ARBITRATION, APPORTIONMENT AND PART IVAA OF THE WRONGS ACT 1958 (VIC)

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Does apportionment apply to arbitrations?

by

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Introduction

1. The events of September 11, 2001 and the HIH collapse precipitated significant changes in the insurance industry. They, in part, instigated the introduction of amendments to the Victorian *Wrongs Act* 1958. Part IVAA replaced joint and several (solidary) liability with proportionate liability.

2. Whilst the imperative behind the amendments of alleviating the "deep pocket syndrome" may be clearly understood (although perhaps not universally agreed), the legal and practical ramifications of the application of Part IVAA have been and continue to be far less clear. Those uncertainties are slowly having to be grappled with and by the Courts, practitioners and parties alike. To date, most of the discussion in that regard has been in the context of court proceedings.

3. A common feature of most commercial construction contracts[1] is dispute resolution by a number of consensual processes, including arbitration.

4. The aim of this paper is to explore the question of whether the apportionment regime in Part IVAA applies to arbitrations; and if so, how it might impact on the role and powers of the arbitrator, the procedures to be adopted and the position of the parties to the arbitration. The paper contains an analysis of the relevant provisions of the Wrongs Act, excerpts from other commentaries, arguments for and against the positive proposition, and a number of practical issues which might attend any attempt to pursue the issue.

5. As far as I have been able to identify, there is no authority on this point and given the relatively recent introduction of the Part IVAA amendments, that is perhaps not surprising. Nonetheless it is a question which has wide reaching ramifications.

Problem

6. Let us take a typical building scenario. A principal engages a builder to construct a project. Their contract contains an arbitration agreement. The builder engages a subcontractor to perform part of the works. The subcontractor's works are defective. The Principal issues a notice of dispute against the builder claiming the cost of rectification. The builder denies liability. The dispute is referred to arbitration.

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[1] S.14 of the *Domestic Building Contracts Act* 1995 prohibits arbitration clauses in domestic building contracts.

7. Now let us assume (as often occurs) that the builder (now respondent to the arbitration) has assets and/or is insured, but that the subcontractor has neither. In the ordinary course, the principal will obtain an award against the builder, and be successful in recovery against the builder's assets. The builder is left to pursue the impecunious subcontractor by way of contribution proceedings under s.23B (Part IV) of the *Wrongs Act* on the basis that the subcontractor caused or contributed to the principal's loss and damage. Unfortunately for the builder, it will not be successful in recovering any judgment sum against the impecunious subcontractor.

8. That form of outcome is more consistent with the days of the long pocket syndrome. The new apportionment climate is, by its operation and clear legislative intent, is such that the risk allocation in respect of impecunious defendants has been shifted from other solvent defendants back onto plaintiffs.

9. Part IVAA enables defendants to effectively 'shed' part or all of their potential liability by permitting joinder of others considered responsible for a plaintiff's claimed loss and by requiring a court to enter judgment against each defendant only for and having regard to that defendant's respective share or portion of responsibility for the loss.

10. Back to our hypothetical arbitration. With such bleak prospects in sight, the hapless builder gets wind of this new 'fangled' apportionment law which means that he should be able to have his liability to the principal apportioned against the subcontractor. The builder then asks whether he can seek the benefit of that within the arbitration.

11. The purists among us will no doubt frown and demur to the age old common law precept that as the arbitration proceeding is a product of a private contractual arrangement solely between the principal and the builder, there is no scope for joining any non-party to the agreement as an additional respondent to the arbitration; and further, that the ambit of the arbitrator's role and jurisdiction is circumscribed by the terms of reference in the arbitration agreement which says nothing about any apportionment.

12. Well, let's have a closer look…

Part IVAA of the *Wrongs Act* – relevant provisions

13. Relevant provisions of Part IVAA include:

24AE. Definitions

In this Part—

***"apportionable claim"** means a claim to which this Part applies;*

***"court"** includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;*

***"damages"** includes any form of monetary compensation;*

***"defendant"** includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise; …*

24AF. Application of Part

(1) This Part applies to—

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

(b) a claim for damages for a contravention of section 9 of the Fair Trading Act 1999.

(2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.

(3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.

24AH. Who is a concurrent wrongdoer?

(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

(2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

24AI. Proportionate liability for apportionable claims

(1) In any proceeding involving an apportionable claim—

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to that claim.

(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—

(a) liability for the apportionable claim is to be determined in accordance with this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

24AJ. Contribution not recoverable from defendant

(1) Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim—

(a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and

(b) cannot be required to indemnify any such wrongdoer.

24AK. Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.

(2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.

24AL. Joining non-party concurrent wrongdoer in the action

(1) Subject to sub-section (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim <u>to be joined as defendants</u> in a proceeding in relation to that claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

…

[emphasis added]

14. The new apportionment 'regime' under the amendments applies to proceedings commenced on or after 1 January 2004.

15. For the purposes of this paper, it is assumed that the principal's claims referred to in the hypothetical dispute described above are 'apportionable claims', and that the builder and subcontractor are both 'concurrent wrongdoers' within the meaning of the Part. The myriad issues surrounding those concepts are beyond the scope of this paper.

