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Proportionate liability

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1 Introduction

This paper provides an overview of the proportionate liability regime which has been enacted in all Australian States and Territories in varying forms.

The paper also discusses how the regime applies and operates throughout Australia and the change that the regime has made to the common law doctrine of joint, several and joint and several liability for claims for property damage or economic loss arising from carelessness or a failure to take reasonable care. The proportionate liability regime is unfortunately quite complicated with much of the devil in the detail, a difficulty that is enhanced by the many subtle differences across the different jurisdictions. It is beyond the scope of this paper to cover all of the intricacies of the proportionate liability regime, but the paper will highlight key aspects of the regime and discuss the slight variances in its application across different Australian jurisdictions.

The paper also discusses the history to the introduction of the regime, as well as recent proposals to introduce a model and uniform law of proportionate liability in Australia.

Knowledge and understanding of the proportionate liability regime is important for all commercial lawyers because it affects contractual risk allocation.

2 Why was the proportionate liability regime introduced?

In 1994, concerns about the way in which the common law doctrine of joint and several liability influenced litigation decisions and a perceived crisis regarding the cost of liability insurance promptedan inquiry instituted by the Commonwealth and NSW Attorneys General and conducted by Professor J L R Davis. Specifically, concerns were being voiced by professional and industry bodies that organisations with deep pockets (eg auditors) or insurers were being targeted in negligence actions not because of their liability (which was often small), but because they were more able to pay large damages awards. A consequence was a significant increase in insurance premiums for liability insurance (especially professional liability). While recommendations for reform were made as a result of that inquiry, they lay dormant until the collapse of the HIH Insurance Group in 2001, which provided the catalyst for change.

3 What is the proportionate liability legislation?

In 2003, the Finance Ministers of all Australian jurisdictions agreed to produce uniform legislation nationally. However, this was not achieved and proportionate liability legislation was introduced under 11 Acts with varying differences.

The relevant Acts are set out below.

Jurisdiction	Legislation
Cth	*Competition and Consumer Act 2010* (Cth) – Part VIA (**CCA**) *Australian Securities and Investments Commission Act 2001* (Cth) – Part 2, Division 2, Subdivision GA (**ASIC Act**) *Corporations Act 2001* (Cth) – Part 7.10, Division 2A (**Corporations Act**)
NSW	*Civil Liability Act 2002* (NSW) – Part 4 (**NSW Act**)
VIC	*Wrongs Act 1958* (Vic) – Part IVAA (**Vic Act**)
WA	*Civil Liability Act 2002* (WA) – Part 1F (**WA Act**)
QLD	*Civil Liability Act 2003* (Qld) – Part 2 (**Qld Act**)

Jurisdiction	Legislation
SA	*Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) – Part 3 (**SA Act**)
TAS	*Civil Liability Act 2002* (Tas) – Part 9A (**Tas Act**)
NT	*Proportionate Liability Act 2005* (NT) (**NT Act**)
ACT	*Civil Law (Wrongs) Act 2002* (ACT) – Chapter 7A (**ACT Act**)

4 What is the effect of the proportionate liability regime and how does it differ from the common law regime?

4.1 What are the common law principles on shared liability?

The common law principles on shared liability are as follows:

- **Several liability**: Where two or more parties undertake separate obligations and each is liable only for its own obligations; if one party cannot meet its obligations, the other party is not liable for that liability.
- **Joint liability**: Where two or more parties undertake the same obligation and each is liable in full for the performance of that obligation. In the event of non-performance, the parties would have to be sued jointly (and if one party pays the liability in full, it can require the other parties to pay their share).
- **Joint and several liability**: Where two or more parties undertake the same obligation, action can be taken against one or more of them and if payment is not received then action can be taken against the other parties.

4.2 How does proportionate liability differ from the common law?

Where it applies, the proportionate liability regime replaces the common law rules of joint, several and joint and several liability with a system which requires liability for the loss to be apportioned between ***all*** the concurrent wrongdoers according to their respective responsibility for the loss. Each concurrent wrongdoer's liability is then limited to the amount of loss attributable to it.

The proportionate liability regime prevents the plaintiff from selecting the defendant(s) (with the deepest pockets) to recover from and thus eliminates the burden on the chosen defendant(s) from chasing the other wrongdoers for contribution. This burden now sits with the plaintiff. The risk of a wrongdoer's insolvency or valid defence is now also borne by the plaintiff and not the other wrongdoers. However, there is an argument that the pendulum may now have swung too far in favour of defendants.

The allocation of contractual risk under the proportionate liability regime (and the changes from the previous common law regime) are illustrated in the following common contractual scenarios:

Scenario	Example	Pre-proportionate liability regime	Post-proportionate liability regime
Co-Contractors	A property Owner separately contracts with both an architect and a builder to construct a project. Both breach their duty of care to the Owner (ie in relation to defective design and build on the same piece of work) and the Owner suffers loss.	Owner could recover 100% of its loss from either party.	Owner only entitled to recover from each party that portion of the loss for which the particular party is responsible.

Scenario	Example	Pre-proportionate liability regime	Post-proportionate liability regime
Head-Contractor and sub-contractor	A property Owner contracts with a Head Contractor to construct certain works. The Head Contractor subcontracts aspects of the construction. Both breach their duty of care (ie in carrying out the works and by not properly supervising the sub–contractor) and the Owner suffers loss.	Owner could recover 100% of the loss from the Head Contractor. (*Note: the Head Contractor would likely have a contractual right to seek a contribution from the sub-contractor*).	Owner only entitled to recover from each party that portion of the loss for which that party is responsible (ie unable to solely rely on the financial capacity of the Head Contractor).
Co-sellers	A buyer contracts with multiple sellers to purchase shares in a company. The sellers breach a warranty given by them jointly under the sale contract in breach of the State/Federal misleading or deceptive conduct provisions.	Buyer could recover 100% of the loss from one of the sellers.	Buyer only entitled to recover from each seller that portion of the loss for which that seller is responsible.

