Proportionate Liability in Arbitrations in Australia?

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ABSTRACT: This article [first published in (2009) 25 BCL 298] explores the vexed issue of whether proportionate liability legislation applies to arbitrations conducted under the Commercial Arbitration Acts.

Proportionate liability legislation is in force in all States and Territories in Australia. The historical background to the legislation was set out with clarity by the Hon. Justice David Byrne in a paper written in May 2006[2]; I will not repeat it here. Suffice to say that in the brave new world of proportionate liability the risk of insolvency amongst one of a number of parties jointly or severally responsible for a plaintiff's loss or damage will be borne by the plaintiff and not, as was generally the case, by one or more of any solvent parties responsible for that loss. It is still a matter of some academic conjecture[3] as to whether the legislation applies to arbitrations conducted under the various Commercial Arbitration Acts.

In Victoria the initial proportionate liability legislation appeared in the now repealed sections of the Building Act 1993 (Vic).[4] By s.131(1)

> "After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly or severally liable for damages for such proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant's responsibility for the loss or damage."

Although initially as enacted there was no definition of the word 'court', by an amendment[5] s.131(3) was inserted from 18 June 1996 which read as follows:

> "In this section "court" includes the Domestic Building Tribunal established under the Domestic Building Contracts and Tribunal Act 1995."

Up until the repeal of these provisions, there was no definitive decision as to whether 'court' in s.131(1) could be construed to include an arbitral tribunal

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2 Byrne, D, Proportionate liability in construction claims (2007) 23 BCL 10

3 See, for example, the paper by the Hon. Justice David Byrne "Proportionate Liability: Some Creaking in the Superstructure", presented to the Judicial College of Victoria, Friday 19 May 2006; Uren Q.C. and Aghion, *Proportionate Liability: An analysis of the Victorian and Commonwealth Legislative Schemes* in a paper presented on 18 August 2005 for the Commercial Bar Association of the Victorian Bar; McDougall, R *Proportionate liability in construction litigation (2006) 22 BCL 394*; Whitten M, *Arbitration, Apportionment & Part IVAA of the Wrongs Act 1958 (Vic)* a paper for the Victorian Bar CLE Programme presented 18 April 2007; Jones, D, *Proportionate Liability – Reform or Regression* [2007] ICLR 92

4 Part 9 Division 2, ss 129-134A

5 s.9 of the Domestic Building Contracts and Tribunal (Amendment) Act 1996

as opposed to a recognised court or the Domestic Building Tribunal (later subsumed into the Victorian Civil & Administrative Tribunal (VCAT)). However the use of the words 'defendant', 'action' and 'judgment' in that section suggest that the provision was addressing court proceedings rather than arbitration proceedings, where such words are inappropriate. Further, the Court of Appeal construed the subsection as demanding that all parties against whom allegations of liability were to be raised had to be joined to the proceedings as defendants.[6] Given that persons who are not parties to an arbitration agreement cannot be joined to an arbitration (save possibly with the consent of all parties including the party proposed to be joined) the provision was inappropriately drafted to be construed as applicable to arbitration proceedings.

That the provisions of s.131 did not apply to arbitrations was assumed by Byrne J in Savcor Pty Ltd v Solomon Corrosion Control Services Pty Ltd [2001] VSC 428 where, by refusing the injunction sought (as being a remedy sought far too late), the Judge accepted that the arbitration would have to proceed between the parties to the arbitration agreement and that any alleged liability of other parties would have to be determined elsewhere:

> "I can understand that Savcor is reluctant to conduct its dispute against the Roads Corp in arbitration and its associated disputes against other parties in court. I can understand that it would prefer, if possible, to avail itself of the protective provisions of s131 of the Building Act where other parties may be responsible for the defects of which the Roads Corp complains. The fact, is, however, that this is what it agreed to four years ago and both the Roads Corp and Savcor have invested substantial funds in implementing that decision. Part of this investment will be lost if the arbitration is abandoned."[7]

New South Wales also enacted proportionate liability in 'building actions' by s.109ZJ of the Environmental Planning and Assessment Act 1979 (NSW)[8]. The provisions were similar to those in the Victorian legislation. In these provisions, there was no definition of 'court' but by s.109ZI(4)

> "In this section *contributing party,* in relation to a building action or subdivision action, means a defendant to the action found by the court to be jointly or severally liable for the damages awarded, or to be awarded, in the action."

