional indemnity policy, is easy to see.

That, however, is a problem which needs a separate solution and one on which a separate paper is required.¹²

CONCLUSION

To summarise, the declared purpose of the legislation is to mitigate the exposure of liability (especially professional indemnity insurers) and a construction consistent with that purpose is likely to be given to it. The question is whether and to what extent that necessarily entails overriding parties' contractual allocations of responsibility, to the extent that these relate to uninsured risks. An external party to the project, such as an insurer or guarantor, who assumes those risks by contract will not be a concurrent wrongdoer for the purposes of the legislation and their contractual responsibilities will not be affected by it.

¹² See for example Mann, Giblett and Hawke, Proportionate Liability, Paper to be presented at the Risk Management Institution of Australasia Annual Conference 2006. Watch this space!

In the case of indemnities or hold harmless agreements given by persons who are involved in a project, and whose acts or omissions have caused or contributed to economic loss or property damage, the key questions are:

1. the extent to which it can be argued that their contractual obligations do not "arise from a failure to take reasonable care", for the purposes of sub-section 24AF(1)(a), in a situation where they have contractually assumed more responsibility than the extent to which their own acts or omissions have caused the loss or damage; and
2. the extent to which a court, in an apportionable claim, can take into account an express contractual assumption of responsibility by a concurrent wrongdoer, for the conduct of other concurrent wrongdoers, in determining what amount would be the just liability of the first concurrent wrongdoer under Section 24AI(1)(a).

In light of the importance of these issues for major projects, it may be worthwhile for a number of key stakeholders to consider seeking to refer these questions to the Victorian Supreme Court upon a case stated, relating to the proper interpretation of Part IVAA of the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*. Assuming the possibility of a satisfactory outcome, upon which Senior Counsel's advice obviously ought to be obtained, this might be preferable to an immediate strategy of making major projects contracts subject to the law of a foreign jurisdiction, in the hope of avoiding the legislation altogether.

While that may well work, the difficulty is that applying the laws of foreign jurisdictions may have other unintended consequences, which the parties and their advisers could not anticipate at the time of contracting, and it would seem likely to increase the cost and complication of both the contractual negotiations and the resolution of any subsequent disputes.

As to the contractual liability exclusion insurance problem, one way of addressing this might be to shift the emphasis in risk management of major projects away from the traditional model of legal liability backed by liability or professional indemnity insurance, toward a form of two party, direct loss project insurance. This would entail side stepping the entire question of legal liabilities and the parties simply insuring directly their respective allocated risks in connection with a project. This might be more economically efficient, however, the cost and availability of such insurance would need to be explored.¹³ The problem of uninsurable risks would remain, of course.

¹³ Construction Performance Bonds have traditionally been provided by insurers, so there is nothing conceptually difficult about such a proposal. It would, however, need a significant commitment on the part of the insurance industry to make it work and both the allocation and rating of the major risks on a two party basis would need to be revisited, as the limiting factor of breach of a Duty of Care would no longer apply.

Finally, there remains the possibility of further legislative intervention. In evaluating the appropriateness and likelihood of that, however, it is pertinent to consider the fact that the proportionate liability reforms, although undoubtedly driven by insurance considerations, are for the benefit of all "deep pocket" defendants including governments, not merely professional indemnity insurers. It is a legitimate question whether it is reasonable for a major contracting party such as the State to have the benefit of a proportionate liability regime in its capacity as a defendant, while avoiding its effects where it is a Principal seeking to sheet home liability for project losses to a Prime Contractor.

Australia-wide Comparison of Proportionate Liability Regimes

Current to 20 October 2006

This document outlines and compares the proportionate liability regimes that each of the states, territories and the commonwealth have enacted.

A summary of whether the regimes prohibit 'contracting out' of the proportionate liability provisions is presented below. In short, Queensland is the only jurisdiction to expressly prohibit contracting out of proportionate liability.

Pages 2 and onwards contain detailed information regarding each jurisdiction's regime and, where applicable, compares this with legislation from other Australian jurisdictions. The information presented includes details as to which legislative instruments provide for proportionate liability, extracts of the exact wording of the proportionate liability provisions from each jurisdiction, commencement information in relation to those provisions, and more detailed information on 'contracting out'.

Does the statute prohibit 'contracting out' of proportionate liability?		
Jurisdiction	Relevant Legislation	Status
QLD	<i>Civil Liability Act 2003</i>	Yes
NSW	<i>Civil Liability Act 2002</i>	No
VIC	<i>Wrongs Act 1958</i>	No
WA	<i>Civil Liability Act 2002</i>	No
ACT	<i>Civil Law (Wrongs) Act 2002</i>	No
SA	<i>Law Reform (Contributory Negligence and Apportionment of</i>	No

	<i>Liability) Act 2001</i>	
TAS	<i>Civil Liability Act 2002</i>	No
CTH	<i>Corporations Act 2001</i>	No
	<i>Trade Practices Act 1974</i>	No
	<i>Australian Securities and Investment Commission Act 2001</i>	No

Comparison of State Proportionate Liability Legislation

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
Provisions providing for Proportionate Liability	<i>Civil Liability Act 2002, Part IV</i> (as amended by section 3 and schedule 2 of the <i>Civil Liability Amendment Act 2003</i> No 94)	<i>Wrongs Act 1958, Part IVAA</i> (as amended by section 1(a)(iii) and section 3 the <i>Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003</i> , as amended by Part 3 of the <i>Wrongs and Other Acts (Law of Negligence) Act 2003</i>) Section 58(10) of the <i>Victoria State Emergency Service Act 2005</i> <i>Act No. 51/2005</i> contains	<i>Civil Liability Act 2002, Part 1F</i> (as amended by section 9 of the <i>Civil Liability Amendment Act 2003</i> and Part 3 of the <i>Civil Liability Amendment Act 2004</i>)	<i>Civil Law (Wrongs) Act 2002, Chapter 7A</i> (as amended by section 4 of the <i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004</i>)	<i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001, Part 3</i> (amended by part 2 of the <i>Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005</i>)	<i>Civil Liability Act 2002, Part 9A</i> (as amended by sections 4 and 5 of the <i>Civil Liability Amendment (Proportionate Liability) Act 2005</i>)	<i>Civil Liability Act 2003 (the CLA), Chapter 2, Part 2</i> (as amended by sections 75 and 76 of the <i>Professional Standards Act 2004</i> (the PSA)) Application- see section 4(3) of the CLA which provides: "Chapter 2, part 2 applies only in relation to a breach of duty happening on or after

