"So What Difference Does it Make?"

Civil Liability Reforms

Recent Amendments to the Trade Practices Act
and
Proportionate Liability

University of New South Wales
Continuing Legal Education
25 November 2004

Presented by
Michael Quinlan, Partner
Matthew Skinner, Senior Associate

Allens Arthur Robinson
Chifley Tower, 2 Chifley Square
Sydney, NSW, 2000
Tel: +61 2 9230 4000
Fax: +61 2 9230 5333
www.aar.com.au
"So What Difference Does it Make?"

Civil Liability Reform

Recent Amendments to the Trade Practices Act

and

Proportionate Liability

It is just over two years since the panel chaired by the Honourable David Ipp (the Panel) released its report recommending reforms to the law of negligence (the Ipp Report). Since the publication of the Ipp Report legislation has been introduced that has significantly altered the civil liability landscape in Australia. Over the past 12 months legislation has been enacted or introduced:

- by the Commonwealth aimed at supporting the tort law reforms introduced by the States and Territories;
- by the Commonwealth, States and Territories introducing proportionate liability for claims in negligence and claims for misleading and deceptive conduct.

In this paper, we will be looking at the nature of the reforms and some potentially difficult legal issues that arise by virtue of the form in which the legislation has been introduced. We will also consider whether the recent tort law reforms introduced by the Commonwealth are likely to be adequate.

1. Tort Law Reform

1.1 The need for Commonwealth legislation

If you impose a restriction on the recovery of damages, lawyers will seek out means to step around the restriction, indeed they have a duty to their clients to do so.

An obvious way around a State or Territory law which may limit a plaintiff's rights is to allege contravention of a Commonwealth law. If the Commonwealth law does not limit or restrict the amount of damages recoverable, the fact that the State or Territory laws do is irrelevant. The plaintiff will be entitled to recover damages under the Commonwealth law using normal principles.

The various consumer protection provisions of the Trade Practices Act 1974 (Cth) (the Trade Practices Act), the Australian Securities and Investments Commission Act (the ASIC Act) and the Corporations Act 2001 (Cth) (the Corporations Act) provide fertile ground for bringing tortious claims in a different guise. An example of this is the judgment of the New South Wales District Court in the matter of Johnson v Golden Circle Limited (5374/02 unreported).

The facts of this case were simple. The plaintiff, Ms Johnson, drank a sample of orange juice provided to her in a plastic cup. The cup contained a splinter of plastic which apparently had come from another cup which had broken. The splinter stuck in Ms Johnson's throat, she coughed it up but continued to suffer some irritation.
The facts are not unlike those of the classic negligence case of Donoghue v Stephenson and the judge had no difficulty concluding that the damage was caused by the negligence of the defendant’s servant or agent. However, if the matter had ended there damages would have been assessed by reference to the rules under the Civil Liability Act 2002 (NSW). As the judge observed, under those rules her injury did not exceed the threshold requirement and no general damages would have been awarded. The plaintiff would only have been entitled to $176.00, being her economic loss, and her medical expenses of $1,196.10. She in fact received a verdict for an additional $10,000.

The reason for this was that the case was also brought under section 75AD of the Trade Practices Act which provides, in effect, that where a corporation manufactures and supplies goods and they have a defect then the corporation is liable to compensate an individual who suffers damage as a result of that defect.

Section 75AA defines manufacture as including ‘grown, extracted, produced, processed and assembled’. Relying on Glendale Chemical Products Pty Limited v The Australian Competition and Consumer Commission (1999) ATPR 41-672, his Honour held that the pouring of the orange juice into the plastic cup was an act of manufacture and that the cup containing the orange juice had a defect, being the plastic splinter, which had caused an injury to an individual and so compensation was payable. In the Glendale case the full Federal Court had found that repackaging of caustic soda involved an act of manufacture.

1.2 The Ipp Report

The desire for harmony between State, Territory and Commonwealth laws was recognised in the Ipp Report.

Recommendation 1 suggested a national response whereby tort law reform should occur by the enactment of a single statute styled the ‘Civil Lability (Personal Injury and Death) Act’, in each jurisdiction. The panel indicated that its aim in making this recommendation was to provide the basis of the drafting of a model statutory provision that could be adopted in any and every Australian jurisdiction.

Recommendation 2 stated that any statute incorporating any or all of the recommendations should be expressed to apply to any claim for damages for personal injury or death resulting from negligence, regardless of whether the claim is brought in tort, contract, under statute or any other cause of action.

In the end neither of these recommendations was adopted, and the States, Territories and Commonwealth have each introduced their own separate legislation to give effect to the recommendations.

The recommendations of the Ipp Report dealing with the Trade Practices Act and like provisions of the ASIC Act and the Corporations Act are set out in Recommendations 17 to 22 of the Ipp Report as follows:

Recommendation 17

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently–caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Recommendation 18
The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

**Recommendation 19**

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div 1.

**Recommendation 20**

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

**Recommendation 21**

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A and Part VA.

**Recommendation 22**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part 5 Div 2A or Part VA.

### 1.3 Commonwealth legislation

In addition to the legislation passed this year, the Commonwealth has previously introduced the following Acts in support of the tort law reforms introduced by the States and Territories:

- **Trade Practices Amendment (Liability for Recreational Services) Act 2002**
- **Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002**
- **Commonwealth Volunteers Protection Act 2003**

The **Trade Practices Amendment (Liability for Recreational Services) Act 2002**, inserts a new section 68B in the Trade Practices Act, which in effect allows a contract for supply by a corporation of recreational services to limit liability for death or personal injury arising from a breach of the warranty implied by section 74. Such a limitation of liability would otherwise be void under section 68.