Articles

16. A number of articles have been written and a number of commentators have spoken about this issue in recent times.

17. In his article[2], "Proportionate Liability under attack by the Construction Industry: A return to deep pockets?", Brett Wilson, a partner of McMahon's Lawyers in Sydney wrote:

> *"Other principals have advocated referring disputes to arbitration since a defendant head contractor would not be able to join a sub-contractor to arbitration proceedings. However, arbitration may in fact involve a double-edged sword. This is because if the legislation applies to arbitrations, it would require an arbitrator to potentially apportion responsibility to a subcontractor (who would not be a party). However, the apportionment upon the subcontractor may not be binding if the principal were to commence other proceedings against the subcontractor."*

18. Scott Budd of Minter Ellison, wrote an article entitled "Implications of the new proportionate liability regime"[3] in which he said:

> ***"Practical issues***
>
> *Difficulties may arise where one or more wrongdoers is unavailable or there are many concurrent wrongdoers. Depending on the defendants' liquidity, the plaintiff may find that it can only recover a small portion, if any, of its loss. To address this issue, a first step is to ensure that all*

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2 insurance.law@mcmahons 2005 October Edition
3 21 September 2005

> *possible concurrent wrongdoers – for example subcontractors, consultants and suppliers – maintain adequate insurance coverage. Arbitration and expert determinations raise the problem that responsible third parties can only be joined by mutual agreement.*

19. Further, on 18 August 2005, the Commercial Bar Association of the Victorian Bar presented a CLE seminar conducted by Graeme Uren QC and Daniel Aghion of Counsel in which the topic was "Proportionate Liability: An analysis of the Victorian and Commonwealth Legislative Schemes". In that paper, the learned authors observed that the word "court" included tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined. The presenters said:

> "*Part IVAA will therefore apply to appropriate proceedings commenced at VCAT. Arguably it may also apply to an arbitration conducted pursuant to the CAA*."

20. In his article entitled "Proportionate Liability Construction Litigation" dated 10 July 2006[4], McDougall J. of the New South Wales Supreme Court makes some interesting observations about this issue and forewarns of various problems if apportionment does not apply to arbitrations. In the context of the NSW legislation[5], his Honour wrote:

> *"The section raises a number of issues. One arises from the references, in paras (a) and (b), to a claim made "in an action for damages": specifically, the word "action". Does the word "action" signify that the proportionate liability regime applies only in proceedings in a court? Or does it extend to arbitral proceedings? If the former – i.e., if there is no proportionate liability regime for claims advanced through and decided by arbitration – what is the underlying policy justification? On the face of things, the former would represent an extraordinary outcome, and one liable to increase the flow of work to arbitrators. I suggest that a purposive construction of the phrase "in an action for damages" would apply it to any kind of "proceeding" whereby a claim for damages can be vindicated.*
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> …

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4 Lawlink website, Supreme Court, speeches.

5 Which differs in a number of respects from the Victorian counterpart, most notably that NSW courts may apportion against non-parties. In Victoria, that can only occur where the non-party is deceased or a company that has been wound up.

> *Of course, the particular problem* (power to award interest) *has been resolved by s 32 of the Commercial Arbitration Act 1984. But the general principle – that arbitrators decide disputes according to law – is capable of application to the circumstances created by the proportionate liability regime. If that is to be taken as altering "the antecedent principle of law regulating" the doctrine of joint and several liability, then it should be taken to be part of the general law applying, among other things, to the conduct of arbitrations, and the awards of arbitrators, in appropriate cases.*
>
> *Arbitrations are, of course, a creature of contract (although now with significant legislative support). In the ordinary way, the arbitrator has jurisdiction in accordance with the terms of the submission: that is to say, jurisdiction between the parties to the submission in respect of disputes that fall within the ambit of the submission. If what I have said is correct, and the proportionate liability regime extends to disputes that are to be resolved by arbitration, then a proportionate liability issue may be raised by one of the parties to the contract – typically, by the respondent. It may then be open to the arbitrator to find that the respondent is liable for X percent of the loss and damage sustained by the claimant. But in the ordinary way, unless the other concurrent wrongdoers consent to be joined in the arbitration, the claimant will be left to pursue its remedies against them in the courts. Unlike a plaintiff in ordinary litigation, a claimant in an arbitration cannot join all alleged concurrent wrongdoers to whom the respondent points as having some responsibility for the claimant's loss or damage. Thus, the risk of multiplicity of proceedings, and the consequential risk of inconsistent decisions, is likely to be multiplied".*

Arguments for

21. Following McDougall J's observations, what other or further arguments may be deployed in support of the proposition that apportionment applies to arbitrations?

22. It may be seen from the relevant provisions reproduced above that if Part IVAA does apply to arbitrations, then arguably the arbitrator pursuant to s.24AL would have power to join other concurrent wrongdoers, and pursuant to s.24AI must apportion liability as between all of them.

Section 22 of the CAA – "according to law"

23. The starting point is to consider the very nature and characteristics of the arbitration itself. The functions of an arbitrator must be performed in a judicial manner applying the rules of natural justice – *Fox v PG Well Fair Limited (in liq)* [1981] 2 Lloyd's Rep 514; *Argyle Lane Corp Pty Ltd v Tower Holdings Pty Ltd* (1993) 10 BCL 273. It is a usual, but not invariable requirement, that the determination be made in accordance with a fixed recognisable system of law – *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep 257 at 264.

24. Section 22 of the CAA provides:

> *22. Arbitrator to decide according to law or fairness*
>
> *(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.*
>
> *(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.*

25. An arbitrator is required to determine the question before him or her according to law, or if the parties so agree in writing, according to considerations of general justice and fairness. In the absence of an agreement to the contrary, the law to be applied will be that of Victoria - *Mond v Berger* [2004] VSC 45.