Where the proportionate liability regime does not apply, a wrongdoer continues to be jointly and/or severally liable (as the case may be) at common law to the plaintiff for the whole of the plaintiff's loss and must rely on statutory, contractual or equitable rights of contribution or indemnity.

5 When and how does the proportionate liability regime apply?

5.1 When does the proportionate liability regime apply?

(a) The claim must be an apportionable claim

While an "apportionable claim" generally requires carelessness, the requirements are expressed differently across the different proportionate liability regimes, which means that the range of claims falling within the proportionate liability regime may vary, particularly in a contractual context.[1]

Carelessness – New South Wales, Victoria, Western Australia, Tasmania, Australian Capital Territory and Northern Territory

Subject to some minor l variation, the legislation in these jurisdictions provides that proportionate liability applies to claims 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, excluding any claim arising out of personal injury.[2]

There is a live issue around what constitutes an action for damages arising from "a failure to take reasonable care" and, by extension, how the proportionate liability regime applies to claims based on breach of a strict contractual obligation or warranty.

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1 Note: the SA Act refers to 'apportionable liability'.

2 See NSW Act s 34(1) and s 34(3); ACT Act s 107B(2) and s 107B(3); NT Act s 4(2) and s 4(3); Tas Act s 43A(1), s 43A(8) and s 3B; WA Act, s 5AI(a), s 5AJ(2) and s 3A; and Vic Act s 24AF(1) and s 24AG(1).

On one interpretation, the legislation only applies to contractual claims where there is a breach of an express or implied contractual term requiring the defendant to exercise reasonable care (ie a contractual duty of care). On this interpretation, apportionment would not be available in a claim for breach of a strict contractual duty, even if the breach was caused by a failure to take reasonable care. No court has yet applied such a narrow interpretation, although such an interpretation is not without support.[3]

The alternative interpretation (supported by a string of cases in **New South Wales** and **Victoria**)[4] is that proportionate liability applies to any breach of contract provided the conduct giving rise to the breach originates in a failure to take reasonable care. The key question is whether, as a matter of fact, the cause of action originates from some carelessness by the defendant and does not depend on establishing a breach of any duty of care.

In *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)*,[5] Macfarlan JA stated that for an action to have arisen from a failure to take reasonable care, it was necessary for that failure to be an element of the cause of action relied on and that "*if claims could be apportioned where negligence is not an element of the successful cause of action, but merely arises from the facts, a plaintiff could lose his or her contractual right to full damages from a party whose breach of a contractual provision of strict liability happened to stem from a failure to take reasonable care*".[6] Barrett J disagreed[7] (and referred to his reasoning in *Reinhold v NSW Lotteries Corporation (No 2))*,[8] and Meagher JA preferred not to express a view on the issue (although he noted that the claim which may or may not arise out of a failure to take reasonable care is one which has been determined and established as a source of liability).[9]

Following *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)*,[10] it remains uncertain whether a court will find that a claim is an apportionable claim on the basis of the relevant facts where it is uncertain whether the cause of action requires a failure to take reasonable care (although a court is likely to closely scrutinise pleadings that appear to have been deliberately phrased to exclude the proportionate liability regime).[11]

Carelessness – Queensland and South Australia

The language used in Queensland and South Australia is different. In Queensland, the regime only applies if there is a claim for economic loss or property damage "arising from a breach of a duty of care".[12] Whereas in South Australia, the regime only applies to liability in damages that arises under the law of torts or under statute or "for breach of a contractual duty of care".[13]

There is presently no case law on these provisions, but they appear to reduce proportionate liability (in a contractual context) to a much narrower scope than in other jurisdictions.[14]

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3 See for example the comments of Biscoe AJ (in an ex tempore judgment on an application for leave to amend a pleading during a trial) in *Pfizer Australia Pty Ltd v Probiotec Pharma Pty Ltd* [2010] NSWSC 532 at [8]. See also Barbara McDonald, "Indemnities and the Civil Liability Legislation" (2011) 27 *Journal of Contract Law* 56 in which she argues that such an interpretation "leads to the absurd result that it would now be advantageous for a defendant to plead negligence in cases where he or she is sued for breach or a warranty or strict obligation."

4 See *Woods v De Gabriele* (2007) 2 BFRA 168; [2007] VSC 177, *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; [2007] FCA 1216, and *Reinhold v NSW Lotteries Corporation (No 2)* [2008] NSWSC 187.

5 [2013] NSWCA 58.

6 [2013] NSWCA 58 at [22].

7 [2013] NSWCA 58 at [37]-[42].

8 [2008] NSWSC 187.

9 [2013] NSWCA 58 at [35]-[36].

10 The High Court dismissed an application for special leave to appeal: [2013] HCATrans 248.

11 Courts will be slow to resolve such issues summarily because of the complexity and uncertainty of the debate involved: see for example *ASF Resources Ltd v Clarke* [2014] NSWSC 252 per Kunc J.

12 Qld Act s 28(1)(a).

13 SA Act s 4(1). Section 3(2)(c) of the SA Act refers to negligent or innocent liability for harm.

14 See Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thompson Reuters – Legal Online at para [26130] for further discussion of the position in Queensland and South Australia.