Section 74 of the Trade Practices Act provides that where a corporation which supplies services to a consumer in the course of a business under a contract, that contract will be subject to an implied term that the services are rendered with due care and skill and that material supplied in connection with those services will be reasonably fit for the purposes for which they are supplied. Obviously, if this provision applied in relation to the supply of recreational services, then the reforms by States and Territories to allow persons to limit their liability in respect of the provision of such services would be seriously undermined.

The **Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002** deals with the tax treatment of structured settlements.

The **Commonwealth Volunteers Protection Act 2003**, provides that an individual who is a volunteer does not incur a civil liability in doing work for the Commonwealth, or a Commonwealth authority, if it is voluntary and organised by the Commonwealth or Commonwealth authority. In circumstances
where the volunteer would be liable but is not because of the Act, the Commonwealth, or the Commonwealth authority, incurs that liability. In other words the liability is shifted from the volunteer to the Commonwealth.

The following Commonwealth Acts received the Royal Assent on 13 July 2004:

- **Trade Practices Amendment (Personal Injury and Death) Act (No. 2) 2004 (Cth).**
- **Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth).**

We will also address the reforms proposed by the **Trade Practices Amendment (Personal Injuries and Death) Bill (No. 1) 2003**, which currently remains in limbo between the House of Representatives and the Senate.

(a) **Trade Practices (Personal Injuries and Death) Act 2004**

The subject matter of this Act is claims for damages for compensation for death or personal injury where those proceedings relate to Part IVA, Division 1A or 2A of Part V or Part VA of the Trade Practices Act.

Part IVA deals with unconscionable conduct. Division 1A of Part V relates to product safety and product information. Division 2A relates to actions against manufacturers and importers of goods and Part VA deals with the liability of manufacturers and importers of defective goods. The Act does not apply to Division 1 of Part V relating to unfair practices.

The subject matter of the Act is as follows:

1. **Limitation periods (ss87F to 87K)** - The limitation periods are those recommended in the Ipp Report and provide that in the case of personal injury damages, proceedings must be commenced 3 years from the date of discoverability of the death or injury or after the end of a long stop period. The date of discoverability is dealt with in section 87G and is essentially defined as the first date on which the plaintiff knows or ought to know each of the 3 following matters:

   (i) that the death or personal injury has occurred;

   (ii) that the death or personal injury was attributable to a contravention of the Trade Practices Act; and

   (iii) that in the case of personal injury, the injury was sufficient to justify bringing an action.

Paragraphs (ii) and (iii) raise some concerns. Paragraph (ii) seems to require knowledge of the law and paragraph (iii) seems to require detailed knowledge of the compensation provisions of the Trade Practices Act. Some protection is given to defendants by a provision dealing with constructive knowledge on the assumption that the plaintiff has taken all reasonable steps to ascertain the particular facts. In relation to minors, incapacitated persons and proceedings by personal representatives, additional protection is provided for defendants. For example, minors are taken to know what the parent or guardian may know.
With the exception of personal injuries and death related to tobacco products, s87H provides a long stop period of 12 years but permits this period to be extended by the court. This period operates from the date of the act or omission alleged to have caused the death or injury.

2. **Damages for non economic loss (sections 87L to 87T):** These provisions introduce similar provisions to those in the New South Wales Civil Liability Act, but with the maximum amount of non economic loss recoverable being $250,000, which is subject to annual indexing. As in the case of New South Wales, the threshold for general damages is an injury which is 15% of the most extreme case. Where the severity of the injury is greater than 15% a sliding scale applies up to 100% of the most extreme case.

3. **Cap on damages for loss of earning capacity (sections 87U to 87V):** These provisions place a cap on damages for loss of earning capacity of twice the average weekly wage earnings. This may be contrasted with the New South Wales limit of 3 times average weekly earnings.

4. **Limits on the recovery of damages for gratuitous attendant care services are provided (sections 87W and 87X):** The provisions follow the recommendations of the Ipp Report and impose the same limits as those found in the New South Wales Civil Liability Act.

5. **Limits on the recovery of damages for loss of superannuation entitlements (section 87Z)**

6. **Limits on the amount of interest payable on damages (section 87ZA):** No interest is payable on an award of damages for non economic loss or gratuitous attendant care services.

7. **The abolition of exemplary and aggravated damages for death or personal injury (section 87ZB)**

8. **Awards may be made for structured settlements (s87ZC):** The Court may approve agreements that provide for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

The intention of this Act is to complement the caps and thresholds legislation introduced by the States and Territories in relation to the Trade Practices Act (and the equivalent provisions of the ASIC Act and the Corporations Act). If Ms Johnson was to bring her claim now, she would not be entitled to recover general damages by resorting to section 75AD of the Trade Practices Act.

With regard to the effect that the caps and thresholds legislation has had generally, present anecdotal evidence and some statistical evidence is showing that there has been a significant drop in claims and in court filings in the personal injury arena. However, while premiums appear to have stabilised and cover is now available where it was not before, there is little indication that premiums are declining. It is probably too early to say whether either of these effects are because of the success of tort law reform, or whether there are other factors at play.

(b) Treasury Legislation Amendment (Professional Standards) Act (No.2) 2004
This Act supports the proposed professional standards legislation at State and Territory level by amending the Trade Practices Act, ASIC Act and Corporations Act.