26. It may be argued that one way around the difficulties associated with determining whether the apportionment provisions of the *Wrongs Act* apply to arbitrations is through the alternate procedure available to the parties and indeed the arbitrator to determine the questions in dispute according to considerations of general justice and fairness. In that regard the concept of an 'amiable compositeur' arises. That has been described as the situation in which the arbitrator is permitted to decide the dispute according to the legal principles the arbitrator believes to be just, without being limited to any particular national law. They are authorised, in those circumstances, to disregard legal technicalities and strict constructions which they would be required to apply in their decisions if the arbitration agreement contains no such clause. In *Hewitt*

v Mckensey [2003] NSWFC 1186, McDougall J summarised the principles concerning an amiable compositeur as follows:

> *" …However, as his Honour then noted, the position of an amiable compositeur was somewhat different, and indeed was a conception 'extremely difficult to fit … into the common law'….*
>
> *A power to decide something as amiable compositeur would not ordinarily entitle the arbitrator to disregard all law, but that the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."*

Whether an arbitration is a "tribunal"?

27. The primary issue then would appear to turn on an even narrower question, namely whether an arbitrator is a "court or tribunal" as referred to in the Part. Having regard to the extended definition of the word 'court' it is clear that the arbitrator is not a court in the usual sense. The question remains whether the arbitrator is a 'tribunal' for the purposes of the Part?

28. As the word 'tribunal' is not itself defined in the Act, its proper interpretation begins with the ordinary and natural meaning of the words in question. In *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR, Gibbs CJ said at page 304:

> "*It is only by considering the meaning of the words used by the legislature that the Court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that the words mean what they say … the danger that lies in departing from the ordinary meaning of unambiguous provisions is that it 'may degrade into mere judicial criticism of the propriety of the Acts of the legislature' … It may lead judges to quit their own ideas of justice or social policy in place of the words of the statute.*"

29. It is clear on the face of it that the legislation under consideration should be characterised as remedial and enabling, and therefore be construed and interpreted accordingly by giving it a liberal interpretation rather than a narrow one – *cf Papaesfstathiou v Zafir*, unreported VSC, 30 October 1986, Nathan J and considered

in *White Constructions NT (Pty Ltd) v Ronald Mutton & Flavius Pty Ltd* (1988) 57 NTR 8.

30. If a construction of the word "tribunal" having regard to its ordinary and natural meaning results in any ambiguity or absurdity, then one may look to other means to distil its intended meaning. Those means include adopting a purposive approach – *HGF v Dore* [2003] VSCA 126; *Kingston v Keprose Ltd* (1987) 11 NSWLR 404; *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [1998] HCA 28; *Eastman v Director of Public Prosecutions* (2003) HCA 28; and *Joad Pty Ltd v Ospies Hotels Pty Ltd* [1995] 1 VR 198. One is reminded, however, of the observations of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*[6]

> *"Plumbing for legislative intention may be an illusionary quest. … the task of the Court … is to give effect to the will of the legislature as it has been expressed in the law and by ascertaining the meaning of the terms of the law. Just because ambiguity might be construed in a statute it does not mean, as the appellant would have it, that Courts should actively seek it out or impose their own meaning on words –."*

31. Is the term "tribunal" as used in Part IVAA ambiguous or is there a construction of the provision that might lead to absurdity? As to the latter, it is arguable that if Part IVAA does not apply to arbitrations, then having regard to the evident intent of the legislation, absurdity would result. In other words, if parties took their disputes to the Courts, then apportionment against responsible concurrent wrongdoers would apply, whereas if those same disputes were determined in arbitration proceedings, the avenue for apportionment would not be available. That, as expressed above, would likely result in a return to the days of the "deep pocket syndrome", the very 'vice' which the amendments were intended to ameliorate.

32. The word 'tribunal' is variously defined as "a court or forum of justice; a person or body of persons having to hear and decide disputes so as to bind the parties; and any court, judicial body or board which has quasi judicial functions; and a body that is appoint to make a judgment or enquiry".

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[6] Referred to in *Clark v Stingel* [2005] VSCA 107

33. In *Lewenberg v Victoria Legal Aid* [2005] ACL Rep 10 Vic 6, in relation to the interpretation of the *Administrative Law Act* 1978, the Court held:

> "*That brings me now to the question whether it was a decision made by 'a tribunal'. The word 'tribunal' is also defined by section 2 and can be relevantly paraphrased as follows –*
>
> > *'Tribunal means … a body of persons (not being a Court of law or a tribunal constituted or presided over by a judge of the Supreme Court) who, in arriving at the decision in question are by law required whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.'*"

34. Accordingly, it is submitted that on the plain and ordinary meaning of the word 'tribunal', Part IVAA was intended by Parliament to apply to arbitrations on the basis that an arbitrator may be included in the term 'any tribunal'.

35. If there be any doubt about the accuracy or completeness of that analysis, then one looks to the extraneous material contemplated by s 35 of the *Interpretation of Legislation Act* 1984 which provides:

> ***35. Principles of and aids to interpretation***
>
> *In the interpretation of a provision of an Act or subordinate instrument-*
>
> *(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and*
>
> *(b) consideration may be given to any matter or document that is relevant including but not limited to-*
>
> *(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;*
>
> *(ii) reports of proceedings in any House of the Parliament;*
>
> *(iii) explanatory memoranda or other documents laid before or otherwise*

presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

[emphasis added]

36. What is the purpose or object underlying the Part IVAA amendments?

37. In September 2002, a review of the law of negligence was completed and submitted to the Attorney-General. It is commonly known as the "IPP report". In relation to proportionate liability, the terms and reference for that inquiry were confined to claims for personal injury and death. Recommendation 44 in the report was that "in relation to claims for negligently caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability".