Misleading or deceptive conduct

An apportionable claim also includes claims for economic loss or damage in an action for misleading or deceptive conduct under designated State or Federal legislation (not limited to a failure to take reasonable care).[15]

Recently, in *Selig v Wealthsure Pty Ltd*,[16] the High Court confirmed the scope of the proportionate liability regime in Division 2A of Part 7.10 of the *Corporations Act*, thereby resolving the conflicting judgments delivered by differently constituted Full Federal Courts in *Wealthsure Pty Ltd v Selig*[17] and *ABN Amro Bank NV v Bathurst Regional Council*[18] in 2014.

The Seligs brought several claims against Wealthsure Pty Limited for breaches of the prohibition against misleading or deceptive conduct in relation to financial products or services in section 1041H of the *Corporations Act* and section 12DA of the *ASIC Act* (which were apportionable claims), as well as other provisions of the *Corporations Act* and other statutes, and for breach of contract and negligence (which were not apportionable claims).

The High Court held that a defendant whose conduct renders it:

- liable for damages for misleading or deceptive conduct which contravenes section 1041H of the *Corporations Act*; and

- liable for damages on other bases (including other contraventions of the *Corporations Act*),

may be liable for the whole of the plaintiff's loss caused by that conduct, notwithstanding the application of the proportionate liability regime to the section1041H claim. In so finding, the High Court held that an apportionable claim under section 1041L of the *Corporations Act* is only a claim for damages caused by misleading or deceptive conduct which contravenes section 1041H, and does not extend to other claims for damages on other bases, even where the damages claims are brought in parallel with the misleading or deceptive conduct claim and are based on the same loss or conduct.[19]

The High Court's reasoning also applies to equivalent proportionate liability provisions in the *ASIC Act* and to the contributory negligence defence in s1041I(1B) of the *Corporations Act*.

Following this, in *Williams v Pisano*,[20] the New South Wales Court of Appeal (albeit in obiter) applied the High Court's reasoning in *Selig v Wealthsure Pty Ltd* to the proportionate liability regime in Part VIA of the *CCA*. The Court stated that where a party is liable for contravening both section 18 and section 30 of the Australian Consumer Law (Schedule 2 of the CCA), the party's liability under section 30 is not apportionable because an apportionable claim under section 87CB of the CCA is only a claim for damages caused by misleading or deceptive conduct which contravenes section 18 of the Australian Consumer Law.[21]

The *Selig* decision is not good news for defendants who are only be able to enjoy the protection of:

- the proportionate liability and contributory negligence regimes in Division 2A, Part 7.10 of the *Corporations Act* to the extent that the plaintiff alleges a breach of section 1041H of the Corporations Act; and

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15 NSW Act s 34(1)(b); ACT s 107B(2)(b); Tas Act s 43A(1)(b); WA Act s 5AI(b); NT Act s 4(2)(b); SA Act s 3(2)and s 4(1)(c) (by implication); Vic Act s 24AF(1)(b); ASIC Act s 12GP(1); Corporations Act s 1041L(1) and CCA s 87CB(1). However, note that the second limb of s 24AF of the Vic Act refers to "a claim for damages for a contravention of section 18 of the Australian Consumer law (Victoria)" without stating that it must also be a claim for economic loss or property damage.

16 [2015] HCA 18.

17 [2014] FCAFC 64.

18 [2014] FCAFC 65.

19 See [22] to [38] per French CJ, Kiefel, Bell and Keane JJ; [51]-[57] per Gageler J.

20 [2015] NSWCA 177.

21 See [55] to [64].

- the proportionate liability regime in Subdivision GA of Division 2, Part 2 of the *ASIC Act* to the extent that the plaintiff alleges a breach of section 12DA of the *ASIC Act*.

Similarly, while the comments of the New South Wales Court of Appeal in *Williams v Pisano* were obiter, they signal a comparable approach by the Court that defendants are only able to enjoy the protection of the proportionate liability regime in Part VIA of the CCA to the extent that the plaintiff alleges a breach of section 18 of the Australian Consumer Law.

(b) The defendant must be a concurrent wrongdoer

A concurrent wrongdoer is generally defined broadly to include one of two or more persons whose acts or omissions caused, independently of each other or together, the loss or damage that is the subject of the claim.[22] However, in **Queensland** and **South Australia**, the relevant persons must have acted independently of each other and not jointly.[23]

A defendant seeking to limit its liability under the proportionate liability regime bears the onus of pleading and proving that it was a concurrent wrongdoer.[24]

There have been numerous cases dealing with the issue of who is a concurrent wrongdoer and whether a person has caused the "loss or damage that is the subject of the claim". These cases have culminated in the 2013 decision in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[25] in which the High Court adopted a more liberal interpretation as to the meaning of "loss or damage" for the purposes of the NSW Act and confirmed that independent and unrelated acts which both cause the same damage can be apportioned. In that case, on the basis of fraudulently obtained certificates of title and forged documentation presented by Mr Caradonna and Mr Vella (the fraudsters), Mitchell Morgan Nominees Pty Ltd (**MM**) advanced money which was secured by mortgage. The mortgage was negligently drafted by Hunt and Hunt lawyers to secure money owed by Mr Vella (and not Mr Caradonna) and therefore secured nothing.

The majority of the High Court reinstated the trial judge's decision (overturning the Court of Appeal decision) and apportioned 72.5% liability to Mr Caradonna, 15 % to Mr Vella and 12.5% to Hunt and Hunt.[26] The basis for the High Court's decision was that it did not matter that MM had different causes of action against Hunt and Hunt (for negligent drafting) and the fraudsters. The harm that MM suffered was the inability to recover the money and, so long as the acts of each wrongdoer were a material cause of that harm, they were concurrent wrongdoers (despite the legal bases of those claims).