It provides that professional standards laws of the States or Territories apply to limit liability relating to an action for contravention of section 52 of the Trade Practices Act (and the equivalent provisions of the ASIC Act and the Corporations Act) in the same way as it limits liability arising under a law of the relevant State or Territory.

However, the professional standards law, or scheme, is stated only to apply if:

- it is prescribed by relevant Commonwealth regulations at the time of contravention; and
- any modifications prescribed by the Commonwealth regulations had been made to the scheme.

Accordingly the Commonwealth retains a significant degree of control over how professional standard schemes are to operate.

Separate from the provisions relating to professional standards, the Act also limits or precludes the amount of damages that may be recoverable pursuant to the implied warranties under section 74 of the Trade Practices Act (and equivalent provisions of the ASIC Act) to the extent of the applicable State or Territory law.

The text of the amendment which is made to section 74 of the Trade Practices Act is as follows:

(2A) If:

(a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and

(b) the law of the State or Territory is the proper law of the contract:

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

At a practical level professionals who join accredited schemes such that they are entitled to limit their liability should benefit from reduced premiums. However, if a professional is allowed to contract out of the limitation provisions (for example, if they have signed up to the scheme solicitors in New South Wales are prevented from contracting out of it by the Law Society) this is likely to raise issues relating to the duty of disclosure. In addition, assuming the policy of insurance contains a term or condition requiring an insured to notify its insurer of any fact or circumstance arising during the currency of the policy that may alter the risk, it is arguable that any such contracting out will need to be brought to the attention of insurers.

(c) Trade Practices Amendment (Personal Injuries and Death) Bill (No.1) 2003

Somewhat ironically this Bill was the first in this series of legislation to be introduced, but has not yet been passed.

The Bill proposes to amend the Trade Practices Act by preventing a person from recovering damages for a contravention of Part V, Div 1 where the loss or damage is or results from death or personal injury.

Part V, Div 1 contains consumer protection measures, the most commonly used ones being those that deal with misleading and deceptive conduct (section 52) and false and misleading representations (section 53).
On December 2003 the Opposition and Democrats proposed amendments in the Senate so that instead of excluding personal injury and death claims, the damages recoverable would be limited to those under the civil liability law of the relevant State or Territory. These amendments were rejected by the House of Representatives and an impasse appears to have been reached as the Senate subsequently insisted on the amendments. With the re-election of the Coalition with a majority in both houses of Parliament, the legislation may soon be passed by the government without amendment.

2. **Proportionate Liability**

2.1 **What is proportionate liability?**

Traditionally, the liability of concurrent tortfeasors has been joint and several. In other words, all concurrent tortfeasors are liable to a plaintiff to the full extent of the damage caused.

Unlike joint and several liability, the principle of proportionate liability requires that each tortfeasor's liability is limited to the extent that they are responsible for the plaintiff's loss. There is no right of contribution between tortfeasors as such because each can only be required to compensate the plaintiff for the proper share owing from that tortfeasor.

Also unlike joint and several liability, the risk that a tortfeasor becomes insolvent or disappears is a risk borne by the plaintiff. In order for a plaintiff to recover the whole of its loss, it must obtain and successfully enforce judgment against each of the tortfeasors responsible for its loss.

2.2 **The Ipp Report**

Prior to the Ipp Report, the issue of proportionate liability had been considered by a number of reform commissions.\(^1\)

The Panel was not asked to consider the potential application of principles of proportionate liability to economic loss and property damage claims. However, its terms of reference requested the Panel make recommendations in relation to proportionate liability in personal injury damages claims. Interestingly, the Panel declined to make any such recommendation, citing the risk that plaintiffs would not be fully compensated for their losses as a result of the application of proportionate liability principles.

Nevertheless, at subsequent Ministerial meetings proportionate liability was flagged as a potential solution to the reported unaffordability of professional indemnity insurance policies. The genesis of the current legislative reforms has been described by the Commonwealth Government through the Department of Treasury as follows:

---

1 The New South Wales Law Reform Commission rejected the introduction of proportionate liability in its 1990 report on the issues of contribution and joint and several liability. In 1995 the 'Davis Report' recommended that joint and several liability be abolished and replaced by a scheme of proportionate liability in all actions in negligence in which the plaintiff’s claim is for property damage or pure economic loss. The Victorian Attorney General’s Law Reform Advisory Council commissioned a report in 1998 to consider the likely economic impact of the replacement of joint and several liability with proportionate liability in cases of pure economic loss and property damage. In 1999 the New South Wales Law Reform Commission published a further report on the issues of joint and several liability, contribution and proportionate liability.
Issues identified with the previous law

Concern was expressed, especially by professionals such as accountants, with ‘deep pockets’ and adequate insurance, that they could be held liable for the full amount of losses even though their actions may have made only a small contribution to the loss.

Several previous Law Reform Commission and other studies had recommended proportionate liability for pure economic loss claims only, or for property damage and pure economic loss claims. Most studies, including the Review of the Law of Negligence, recommended a continuation of joint and several liability for personal injury and death claims.2

2.3 Recent reforms

At present, most Australian jurisdictions have introduced legislation intended to apply proportionate liability to claims other than personal injury claims.

Legislation applying proportionate liability principles has been commenced by the Commonwealth and Victorian Parliaments. The New South Wales, Queensland and Western Australian Parliaments have passed legislation that contains proportionate liability provisions but those provisions have not yet commenced. The ACT Legislative Assembly has also recently introduced proportionate liability legislation. The South Australian and Tasmanian Governments have announced their intention to introduce similar legislation.