38. On 12 September 2002, Premier Bracks in his Second Reading Speech in relation to the Wrongs and Limitation of Actions Act (Insurance Reform) Bill described the main aims of the legislation as being insurance related. He said:

> *"This Bill continues the government's wide ranging response to problems in the insurance sector that have impacted on all sectors of the Victorian economy and community".*

39. On 21 May 2003, Premier Bracks said further in relation to the Wrongs and Limitation of Actions Act (Insurance Reform) Bill:

> *"Proportionate liability for economic loss*
>
> *The bill implements 'proportionate liability' in place of joint and several liability for purely economic losses - that is, losses that do not relate to death or personal injury. This means that persons or entities, including government, will each only be liable for the proportion of economic loss caused by their own negligence.*
>
> *They will not have to be responsible for the whole amount of economic loss damages awarded if they did not cause 100 per cent of the loss.*
>
> *Proportionate liability has operated satisfactorily in the building industry in Victoria*

for some years under specific provisions in the Building Act 1993[7]. The bill repeals those provisions, as claims relating to the building industry will now be covered by these general provisions that relate to all non-injury claims.

The move to proportionate liability for economic loss comes after extensive research and consultation over the last decade by attorneys-general and others across Australia.…

Statement as to s.85 of the Constitution Act….

The purpose of these provisions is to restrict the powers and authorities of the court to ensure that the new laws relating to proportionate liability operate as intended."

40. On 30 October 2003, Minister Brumby, said in his second reading of the Wrongs and Other Acts (Law of Negligence) Bill:

> "*The Bill includes some minor amendments to the proportionate liability provisions implemented in the autumn sitting, which have not yet been proclaimed. These amendments repeal the definition of 'economic loss' and clarify that proportionate liability extends to pure economic losses arising under statute*".

41. On 22 May 2003, the explanatory memorandum for the Wrongs and Limitation of Actions Act (Insurance Reform) Bill was circulated. Relevantly, it provided:

> "*Section 24AE defines the terms used in the new part 4AA.*
>
> *Section 24AF provides that this Part applies to claims for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from failure to take reasonable care, and also claims for damages for contravention of section 9 of the* Fair Trading Act *1999. These are 'apportionable claims'.*
>
> *It also provides for apportionable cases arising from different causes of action to be considered as if part of one claim.*

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[7] Part IX and the since repealed s.131 of the Building Act 1993 did not contain a definition of the term 'court' as found in s.24AE of the Wrongs Act.

The section further provides that this Part does not affect any other protection from liability under any statute or other law.

Section 24AG excludes claims relating to injury from the operation of this Part and further explicitly excludes claims under certain specified statutory provisions from the operation of this Part. It also provides for other claims in a specified class of proceedings under Regulation to be excluded from the operation of this Part.

Section 24AH defines a 'concurrent wrongdoer' as one of two or more persons whose acts or omissions caused independently of each other or jointly the loss or damage that is the subject of the claim, and specifies that a person who is insolvent, is being wound up, has ceased to exist or has died is not excluded from being a concurrent wrongdoer.

Section 24AI limits the liability of a defendant who is a concurrent wrongdoer in an apportionable claim to the proportion of the plaintiff's loss for which that defendant is considered responsible, and precludes judgment from being given for more than that amount. Note that section 24AP(d) provides that punitive or exemplary damages may still be awarded against such a defendant.

The section also provides that in proceedings that involve both an apportionable claim and some other claim, only the apportionable claim is to be determined in accordance with the proposed Part. The existing law will continue to apply to the non-apportionable claim.

The section further provides that the Court cannot apportion responsibility to any person who is not a party to the proceedings, unless the reason for the person not being a party is that the person is dead or, if a corporation, has been wound up.

Section 24AJ precludes a defendant against whom judgment has been given in an apportionable claim from being required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceedings, or to indemnify another concurrent wrongdoer.

Section 24AK provides that a plaintiff who has recovered damages from a concurrent wrongdoer for an apportionable loss retains the right to bring an

> *action another concurrent wrongdoer for that loss, but cannot through the success of actions recover more than the amount actually lost.*
>
> *Section 24AL provides for the Court to allow any other persons to be joined as a defendant in an apportionable claim, except where that person was a party to a previously concluded proceeding in respect of that claim. …*"

42. The term 'tribunal' is used both in the context of arbitrations and other non-defined contexts in various sources of legislation.

43. In the *King and Commonwealth Court of Conciliation and Arbitration and the President thereof v Boot Trade Employee's Federation* [1910] 11 CLR 1, Griffiths CJ said:

> *"These considerations are, in my opinion, of great weight, but they do not determine the question, whether the elements of voluntary submission and choice were part of the original concept of arbitration which should be treated as having only been modified so far as expressly declared by some law, or whether they are incidental attributes which had been temporarily added to that concept by reason of the operation of the common law. To solve this question recourse may be had to other instances of the use of the word, and the series of Statutes mentioned by my brother Isaacs indicate to my mind conclusively that for a long time before 1900 the words "arbitrator" and "arbitration" had been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land. The word arbitrator had been used in the same sense in the Queensland Railway Act 1872, which left the assessment of compensation for land taken for railway purposes to the determination of a single person called the Railway Arbitrator."*

44. The term 'arbitral tribunal' has been used in a number of decisions, including *Anaconda Operations Pty Ltd & Anor v Fluor Australia Pty Ltd* [2003] VSC 275; *Mond v Berger & Ors* [2004] VSC 45; *Transfield Philippines Inc v Luzon Hydro Corporation* [2002] VSC 215; *AWB (International) Ltd v Tradesmen International (Pvt) Ltd* [2005] VSC 350; and *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] VSCA 158.