The High Court also distanced itself from the decision in *St George Bank Ltd v Quinerts Pty Ltd*,[27] which involved a negligent valuation and a subsequent mortgage default which left the Bank with a loss of more than $100,000. In that case, the Victorian Supreme Court held that for the purposes of identifying concurrent wrongdoers, the damage or loss caused must be the "same damage" (and that the only actionable acts or omissions by the borrower and the Guarantor was the failure to repay the loan and that such failures did not cause the Bank to make the loan). However, the High Court was not prepared to delve into whether or not *Quinerts* was wrongly decided and so it remains law, particularly in relation to negligent valuations.[28]

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22 NSW Act s 34(2); ACT Act s 107A and s 107D; NT Act s 3 and s 6(1); Tas Act s 43A(2); Vic Act s 24AH(1); WA Act s 5AI; ASIC Act s 12GP(3); Corporations Act s 1041L(3); and CCA s 87CB(3).

23 Qld Act s 30 and SA Act s 3(2)(b). Note also that the SA Act uses the term 'wrongdoer' instead of 'concurrent wrongdoer' (s3 of the SA Act).

24 *Dartberg Pty Limited v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450 at [31] and *Polon v Dorian* [2014] NSWSC 571 at [812].

25 [2013] HCA 10; (2013) 246 CLR 613.

26 French CJ, Hayne and Kiefel JJ.

27 (2009) 25 VR 666. See also *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510; [2007] FCA 1468.

28 See also *Hadgelias Holdings Pty ltd v Seirlis* [2014] QCA 117 where Holmes JA (with whom Gotterson and Morrison JJA agreed) explained the definition of concurrent wrongdoer in s87CB(3) of the *Trade Practices Act 1974* (Cth) (now s87CB(3) of the CCA) as "concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a

The decision in *Hunt and Hunt* is good news for defendants and insurers who will find it easier to establish that there were other concurrent wrongdoers who were responsible for the loss or damage the subject of the claim, and thus limit their liability under the proportionate liability regime. At this stage, whether or not parties are "concurrent wrongdoers" continues to depend on a detailed analysis of the claims against each of them and a careful characterisation of the loss caused by each of them. However, a plaintiff wishing to target a particular party will need to ensure that their claim focusses on the particular loss or damage caused, to help show that a concurrent wrongdoer's conduct did not cause the same loss or damage as the targeted defendant.

(c) Proportionate liability must not be excluded from the claim

There are a number of categories of claims which are excluded from the proportionate liability regime, which are set out below (although not all of these exclusions apply in every jurisdiction):

- intentional or fraudulent conduct[29]
- where proportionate liability is excluded by other legislation[30]
- vicarious liability and the liability of a partner[31]
- agency[32]
- consumer claims[33]
- exemplary or punitive damages[34]
- claims arising from personal injury[35]
- criminal proceedings[36]
- the right to contract out[37] (see Section 6 **Contracting out of the proportionate liability regime** below).

5.2 Apportionment

If the proportionate liability regime applies, then liability for a plaintiff's loss is to be apportioned between all concurrent wrongdoers according to their respective responsibility for the loss.

Each concurrent wrongdoer's liability is then limited to the amount of loss apportioned to it. The proportionate liability legislation operates to restrict the courts, when ordering damages, to such amounts as the court considers "just", having regard to each concurrent wrongdoer's responsibility, and no more.[38]

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single act or set of acts causing loss, attributable to more than one person". This approach has been questioned. See for example Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thompson Reuters – Legal Online at para [25770].

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

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

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

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

33 ACT Act s 107B(3)(b); Qld Act s 28(3)(b).

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

35 NSW Act s 34(1)(a); ACT Act s 107B(3)(a); NT Act ss 3 definition of 'economic loss' and 4(3)(a); Qld Act s 28(3)(a); SA Act s 3(2)(a)(i) and s 8(6); Tas Act s 43A(1); Vic Act s 24AG(1); and WA Act s 5AI(1)(a).

36 SA Act s 4(2).

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

It is unclear what factors the court must take into account in determining what is "just", but the court must exclude the extent to which the plaintiff's contributory negligence caused the loss or damage.[39]

5.3 Identifying and joining all possible concurrent wrongdoers

Courts may (and in **Western Australia, Tasmania** and **South Australia**, must) look to the proportionate responsibility of absent defendants.[40] In **Victoria**, the legislation is silent on this issue because under sub-section 24AI(3), a court is only permitted to take into account the comparative responsibility of a non-party unless the person is not a party because the person has died or is a corporation that has been wound up.[41]

A court has the power to grant leave for a concurrent wrongdoer to be joined as a defendant.[42]

Except in **Victoria**, plaintiffs must identify and join everyone legally responsible to ensure the recovery of 100% of their loss. To facilitate this, a concurrent wrongdoer must inform the plaintiff if it has reasonable grounds to believe that a particular person may also be a concurrent wrongdoer in relation to the relevant claim. This is not a duty to inform as such, but if a concurrent wrongdoer fails to do this, it may be liable for any costs incurred by the plaintiff because it was not aware of such additional concurrent wrongdoer.[43] In Victoria, the defendants must ensure that all concurrent wrongdoers have been joined as parties to the proceedings.