(a) Commonwealth


Schedule 3 to the Act contains amendments that have now been made to the Trade Practices Act, the Corporations Act and the ASIC Act. These amendments provide for contributory negligence and also abolish joint and several liability in cases arising from a breach of section 52 of the Trade Practices Act for misleading and deceptive conduct (or the equivalent provisions of the Corporations Act and the ASIC Act).

The amendments appear in sections 82 to 87 of the Trade Practices Act relating to the recovery of damages.

In relation to contributory negligence, section 82 of the Trade Practices Act is amended as follows:

(1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to:

(i) economic loss; or
(ii) damage to property;

caused by conduct of another person (the defendant) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant’s failure to take reasonable care; and
(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

2 Reform of liability insurance law in Australia, Commonwealth Department of Treasury, February 2004.
(i) did not intend to cause the loss or damage; and
(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be
reduced to the extent to which the court thinks just and equitable having regard to the
claimant's share in the responsibility for the loss or damage.

Accordingly, a defendant will not be able to assert contributory negligence in respect of a claim
arising from a breach of section 52 of the Trade Practices Act where the breach was intentional or
fraudulent.

Proportionate liability is introduced by new sections 87CB to 87Cl of the Trade Practices Act (and
the equivalent provisions of the ASIC Act and Corporations Act).

We will not set out the proportional liability provisions in full, but observe as follows:

1. The provisions do not apply to intentional or fraudulent conduct.
2. The apportionment of liability between joint tortfeasors is by reference to what the court
   considers to be just having regard to the extent of each defendant's responsibility – this
   differs slightly from the provisions relating to contributory negligence which require the
   court to consider a 'just and equitable' apportionment of liability between the plaintiff and
   the defendant.
3. The provisions allow apportionment even if all concurrent wrong doers are not joined as
   parties, although cost consequences can apply if a defendant does not provide the plaintiff
   with information about those who he or she has reasonable grounds to believe may be a
   concurrent wrong doer.
4. Vicarious liability, liability of partners between each other or the imposition of several
   liability is unaffected.

Significantly the provisions do not deal with other provisions of the Trade Practices Act (or the
equivalent provisions of the ASIC Act or Corporations Act) that give rise to a civil liability in
circumstances that are similar to, or in some way related to the provisions found in section 52. We
will deal with this in more detail later.

The provisions relating to proportionate liability came into effect on Monday, 26 July 2004.

(b) New South Wales

Clause 5 of Schedule 1 to the Civil Liability Amendment (Personal Responsibility) Act 2002,
contains part of the proportionate liability provisions that are intended to be inserted into the Civil
Liability Act 2002. However, it is also necessary to be aware that Schedule 2 to the Civil Liability
Amendment Act 2003 amends those amending provisions, so that both amending Acts must be
read together in order to identify the whole of the proposed proportionate liability provisions.

The later amendments were intended to bring New South Wales into line with what was being
proposed (and which has since been enacted) at Commonwealth level. As originally drafted, the
proportionate liability provisions applied only where there was negligence by two or more
defendants. Therefore, if a cause of action lay against one defendant in negligence and against
another in contract, proportionate liability would not have applied.
The further revisions mean that under the New South Wales legislation, as under the Commonwealth legislation, proportionate liability does not apply to intentional or fraudulent conduct. Also, there is now proposed to be an obligation imposed on a defendant to inform a plaintiff about concurrent wrongdoers (which is discussed in further detail below).

(c) Western Australia

The Civil Liability Amendment Act 2003 proposes to insert into the Civil Liability Act 2002 a proportionate liability provision with application to Western Australia.

The Western Australian model adopts a similar approach to the New South Wales legislation and, like New South Wales, has been passed but not commenced. The main distinction between the legislation passed in Western Australia and that of New South Wales and the Commonwealth, is that in Western Australia there is no duty imposed upon a defendant to inform a plaintiff of the identity of concurrent wrongdoers.

(d) Queensland

Proportionate liability provisions are contained in the Civil Liability Act 2003 but have not yet commenced. However, it now appears that those provisions will never commence because new proportionate liability provisions are now proposed to be inserted into the Civil Liability Act 2003 once relevant parts of the Professional Standards Act 2004 have been proclaimed to commence.

The new provisions of the Professional Standards Act 2004 apply to claims for economic loss or damage to property in an action for damages arising from a breach of a duty of care, or under section 38 of the Fair Trading Act 1989 for misleading and deceptive conduct. This is subject to the exception of claims made ‘by a consumer’.

A ‘consumer’ means an individual whose claim is based on rights relating to goods or services, or both, in circumstances where goods or services are being acquired for personal domestic or household use or consumption, or 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.

Proposed section 32F contains a unique provision to the effect that a concurrent wrongdoer who breaches section 38 of the Fair Trading Act is ‘severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.’ The intent of this provision is unclear. If a person is misleading or deceptive and thereby contributes to another’s economic loss, the Act states that they are proportionately liable. However, by section 32F, they are also ‘severally liable’ for the wrongdoing of all concurrent wrongdoers.

By section 31(1)(a), in any proceedings involving a claim that is covered by the Act:

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.

Section 31(3) provides that in apportioning liability 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 proceedings.