45. Further, in the United Nations Commission on International Trade Law, otherwise known as the UNCITRAL Arbitration Rules, there are various references within the articles therein to the term 'tribunal' and 'arbitral tribunal' when referring to what we

would commonly regard as an arbitration proceeding, and an arbitrator as the case may be.

46. Order 63 of the Supreme Court Rules deals with costs. Definitions provided in that Rule include one for the term 'party' said to include:

(a) …

(b) *in the case of a proceeding in another court or before a tribunal or an arbitration, a person whether or not a party to that proceeding or arbitration by or to whom costs in respect of the proceeding or arbitration are payable where by or under any Act or these Rules or any order of the Court the costs are to be taxed in the Court.*

47. Interestingly in that instance, the legislative rules appear to differentiate between courts, tribunals and arbitrations. It may be said though that the rule and its definitions appear to apply to arbitrations ordered by a court, as opposed to private arbitrations as 'creatures' of contract.

48. Rule 5.02 of the *Supreme Court (Miscellaneous Civil Proceeding) Rules* 1998 includes in the definitions contained therein:

> "*Tribunal means the person who or body which may reserve a question of law.*"

49. Others Parts of the *Wrongs Act*, including at sections 47 and 71, contain express statements that those Parts, except as provided within them, are not intended to affect the common law. Part IVAA does not contain any similar provision. Arguably then, Parliament did intend to alter the common law and obviously has in removing joint and several liability. To the extent that apportionment may alter any common law principles relevant to arbitrations, it may again be argued that Parliament intended that alteration.

50. In the absence of any express language in the Act to exclude the operation of Part IVAA to arbitrations, the evident intent of the legislation is that it apply to all claims in all proceedings before courts or tribunals involving claims for economic loss, and that it should equally apply to arbitration proceedings.

Policy

51. There are clear policy imperatives in favour of the proposition that Part IVAA, apportionment in economic loss claims, should equally apply to arbitrations as it does to curial proceedings and proceedings before other recognised tribunals, such as VCAT. The point may be best illustrated by considering the result if it is not correct. If apportionment were not to apply to arbitrations, then those in positions of control in contractual relationships, for example, principals in building contracts could insist upon any disputes being determined solely by arbitration and thereby circumvent the ability for respondents in the arbitration to have others who may be responsible joined and liability apportioned. In that way, those principals could effectively 'undo' the work intended by the amendments to the *Wrongs Act*, namely to alleviate the "deep pocket syndrome" by allocating the risks associated with impecunious defendants back to the plaintiff or claimant in the case of arbitrations. If that result were to obtain, then we would see in Victoria an inconsistency in outcomes in litigation between those conducted in the Courts and those conducted in arbitration proceedings.

Arguments against

52. In his article "Proportionate Liability – Reform or Regression"[8], Professor Doug Jones wrote:

> *"Finally, parties may try to elude the legislation by referring all disputes to some form of alternative dispute resolution, such as arbitration, and expressly excluding the arbitrator, mediator, etc, from resolving the dispute under the proportionate liability scheme. This relies on a literal interpretation to the words "the court" in the legislation. Such an approach would not be taken in New South Wales, Tasmania or the Northern Territory, as the legislation specifically includes tribunals in the definition of "court". This is also the case in Victoria, although in that state the Act expressly bars the court from taking into account the comparative responsibility of wrongdoers unless they are parties to the action. As a court may join parties to an action, but an arbitral tribunal typically cannot (and can be expressly prevented from doing so under the arbitration agreement) it may be possible to argue that this inconsistency means that arbitrations are not subject to the legislation in Victoria. In other Australian jurisdictions, it is unlikely that this tactic would succeed, as arbitral tribunals have the authority to provide*

[8] The International Construction Law Review [2007] ICLR 1-132 at page 92.

parties to an arbitration with the same relief (including relief derived purely from statute) which would be available in a court of law.[9]*"*

53. The *Limitation of Actions Act* 1958 provides at section 5 that actions in contract and tort shall not be brought after the expiration of six years from the date from which the cause of action accrued. Relevantly, s 28 of that Act provides that the limitation periods apply to arbitrations:

28. Application of Act to arbitrations

(1) This Act shall apply to arbitrations in like manner as it applies to actions.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the arbitration agreement to be referred to arbitration until an award is made under the arbitration agreement, the cause of action shall for the purpose of this Act (whether in its application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the arbitration agreement.

….

(6) This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to an arbitration agreement, and sub-sections (3) and (4) hereof shall have effect in relation to an arbitration under an Act as if for the references to the arbitration agreement there were substituted references to such of the provisions of the Act or of any order, scheme, rules, regulations or by-laws made thereunder as relate to the arbitration.

54. A similar reference is found in the Supreme Court Rules at Order 63, which appears to differentiate between courts, tribunals and arbitrations.

55. Such distinctions or express references to arbitrations may found an argument based on the maxim expressio unius exclusio alterius: the expression of one excludes another. That is, by Parliament's express reference within Part IVAA to only courts and tribunals, it intended to exclude any reference to or inclusion of arbitrations.

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[9] Professor Jones cites *GIO of NSW v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206; and *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466.