The use of words such as 'defendant' and 'action' once again suggests that 'court' does not include an arbitral tribunal.

From 1 January 2004 the proportionate liability provisions in the Building Act 1993 (Vic) were repealed and replaced by more wide ranging provisions in a new Part IVAA inserted into the Wrongs Act 1958 (Vic) by the Wrongs and

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6 Boral Resources (Vic) Pty Ltd v Robak Engineering & Construction Pty Ltd [1999] VSCA 66

7 Savcor (supra) at [14]

8 Inserted by provisions in the Environmental Planning and Assessment Amendment Act 1997 from 1 July 1998

Limitation of Actions Acts (Insurance Reform) Act 2003 (Vic). No longer was proportionate liability to be limited to 'building actions'; subject to exceptions it was now to apply to all claims for economic loss or damage to property in actions for damages arising from a failure to take care and to claims for damages for misleading or deceptive conduct in contravention of s.9 of the Fair Trading Act 1999 (Vic). By the definition in s.24AE the definition of 'court' was altered from that in the Building Act 1993 (Vic) to include

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

However the legislation was still not appropriate for the proportionate liability provisions to be held to apply to arbitrations, even if these could be considered to be 'tribunals', as by s.24AL(1):

> "Subject to subsection (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim."

Such a power of joinder had never previously existed in relation to arbitrations. Arbitration is, of course, "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[9] Examination of the 2nd reading speeches gives no hint that the provisions were intended to effect such a radical change to arbitration practice and procedure.

This amendment to the Victorian Wrongs Act was one of a series of legislative changes designed to implement proportionate liability throughout Australia. The events giving rise to the various statutory provisions have been well detailed by Professor McDonald in her paper *Proportionate Liability in Australia: The Devil in the Detail*.[10] Following Victoria, all other states[11] and

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9 See the judgment of the U.S. Supreme Court in Steelworkers v. Warrior & Gulf Co., [1960] USSC 109; 363 U.S. 574, 582; see also Paharbur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110 (unrep) esp at [43]

10 Sydney Law School Research Paper No. 06/25; Australian Bar Review, Vol. 26, pp. 29-50, 2005. Available at SSRN: http://ssrn.com/abstract=934993

11 On 26 July 2004 the New South Wales proportionate liability provisions (in Part 4 of the Civil Liability Act 2002 (NSW)) came into force;
In Western Australia the reforms are contained in the Civil Liability Act 2002 (WA) Part 1F which came into force on 1 December 2004;
Queensland implemented proportionate liability in the Civil Liability Act 2003 (Qld) Part 2 which commenced on 1 March 2005;
By amendments to the Civil Liability Act 2002 (Part 9A) (enacted in the Civil Liability Amendment (Proportionate Liability) Act 2005 and brought into force on 1 June 2005), Tasmania enacted its proportionate liability legislation;
In South Australia the Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005 (No 32 of 2005) came into operation on 1 October 2005, amending the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001.

territories[12], and the Commonwealth[13] enacted proportionate liability legislation.

A substantive difference between the legislation of Victoria and that of New South Wales was that under the Victorian legislation a court could only have regard to the comparative responsibility of parties before it, unless the reason that the person was not a party was because of death or, if a corporation, that it had been wound up.[14] The requirement that the adjudication of proportionate responsibility can only be made between parties to the proceedings (save in the two exceptional circumstances) reinforces the contention that 'court' in Part IVAA is not intended to include arbitral proceedings. The fact that the proportionate liability legislation does not apply to arbitrations in theory ought not result in a substantive difference in the outcome, unless one party responsible is insolvent. A successful claimant in an arbitration against a single respondent will, upon establishing its legal entitlement, obtain an award for 100% of its proved loss, whether others also caused or contributed to such loss. The unsuccessful respondent can then seek to apportion that loss amongst all other parties allegedly responsible in some other appropriate forum.