5.4 Contribution between concurrent wrongdoers

The legislation in all jurisdictions (apart from **South Australia**) provides that a defendant against whom judgment is given as a concurrent wrongdoer in relation to an apportionable claim cannot be required to:

(a) contribute to any damages or contribution recovered from another wrongdoer in respect of that apportionable claim (in **Victoria** and the **Northern Territory**, the damages must have been recoverable in the same proceedings in which judgment was given against the defendant, whereas in other jurisdictions, it does not matter whether or not the damages were recovered in the same proceedings); or

(b) indemnify any such wrongdoer.[44]

Importantly, this protection only applies to concurrent wrongdoers against whom judgment is given in relation to an apportionable claim. As such, defendants who settle with a plaintiff ought to consider the relative benefits of having judgment entered against them.

5.5 Subsequent claims

A plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss is not prevented from subsequently bringing another action against another wrongdoer, provided the plaintiff cannot recover in total more than the damage or loss sustained by the plaintiff.[45]

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38 NSW Act s 35(1);ACT Act s 107F(1)(a); NT Act s 13(1)(a); Qld Act s 31(1)(a) (although note that the reference is to 'just and equitable' as opposed to 'just'); SA Act s 8(2)(a) (although note that there reference is to 'fair and equitable' as opposed to 'just'); Tas Act s 43B(1)(a); Vic Act s 24AI(1)(a); WA Act s 5AK(1)(a); ASIC Act s 12GR(1)(a); Corporations Act s 1041N(1)(a); and CCA s 87CD(1)(a).

39 NSW Act s 35(3)(a); ACT Act s 107F(2)(a); Vic Act s 24AN; NT Act s 13(2); Qld Act s 32G; Tas Act s 43B(3)(a); WA Act s 5AK(3)(a); ASIC Act s 12GR(3)(a); Corporations Act s 1041N(3)(a);and CCA s 87CD(3)(a).

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

41 Vic Act s 24AI(3).

42 NSW Act s 38; ACT Act s 107J; NT Act s 11; Qld Act s 32H; SA Act s 11; Tas Act s 43F; Vic Act s 24AL; WA Act s 5AN; ASIC Act s 12GV; Corporations Act s 1041R; and CCA s 87CH. Leave will be granted even if only declaratory relief is sought against a concurrent wrongdoer. See for example *Fudlovski v JGC Accounting and Financial Services Pty Ltd (No 3)* [2013] WASC 476 and also *Lion-Dairy and Drinks Pty Ltd v Sinclair Knight Merz Pty Ltd* [2014] FCA 386.

43 NSW Act s35A (despite the section being titled 'Duty...to inform..'); ACT Act s 107G; NT Act s 12; Qld Act s 32; SA Act s 10; Tas Act 43D; WA Act s 5AKA; ASIC Act s 12GS; Corporations Act s 1041O; and CCA s 87CE.

44 See NSW Act s36. ACT Act s 107H; NT Act s 15; Qld Act s 32A; SA Act s 9; Tas Act s 43C; Vic Act s 24AJ; WA Act s 5AL; ASIC Act s 12GT; Corporations Act s 1041P; CCA s 87CF are also in a similar form. Note that SA Act s 9(a) allows for contribution between wrongdoers who are members of the same group, in respect of the liability group, in the same way.

However, a plaintiff risks recovering less than their total loss if separate actions are run because courts are not bound to find the same proportionate responsibility for the later defendant to that which was apportioned by the court in an earlier proceeding.

The scope of section 12GU of the *ASIC Act* was considered in *City of Swan v McGraw-Hill Companies Inc.*[46] In that case, Rares J found that the proportionate liability regime does not envisage that quantification of the claimant's damages will necessarily be finalised in the first proceedings and, instead, subsequent proceedings can arrive at different apportionments for other concurrent wrongdoers not joined in the original proceedings.

6 Contracting out of the proportionate liability regime

6.1 Is it possible to contract out?

A key issue to consider is the ability of a party under the proportionate liability regime to "contract out" – that is, to contractually agree that the proportionate liability regime will not apply. On this point, as between the different jurisdictions in Australia, there are various approaches:

- **New South Wales, Western Australia and Tasmania:** Permit contracting out; expressly in Western Australia and by implication in New South Wales and Tasmania.[47]

- **South Australia, Victoria, Australian Capital Territory and Northern Territory:** Say nothing about contracting out. There is a significant risk that contracting out is not permitted because it is arguably inconsistent with public policy underpinning proportionate liability.[48]

- **Commonwealth misleading or deceptive conduct legislation:** Is the same as South Australia, Victoria, Australian Capital Territory and Northern Territory. It is generally accepted that it is not possible for parties to limit or exclude their liability for breach of the statutory misleading or deceptive conduct prohibitions.

- **Queensland:** Prohibits contracting out.[49]

6.2 Should parties contract out?

Whether it is more beneficial to allow the proportionate liability regime to operate or to exclude or modify its operation by contract (in those jurisdictions where it is currently permitted to do so) will depend on the party you are acting for. As a general rule, the proportionate liability regime benefits supplier defendants rather than customer plaintiffs – The blame is shared and the losses distributed. However, a customer plaintiff is generally better off excluding the proportionate liability regime because, in the event that it needs to sue a supplier/Contractor, it is preferable to deal only with the party it has contracted with as opposed to also having to sue a number of other entities (who may be unknown and of which there may be many).

Similarly, where there are multiple sellers in a sale contract, the proportionate liability regime favours the sellers (each of which will only be liable for the loss apportioned to them). However, the buyer would likely want to exclude the regime and replace it with the common law joint and several liability rule, so that it can sue

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45 Under the NSW Act s 37; ACT Act s 107I; NT Act s 16; Qld Act s 32B; Tas Act s 43E; Vic Act s 24AK; WA Act s 5AM; ASIC Act s 12GU; Corporations Act s 1041Q; and CCA s 87CG, the plaintiff's rights are expressly preserved. The position under s 11 of the SA Act is different and may be broader in scope. It does not expressly preserve the plaintiff's rights but starts from the premise that such actions may be brought.