Trade Practices Act

56. Part VIA of the Commonwealth *Trade Practices Act* 1974 provides for proportionate liability in relation to claims for misleading and deceptive conduct. It contains similar provisions to Part IVAA of the *Wrongs Act* with the notable exception in s.87CD(3)(b) that the court may have regard to the responsibility of non-parties to the proceedings. In that regard, the Part operates similarly to the NSW legislation. There is also an obligation in s.87CE for defendants to notify plaintiffs of concurrent wrongdoers of whom defendants are aware.

57. There are at least two observations to be made about the proportionate liability provisions of the TPA and whether they might apply in a given case.

58. Firstly, the apportionment provisions apply only to claims for relief in respect of contraventions of s.52 of the TPA, misleading and deceptive conduct. In that sense, they may be of limited utility in the majority of construction disputes which focus on contract and negligence claims.

59. Secondly, the question arises whether Part VIA of the TPA applies to arbitrations.

60. Section 87CD refers solely to the "court" giving judgment against concurrent wrongdoers on an apportionment basis. It does not extend to "any tribunal" as found in the *Wrongs Act*. The word "Court" is defined in the TPA as the Federal Court. More relevantly though, s.86 confers jurisdiction in respect of certain powers under Parts of the TPA on the State courts. There is nothing within those provisions that suggests it extends to tribunals including arbitral tribunals. To illustrate with a 'local' example, it is well settled that VCAT is not a 'court' for the purposes of the TPA and thus has no jurisdiction in respect of it[10].

Practical issues

61. Assume then that a respondent to an arbitration wants the benefit of apportionment, how then might the issue be agitated, at first instance, before the arbitrator?

62. Until these questions are authoritatively determined, the immediate challenges for a respondent will include persuading the arbitrator that:

    (a) Part IVAA applies to the arbitration;

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[10] *Buttigieg v Melton SC* [2004] VCAT 868 applying *Maltall Pty Ltd & Iliopoulous v Bevendale Pty Ltd* (1998) V Conv R58 520.

(b) as such, the arbitrator has the power to join other parties to the arbitration for the purpose of apportionment;

(c) he or she should entertain an application to join other concurrent wrongdoers to the arbitration for the purposes of apportionment under Part IVAA.

63. Of course, such an application will trigger issues of the arbitrator's jurisdiction and power, which as we have seen above, is circumscribed by the terms of reference in the particular arbitration agreement and the CAA. The first port of call would of course be to seek the consent of all existing parties to the arbitration and the proposed joined respondent/s. Given that (a) the claimant stands to lose if any of those others is impecunious, and (b) those others are likely to say that they were never parties to the arbitration agreement and therefore never agreed to the appointment of or to be subject to the jurisdiction of the arbitrator, or to be bound by any award, consent is unlikely to be forthcoming.

64. In the absence of consent, the issues listed above may themselves become the subject of dispute between the parties. That will raise a question as to whether the arbitrator has power under the terms of the arbitration agreement to adjudicate upon such disputes. They will have to be the subject of presumably a separate notice of dispute, all of which will probably occur after the arbitrator has entered upon the reference in respect of the main dispute.

65. If the arbitrator considered he or she had jurisdiction and decided the application in favour of the respondent, i.e. that Part IVAA applied and made an order for joinder, it is very possible that the joined respondent to the arbitration may 'thumb its nose' at such an order on the basis that it was not a party to any arbitration agreement. In that case, the inherent tension between the privity of arbitration agreements and the joinder power under s.24AL comes into sharp focus. Assuming the joined respondent simply refused to participate in the arbitration proceeding, would the arbitrator nonetheless continue and hand down an award against that party for its portion of found responsibility? Could the claimant then still seek to enforce the award in the usual manner?

66. If, on the other hand, the arbitrator either decides he or she does not have jurisdiction in respect of any dispute relating to the application of Part IVAA; or decides against the applications described above, what other avenues might be open to the 'stranded' respondent?

Staying the arbitration?

67. Some respondents to an arbitration may seek to have the arbitration stayed on the basis that there they are not able to obtain the benefit of apportionment, whereas they may in curial proceedings. In contrast to the usual application pursuant to s.53 of the CAA to stay court proceedings where a valid arbitration agreement exists, what are the considerations and indeed the prospects of an unhappy respondent applying to have an arbitration prevented or stayed?

68. In *Grant Constructions Pty Ltd v Claron Constructions Pty Ltd* [2006] NSWSC 369, on an application to stay arbitration proceedings, it was held:

    (a) *The inherent power of the Court to stay an action is exercisable in any situation where the requirements of justice demand it:* Tringali v Stewardson Stubbs & Collett Pty Ltd *(1966) 66 SR (NSW) 335 at 344. Further, s 23 of the Supreme Court Act confers on the Court all jurisdiction necessary for the administration of justice in New South Wales.*

    (b) *The inherent power and the jurisdiction conferred by s 23 of the Supreme Court Act are to be exercised only as necessary for the administration of justice:* Reid v Howard *(No 2) (1995) 184 CLR 1 at 17. The circumstances in which it may be appropriate for the Court to exercise its inherent power and the jurisdiction under s 23 is not restricted to defined and closed categories: Reid v Howardat 16.*

    (c) *The general supervisory power of the Court with respect to the justice system in New South Wales is not limited to proceedings before the Court:* Gill v Walton *(1991) 25 NSWLR 190 at 209F -- 210E.*