When the NSW legislation was enacted[15], consistent with the pre-existing legislative situation, no definition of 'court' was included. More importantly, however, by s.35(3)(b):

> "the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings"

Thus, had it gone no further, there might have been a respectable argument to the effect that an arbitrator would be required to assess the proportionate responsibility of a respondent claiming that the claim was 'apportionable' under the legislation in that State, even though other possibly responsible parties were not, and could not be brought into the arbitration. However the legislation by s.38(1) provided:

> "The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim."

If it is accepted that the essential feature distinguishing arbitration from court proceedings is that the parties to an arbitration agreement have agreed on

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12 By Chapter 7A of the Civil Law (Wrongs) Act 2002 (ACT) (inserted by the Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004) the Australian Capital Territory enacted its proportionate liability legislation, which commenced on 8 March 2005;
Proportionate Liability Act 2005 (N.T.) came into force on 1 June 2005

13 Part VIA of the Trade Practices Act 1974, Part 7.10 Division 2A of the Corporations Act 2001 and Part 2, Sub-Division GA of the Australian Securities and Investment Commission Act 2001

14 The Hon. Justice David Byrne, in his paper "Proportionate Liability: Some Creaking in the Superstructure", presented to the Judicial College of Victoria, Friday 19 May 2006 p.26 para 58-9 is less than complimentary as to the drafting of this expression 'wound up' and critical of the rationale behind it.

15 Civil Liability Act 2002 (NSW)

the manner of resolving disputes between them, the suggestion that s.38(1) of the Civil Liability Act 2002 (NSW) had effected a fundamental change to the arbitration process and for the first time had allowed an arbitrator to order the joinder of other parties to the arbitration who had not agreed to have disputes with the claimant or respondent adjudicated by way of arbitration would be surprising, to say the least. More likely, in my submission, is the proposition that the inclusion of this provision underlined the fact that it was inappropriate for 'court' to be construed as including an arbitration when neither the arbitrator nor a judge could order a person not a party to an arbitration agreement to participate in an arbitration nor could it compel parties to the arbitration agreement to include non-parties in their contractually agreed dispute resolution process.

The legislation enacted in the other States and Territories and the Commonwealth legislation, subject to minor differences of detail, has followed either the Victorian or New South Wales models, either requiring all parties allegedly liable to some degree in an apportionable claim to be before the court or allowing proportionate liability to be assessed in relation to parties allegedly responsible, whether before the court or not[16] but empowering the compulsory joinder of parties to the proceedings before the court.[17] In a unique provision[18] in South Australia, the first judgment given in an apportionable claim determines for the purpose of all other actions—

(a) the amount of the plaintiff's notional damages; and
(b) the proportionate liability of each wrongdoer who was a party to the action in which the judgment was given; and
(c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.

It is noteworthy that in no State or Territory has any court or arbitrator attempted to order the joinder to an arbitration of someone not a party to the arbitration agreement.

If further support were required for the proposition that the Victorian regime does not apply to arbitrations one can look to two judges of the Supreme Court, Byrne and Cavanough JJ.

Writing extra-judicially in 2006, the Honourable Justice David Byrne has opined that the Victorian regime of Pt IVAA "does not appear to apply to

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16 E.g. s.10 Proportionate Liability Act 2005 (N.T.); s.8(2)(b) Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (S.A.); s.31(3) and (4) Civil Liability Act 2003 (Qld); s.87CD(3)(b) Trade Practices Act 1974 (Cth); s.1041N(3)(b) and s.4 Corporations Act 2001 (Cth); s.12GR(3)(b) ASIC Act 2001 (Cth)

17 E.g. s.43F(1) of the Civil Liability Act 2002 (Tas); s.32C Civil Liability Act 2003 (Qld); s.5AN Civil Liability Act 2002 (W.A.); s.11(1) Proportionate Liability Act 2005 (N.T.); s.107J(2) Civil Law (Wrongs) Act 2002 (ACT); s. 87CH Trade Practices Act 1974 (Cth); s.1041R Corporations Act 2001 (Cth); s.12GV(1) ASIC Act 2001 (Cth).