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>a consequential amendment to s.24AG of the Wrongs Act that lies within the proportionate liability provisions of the Act. Section 58(1) reads as such:</p> <p>For section 24AG(2)(e) of the <i>Wrongs Act 1958</i> substitute—</p> <p>"(e) an application for compensation under Part 4 of the <i>Victoria State Emergency Service Act 2005</i>";.</p> <p>This amendment has not yet been proclaimed.</p>					the commencement of this subsection."
Commence-ment	<p>The NSW proportionate liability regime was proclaimed to commence on 1 December 2004. As the provisions are not prescribed to be retrospective, it is assumed that the regime applies to causes of action happening on or after 1 December 2004.</p>	<p>Section 24AS of the <i>Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003</i> states that proportionate liability applies to "proceedings that are commenced in a court on or after the commencement of section 3" of that Act. Section 3 of that Act was proclaimed to commence on 1 January 2004. Therefore, proportionate</p>	<p>The WA proportionate liability regime was proclaimed to commence on 1 December 2004 (see section 5AJ(3)), and applies to causes of action happening on or after 1 December 2004.</p>	<p>The ACT proportionate liability scheme was proclaimed to commence on 8 March 2005. As the provisions are not retrospective, it is assumed that the regime applies to causes of action happening on or after 8 March 2005.</p>	<p>Part 3 forms part of the amendments to the Act inserted by operation of the <i>Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005</i> (SA). The amending bill received assent on 14 July 2005. The amending Act commenced on 1 October 2005 by virtue of a</p>	<p>The amending Act received royal assent on 12 April 2005. The proportionate liability provisions of the Act were commenced on 1 June 2005 by virtue of proclamation gazettal reference S.R. 2005 No. 43. The proportionate liability provisions apply to causes of actions that accrue after the proclamation date.</p>	<p>The Qld proportionate liability regime was proclaimed to commence on 1 March 2005, and applies to causes of action that happen on or after 1 March 2005.</p>

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		<p>liability applies to proceedings commenced in a court on or after 1 January 2004.</p>			<p>proclamation Gazettal reference GG. 87 8/9/2005 p.3275. Section 12 of the Amending Act states: "12-Transitional provision (1) the <i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</i> (the principal Act) and the amendments made to the principal Act by this Act are intended to apply only prospectively. (2) It follows that - (a) the law of the State, as in force before the commencement of the principal Act, applies to a cause of action that arose before its commencement; and (b) a cause of action that arose after the commencement of the principal Act but before the commencement of Part 3 of that Act is unaffected by that Part."</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
PROVISIONS							
Proportionate Liability	Part 4	PART IVAA	Part 1F	Chapter 7A	Part 1	PART 9A	PART 2
Application of Part	<p>34 (1) This Part applies to the following claims (apportionable claims):</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,</p> <p>(b) a claim for economic loss or damage to property in an action for damages under the <i>Fair Trading Act 1987</i> for a contravention of section 42 of that Act.</p> <p>(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based</p>	<p>24AF. (1) This Part applies to—</p> <p>(a) a claim 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; and</p> <p>(b) a claim for damages for a contravention of section 9 of the Fair Trading Act 1999.</p> <p>(2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.</p> <p>(3) A provision of this Part that gives protection from civil liability does not limit</p>	<p>5AJ. (1) For the purpose of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p> <p>(2) This Part does not apply -</p> <p>(a) to a claim for damages of a class that is excluded from the operation of this Part by section 3A; or</p> <p>(b) to the extent that its operation is excluded, modified or restricted in accordance with section 4A.</p> <p>(3) This Part applies only to causes of action that accrue after the commencement of the <i>Civil Liability Amendment Act 2003</i> section 9.</p> <p>(4) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of</p>	<p>107B (1) This chapter applies to apportionable claims.</p> <p>(2) An apportionable claim is—</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in tort, under contract or otherwise) arising from a failure to take reasonable care; or</p> <p>(b) a claim for economic loss or damage to property in an action for damages under the <i>Fair Trading Act 1992</i>, section 46 for a contravention of that Act, part 2 (Unfair practices).</p> <p>(3) However, none of the following is an apportionable claim:</p> <p>(a) a claim arising out of personal injury;</p> <p>(b) a consumer claim;</p>	<p>4—Application of Act</p> <p>(1) This Act applies to liabilities of the following kinds—</p> <p>(a) a liability in damages that arises under the law of torts;</p> <p>(b) a liability in damages for breach of a contractual duty of care;</p> <p>(c) a liability in damages that arises under statute.</p> <p>(2) This Act—</p> <p>(a) has no effect on criminal proceedings; and</p> <p>(b) does not make enforceable an agreement for an indemnity that would not have been enforceable apart from this Act; and</p> <p>(c) does not apply to liability subject to apportionment under section 72 of the Development Act 1993.</p>	<p>43A. (1) This Part applies to the following claims ("apportionable claims"):</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care (but not including any claim arising out of personal injury);</p> <p>(b) a claim for economic loss or damage to property in an action for damages under the Fair Trading Act 1990 for a contravention of section 14 of that Act.</p> <p>(2) In this Part –</p> <p>"concurrent wrongdoer", in relation to a claim, means a person who is one of two or more persons whose act or omission caused,</p>	<p>28 (1) This part applies to either or both of the following claims ("apportionable claim")—</p> <p>(a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;</p> <p>(b) a claim for economic loss or damage to property in an action for damages under the <i>Fair Trading Act 1989</i> for a contravention of section 38 of that Act.</p> <p>(2) For this part, if more than 1 claim of a kind mentioned in subsection (1)(a) or (1)(b) or both provisions is based on the same loss or damage, the claims must be treated as a single apportionable claim.</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
	<p>on more than one cause of action (whether or not of the same or a different kind).</p> <p>(2) In this Part, a concurrent wrongdoer, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.</p> <p>(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).</p> <p>(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p> <p>(5) (Repealed)</p>	<p>or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.</p>	<p>the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).</p>	<p>(c) a claim prescribed under the regulations for this paragraph.</p> <p>(4) Also, without limiting subsection (3), none of the following is an apportionable claim:</p> <p>(a) a claim under the <i>Discrimination Act 1991</i>;</p> <p>(b) a claim to which the <i>Road Transport (General) Act 1999</i>, part 10 (Compulsory vehicle insurance) applies;</p> <p>(c) a claim under the <i>Workers Compensation Act 1951</i>.</p> <p>(5) Regulations made for subsection (3) (c) may make provision in relation to their application to claims arising from acts or omissions that happened before the regulations were notified.</p> <p>(6) For this chapter, there is a single apportionable claim in a proceeding in relation to the same loss or damage even if the claim for the loss or</p>		<p>independently of each other or jointly, the damage or loss that is the subject of the claim;</p> <p>"excluded concurrent wrongdoer" means a concurrent wrongdoer referred to in subsection (5)(a) or (b).</p> <p>(3) For the purpose of this Part, apportionable claims are limited to those claims specified in subsection (1).</p> <p>(4) For the purpose of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p> <p>(5) Nothing in this Part operates to limit the liability of a concurrent wrongdoer in proceedings involving an apportionable claim if –</p> <p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the</p>	<p>(3) This part does not apply to a claim—</p> <p>(a) arising out of personal injury; or</p> <p>(b) by a consumer.</p> <p>(4) Also, this part 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.</p> <p>(5) A provision of this part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
				<p>damage is based on more than 1 cause of action (whether or not of the same or a different kind).</p>		<p>claim; or (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim. (6) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant. (7) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part. (8) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B. (9) For the purpose of this Part, there is a single apportionable claim in proceedings in respect of</p>	