A ‘concurrent wrongdoer’ is defined by section 30(1) as:

…a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.
This definition causes some concern as it represents a significantly different position to the legislation introduced by the Commonwealth, New South Wales, Victoria and Western Australia. In each of those Acts ‘concurrent wrongdoer’ includes persons whose actions jointly caused the loss or damage claimed. The Queensland Act, however, uses the term ‘concurrent wrongdoer’ to refer to what is, in effect, an independent tortfeasor.

The important point to note here is that there is a difference between a tort which is committed jointly, a series of successive torts committed by different persons where the loss, damage or injury is indivisible and a series of successive torts committed by different persons where the loss, damage or injury is divisible. In the latter case, the liability is severable, that is, it is apportioned between tortfeasors by reference to the divisible loss caused to each of them. In the first two instances, there is joint and several liability.

(e) Victoria

The provisions relating to proportionate liability in Victoria are found in sections 24AE to 24AS of the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*. These provisions commenced on 3 December 2003.

As with the New South Wales and Commonwealth legislation, the provisions apply to claims for economic loss or property damage. However, by section 24Al(3), in apportioning responsibility between defendants a court must not have regard to the comparative responsibility of any person who is not a party to the proceedings unless that person is dead or, in the case of a corporation, has been wound-up.

(f) Australian Capital Territory

The *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004* has been passed by the ACT Legislative Assembly. However its provisions relating to proportionate liability have not yet commenced.

3. Issues for consideration arising from the reforms

This section of the paper seeks to identify some potentially difficult issues that arise by virtue of the way in which the drafters of the legislation have each sought to implement proportionate liability.

3.1 Are the Commonwealth reforms adequate?

Leaving aside the obvious gap that remains by the failure to introduce the *Trade Practices Amendment (Personal Injuries and Death) Bill (No. 1) 2003*, it appears that the recent Commonwealth reforms may not be watertight.

(a) Part V, Division 1 of the Trade Practices Act

As identified above, the legislation in respect of proportionate liability (*Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth)*) and professional standards (*Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth)*) is limited to breaches of section 52 of the Trade Practices Act (and the equivalent provisions of the ASIC Act (section 12DA) and Corporations Act (section 1041H)) only. This raises a number issues in relation to the other sections of Part V, Division 1 of the Trade Practices Act.

(b) Section 52
Section 52(1) of the Trade Practices Act provides as follows:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 52(1) is written in general terms and is ‘a comprehensive provision of wide impact’. As noted in the Ipp Report, section 52 of the Trade Practices Act has had a vast influence on the law of contract and is a major source of litigation in Australia. The reason for this was identified in paragraph 5.24 as follows:

Section 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault. Often, a plaintiff will plead, as an alternative to a claim under section 52, a claim for negligent misrepresentation or deceit. In order for such common law claims to succeed it would be necessary for the plaintiff to prove not only that the defendant made a false representation, but also that he or she did so negligently, or dishonestly (as the case may be). Under section 52, however, the plaintiff can succeed merely by proving that the statement was misleading or deceptive, even if the defendant made the statement with the utmost care and with complete honesty. [our emphasis]

Bearing this observation in mind, is there any reason why the legislation in respect of proportionate liability and professional standards should not extend to the other sections of Part 5, Division 1?

(c) Section 53

Section 53 of the Trade Practices Act provides as follows:

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

(aa) falsely represent that services are of a particular standard, quality, value or grade;

(b) falsely represent that goods are new;

(bb) falsely represent a particular person has agreed to acquire goods or services;

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

(e) make a false or misleading representation with respect to the price of goods or services;

(f) make a false or misleading representation concerning the need for any goods or services; or

(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

There are a number of concepts involved in understanding section 53 that do not appear in section 52. In particular, in a number of instances the conduct referred to will only constitute a breach of section 53 if it ‘falsely’ represents the position.

---

3 see Fox J in Brown v Jam Factory Pty Ltd (1981) 53
In *Murphy v Farmer* (1988) 165 CLR, a case involving the application of section 229(1) of the *Customs Act 1901* (Cth), the High Court was inclined to interpret 'false' to mean 'purposely untrue' in circumstances where the importer of a motor vehicle had made an incorrect, but not deliberately incorrect, customs declaration. If this was the case in relation to section 53, a clear distinction could be drawn between it and section 52. However, in *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212, where the defendant offered for sale a car with an odometer reading of 23,700 miles, when in fact it had travelled substantially in excess of that mileage, Franki J said (at page 217):

> The next matter to consider is whether the words 'falsely represent' in s 53(a) are satisfied if the representation is not correct, or whether it must be known to be false by the person making the representation...I am satisfied that, if a representation is in fact not correct it comes within the words of the section, even if it is not false to the knowledge of the person making the representation.

This view was endorsed by the Full Court in *Darwin Bakery Pty Ltd v Sully* (1981) 51 FLR 90 (see also *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 and *TPC v The Vales Wine Company Pty Ltd* (1996) 6 FCR 336.

(d) **Section 53A**

Section 53A applies to corporations which, in trade or commerce:

...make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully by put or the existence or availability of facilities associated with the land...

As to the term misleading, the test to be applied is simply whether the representation was false or misleading as to the use to which the land could be put at the time of settlement. The representor's intention or belief at the time of the representation is irrelevant (*Bowler v Hilda Pty Ltd* (1998) 80 FCR 191).

Accordingly, as with section 52 a plaintiff can succeed in an action for breach of sections 53 and 53A merely by proving that a representation is incorrect and there is no requirement for dishonesty or knowledge that this is the case.