18 s.11 Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (S.A.)

arbitrations".[19] Justice Byrne has extensive experience in adjudicating upon proportionate liability issues.[20]

Cavanough J considered the issue of the applicability of Part IVAA of the Wrongs Act 1958 to arbitrations in Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd (2009) 69 ACSR 418. In that case the Judge was dealing with an arbitration before a panel established under Financial Industry Complaints Service (FICS), a private dispute resolution system[21] approved by ASIC under 912A of the Corporations Act and the reasons for judgment were strictly obiter on the point.

Wealthcare conceded that neither Pt IVAA of the Wrongs Act nor any other statutory provisions imposing proportionate liability applied, of their own force, to the complaint before the panel. However it argued that proportionate liability was a "norm" which had become an "applicable legal rule" within the FICS system. The FICS system operated under rules, of which the most relevant one was rule 5 which stated, so far as relevant:

> *"What principles must the Service have regard to?*
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> *5 In dealing with complaints, the Service must deal with the complaint on its merits and do what, in its opinion, is fair in all the circumstances, having regard to each of the following:*
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> - *any applicable legal rule or judicial authority (including one concerning the legal effect of an express or implied term of the contract or other document) general principles of good industry practice and any applicable code of practice …"*

Cavanough J determined[22] that he could see nothing in r 5 of the FICS rules to elevate the so-called "norm" of proportionate liability to an "applicable legal rule" that the panel was obliged to put into effect in this case; nor did he consider that the provisions of Pt IVAA could be used, at least in the Federal Court, in defence of a claim under ss 945A and 953B of the Corporations Act. He nevertheless expressed his view (strictly obiter) that "there are various additional limitations and other features of Pt IVAA (for example, the provisions relating to the joinder of parties) which confirm that "proportionate liability" cannot be regarded as a legal rule that a FICS panel is obliged to

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19 The Hon. Justice David Byrne, "Proportionate Liability: Some Creaking in the Superstructure", A paper presented to the Judicial College of Victoria, Friday 19 May 2006, p 7, para 20

20 For example Byrne J decided the following cases at first instance: Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority dealing with proportionate liability in judgments No 2 [2006] VSC 117 and No 3 [2006] VSC 270; Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd [2006] VSC 269; Premier Building And Consulting Pty Ltd (Recs Apptd) v Spotless Group Ltd (2007) 64 ACSR 114; Gunston v Lawley [2008] VSC 97

21 The history of the scheme is explained by Finkelstein J in Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd (2006) 157 FCR 229

22 Wealthcare (supra) at [27]

apply."[23] Given the importance of the reasons to the central issue to which this paper is directed, it is important to set them out"

"*[37] Wealthcare's essential argument is that, in Victoria at least, proportionate liability is now a fundamental legal norm. It is true that, where it applies, Pt IVAA of the Wrongs Act makes fundamental changes to the law of Victoria. In Gunston v Lawley,[24] on which Wealthcare relies, Byrne J said:*

> '[59] The scheme of s 24AI is that any given defendant is at risk of liability and judgment for an amount limited to its proper share of the loss or damage the subject of the claim.
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> [60] The effect of the proportionate liability regime, therefore, is to transform fundamentally the relationship which exists between a plaintiff and a concurrent wrongdoer …'