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
						the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).	
Certain concurrent wrongdoers not to have benefit of apportionment	<p>34A (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an <i>excluded concurrent wrongdoer</i>) in proceedings involving an apportionable claim if:</p> <p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or</p> <p>(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or</p> <p>(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the</p>		<p>5AJA. (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an "excluded concurrent wrongdoer") in proceedings involving an apportionable claim if -</p> <p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim;</p> <p>(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim; or</p> <p>(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the</p>	<p>107E (1) This chapter does not limit the liability of a concurrent wrongdoer (an <i>excluded concurrent wrongdoer</i>) in a proceeding involving an apportionable claim if the concurrent wrongdoer intended to cause, or fraudulently caused, the economic loss or damage to property the subject of the claim.</p> <p>(2) The liability of an excluded concurrent wrongdoer must be decided in accordance with the legal rules (if any) that, apart from this chapter, are relevant.</p> <p>(3) The liability of any other concurrent</p>			

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
	<p>operation of this Part by section 3B.</p> <p>(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.</p>		<p>operation of this Part by section 3A.</p> <p>(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.</p>	wrongdoer is to be decided in accordance with this chapter.			
Definitions for Part		<p>24AE. In this Part—</p> <p>"apportionable claim" means a claim to which this Part applies;</p> <p>"court" includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;</p> <p>"damages" includes any form of monetary compensation;</p>	<p>5AI. Interpretation</p> <p>(1) In this Part -</p> <p>"apportionable claim" means -</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care (but not including any claim arising out of personal</p>	<p>107A In this chapter:</p> <p><i>apportionable claim</i>— see section 107B.</p> <p><i>concurrent wrongdoer</i>— see section 107D.</p> <p><i>defendant</i>, in a proceeding, includes anyone joined as a defendant or other party in the proceeding (other than as a claimant), whether joined under this chapter, under rules of</p>	<p>3. Interpretation</p> <p>(1) In this Act—</p> <p><i>"apportionable liability"</i>—see subsection (2);</p> <p>"claimant" means a person who asserts, or is entitled to assert, a right to damages for harm;</p> <p>"contributories" means the person (or persons) seeking contribution under this Act and the person (or persons) from whom</p>		<p>29</p> <p>In this part—</p> <p>"apportionable claim" see section 28(1).</p> <p>"consumer" means an individual whose claim is based on rights relating to goods or services, or both, in circumstances where the particular goods or services—</p> <p>(a) are being acquired for personal, domestic or</p>

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		<p>"defendant" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise;</p> <p>"injury" means personal or bodily injury and includes—</p> <p>(a) pre-natal injury; and</p> <p>(b) psychological or psychiatric injury; and</p> <p>(c) disease; and</p> <p>(d) aggravation, acceleration or recurrence of an injury or disease.</p> <p>24AH. Who is a concurrent wrongdoer</p> <p>(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 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.</p>	<p>injury); or</p> <p>(b) a claim for economic loss or damage to property in an action for damages under the <i>Fair Trading Act 1987</i> for a contravention of section 10 of that Act;</p> <p>"concurrent wrongdoer", in relation to a claim, means a person who is one of 2 or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim.</p>	<p>court or otherwise.</p> <p>107C Meaning of consumer claim for pt 7A (1) A consumer claim</p> <p>is a claim by an individual (the <i>claimant</i>) relating to—</p> <p>(a) goods or services acquired by the claimant from a defendant, or the supply of goods or services to the claimant by a defendant, for the claimant's personal, domestic or household use or consumption; or</p> <p>(b) personal financial advice supplied to the claimant by a defendant.</p> <p>(2) However, a claim relating to goods or services is not a consumer claim if, in the course of business, the claimant holds himself or herself out as acquiring the goods or services from the defendant for the purpose of—</p> <p>(a) resupplying them; or</p>	<p>contribution is sought;</p> <p>"contributory negligence" means a failure by a person who suffers harm to take reasonable care for his or her own protection or the protection of his or her own interests;</p> <p>"damages" means compensation or damages for harm and includes solatium but does not include workers compensation;</p> <p>"defendant" includes a third party (that is, the defendant to a third-party claim);</p> <p>"derivative harm" means harm suffered as a result of injury to, or death of, another (but does not include nervous shock arising from injury to, or death of, another);</p> <p><i>Examples—</i></p> <p>1. The loss suffered by dependants as a result of the death of the person on whom they are dependent (See Part 2 of the <i>Wrongs</i></p>		<p>household use or consumption; or</p> <p>(b) relate to advice given by a professional to the individual for the individual's use, other than for a business carried on by the individual whether solely or as a member of a business partnership.</p> <p>"court", in relation to a claim for damages, means any court by or before which the claim falls to be decided.</p> <p>"defendant" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this part, under rules of court or otherwise.</p> <p>30 Who is a concurrent wrongdoer</p> <p>(1) A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more</p>