(e) **Section 55A**

By section 55A a corporation shall not, in trade or commerce:

...engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

*TPC v J&R Enterprises Pty Ltd* (1991) 99 ALR 325 involved the sale by the defendants to businesses of advertising space in an advertising scheme called the 'System 2000' which was a home organiser and information centre, at a time when they knew there was no prospect of the System 2000 be available in the Adelaide area in the foreseeable future.

O'Loughlin J held (as with sections 53 and 53A) that there was no need to show any intention to mislead on the part of the defendants.

Relying upon the authority of *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499, the Court found that the term 'liable to mislead' in section 55A was narrower than the words 'likely to mislead' in section 52. Hence a greater degree of evidence is required to establish a breach of section 55A.
The words 'the public' did not mean the world at large or the whole community. It was sufficient that an approach had been made that was general and at random and that the number of people approached was sufficiently large.

(f) Example

To illustrate this point further, let us consider whether a decision concerning a breach of section 52 which has given rise to a claim for economic loss is capable of giving rise to a claim for breach of any of the other sections of Part V, Division 1.

In *Smith v State Bank of NSW Limited* [2001] FCA 946, the plaintiffs had emigrated from England in 1998. They placed $300,000 in the hands of a Mr Johnston, an undischarged bankrupt with a criminal history of dishonesty offences, who was conducting a business as a taxation and business consultant called Cranbourne Park Accounting Services Pty Ltd (*Cranbourne*). At the time the applicants invested their money upon the advice of Mr Johnston, Cranbourne was an accredited agent of the defendant bank. The bank provided Cranbourne with a certificate of accreditation for display, which represented Mr Johnston as having been assessed by the bank as meeting its prescribed levels of competency, and further, as being able to provide professional advice on 8 listed subjects, including financial matters.

Mr Johnston persuaded the plaintiffs to invest their money in an investment company which he controlled, Greenacres, promising high rates of return, thus increasing their chances of obtaining a home loan with the bank. The plaintiffs received three interest payments, the third by way of a cheque that was dishonoured and subsequently sought and obtained a guarantee from Mr Johnstone that the sum of $150,000 would be repaid in 60 days. When this did not occur, the plaintiffs sued Greenacres and Mr Johnstone in the Supreme Court of Victoria. They obtained judgment for damages and costs, however, the judgment remained unsatisfied.

The plaintiffs subsequently sought to recover their loss from the bank under section 52 on the basis that by issuing the certificate of accreditation, the bank represented that Mr Johnston had been assessed to be competent and was competent, which was untrue.

Gray J held that in accrediting Cranbourne, the bank was undoubtedly acting in trade or commerce. Its object was to sell its services, which it regarded as 'products', to members of the public and to use Cranbourne as a means of attracting customers to itself.

The representation conveyed in the certificate of accreditation was plainly false: the holder of the certificate had been assessed by the bank as meeting its prescribed levels of competency. The process through which Mr Johnston had been put was far from rigorous and was, indeed, wholly inadequate to determine that he was competent to do anything of significance and the plaintiffs were entitled to recover their economic loss suffered.

Taking the findings of his Honour, it would appear that this case would sit comfortably within section 53(aa) of the Trade Practices Act, namely a false representation that services are of a particular standard, quality, value or grade.

A question arises as to whether the representations in this case arose 'in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services'. This concept has not been considered in detail by the courts in the context of section 53. However, in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants (Aust)* [2001] FCA 1056, the court considered the term 'in connection with'
in section 51 AC and decided that it required the conduct complained of to 'accompany' or 'go with' or 'be involved in' the supply of goods and service. In ACCC v Woolworths (South Australia) Pty Ltd [2003] FCA 530, Mansfield J considered the term in relation to section 87B. Applying the test in Berry v Federal Commissioner of Taxation (1953) 89 CLR 653, to the effect that there needs to be a substantial relationship, in a practical sense, between the conduct complained of and the undertaking accepted. His Honour also noted the view expressed by Wilcox J in Our Town FM Pty Limited v Australian Broadcasting Tribunal (1987) 16 FCR 465 that the test did not require 'an immediate causal relationship'. Accordingly, given the finding that the bank used the accreditation to attract customers to itself, it seems likely that any representation arose in connection with the provision of services and hence, that the defendant could also have been liable for a breach of section 53(aa).

This conclusion illustrates further the inconsistency in the Commonwealth's approach. If this claim were litigated today, the liability of the defendant bank under section 52 would be assessed using the proportionate liability principles and hence, it would only be liable to the extent of its contribution to the loss. The liability of Mr Johnston and Greenacres would be taken into account notwithstanding that they may be unable to satisfy any debt to the plaintiffs. However, it seems likely that the plaintiffs would be able to bypass this and recover 100% of their losses from the bank by bringing their claim under section 53(aa).  

4 (g) Rationale for the Commonwealth’s approach

The rationale for the Commonwealth's approach appears to be that a distinction should be drawn between provisions of the Trade Practices Act which are capable of giving rise to an offence (eg. section 53) and those which are not (section 52). However, the distinction is a curious one. Such a distinction was not drawn by the Ipp Report in Recommendation 19 which suggested that the Trade Practices Act be amended to prevent individuals bringing actions for damages for personal injury and death under Part V, Division 1 generally. It was not the approach followed by the Commonwealth in giving effect to this recommendation in the Trade Practice Act (Personal Injuries and Death) Bill (No. 1) 2003. We doubt that plaintiffs will draw this distinction and that any competent lawyer will be able to frame those claims where circumstances permit, to bring claims under sections of Part V, Division 1 other than section 52.