However, the provisions of Pt IVAA are by no means of universal application. For example, they apply only in a "proceeding[25] involving an apportionable claim". "Apportionable claim" is defined to mean a claim to which Pt IVAA applies. By virtue of s 24AF(1), the limits on that concept include that the claim must either be a claim for economic loss or damage to property in an action for damages[26] arising from a failure to take reasonable care, or be a claim for damages for a contravention of s 9 of the Fair Trading Act. Immediately one sees a contrast between Pt IVAA and provisions such as s 9 of the Fair Trading Act itself. That section directly regulates the conduct of persons and other entities. It prohibits misleading and deceptive conduct; and it does so in respect of a vast field of activity, namely trade or commerce. It may truly be said to be a legislative reflection of a norm of conduct.[27] Pt IVAA of the Wrongs Act is different. It makes no change to the law or to the rights or obligations of individuals outside the context of a "claim" within a "proceeding". A "concurrent wrongdoer" is only defined "in relation to a claim": s 24H. The central provision — s 24AI — is expressly directed towards the position of a "defendant", as defined. At least insofar as Pt IVAA relates to a claim arising from a failure to take reasonable care,[28] the claim must be made in an "action": s 24AF(1)(a). In its context in Pt IVAA, the word "action" does not bear its popular meaning of a proceeding commenced by writ, but

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23 Wealthcare (supra) at [28]

24 [2008] VSC 97 at [59] and [60].

25 Section 24AI(1). "Proceeding" is not defined.

26 "Damages" is defined to include any form of monetary compensation.

27 See Brown v Jam Factory Pty Ltd (1981) 35 ALR 79 at 86 and Travel Compensation Fund v Tambree (2005) 224 CLR 627 at 639 [28]–[29], to each of which Wealthcare referred.

28 Compare s 24K. The word "action" is used in s 24K in a way that may indicate that no apportionable claims at all can arise except in the context of an "action".

it does, I think, mean, in substance, a legal proceeding.[29] It will extend to a legal proceeding conducted in a tribunal (because of the definition of "court") but the whole tenor of Pt IVAA suggests confinement to proceedings in court and closely comparable proceedings. The central provision — s 24AI — is expressed to operate by reference to "the court". "Court" may be defined to include "tribunal" and, in relation to a claim for damages (as defined), to mean "any court or tribunal by or before which the claim falls to be determined", but, as Bennion says in relation to statutory definitions in general,[30] it is "impossible to cancel the ingrained emotion of a word merely by an announcement". Moreover, the very subject matter of Pt IVAA is the distribution of liability, meaning, I think, legal liability. Part IVAA hardly seems to be directed towards the proceedings of a domestic tribunal with an essentially discretionary jurisdiction. Writing extra-judicially, Byrne J has said that the regime of Pt IVAA "does not appear to apply to arbitrations".[31] I think that his Honour was referring there to commercial arbitrations, as distinct from industrial arbitration and like processes. I need not and do not decide the very important question whether Pt IVAA applies to formal commercial arbitrations,[32] but his Honour's comment is entirely consistent with the proposition that Pt IVAA is inapplicable to a matter before a FICS panel.

[38] *Another feature of Pt IVAA tends strongly in the same direction. Unsurprisingly, Pt IVAA seems to proceed on the basis that, at least in the usual case, if possible, all putative "concurrent wrongdoers" should be before the court (or tribunal) in the one proceeding.[33] That principle can only happily operate in a forum which has jurisdiction over all potential defendants. Needless to say, FICS can only deal with its members and has no jurisdiction or power over anyone else.[34] Further, s 24AI(3) of the Wrongs Act prevents the court or tribunal from having 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 (being a corporation) has been wound-up. Section 24AK does contemplate the possibility of*

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29 Compare R v Day and Thomson [1985] VR 261 at 266.45 F. Bennion, Statutory Interpretation, 3rd edition, 434, citing Richard Robinson, Definition (1952), p 77.

30 F. Bennion, Statutory Interpretation, 3rd edition, 434, citing Richard Robinson, Definition (1952), p 77.

31 The Hon. Justice David Byrne, "Proportionate Liability: Some Creaking in the Superstructure", A paper presented to the Judicial College of Victoria, Friday 19 May 2006, p 7, para [20].

32 Counsel for FICS disclaimed any suggestion that FICS was covered by the Commercial Arbitration Act 1984: transcript 185–186.