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		<p>(2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.</p>		<p>(b) using them up or transforming them in or in relation to a process of manufacture or production; or</p> <p>(c) repairing or treating other goods or fixtures on land.</p> <p>(3) In this section: acquire—see the <i>Fair Trading Act 1992</i>, section 5 (1) and section 7. business—see the <i>Fair Trading Act 1992</i>, section 5 (1). goods—see the <i>Fair Trading Act 1992</i>, section 5 (1). resupply—see the <i>Fair Trading Act 1992</i>, section 7 (1). services—see the <i>Fair Trading Act 1992</i>, section 5 (1). supply—see the <i>Fair Trading Act 1992</i>, section 5 (1) and section 7 (1).</p> <p>107D Concurrent wrongdoers (1) For this chapter, a</p>	<p><i>Act 1936</i>).</p> <p>2. Loss or impairment of consortium (See section 33 of the <i>Wrongs Act 1936</i>).</p> <p>3. Business losses resulting from injury to or death of spouse who participated in the business (See section 34 of the <i>Wrongs Act 1936</i>).</p> <p>"derivative liability" means—</p> <p>(a) a vicarious liability (including a partner's liability for the act or omission of another member of the partnership); or</p> <p>(b) a liability of a person who is subject to a non-delegable duty of care for the act or omission of another that places the person in breach of the non-delegable duty; or</p> <p>(c) if an insurer or indemnifier is directly liable to a person who has suffered harm for the act or omission of a person</p>		<p>persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.</p> <p>(2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
				<p>concurrent wrongdoer, for a claim, is 1 of 2 or more people whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim.</p> <p>(2) For this chapter, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p>	<p>who is insured or indemnified against the risk of causing the harm—the liability of the insurer or indemnifier; or</p> <p>(d) a liability as nominal defendant under a statutory scheme of third-party motor vehicle insurance;</p> <p>"duty of care" means a duty to take reasonable care or to exercise reasonable skill (or both);</p> <p>"group" - a group consists of a person who is directly liable for a particular act or omission and the person or persons (if any) who have a derivative liability for the person's act or omission;</p> <p>"harm" includes loss of life, personal injury, damage to property, economic loss and loss of any other kind (whether the harm is primary or derivative);</p> <p>"innocent" - wrongdoing is innocent if the wrongdoer whose act or</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
					<p>omission actually caused the harm neither intended to cause harm nor was negligent in causing harm;</p> <p>"negligent wrongdoing" means—</p> <p>(a) a breach of a duty of care;</p> <p>(b) a breach of a contract;</p> <p>(c) a breach of a statutory duty;</p> <p>"notional damages" - a plaintiff's notional damages is the amount of the damages (excluding exemplary damages) to which the plaintiff is, or would be, entitled assuming—</p> <p>(a) no contributory negligence; and</p> <p>(b) the defendant were fully</p> <p>(i) this Act; or</p> <p>(ii) any other Act that limits the amount of damages;</p> <p>(iii) a contract;</p> <p>"primary harm" means harm other than derivative harm;</p> <p>"special limitation" of liability means a limitation of liability to which a defendant is entitled under—</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
					<p>(a) an Act (other than this Act) that limits the liability of defendants of a particular class (as distinct from one that imposes a general limitation of liability); or</p> <p>(b) a contract;</p> <p>"wrongdoer" means—</p> <p>(a) a person who commits an act, or makes an omission, that causes or contributes to harm (including a person whose act or omission contributes to his or her own harm); or</p> <p>(b) a person who has a derivative liability for harm resulting from the act or omission of someone else;</p> <p>Note—</p> <p>A person may be considered a wrongdoer even though the person—</p> <ul style="list-style-type: none"> • has died; or • has been wound up or has ceased to exist; or • has become insolvent; <p>or</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
					<p>• cannot be found.</p> <p>"wrongdoing" means an act or omission that causes or contributes to harm (including such an act or omission on the part of the person who suffers the harm); and a reference to the wrongdoing of a wrongdoer (or a defendant) is to be understood as a reference to wrongdoing for which that person is directly liable or for which that person has a derivative liability.</p> <p>(2) A liability is an apportionable liability if the following conditions are satisfied:</p> <p>(a) the liability is a liability for harm (but not derivative harm) consisting of—</p> <p>(i) economic loss (but not economic loss consequent on personal injury); or</p> <p>(ii) loss of, or damage to,</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
					<p>property;</p> <p>(b) 2 or more wrongdoers (who were not acting jointly) committed wrongdoing from which the harm arose;</p> <p>(c) the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent.</p> <p>Example—</p> <p>A , who acts with intention to defraud, prepares a false and deceptive statement. B, who is not aware of the fraud, negligently publishes the statement to C, who relies on it and suffers financial loss in consequence. C brings an action against A and B under section 56 of the Fair Trading Act 1987. In this case, B's liability is an apportionable liability but A's is not.</p> <p>(3) A liability to pay exemplary damages is not however to be regarded as an apportionable liability.</p>		

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
Proportionate liability for apportionable claims	<p>35 (1) In any proceedings involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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, and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:</p> <p>(a) liability for the apportionable claim is to</p>	<p>24AI. (1) In any proceeding involving an apportionable claim—</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that 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; and</p> <p>(b) judgment must not be given against the defendant for more than that amount in relation to that claim.</p> <p>(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—</p> <p>(a) liability for the</p>	<p>5AK. (1) In any proceedings involving an apportionable claim -</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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; and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>(2) If proceedings involve both an apportionable claim and a claim that is not an apportionable claim -</p> <p>(a) liability for the apportionable claim is to</p>	<p>107F (1) In a proceeding involving an apportionable claim—</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer for the claim is limited to an amount reflecting the 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; and</p> <p>(b) the court must not give judgment against the defendant for more than that amount.</p> <p>(2) In apportioning responsibility between defendants in the proceeding—</p> <p>(a) the court must exclude the proportion of the loss or damage in relation to which the claimant is</p>	<p>8 - Limitation of defendant's liability in cases of apportionable liability</p> <p>(1) If a defendant's liability on a claim for damages is apportionable, the liability is limited under this section.</p> <p>(2) If the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is fair and equitable having regard to—</p> <p>(a) the extent of the defendant's responsibility for the harm; and</p> <p>(b) the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to</p>	<p>43B. (1) In any proceedings involving an apportionable claim –</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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; and</p> <p>(b) the court is not to give judgment against the defendant for more than that amount.</p> <p>(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim –</p> <p>(a) liability for the apportionable claim is to</p>	<p>31 (1) In any proceeding involving an apportionable claim—</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage; and</p> <p>(b) judgment must not be given against the defendant for more than that amount in relation to the claim.</p> <p>(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
	<p>be determined in accordance with the provisions of this Part, and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) In apportioning responsibility between defendants in the proceedings:</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and</p> <p>(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all</p>	<p>apportionable claim is to be determined in accordance with this Part; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) 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.</p>	<p>be determined in accordance with the provisions of this Part; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) In apportioning responsibility between defendants in the proceedings -</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and</p> <p>(b) the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all</p>	<p>contributorily negligent under any relevant law; and</p> <p>(b) the court may consider the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.</p> <p>(3) If the proceeding involves an apportionable claim and a claim that is not an apportionable claim—</p> <p>(a) liability for the apportionable claim must be decided in accordance with this chapter; and</p> <p>(b) liability for the other claim must be decided in accordance with the legal rules (if any) that, apart from this chapter, are relevant.</p> <p>(4) This chapter applies in a proceeding involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding.</p>	<p>the harm.</p> <p>(3) For the purpose of subsection (2)—</p> <p>(a) 2 or more wrongdoers who are members of the same group are to be treated as a single wrongdoer; and</p> <p>(b) if the plaintiff was guilty of contributory negligence, that contributory negligence will be brought into account as wrongdoing and a percentage assigned to it; and</p> <p>(c) if 2 or more wrongdoers are each entitled to the benefit of a limitation of liability under this section (for some reason other than that they are members of the same group), the aggregate percentage assigned to them cannot exceed—</p> <p>(i) if there is no contributory negligence on the plaintiff's part— 100%; or</p>	<p>be determined in accordance with the provisions of this Part; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p> <p>(3) In apportioning responsibility between defendants in the proceedings –</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and</p> <p>(b) the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all</p>	<p>(a) liability for the apportionable claim, to the extent it involves concurrent wrongdoers, is to be decided in accordance with this part; and</p> <p>(b) liability for the other claim, and the apportionable claim to the extent it is not provided for under paragraph (a), is to be decided in accordance with the legal rules, if any, that, apart from this part, are relevant.</p> <p>(3) In apportioning responsibility between defendants in a proceeding the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.</p> <p>(4) This section applies to a proceeding in relation to an apportionable claim</p>