3.2 Obligation to notify plaintiff of concurrent wrongdoers

The obligation imposed on a defendant by the legislation in most jurisdictions to provide details in relation to concurrent wrongdoers has significant potential to create controversy and further dispute.

Consider circumstances in which a party is identified by a defendant as being a concurrent wrongdoer and the circumstances on which the allegation of wrongdoing is based are provided to a plaintiff or plaintiffs. There would seem to be significant potential reputational issues for the named party in such circumstances. Depending on the manner in which the allegations are provided to the plaintiff, it seems possible that a non-party may, at best, suffer a significant slight to its reputation and, at worst, potentially damaging allegations may be made in the course of the  

4 Note that while the plaintiff also argued breach of section 53 in this case, his Honour said that the relevant principles had not been accurately applied, such that it was not considered in detail.
hearing and, unless the non-party is joined to the proceedings or unless the plaintiff brings a subsequent action against it, the non-party will not have the opportunity to defend those allegations.

In addition, the notice test to be applied appears not to have a particularly high threshold. That is, the requirement that there be 'reasonable grounds to believe' appears to be a rather lower test than that which must be satisfied before commencing proceedings (or a cross-claim) against a party in jurisdictions such as New South Wales where the basis for the belief must arise on the basis of provable facts and a reasonably arguable view of the law.

As to what information is required to be provided, the legislation does not make clear whether some or all of the detail in the possession of a defendant must be provided to the plaintiff. Is it necessary that the detail be sufficient to establish a basis for reasonable prospects of success, as is required in some jurisdictions? If not, will notification provide anything more than a potentially costly avenue of enquiry for a plaintiff?

In an insurance context, potentially difficult circumstances arises depending on whether the other party’s interests are noted on the insured defendant’s contract of insurance or, alternatively, where they are a co-insured. If the concurrent wrongdoers are officers of the defendant then the existence of comprehensive directors and officers liability insurance becomes very important.

In addition to issues of insurance, further issues arise where the defendant may be aware of the existence of concurrent wrongdoers that are related to the defendant. Such issues may present themselves in a multitude of complex circumstances but it seems likely that professional advisers acting on behalf of a defendant may need to review their obligations carefully where the available information suggests, for example, that directors or officers of their client company are concurrent wrongdoers (or were intentional or fraudulent). Conflicts of interest may arise.

The need to identify individuals who may be concurrent wrongdoers is not only an issue for professional advisers but also for insurers and intermediaries. Allegations against a corporation that has limited or no insurance may require careful consideration (certainly by the plaintiff if not also by the defendants) in circumstances where potentially liable directors have the benefit of responsive directors’ and officers’ liability insurance.

3.3 Conflict of laws

Although there is, on the whole, a significant degree of consistency between the proportionate liability provisions of each jurisdiction, there are nevertheless some potentially important and difficult discrepancies that have the potential to produce anomalous results, particularly where wrongs have been committed, or damage sustained, across State borders.

(a) Differences between jurisdictions

There are three principal areas of difference between the legislation as introduced or enacted in each jurisdiction, as set out below:

- Consumer carve-out

The Queensland and ACT provisions are the only statutes to contain a carve-out from proportionate liability for consumer claims. The term ‘consumer claims’ is defined by the relevant legislation although there are some differences in that regard also. No other States exclude actions arising from the goods or services
relating acquired for personal, domestic or household use. The inclusion of professional advice services within the meaning of ‘consumer claims’ has the potential to raise interesting questions as to whether a professional understood they were providing advice to for use by an individual (under the Queensland legislation) and whether certain financial advice was ‘personal’ (under the ACT legislation).

- Obligation to provide notice of concurrent wrongdoers

The obligation to provide such a notice is not uniform throughout all jurisdictions. In Western Australia and Victoria, there is no obligation on the part of a defendant to notify a plaintiff of persons believed to be concurrent wrongdoers. This may provide an incentive for plaintiffs in those jurisdictions to rely on allegations of misleading and deceptive conduct in order to trigger the obligation that exists under the Commonwealth proportionate liability provisions.

It is also worth noting that the Queensland legislation contains the only provision that requires an actual belief on the part of the defendant that the person they are nominating may be a concurrent wrongdoer.

- Having regard to the liability of non-parties

In Western Australia, the legislation provides that a court is to have regard to the proportionate liability of persons who are not party to the litigation. By contrast, the Commonwealth, New South Wales, Queensland and ACT legislation states that the court may have regard to the liability of those non-parties. In practice, this may make little difference but until the courts begin to apply the legislation it remains to be seen whether the courts will consider themselves bound to have regard to these matters.

More importantly, the Victorian legislation expressly prohibits a court from having regard to the liability of non-parties unless they are insolvent or deceased. Again, this may produce unexpected outcomes in circumstances where a court is required to have regard to a non-party’s proportionate liability for misleading and deceptive conduct under the *Trade Practices Act* but must not have regard to that party’s liability in a concurrent negligence claim.

(b) Issues arising out of differences

To the extent that these differences between the Commonwealth, State and Territory legislation are not resolved, they create the potential for confusion and unexpected results in claims where causes of action cross borders.