33 See also Byrne, op cit, p 26 [57].

34 Thus in ABN Amro Morgans Ltd v Alders [2008] QSC 160 at [13] Jones J said that it was "undoubtedly the position" that a FICS member would not have the opportunity before a FICS panel to put forward claims against third parties.

successive actions, but s 24AL(1) envisages the giving of leave for concurrent wrongdoers to be joined as defendants. Moreover, s 24AL(2) prevents the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim. The combination of ss 24AI(1) and (3) and 24AL(2) makes manifest the general undesirability of split proceedings in relation to apportionable claims.[35] Further, there is something to be said for the submission by FICS that even if the panel had purported to apply Pt IVAA, it would necessarily have arrived at the same conclusion, because there still would have been only one "defendant" before it.[36]

[39] None of this is meant to imply that the provisions of Pt IVAA should be characterised as procedural rather than substantive where that distinction may be significant.[37] But, even regarded as substantive provisions, they are relevantly quite limited in their scope.

[40] In addition to the limitations already mentioned, I note that Pt IVAA does not purport to override any other Victorian statutory provisions imposing several or solidary liability (as distinct from proportionate liability) for a particular type of claim, even in relation to what would otherwise be an "apportionable claim" as defined in Pt IVAA. Quite the opposite. That is spelt out expressly in s 24AP(e).

The judge went on to consider the interplay between Part IVAA and Commonwealth legislation, referring at some length to a judgment of Middleton J[38] delivered in August 2007.

"[41] Nor should Pt IVAA readily be construed to purport to operate in a way that would be inconsistent with any Commonwealth statutory provision.[39] In the present case, as I have mentioned, the FICS panel found that Wealthcare was initially in breach of s 851(2) of the Corporations Act. It also found that Wealthcare was later in breach of the successor provision, s 945A of the Corporations Act. In the course of its reasons it had also quoted s 953B of that Act (the provision creating a right to bring a civil action for damages for breach of s 945A). I infer that the panel relied on both provisions (as well as on s 851(2) of the Corporations Act in respect of the earlier conduct). Had the Norrises brought a claim against Wealthcare in the Federal Court

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35 See also Byrne, op cit, p 14–17 [28]–[33].

36 However this assumes, controversially, that it would have been proper for the panel to have imported all of the provisions of Pt IVAA, including s 24AI(3), despite the panel's inability to join other parties.

37 Compare John Pfeiffer Pty Ltd v Rogers (2000) 203 CLR 503

38 Dartberg Pty Ltd (As Trustee For The Pollard Children Trust) v Wealthcare Financial Planning Pty Ltd (2007) 244 ALR 552

39 Any attempt to do so may have to contend with s 109 of the Commonwealth Constitution. No s 109 question was raised by either of the parties and no notices were given to Attorneys-General under s 78B of the Judiciary Act 1903 (Cth).

under s 851(2) of the Corporations Act and/or under ss 945A and 953B of that Act, that claim could not have been met by any valid plea under the Pt IVAA of the Wrongs Act. So much follows from the reasoning of Middleton J on certain points raised in Dartberg.[40] *I am in respectful general agreement with his Honour's reasoning. The applicant in Dartberg relied on four sets of Commonwealth statutory provisions (referred to in the judgment as "the Commonwealth Legislation"), including s 851(2) of the Corporations Act. Middleton J found that the "express purpose"*[41] *of the Commonwealth Legislation was to make each alleged transgressor, if found liable, legally responsible for the whole of the loss. His Honour noted*[42] *that the Commonwealth had introduced proportionate liability provisions into the Corporations Act in 2004, but had made them applicable only to conduct done in contravention of s 1041H (which prohibits misleading and deceptive conduct in relation to a financial product or a financial service). They were not made applicable to s 945A (or (retrospectively) to its predecessor, s 851). Certain other Commonwealth proportionate liability provisions were identified, but they likewise had no application to the causes of action relied on by the applicant in Dartberg. Therefore the respondents had sought to rely on Pt IVAA of the Wrongs Act (Vic).*

[42] However, as Middleton J further noted,[43] *the Wrongs Act could not apply of its own force to proceedings in the Federal Court exercising federal jurisdiction. The application of Pt IVAA of the Wrongs Act therefore depended on s 79 of the Judiciary Act. Section 79 provides:*

> 'The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.'