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	<p>concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.</p>		<p>concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.</p>		<p>(ii) if there is contributory negligence on the plaintiff's part—100% less a percentage representing the extent of the plaintiff's responsibility for his or her harm.</p> <p>(4) In a case involving apportionable liability, the court must proceed as follows:</p> <p>(a) the court first determines the plaintiff's notional damages;</p> <p>(b) the court gives judgment against any defendant whose liability is not subject to limitation under this section for damages calculated without regard to this Part;</p> <p>(c) the court determines, in relation to each defendant whose liability is limited under this section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability;</p>	<p>concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.</p>	<p>whether or not all concurrent wrongdoers are parties to the proceeding.</p>

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					<p>(d) the court then gives judgment against each such defendant based on the assessment made under paragraph (c) (but in doing so must give effect to any special limitation of liability to which any of them may be entitled).</p> <p>Example—</p> <p>A Ltd (which runs a forestry business) has engaged B (an independent contractor) to protect its forest from fire. C (an arsonist) sets the forest on fire. B is negligent in failing to detect and stop C's malicious act. A Ltd sues B and C for damages. In this case, B would be entitled to a limitation of liability under this section but C would not. In working out the amounts for which judgment should be given, the court would determine first the amount of damages necessary to</p>		

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					<p>cover the damage caused by the fire. Judgment for that amount would be given against C. In determining the amount for which judgment should be given against B, responsibility for the damage would be divided between B and C on essentially the same basis as would formerly have been applicable to an action for contribution between them. Judgment would be given against B for an amount reflecting the proportionate responsibility assigned to B on that basis.</p> <p>(5) The plaintiff is not entitled to recover, by way of damages under the judgment, more than the amount fixed as the plaintiff's notional damages.</p> <p>Example— Suppose that A has suffered a loss of \$1 000 for which B, C and D are</p>		

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					<p>liable. The liability of B and C is limited to 20% and 30% respectively, but D's liability is not limited. Judgment is therefore given against B for \$200, against C for \$300 and against D for \$1 000. In this case, the court would fix \$1 000 as the plaintiff's notional damages—thus limiting the damages that the plaintiff is entitled to recover under the judgment to that amount. If A proceeded first to recover in full against B and C, recovery against D would be limited to \$500. Conversely, recovery in full against D would preclude recovery against B and C. But rights of contribution may arise—see section 9.</p> <p>(6) However, this section does not affect the award of exemplary damages and, if such damages are awarded, they may be recovered in the ordinary</p>		

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					way from a defendant against whom they were awarded.		
Duty of defendant to inform plaintiff about concurrent wrongdoers	<p>35A (1) If:</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim, and</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:</p> <p>(i) the identity of the other person, and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was</p>		<p>5AKA. (1) If -</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the "other person") may be a concurrent wrongdoer in relation to the claim;</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about -</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was</p>	<p>107G (1) This section applies if—</p> <p>(a) a defendant in a proceeding involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer for the claim; and</p> <p>(b) the defendant does not give the claimant, as soon as practicable, written notice of the information the defendant has about—</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer for the claim; and</p> <p>(c) the claimant unnecessarily incurs costs in the proceeding</p>	<p>10 Procedural Division</p> <p>(1) If a defendant entitled to a limitation of liability under this Part has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim, the defendant must 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—</p> <p>(a) the other person's identity and whereabouts; and</p> <p>(b) the circumstances giving rise to the other person's liability.</p> <p>(2) If a defendant fails to comply with its obligation under this section, a court may order the defendant</p>	<p>43D. (1) If –</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the "other person") may be a concurrent wrongdoer in relation to the claim; and</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about –</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was</p>	<p>32 Onus of parties to identify all relevant parties (1) 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.</p> <p>(2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has—</p> <p>(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</p>

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	<p>not aware that the other person may be a concurrent wrongdoer in relation to the claim, the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.</p> <p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>		<p>not aware that the other person may be a concurrent wrongdoer in relation to the claim, the court hearing the proceedings may order that the defendant pay all or any of those costs to the plaintiff.</p> <p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>	<p>because the claimant did not know that the other person may be a concurrent wrongdoer for the claim.</p> <p>(2) The court hearing the proceeding may order that the defendant pay all or any of the claimant's costs.</p> <p>(3) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>	<p>to pay costs incurred in proceedings that could have been avoided if the obligation had been carried out.</p> <p>(3) A court may order that costs payable under this section be assessed on the basis of an indemnity.</p>	<p>not aware that the other person may be a concurrent wrongdoer in relation to the claim – the court hearing the proceedings may order that the defendant pay all or any of those costs to the plaintiff.</p> <p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>	<p>reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and</p> <p>(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.</p> <p>(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.</p> <p>(4) If the claimant fails to comply with the claimant's obligations under this section, a court may, on a concurrent wrongdoer's application, make orders as it considers just and equitable in the circumstances of the</p>

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							<p>case on the following—</p> <p>(a) apportionment of damages proven to have been claimable;</p> <p>(b) costs thrown away as a result of the failure to comply.</p> <p>(5) If a concurrent wrongdoer fails to comply with the concurrent wrongdoer's obligations under this section, a court may on application, if it considers it just and equitable to do so, make either or both of the following orders—</p> <p>(a) an order that the concurrent wrongdoer is severally liable for any award of damages made;</p> <p>(b) an order that the concurrent wrongdoer pay costs thrown away as a result of the failure to comply.</p> <p>(6) However if, as a result of information given by a concurrent</p>

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							wrongdoer under subsection (2), the claimant joins another party to the proceeding for the claim, and that party is found not to be liable to the claimant, the court may make orders about costs as it considers just and equitable in the circumstances of the case.
Contribution not recoverable from Defendant	36 A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim: (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which	24AJ. Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim— (a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and (b) cannot be required to indemnify any such wrongdoer.	5AL. (1) A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim - (a) cannot be required to contribute to the damages or contribution recovered from another concurrent wrongdoer in respect of an apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against	107H A defendant against whom judgment is given under this chapter as a concurrent wrongdoer for an apportionable claim cannot be required to— (a) contribute to any damages or contribution recovered from another concurrent wrongdoer for the claim (whether or not the damages or contribution are recovered in the same proceeding in which judgment is given against the defendant); or (b) indemnify another	9 - Contribution In a case in which the liability of one or more wrongdoers is limited under this Part, the provisions of Part 2 regarding contribution apply but subject to the following qualifications: (a) no order for contribution between wrongdoers whose liability is limited may be made; Exception— Contribution will be allowed between wrongdoers who are	43C. (1) A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim – (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which	32A Contribution not recoverable from concurrent wrongdoer Subject to this part, a concurrent wrongdoer against whom judgment is given under this part in relation to an apportionable claim— (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the