46 [2014] FCA 442 at [63].

47 WA Act s 4A (which includes an express statement that contracting out is permitted) and NSW Act s 3A(2) and Tas Act s 3A(3) (where the ability to contract out is not as clear cut as in WA but the relevant sections state that parties are not prevented from making express provisions for their rights, obligations and liabilities and the relevant Acts do not affect the operation of such express provisions). Courts have expressed the view that the provisions in the NSW Act and the Tas Act permit contracting out: see eg *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [19] and *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [11]-[12]. Legal commentators also agree with this position. See for example Owen Hayford, "Proportionate liability – its impact on contractual risk allocation" (2005) *Australian Business Review* 29 at 44 and Barbara McDonald, "Proportionate liability in Australia: The Devil in the Detail", (2005) 26 *Australian Business Review* 29.

48 See for example, Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thompson Reuters – Legal Online at para [26790].

49 Qld Act s 7(3) (the Qld Act does not prohibit contracting out entirely, but only in relation to Chapters 2 (which contain proportionate liability provisions) and 3).

one or more of the sellers for the whole of its loss (bearing in mind, it is generally agreed that it is not possible for parties to limit or exclude their liability for breach of the statutory misleading or deceptive conduct prohibitions).

6.3 How do parties contract out?

Where contracting out is permitted, there are a number of ways the parties can achieve this. For instance:

(a) by including an express clause which states that the relevant proportionate liability legislation does not apply; or

(b) by including provisions that have the effect of proportioning liability between the parties in a way that is inconsistent with the proportionate liability regime.[50] For example, a statement that the parties are jointly and severally liable (eg in a joint venture arrangement or a purchase agreement involving multiple sellers), a statement that a Head Contractor is liable for the acts and omissions of its sub-contractors,[51] or a statement that one party agrees to indemnify the other in relation to particular liabilities.

There has historically been some debate around whether a contractual indemnity alone is sufficient to constitute contracting out. However, the New South Wales Court of Appeal in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)*[52] found that an indemnity by CTC Group Pty Ltd in favour of Perpetual Trustee Company Ltd for loss suffered by Perpetual as a result of a breach of warranty by CTC Group was sufficient to constitute contracting out under section 3A(2) of the NSW Act, and that to find otherwise would have deprived Perpetual of its contractual right to full indemnity for its loss.[53]

6.4 Potential insurance issues

Note that if an insured party to a contract contractually assumes joint and several liability of an obligation to indemnify in respect of a claim which would otherwise be apportionable, it may be assuming a liability that would otherwise not have arisen at law. Most liability insurances will exclude protection for contractually assumed liability that would not ordinarily arise at law. Therefore, before contracting out in this way, parties should consider whether their insurers need to be aware of and accept this proposed risk allocation.

6.5 Exclusion clauses

In **Western Australia, New South Wales** and **Tasmania** (where contracting out is permitted), an exclusion clause, whereby a defendant excludes all liability for breach of contract and negligence, would not seem to be affected by the proportionate liability regime.

Similarly, in **South Australia**, courts are expressly directed to take into account any special limitation of liability (which is defined to include a limitation under a contract) to which a defendant may be entitled and, as such, would not seem to affect the operation of an exclusion clause.[54]

In **Queensland** (where contracting out of proportionate liability is prohibited), the legislation is expressed to "limit" the liability of a concurrent wrongdoer.[55] As such, it is arguable because the Qld Act deals with the *limitation* of liability (and not the *imposition* of liability), there is no reason why liability could not be

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50 The Tasmanian Full Court held in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [19] that parties can contract out just by adopting an allocation of liability wording that is inconsistent with the proportionate liability regime, and without referring specifically to the proportionate liability regime. See also the Western Australia District Court in *Owners of Strata Plan 13259 v Fowler* [2013] WADC 5 (noting its limited precedential value) and the new South Wales Court of Appeal in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58.

51 This was the relevant contractual provision considered in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3.

52 [2013] NSWCA 58.

53 Further, the Tasmanian Full Court in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [16] observed that the "plain purpose" of s 3A(c) (the Tas Act equivalent of section 3A of the NSW Act) was "to ensure the primacy of express provisions of a contract as to the parties' rights, obligations and liabilities under the contract, over any provision in relation to the same matter in the Act".

54 SA Act s 8(4)(d).

55 Qld Act s 31(1)(a).

excluded altogether.[56] If such an argument is valid under the Qld Act, it is also likely to be valid in **Victoria**, the **Australian Capital Territory** and the **Northern Territory**, where the legislation is silent on contracting out and is similarly expressed to *limit* the liability of a concurrent wrongdoer.[57]

6.6 Other possible indirect methods of contracting out

Other indirect ways in which the parties may be able to effectively contract out of the proportionate liability regime include:

(a) by choosing a governing law clause that is in a State where contracting out is permitted – namely, **Western Australia, New South Wales** and **Tasmania**). There is a risk in pursuing this strategy if the chosen jurisdiction and the contract are not sufficiently connected.[58]

(b) by agreeing to arbitrate disputes under a contract. It is unclear whether arbitration is subject to the proportionate liability legislation.[59] If it is not, it may be possible to avoid proportionate liability in this way (although, for the sake of clarity, it is prudent to include an express provision in the contract that the proportionate liability regime does not apply to the arbitration).