    (d) *It has been held that the supervisory jurisdiction under s 23 would allow the Court to determine whether an arbitrator's procedural directions, at a stage before the arbitration has run its course, are beyond power:* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662 at 675D -- 676A, 677C-G, 684B. In that case Kirby P said at 675F-676A:*

    In issue here is the scope of the arbitration itself and the ambit of the orders that may properly be made by an arbitrator within that scope. Allowing that a large circle will be drawn within which the arbitrator may make procedural orders, the circle is not without limit. A point will be reached where the edge of the circle will be arrived at and passed. When passed, the Court, upholding the other interests

> *which lie outside the legitimate scope of the arbitration, will retain its powers to intervene ... The rule of law requires that the Court, protective of other competing public and private interests, will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of private arbitration intrude into competition with other legitimate public and private rights and duties."*

69. In that case, the application was refused on the basis that Einstein J found that the arbitration in no way delayed or frustrated the rights of the plaintiff to pursue conventional enforcement processes in relation to its judgment. The conduct of the arbitration could not be said in that case to "circumvent the Act".

70. In the *Grant* decision, the application was based, in part, on s 23 of the *New South Wales Supreme Court Act* 1970. That section gives that Court all jurisdiction which may be necessary for the administration of justice in New South Wales. Section 30 of the *Victorian Supreme Court Act* 1986 gives the Court power to stay a proceeding in the Court. It says nothing of other proceedings such as arbitrations. However, s 85(1) of the *Constitution Act* 1975 provides that the Supreme Court "shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction" – *WHY v Austin Health & Anor* [2005] VSC 427, referring to *AB v Attorney-General of Victoria*, unreported, 23 July 1998, Gillard J in which the Court's inherent jurisdiction in respect of an application to stay arbitration proceedings was considered. Further, in *Savcor Pty Ltd v Solomon Corrosion Control Services Pty Ltd & Ors* [2001] VSC 428, Byrne J said at paragraph 6:

> "*It was accepted by all parties that the Court has power, pursuant to its inherent jurisdiction, to stay an arbitration where the interests of justice and the protection of its own process so require it*".

71. That principle, however, must be considered in light of the decision in *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd & Anor* [2001] VSC 76 at para 17 and following, and in particular on appeal before the Court of Appeal[11] where, in relation to an issue as to whether an arbitrator had jurisdiction to determine claims for public interest immunity over certain documents, the Court of Appeal said:

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[11] [2001] VSCA 94 at para 19

"*The question raised by this appeal is whether the inherent jurisdiction of this Court to resolve an issue of public interest immunity has been taken away expressly or impliedly by the provisions of the Act. It is unnecessary to examine authority in order to assert that that jurisdiction can only be lost if it is shown to be the clear intendment of parliament. That has not been here demonstrated for the relevant jurisdiction as to this immunity is not to be characterised merely as part of the jurisdiction of the arbitrator to resolve the referred dispute, but to the limited extent necessary to resolve the dispute. … Our decision in this case answers nothing as to the inherent jurisdiction of the Court to determine other questions arising in the course of an arbitration, whether or not they be issues going to an arbitrator's own jurisdiction.*"

72. Assuming for present purposes, that the Court has power to entertain an application to stay the arbitration proceedings, what would be the argument? The respondent may say that the arbitration should be stopped because, on one view, there is no power within that proceeding to involve others responsible for the claimant's loss for the purposes of apportionment. If that proposition were accepted, the logical result would be that the dispute would have to be transferred to the Court. That may then see a return to the question of what claim the respondent might have against the claimant. The claimant will likely say that it should not effectively be forced to transfer its dispute from arbitration to Court in circumstances where it has a clear agreement with the respondent to have such disputes determined by way of arbitration.

73. Another option for the respondent may be to try and commence curial proceedings, preferably before the arbitration commences. In that event, the claimant is likely to bring an application to stay the court proceedings pursuant to s.53 of the CAA. Both applications will attract the considerations in s.53(1), which provides:

53. Power to stay court proceedings

(1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to sub-section (2), apply to that court to stay the proceedings and that court, if satisfied-

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration-

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

74. One can see that the linchpin to s 53 is that the Court may stay proceedings before it if satisfied, *inter alia*, that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the parties' agreement.

75. Assuming for present purposes, that apportionment is not available in arbitration, the respondent may argue that that is a sufficient reason why the matter should not be referred to arbitration. It may be in the context of such an application that we will see the courts answer the questions at the heart of this topic.

76. It may be useful to consider some of the other issues relevant to 'attacking' an arbitration.

77. The starting point is that generally a Court will stay a proceeding before it where there is an agreement to arbitrate. The reason is obvious. The parties had made an agreement to that effect and the Court should enforce it. The general rule should only be departed from if there is good cause - *Huddart Parker Ltd v. The Ship 'Mill Hill'* (1950) 81 C.L.R. 502 at p.508; *Cott (UK) Ltd v Barber* [1997] 3 All ER 540; *Badgin Nominees Pty Ltd v Oneida Ltd & Anor* [1998] VSC 188; *Computershare Ltd v Perpetual Registrars Ltd and Ors (No 2)* [2000] VSC 233.

78. The desirability of having all issues in dispute between the parties determined in one proceeding by the same tribunal - in the instant scenario, the respondent may argue that if the arbitration proceedings continue, then it is likely that separate proceedings for contribution or indemnity will have to be brought by the respondent as against the other responsible parties. In that event, the respondent may argue that there would be a multiplicity of proceedings and the possibility of inconsistent findings – *Abigroup Pty Ltd v Transfield Pty Ltd* [1998] VSC 103 at paragraphs 140-141; *cf Turnock v Sartois* (1989) 43 Ch D 150; *BTR Engineering (Australia) Ltd v Dana Corporation & Ors* [2000] VSC 246 at para 25.