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	<p>judgment is given against the defendant), and (b) cannot be required to indemnify any such wrongdoer.</p>		<p>the defendant); and (b) cannot be required to indemnify any such wrongdoer. (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.</p>	<p>concurrent wrongdoer for the claim.</p>	<p>members of the same group, in respect of the liability of the group, in the same way (and subject to the same exceptions) as apply under Part 2. (b) no order for contribution may be made in favour of a wrongdoer whose liability is limited against a wrongdoer whose liability is not limited; (c) no order for contribution may be made in favour of a wrongdoer whose liability is not limited (A) against a wrongdoer (B) whose liability is limited unless A has fully satisfied the judgment debt, and, if such an order is made, the amount of contribution awarded against B cannot exceed the amount of B's liability for damages under the judgment.</p>	<p>judgment is given against the defendant); and (b) cannot be required to indemnify any such wrongdoer. (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from, or to indemnify, another concurrent wrongdoer in relation to an apportionable claim.</p>	<p>damages are recovered or recoverable in the same proceeding in which the judgment is given; and (b) can not be required to indemnify the other concurrent wrongdoer.</p>

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Subsequent actions	<p>37 (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.</p> <p>(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.</p>	<p>24AK. (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 loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.</p> <p>(2) However, in any proceeding 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 loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.</p>	<p>5AM. (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.</p> <p>(2) In any proceedings in respect of any action referred to in subsection (1) 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.</p>	<p>107I Subsequent proceeding by claimant</p> <p>(1) This chapter (or any other law) does not prevent a claimant for an apportionable claim who has recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing a subsequent proceeding against any other concurrent wrongdoer for the loss or damage.</p> <p>(2) However, in any subsequent proceeding the claimant cannot recover an amount of damages that, having regard to any damages previously recovered by the claimant for the loss or damage, would result in the claimant receiving compensation for loss or damage that is more than the loss or damage actually sustained by the claimant.</p>	<p>12—Judgment does not bar an action against person who is also liable for the same harm</p> <p>(1) A judgment for damages against one person does not bar an action against another person who is also liable for the same harm.</p> <p>(2) The general rule is that if separate actions are brought for damages for the same harm—</p> <p>(a) the aggregate amount of damages recoverable in the actions cannot exceed the relevant amount; and</p> <p>(b) the claimant is not entitled to costs in any action except the first.</p> <p>(3) However, if a court is satisfied that there were in the circumstances of a particular case reasonable grounds for bringing the actions separately, the court may</p>	<p>43E. (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.</p> <p>(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.</p>	<p>32B (1) In relation to an apportionable claim, nothing in this part prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.</p> <p>(2) However, in any proceeding in relation to the other action, the plaintiff can not recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in relation to the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.</p>

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					<p>depart from the general rule to the extent that it is fair and equitable to do so in the circumstances of that case.</p> <p>(4) The relevant amount is—</p> <p>(a) in a case that does not involve apportionable liability—the amount of damages awarded in the judgment first given (or, if that amount is varied on appeal, the amount as varied);</p> <p>(b) in a case involving apportionable liability—the amount fixed in the judgment first given as the plaintiff's notional damages¹ (or, if that amount is varied on appeal, the amount as varied).</p>		
Joining non-party concurrent wrongdoer in the action	38 (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.	24AL. (1) Subject to subsection (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an	5AN. (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.	107J Including non-party concurrent wrongdoer (1) In a proceeding in a court involving an apportionable claim, any	11 Separate proceedings If a plaintiff brings separate actions for the same harm against wrongdoers who are	43F. (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.	32C (1) Subject to subsection (2), the court may give leave for any 1 or more persons who are concurrent wrongdoers in relation to