In its June 2000 judgment in *John Pfeiffer Pty Limited v Rogerson*, the High Court found that the assessment of damages in interstate tort cases is to be determined in accordance with the law of the place of the wrong and not the law of the forum in which proceedings had been commenced. In that decision, the High Court declared that the place of the wrong determines questions of substance such as calculation of damages and the application of limitation periods. The judgment

---

has the potential to reduce, if not eliminate, the incentive for parties to forum shop for favourable damages awards.

Rogerson sued Pfeiffer, his ACT-based employer, in the ACT Supreme Court for damages for a work-related accident that occurred in a New South Wales hospital. If damages were determined under New South Wales statutory workers’ compensation provisions, they would have been considerably less favourable to Rogerson than the common law assessment of damages in the ACT.

The Supreme Court of ACT, following earlier High Court authority, assessed damages in accordance with the common law of the ACT. On appeal, however, the High Court overturned the existing authority and applied the law of the commission of the tort as the governing law for tortious claims with an interstate element. The High Court also held that laws relating to limitation periods and damages are both questions of substance and not procedure.

Accordingly, the present state of the law in Australia is that all matters affecting the existence, extent or enforceability of the rights or duties of the parties to an action are matters concerned with issues of substance, and not procedure. As such, they are to be determined in accordance with the *lex loci delicti*. Only the rules directed to governing or regulating the mode or conduct of court proceedings were procedural. All questions of the type or amount of damages recoverable were therefore matters of substance governed by the law of the place of the tort.

On that basis, in order to understand and identify the potential for anomaly in the context of proportionate liability legislation, it is necessary to consider whether any conflicting aspects of the legislation are procedural or substantive. If they are merely procedural, then they will be determined by reference to the place where the action is commenced. However, if they are substantive (and it now appears that many of the provisions will be substantive) then they will be determined by the law of the place where the tort was committed.

Consider, for example, proceedings concerning allegations of misleading and deceptive conduct and also of negligence where the proceedings are commenced in Victoria (where the plaintiff has suffered loss) in respect of a tort committed by the defendant in Queensland. Each of the matters referred to above are different as between those jurisdictions.

Firstly, the consumer carve-out applies in Queensland. That would seem to be a substantive matter rather than a procedural one (although it is less than clear cut) so ought be determined by the law of Queensland. If the plaintiff’s claim falls within the description in the Queensland legislation then proportionate liability may not apply at all.

Secondly, the obligation to notify the plaintiff of concurrent wrongdoers seems likely to be a procedural rather than substantive matter, so that should be determined by the law of Victoria. In Victoria, there is no such notification requirement.

Thirdly, the question of whether a Court is to have regard to the liability of non-parties seems to be more than a matter of procedure but a matter that goes to the substance of the action. On that basis, it should be determined by the law of Queensland, where the tort was committed, and might foreseeably result in a reduction of the damages to which the plaintiff is otherwise entitled.

But if the consumer carve-out applies and the claim is not an apportionable claim under Queensland law, then is there any need to consider the liability of non-parties?
And in any event, what effect, if any, does this consideration have if the plaintiff has pleaded an alternative count of misleading and deceptive conduct not only in breach of the State's statutory prohibition but also a breach of section 52?

There are a multitude of difficult permutations of causes of action in which it may be difficult to determine the existence of any tactical advantage or arbitrage to be gained from discrepancies in the legislation. For as long as such discrepancies exist, it will be incumbent on the solicitors of plaintiffs and defendants alike to be wary of the potential application of the legislation of different States to cross-border tortious disputes.

Similar issues arise even where there is no cross-border dispute but where causes of action are pleaded concurrently based on State and Commonwealth proportionate liability legislation and where drafting anomalies remain in the State legislation.

Assume, for example, two defendants are jointly liable under Queensland law and, in addition to being negligent, they have also engaged in misleading and deceptive conduct. In these circumstances, proportionate liability will not apply to the claim in negligence (because the legislation in Queensland curiously excludes joint liability) and both parties will be liable for the entire loss and damage suffered by the plaintiff. However, in respect of the claim for misleading and deceptive conduct, liability is to be apportioned. If the plaintiff only decides to bring a claim against one of the defendants, what is the correct measure of damage? Are the proportionate liability provisions of the Trade Practices Act to apply, or is the defendant liable for 100% of the loss suffered? Who should make this decision?

4. Conclusion

It is clear that the piecemeal approach taken by the States, Territories and Commonwealth gives rise to the potential for uncertainty and that plaintiffs who are appropriately advised will target weak spots to try and forge a way round the reforms that have been introduced.

Further, as lawyers come to appreciate and explore the anomalies in drafting in a particular jurisdiction, there will be a potential for damages awards in that jurisdiction to reflect issues that are not appropriate for consideration in other States or Territories. Consequently, it seems likely that this will create the potential for arbitrage to exist where several concurrent tortfeasors are proportionately liable for a loss, particularly where the loss is suffered or the causes of action arise in different jurisdictions.

NOTE: This document is intended only to provide a general review on matters of concern or interest to readers. The text of this document should not be relied upon as legal advice. Matters differ according to their facts. The law changes. You should seek legal advice on specific fact situations as they arise. Parts of this paper have been extracted from the Allens Arthur Robinson Annual Reviews of Insolvency and Restructuring Law 2002 and 2003.
Visit our website, www.aar.com.au, for:

- An electronic, fully-searchable version of this paper;
- Past papers presented at Allens Arthur Robinson Corporate Insolvency & Restructuring Forums and Insurance Forums;
- The 1999, 2000, 2001, 2002 and 2003 Annual Reviews of Insolvency & Restructuring Law; and