(c) possibly, by creating separate legal relationships with parties who may be found to be proportionately liable, eg a Principal could enter into a deed with a sub-contractor pursuant to which the sub-contractor promises to the Principal that it will exercise due care in carrying out its obligations to the Head Contractor. The Principal would then have a direct cause of action against the sub-contractor in the event that a claim for defective work against the Head Contractor is met with a claim that the defects were caused by the sub-contractor. However, in the absence of a direct contractual relationship with the sub-contractor, the Principal may, nonetheless, be able to establish that the sub-contractor owed a duty of care to the Principal in carrying out the works contractually via the Head Contractor.

7 Indemnities between concurrent wrongdoers

7.1 Are indemnities between concurrent wrongdoers permitted?

The availability of indemnities between concurrent wrongdoers depends on the relevant jurisdiction.

As noted in Section 5.4 (**Contribution between concurrent wrongdoers**), the legislation in all jurisdictions (other than **South Australia**) provides that a defendant against whom judgment is given (as a concurrent wrongdoer in relation to an apportionable claim), cannot be required to indemnify any other wrongdoer for any damages or contribution recovered from that concurrent wrongdoer in respect of that apportionable claim.[60]

In **Tasmania, Western Australia** and the **Northern Territory**, the right to re-allocate liability through contractual indemnities is also expressly preserved.[61]

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56 See Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thompson Reuters – Legal Online at para [27020].

57 Ibid.

58 For further discussion on choice of law as an indirect method of contracting out, see Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and* Interpretation, Thompson Reuters – Legal Online at paras [26910] to [26970].

59 In *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449, the Western Australia Supreme Court decided that the WA Act did not apply to commercial arbitrations as the word "court' in the WA Act did not comfortably encompass arbitrators. While this decision was based on the WA Act, it would seem likely that the reasoning would also apply to the other proportionate liability legislation. The court also left open the possibility that the implied term in every arbitration agreement that the arbitrator should decide the dispute according to the existing law of the contract meant that the proportionate liability regime applied. Earlier, in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3, the Tasmanian Full Court (in obiter) also favoured the view that the proportionate liability regime under the Tas Act did not apply to arbitrations.

60 In Victoria and the Northern Territory, the damages must have been recoverable in the same proceedings in which judgment was given against the defendant, whereas in the other jurisdictions, it does not matter whether or not the damages were recovered in the same proceedings).

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

In other jurisdictions, a strict reading of the language above would operate to prevent a defendant from being required to indemnify a concurrent wrongdoer pursuant to a contractual right of indemnity. The position has not been judicially considered and remains unsettled. Commentators have used various analyses to argue that this is not the intention. For example, McDonald highlights the importance of looking at the proportionate liability legislation in juxtaposition with the legislation it replaces. If this is done, she argues, it can be seen that the restriction is on the power of the courts under the former legislation to order contribution or an indemnity as part of the apportionment process.[62] Furthermore, there is no "*obvious reason of policy or justice which should prevent a defendant from enforcing a voluntarily entered, pre-existing contractual arrangement against another*".[63] Conversely, Hayford argues that the limitation only applies to requirements arising under common law or statutory rights of indemnity,[64] as opposed to contractual requirements, and Watson argues that the limitation only applies to indemnities which are sought after judgment is given.[65]

In **New South Wales**, section 3A of the NSW Act specifically acknowledges that contracting parties may make express provisions for their rights, obligations and liabilities to which the proportionate liability regime applies. Arguably this means that contractual indemnities can be enforced against a concurrent wrongdoer.[66]

In **Queensland**, the same provision applies about making express provisions, but includes an express carve out for the proportionate liability regime. This suggests that contractual indemnities that re-apportion loss between concurrent wrongdoers will not be enforced in Queensland.[67]

In **Victoria** and the **Australian Capital Territory**, the proportionate liability regime does not include the additional express acknowledgment that contracting parties may make express provision for their rights, obligations and liabilities. As such, the position is less clear and despite the arguments of commentators outlined above, the question remains that it was open to legislatures to include similar provisions to other jurisdictions, but they chose not to.[68]

In **South Australia**, indemnities are approached differently but the result seems to be that a contractual indemnity can be enforced against a concurrent wrongdoer, even where proportionate liability applies.[69]

7.2 Do indemnities between concurrent wrongdoers breach the prohibition on contracting out?

The next question is whether contractual indemnities between concurrent wrongdoers breach the "no contracting out position" in **Queensland** (and most likely **Victoria, South Australia, Australia Capital Territory** and the **Northern Territory**).

This point is arguable but commentators such as Barbara McDonald, who are in favour of the availability of indemnities, point to the fact that "*the primary liability of either wrongdoer to the plaintiff is not affected*" and that "*the common objection to allowing contracting out – That it enables powerful commercial clients to use their market power to insist on solitary liability and to undermine the effectiveness and benefits of the regime... does not apply where it is the potential defendants who have sorted out the allocation of risk between themselves in advance*".[70]

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62 See Barbara McDonald, "Indemnities and the Civil Liability Legislation" (2011) 27 *Journal of Contract Law* 56.

63 Ibid.

64 Owen Hayford, "Proportionate liability – its impact on contractual risk allocation" (2005) *Australian Business Review* 29 at 44.

65 James Wtaosn, "From Contribution to Apportioned Contribution to Proportionate Liability", (2004) 78 *Australian Law Journal* 126.

66 NSW Act s 3A(2). See further Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook Co, Second edition 2013), para 4.36.020.