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	<p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>	<p>apportionable claim to be joined as defendants in a proceeding in relation to that claim.</p> <p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.</p>	<p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>	<p>number of people may be included as defendants.</p> <p>(2) However, a person may be included as a defendant only with the court's leave.</p> <p>(3) The court must not give leave for a person to be included as a defendant if the person was a party to a previously concluded proceeding in relation to the claim.</p>	<p>entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—</p> <p>(a) the amount of the plaintiff's notional damages; and</p> <p>(b) the proportionate liability</p> <p>(c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.</p>	<p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>	<p>an apportionable claim to be joined as defendants in a proceeding in relation to that claim.</p> <p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.</p>
<p>What if a concurrent wrongdoer is fraudulent</p>		<p>24AM. What if a defendant is fraudulent?</p> <p>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.</p>					<p>32D Despite sections 31 and 32A, a concurrent wrongdoer 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 severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
Part not to affect other liability	<p>39 Application of Part Nothing in this Part:</p> <p>(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or</p> <p>(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>	<p>24AN. Liability for contributory negligence not affected Nothing in this Part affects the operation of Part V or Division 7 of Part X.</p> <p>24AO. Effect of Part IV Except as provided in section 24AJ, nothing in this Part affects the operation of Part IV.</p> <p>24AP. Part not to affect other liability Nothing in this Part—</p> <p>(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or</p> <p>(b) prevents a person from being held jointly and severally liable for the damages awarded against another person as</p>	<p>5AO. Part does not prevent other liability or operation of other Act</p> <p>Nothing in this Part -</p> <p>(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable;</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(c) affects the operation of any Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>	<p>107K Ch 7A does not affect certain other liability</p> <p>This chapter does not—</p> <p>(a) prevent a person from being held vicariously liable for a proportion of an apportionable claim for which someone else is liable; or</p> <p>(b) prevent a person from being held jointly and severally liable for the damages awarded against someone else as agent of the person; or</p> <p>(c) prevent a partner from being held severally liable with another partner for the proportion of an apportionable claim for which the other partner is liable; or</p> <p>(d) affect the operation of any other Act to the extent that the other Act imposes several liability on anyone</p>		<p>43G. This Part does not prevent certain liability, &c.</p> <p>(1) Nothing in this Part –</p> <p>(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p> <p>(2) In subsection (1)(b) – "partner" means a</p>	<p>32I</p> <p>Nothing in this part—</p> <p>(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or</p> <p>(b) prevents a person from being held jointly and severally liable for the damages awarded against another person as agent of the person; or</p> <p>(c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(d) prevents a court from awarding exemplary or punitive damages</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>agent of the person; or</p> <p>(c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(d) prevents a court from awarding exemplary or punitive damages against a defendant in a proceeding; or</p> <p>(e) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>		<p>for what would otherwise be an apportionable claim.</p>		<p>person who has entered into a partnership, within the meaning of the <i>Partnership Act 1891</i>, with another person.</p>	<p>against a defendant in a proceeding.</p>
General		<p>24AG. What claims are excluded from this Part? (1) This Part does not apply to claims arising out of an injury.</p> <p>(2) Without limiting subsection (1), this Part does not apply to the following—</p>			<p>7—Apportionment of liability in cases where the person who suffers primary harm is at fault</p> <p>(1) If contributory negligence contributes to (but is not the sole cause of) the harm for</p>		<p>32G Liability for contributory negligence not affected In apportioning responsibility as between concurrent wrongdoers, the court is to exclude the proportion of the damage or loss in</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>(a) a claim to which Part 3, 6 or 10 of the Transport Accident Act 1986 applies;</p> <p>(b) a claim to which Part IV of the Accident Compensation Act 1985 applies;</p> <p>(c) a claim in respect of an injury which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the Workers Compensation Act 1958 to compensation under that Act;</p> <p>(d) a claim for compensation under Part V of the Country Fire Authority Act 1958 or a claim for compensation under a compensation scheme established under the regulations made under that Act;</p> <p>(e) an application for compensation under Part 4 of the Victoria State Emergency Service Act 2005;</p>			<p>which a claimant seeks damages, the claim is not to be defeated on the ground of the contributory negligence.</p> <p>(2) If a claimant's harm is caused partly by another's negligent wrongdoing and partly by contributory negligence, the court must proceed as follows:</p> <p>(a) the court must determine (and record) the amount of the damages to which the claimant would have been entitled assuming there had been no contributory negligence; and</p> <p>(b) the court must then reduce the amount so determined to the extent the court thinks just and equitable having regard to the extent the contributory negligence contributed to the harm.</p> <p>(3) This section applies</p>		<p>relation to which the plaintiff is contributorily negligent under any relevant law.</p> <p>32E What if a concurrent wrongdoer intends to cause loss or damage</p> <p>Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who is found to have intended to cause the loss or damage suffered, and is found liable for damages, is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.</p> <p>32F What if a concurrent wrongdoer is proved to have engaged in misleading or deceptive conduct under the Fair Trading</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>(f) a claim for compensation under Part 6 of the Emergency Management Act 1986;</p> <p>(g) an application for compensation under the Police Assistance Compensation Act 1968;</p> <p>(h) an application for assistance under the Victims of Crime Assistance Act 1996;</p> <p>(i) a complaint under the Equal Opportunity Act 1995;</p> <p>(j) a claim for compensation under Part 8 of the Juries Act 2000 or Part VII of the Juries Act 1967;</p> <p>(k) a claim for compensation under Division 6 of Part II of the Education Act 1958.</p> <p>(3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.</p>			<p>subject to—</p> <p>(a) any contractual modification, exclusion or limitation binding on the claimant</p> <p>or, in the case of a claim for damages for derivative harm, on the person who suffered the primary harm; and</p> <p>(b) any statutory modification, exclusion or limitation.</p> <p>(4) In this section, a reference to contributory negligence extends, in the case of a claim for derivative harm, to negligence on the part of the person who suffered the primary harm.</p>		<p>Act</p> <p>Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who contravenes the <i>Fair Trading Act 1989</i>, section 38 is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.</p> <p>32H Concurrent wrongdoer may seek contribution from person not a party to the original proceeding</p> <p>Nothing in this part prevents a concurrent wrongdoer from seeking, in another proceeding, contribution from someone else in relation to the apportionable claim.</p> <p>33 Court May Give</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>24AQ. Supreme Court— limitation of jurisdiction</p> <p>It is the intention of sections 24AI and 24AL to alter or vary section 85 of the Constitution Act 1975.</p> <p>24AR. Regulations (1)</p> <p>The Governor in Council may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.</p> <p>(2) The regulations—</p> <p>(a) may leave any matter to be determined by the Minister; and</p> <p>(b) may apply, adopt or incorporate, wholly or partially or as amended by the regulations, any matter contained in any document as existing or in force—</p> <p>(i) from time to time; or</p> <p>(ii) at a particular time.</p>					<p>Directions (1) This section applies for the purposes of this part in relation to a claim for damages.</p> <p>(2) To the extent a matter about the court's procedure is not provided for by rules of court, the matter may be dealt with by a direction under subsection (3).</p> <p>(3) On application by a party, the court may give directions about the way a matter not dealt with by the rules is to proceed.</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
		<p>24AS. Transitional This Part applies to proceedings that are commenced in a court on or after the commencement of section 3 of the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003.</p>					
Does the Act prohibit 'contracting out' of proportionate liability?	<p>No. Note: Section 3A(2) does not prevent parties from contracting out of the Act, apart from Part 2 (personal injuries) matters.</p>	<p>No. Note: Section 46 allows for contracting out of Part X (negligence) matters and section 70 allows for contracting out of Part XI (mental harm) matters.</p>	<p>No. Section 4A is an express provision allowing "contracting out": (1) A written agreement signed by the parties to it may contain an express provision by which a provision of [proportionate liability] is excluded, modified or restricted and this Act does not limit or otherwise affect the operation of that express provision. (2) Subsection (1) applies</p>	<p>No. Note: Section 4.58 (part of Schedule 4 - which pertains to Professional Standards not proportionate liability) does not allow contracting out of Schedule 4 of the Act. That provision reads: "58 - No contracting out of sch 4 This schedule applies to a person to whom a scheme in force under this schedule applies</p>	<p>No. No mention is made of contracting out of the proposed proportionate liability provisions.</p>	<p>No. No mention is made of contracting out of the proportionate liability provisions.</p>	<p>Yes See section 7(3) (as amended by section 7 of the PSA) which provides: "This Act, other than [chapter 2, part 2], and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the "express provision") in relation to any matter to which this</p>

Jurisdiction:	NSW	VIC	WA	ACT	SA	TASMANIA	QLD
			to any provision of this Act referred to in that subsection even if the provision applies to liability in contract.	despite any contract to the contrary, whether the contract was made before, on or after the day the person became a person to whom the scheme applies."			Act applies and does not limit or otherwise affect the operation of the express provision."