79. Whether the issues can adequately be dealt with by the arbitrator or whether they have to be determined by a Court – *cf Oliver v Hillier* [1959] 1 WLR 551 at 554: whilst the

respondent may argue that the issue of the application of the *Wrongs Act* may be appropriate for a Court, the claimant will most likely say that the dispute between it and the respondent is only one as to liability under a contractual arrangement. No doubt the claimant will contend that such issues may be adequately determined by the arbitrator. Further, the claimant may argue that the respondent has appropriate relief available to it in the form of s 23B of the *Wrongs Act* and that if it wishes to seek contribution or indemnity from others, it may do so via separate proceedings.

80. Another consideration is whether there is a high degree of probability that the matter will end up before the Court on the same issue – *Crusader Resources v Santos Limited* (unreported, SC of SA, 21 March 1990) and *Delhi Petroleum Pty Ltd v Santos Limited* [1999] SAFC 37: whilst, as have seen, the question of the application of the *Wrongs Act* to arbitrations is an issue which may well end up before the Court, the claimant is likely to argue that the question of the respondent's liability to the claimant pursuant to their contract is not necessarily something which has a high probability of ending up before the Court.

Extending the ambit of the arbitration

81. Section 25 of the CAA provides for an extension of the ambit of arbitration proceedings. It enables the arbitrator, to make an order directing that the arbitration be extended so as to include other disputes between the parties to the arbitration agreement to which that agreement applies. Query here whether the "Wrongs Act issue" would be a dispute to which an arbitration agreement applies? It may in part however provide some assistance to the question of whether and if so how an arbitrator ought deal with any application concerning apportionment and possible joinder.

82. If the arbitrator then heard and determined that issue whether by way of interlocutory application or by way of preliminary determination or interim award in respect of any separate notice of dispute, the matter may in any event end up before the Court if any party were dissatisfied with the result.

The Court's power to make interlocutory orders

83. A further alternative may be to enlist s 47 of the CAA which provides:

> ***47. General power of the Court to make interlocutory orders***
>
> *The Court shall have the same power of making interlocutory orders for the purposes*

of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court.

84. Therein lies the possibility that a respondent could bring this question directly before the Court on the basis of seeking interlocutory orders for the purposes of and in relation to the arbitration proceedings as if those proceedings were before the Court.

Determination of preliminary point of law

85. Finally, and by way of a further alternative, a respondent could make an direct application to the Supreme Court pursuant to s.39 of the CAA which provides:

> ***39. Determination of preliminary point of law by Supreme Court***
>
> *(1) Subject to sub-section (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement-*
>
> *(a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or*
>
> *(b) with the consent of all the other parties-*
>
> *the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.*
>
> *(2) The Supreme Court shall not entertain an application under sub-section (1)(a) with respect to any question of law unless it is satisfied that-*
>
> *(a) the determination of the application might produce substantial savings in costs to the parties; and*
>
> *(b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38(4)(b).*
>
> *(3) Unless the Supreme Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the Supreme Court to entertain or not to entertain an application under sub-section (1)(a).*

(4) An appeal shall not lie to the Court of Appeal from a decision of the Supreme Court on a question of law under sub-section (1) unless-

(a) the Supreme Court or the Court of Appeal grants leave; and

(b) it is certified by the Supreme Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal-

and for the purpose of such an appeal a decision of the Supreme Court under that sub-section shall be deemed to be a judgment of the Supreme Court.

86. The bringing of an application to the Court pursuant to s.39 requires the consent of the arbitrator or the consent of all the other parties. Where the arbitrator consents, the requirement in subsection (2)(a) may be problematic.

Contracting out

87. It is probably inevitable, if it is not already happening, that parties to arbitration agreements, and in particular principals, will seek to include provisions designed to avoid the operation of Part IVAA or to have some regime other than proportionate liability apply to their relationship.

88. Part IVAA of the Victorian legislation, unlike some other States, is silent on the question of contracting out. Other parts of the Act expressly permit contracting out, such as section 46. But there is no similar provision in Part IVAA. Application of the 'expressio unius est exclusio' rule would suggest that parties cannot contract out the operation of the Part.[12]

Conclusion

89. The main difficulty afflicting this question is the apparent tension between some of the propositions advanced herein, namely that apportionment may apply to arbitrations and that arbitrators may have the power to join non-parties to the arbitration agreement as parties to the arbitration for the purposes of apportionment; and, as against the time-honoured principles of private arbitrations affecting only the parties to the arbitration agreement, and those parties' appointed arbitrator having only the powers conferred by the arbitration agreement.

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[12] See the article by Professor Jones, ibid, at page 91; and "Proportionate liability – its impact on risk allocation in construction contracts" by Owen Hayford, (2006) 22 BCL 322.

90. However, it must also be recognised that private arbitrations are subject to the CAA and the Court's supervisory role as bestowed by that Act, as discussed above. The CAA requires an arbitrator to determine a dispute according to law. The law in Victoria is now one of apportionment in economic loss claims.

91. The potential for inconsistent outcomes as between arbitrations and curial proceedings in respect of the same claim, by reason of apportionment applying to one and not the other, presents, it is submitted, a strong argument in favour of the view that Part IVAA of the *Wrongs Act* applies to arbitrations.