67 Qld Act s 7(3).

68 See Joshua Thompson, Leigh Warnick and Ken Martin, *Commercial Contract Clauses: Principles and Interpretation*, Thompson Reuters – Legal Online at para [26550].

69 SA Act ss 6(1), 6(3), 6(5), 6(9)(a) and 9 and Pt 2 and Pt 3.

70 See Barbara McDonald, "Indemnities and the Civil Liability Legislation" (2011) 27 *Journal of Contract Law* 56.

7.3 Indemnities given by non-concurrent wrongdoers

The proportionate liability regime does not operate to restrict indemnities given by a party who did not contribute to the loss (and is not a concurrent wrongdoer). These parties fall outside of the apportionment process under the proportionate liability regime.

8 Summary of jurisdictional differences

As noted throughout this paper, there are a number of important legislative inconsistencies between jurisdictions which raise the potential for forum shopping.

For ease of reference, we set out below a summary of the key differences across the different jurisdictions.

Scenario	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
If acting for a plaintiff, concurrent wrongdoers should be joined as parties to an action	✓	×	✓	✓	✓	✓	✓	✓
If acting for a defendant, concurrent wrongdoers should be joined as parties to an action	×	✓	×	×	×	×	×	×
Concurrent wrongdoers acting jointly (as well as independently) are caught	✓	✓	×	✓	×	✓	✓	✓
Applies to contractual breaches regardless of whether there has been a breach of a duty of care (although there is some debate)	✓	✓	×	✓	×	✓	✓	✓
Intentional wrongdoing excluded (note fraudulent wrongdoing is excluded in all jurisdictions)	✓	×	✓	✓	✓	✓	✓	✓
Proportionate liability excluded as between Principal and agent	×	✓	✓	×	×	×	✓	×
Proportionate liability does not override the award of exemplary or punitive damages	×	✓	✓	×	✓	×	×	×
Exclusion clause can be used to exclude liability for negligence and breach of contract	✓	?	?	✓	✓?	✓	?	✓
Reapportionment through contractual	✓?	×?	×?	✓	✓?	✓	×?	✓

Scenario	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
indemnities between wrongdoers permitted								
Contracting out permitted	✓	?	✗	✓	?	✓	?	?

9 Proportionate liability reform

The lack of consistency in the proportionate liability legislation (particularly for claims involving more than one jurisdiction), prompted an extensive review of current proportionate liability beginning in 2007.

In September 2011, the Standing Council on Law and Justice (**SCLJ**) (formerly the Standing Committee of Attorneys General and then replaced by the Law Crime and Community Safety Council in December 2013) released consultation draft model proportionate liability provisions and a proportionate liability regulation impact statement for public consultation.

Following further submissions, the Revised Draft Model Proportionate Liability Provisions – 26 September 2013 (**Draft Model Provisions**) and a new Decision Regulation Impact Statement – October 2013 (**Regulation Impact Statement**) were presented to the SCLJ in October 2013. The Regulation Impact Statement notes that stakeholders and legal commentators have identified the following two main problems with the current proportionate liability regime:[71]

(a) legislative inconsistencies between jurisdictions (particularly in relation to contracting out of the regime), which can lead to forum shopping; and

(b) a lack of clarity and/or certainty in the operation of particular provisions.

The Regulation Impact Statement considers a number of options and then recommends the introduction of uniform legislation applicable to all jurisdictions, which more narrowly defines an apportionable claim (ie as one where a failure to take reasonable care is an element of the action) and which prohibits contracting out.

The key recommended features of the proposed uniform legislation (reflected in the Draft Model Provisions), include:

- clarification that, apart from an action under the ACL for statutory misleading or deceptive conduct claims, a failure to take reasonable care must be an element of the claimant's cause of action;
- that a "concurrent wrongdoer" should be one of two or more persons who cause the same or "substantially or materially similar" loss or damage, even if a plaintiff has settled with them or released them from liability;
- a defendant is required to provide information to a plaintiff about the identity and location of other possible concurrent wrongdoers, notify the possible concurrent wrongdoers and bears the onus of establishing a *prima facie* case against other possible wrongdoers;
- in apportioning liability, the court must take into account the wrongdoing of a notified concurrent wrongdoer and may take into account the wrongdoing of any other concurrent wrongdoer;
- in apportioning liability among concurrent wrongdoers, the court is to consider what is "just and equitable";
- standardisation of the types of claims that are excluded from the proportionate liability regime;

71 Page 7 of the Regulation Impact Statement.

- if notice is given to a plaintiff of a concurrent wrongdoer they should only be able to bring subsequent proceedings against that concurrent wrongdoer with leave of the court and caps should apply above which the plaintiff is not entitled to receive an award in subsequent proceedings;

- proportionate liability legislation does not apply to arbitral tribunals or other entities capable of making a binding determination, unless they are a court or tribunal (jurisdictions may elect whether to include this provision);

- where a plaintiff settles with one concurrent wrongdoer, that concurrent wrongdoer will not be exposed to contribution claims from other concurrent wrongdoers; and

- contracting out is prohibited for all contracts except for an agreement by a concurrent wrongdoer to contribute to/indemnify another concurrent wrongdoer.[72]

There is a useful table in the Regulation Impact Statement which illustrates the degree to which the Draft Model Provisions represent a change to the current proportionate liability legislation in each jurisdiction.[73]

The Ministers of each jurisdiction have agreed to consider introducing the Draft Model Provisions, but there has not to-date been any concrete developments in this area.

72 See page 21 to 22 of the Regulation Impact Statement and also the Draft Model Provisions.

73 See page 23 of the Regulation Impact Statement.

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