Comparison of Commonwealth Proportionate Liability Legislation

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
Provisions providing for Proportionate Liability	<i>Corporations Act 2001, Volume 4, Part 7.10, Division 2A</i>	<i>Trade Practices Act 1974, Part VIA</i>	<i>Australian Securities and Investments Commission Act 2001, Part 2, Division 2, Subdivision GA</i>
Commencement	Section 2 of the <i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i> prescribes the commencement date for the proportionate liability scheme contained in the <i>Corporations Act 2001</i> . The proportionate liability scheme was proclaimed to commence on 26 July 2004 (Government Notice 28 on 14 July 2004). As this proclamation is not specified to be retrospective, it is assumed that proportionate liability applies to causes of action arising on or after 26 July 2004.	Section 2 of the <i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i> prescribes the commencement date for the proportionate liability scheme contained in the <i>Trade Practices Act 1974</i> . The proportionate liability scheme was proclaimed to commence on 26 July 2004 (Government Notice 28 on 14 July 2004). As this proclamation is not specified to be retrospective, it is assumed that proportionate liability applies to causes of action arising on or after 26 July 2004.	Section 2 of the <i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i> prescribes the commencement date for the proportionate liability scheme contained in the <i>ASIC Act 2001</i> . The proportionate liability scheme was proclaimed to commence on 26 July 2004 (Government Notice 28 on 14 July 2004). As this proclamation is not specified to be retrospective, it is assumed that proportionate liability applies to causes of action arising on or after 26 July 2004.
PROVISIONS			

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
Proportionate Liability	Division 2A—Proportionate liability for misleading and deceptive conduct	Part VIA—Proportionate liability for misleading and deceptive conduct	Subdivision GA—Proportionate liability for misleading and deceptive conduct
Application of Part	<p>1041L (1) This Division applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 1041I for:</p> <p>(a) economic loss; or</p> <p>(b) damage to property;</p> <p>caused by conduct that was done in a contravention of section 1041H.</p> <p>(2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).</p> <p>(3) In this Division, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.</p> <p>(4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).</p> <p>(5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p>	<p>87CB (1) This Part applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 82 for:</p> <p>(a) economic loss; or</p> <p>(b) damage to property;</p> <p>caused by conduct that was done in a contravention of section 52.</p> <p>(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).</p> <p>(3) In this Part, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.</p> <p>(4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).</p> <p>(5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p>	<p>12GP (1) This Subdivision applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 12GF for:</p> <p>(a) economic loss; or</p> <p>(b) damage to property;</p> <p>caused by conduct that was done in a contravention of section 12DA.</p> <p>(2) For the purposes of this Subdivision, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).</p> <p>(3) In this Subdivision, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.</p> <p>(4) For the purposes of this Subdivision, apportionable claims are limited to those claims specified in subsection (1).</p> <p>(5) For the purposes of this Subdivision, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.</p>
Certain concurrent wrongdoers not to have benefit of apportionment	<p>1041M (1) Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an excluded concurrent wrongdoer) in proceedings involving an</p>	<p>87CC (1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an excluded concurrent wrongdoer) in proceedings involving an apportionable claim</p>	<p>12GQ (1) Nothing in this Subdivision operates to exclude the liability of a concurrent wrongdoer (an excluded concurrent wrongdoer) in proceedings involving an apportionable claim if:</p>

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
	<p>apportionable claim if:</p> <p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or</p> <p>(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.</p> <p>(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Division) are relevant.</p> <p>(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Division.</p>	<p>if:</p> <p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or</p> <p>(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.</p> <p>(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.</p> <p>(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.</p>	<p>(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or</p> <p>(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.</p> <p>(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Subdivision) are relevant.</p> <p>(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Subdivision.</p>
<p>Proportionate liability for apportionable claims</p>	<p>1041N (1) In any proceedings involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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; and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:</p> <p>(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from</p>	<p>87CD (1) In any proceedings involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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; and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:</p> <p>(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.</p>	<p>12GR (1) In any proceedings involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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; and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:</p> <p>(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Subdivision; and</p> <p>(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Subdivision) are relevant.</p> <p>(3) In apportioning responsibility between defendants in the proceedings:</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant</p>

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
	<p>this Division) are relevant.</p> <p>(3) In apportioning responsibility between defendants in the proceedings:</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and</p> <p>(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Division, under rules of court or otherwise.</p>	<p>(3) In apportioning responsibility between defendants in the proceedings:</p> <p>(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and</p> <p>(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.</p>	<p>law; and</p> <p>(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.</p> <p>(5) A reference in this Subdivision to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Subdivision, under rules of court or otherwise.</p>
<p>Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware</p>	<p>1041O (1) If:</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim; and</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the</p>	<p>87CE (1) If:</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim; and</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may</p>	<p>12GS (1) If:</p> <p>(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim; and</p> <p>(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:</p> <p>(i) the identity of the other person; and</p> <p>(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and</p> <p>(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim; the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.</p>

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
	<p>other person may be a concurrent wrongdoer in relation to the claim;</p> <p>the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.</p> <p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>	<p>be a concurrent wrongdoer in relation to the claim;</p> <p>the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.</p> <p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>	<p>(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.</p>
Contribution not recoverable from defendant	<p>1041P A defendant against whom judgment is given under this Division as a concurrent wrongdoer in relation to an apportionable claim:</p> <p>(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and</p> <p>(b) cannot be required to indemnify any such wrongdoer.</p>	<p>87CF A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:</p> <p>(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and</p> <p>(b) cannot be required to indemnify any such wrongdoer.</p>	<p>12GT A defendant against whom judgment is given under this Subdivision as a concurrent wrongdoer in relation to an apportionable claim:</p> <p>(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and</p> <p>(b) cannot be required to indemnify any such wrongdoer.</p>
Subsequent actions	<p>1041Q (1) In relation to an apportionable claim, nothing in this Division 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.</p> <p>(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</p>	<p>87CG (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.</p> <p>(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</p>	<p>12GU (1) In relation to an apportionable claim, nothing in this Subdivision 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.</p> <p>(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.</p>

Legislation:	Corporations Act 2001	Trade Practices Act 1974	Australian Securities and Investment Commission Act 2001
	sustained by the plaintiff.	plaintiff.	
Joining non-party concurrent wrongdoer in the action	<p>1041R (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.</p> <p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>	<p>87CH (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.</p> <p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>	<p>12GV (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.</p> <p>(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.</p>
Application of Division	<p>1041S Nothing in this Division:</p> <p>(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>	<p>87CI Nothing in this Part:</p> <p>(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>	<p>12GW Nothing in this Subdivision:</p> <p>(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or</p> <p>(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or</p> <p>(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.</p>
Does the Act prohibit 'contracting out' of proportionate liability?	Misleading and deceptive conduct - the Act makes no mention of preventing parties from contracting out of the proportionate liability provisions (in Volume 4, Part 7.10, Division 2A) for section 1041I damages for a section 1041H action.	Misleading and deceptive conduct - the Act makes no mention of preventing parties from contracting out of the proportionate liability provisions (in Part VIA) for section 82 damages for a section 52 action.	Misleading and deceptive conduct - the Act makes no mention of preventing parties from contracting out of the proportionate liability provisions (in Subdivision GA) for section 12GF damages for a section 12DA action.