Middleton J considered first[44] *whether or not Pt IVAA was "applicable" (within the meaning of s 79) in any event having regard to its own terms. His Honour was prepared to accept that the reference in s 24AF(1)(a) of the Wrongs Act to "under statute or otherwise" would include Commonwealth statutes such as the Commonwealth Legislation. Further, his Honour concluded that the form of the applicant's pleading of its claim was not conclusive. Part IVAA was so drafted that it could apply even in the absence of any pleading of negligence or "failure to take reasonable care", because a failure to take reasonable care may form part of the allegations or the evidence*

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40 [2007] FCA 1216, at [16]–[37], esp at [21] and [33]–[34].
41 At [10]–[12], [33].
42 At [18].
43 At [21].
44 At [26]–[31].

that is tendered in the proceedings. At the end of the trial, after all the evidence has been heard, it may be found that Pt IVAA applies, although the onus would be on the party so contending to prove it.[45]

[43] Nevertheless, Middleton J decided that Pt IVAA was not picked up in the proceeding by s 79 of the Judiciary Act, because the Commonwealth Legislation "otherwise provide[d]" (within the meaning of s 79). The operation of the Commonwealth Legislation would so reduce the ambit of Pt IVAA that, in his Honour's view, the provisions of the Commonwealth Legislation were irreconcilable with it.[46] *Middleton J said:*

> '[33] For the reasons I have enunciated above in relation to the express purpose of the Commonwealth Legislation, in my view the Commonwealth Legislation has otherwise provided for the determination of liability to compensate a person who has suffered loss or damage by conduct in contravention of the Commonwealth Legislation. The purpose of the Commonwealth Legislation is to impose a specific and comprehensive regime imposing liability according to its terms, and to give an entitlement to an applicant to recover the whole amount of which it is established under such enactments the applicant is entitled to recover.
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> [34] I do not accept that Pt IVAA of the Wrongs Act is complementary to the operation of the Commonwealth Legislation. This would be inconsistent with the whole purpose of the Commonwealth Legislation, for to allow Pt IVAA of the Wrongs Act to apply would be to detract from the operation and effect of the Commonwealth Legislation, as the applicant would not necessarily be entitled to full compensation from a wrongdoer as is contemplated.' "

These expressions of opinion provide some support for the proposition that the proportionate liability legislation in Victoria, at least, does not apply to Commercial Arbitration Act arbitrations. If it is accepted that the provisions of Part IVAA of the Wrongs Act 'are not of universal application' as Cavanough J held at [37],then any attempt to resort to a 'purposive' construction of the legislation and the use of applicable legislative interpretation provisions will not assist in advancing the argument that the proportionate liability statutes should be construed so as to apply to arbitrations.

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45 These views are consistent with those expressed by Hollingworth J in her Honour's interlocutory judgment in Woods v De Gabriele [2007] VSC 177. But compare Byrne, op cit, p 7 (comment (2) to para [20]) and at p 20 [42]; Gunston v Lawley [2008] VSC 97 at [55]. Having expressed my general agreement with the relevant reasoning of Middleton J in Dartberg, I should nevertheless not be taken to have formed a concluded view as to whether it is the pleadings or the facts that should be regarded as the principal determinant of whether or not a claim is an apportionable claim.

46 Citing, among other cases, Macleod v Australian Securities and Investments Commission (2002) 211 CLR 287 at [22].

One might expect that a definitive answer to the conundrum would be provided in an application for a stay of court proceedings brought under s.53 of an applicable Commercial Arbitration Act. Applications for a stay of court proceedings under s.53 may compel a court to address the conflict between the two principles mentioned by Pearson L.J. in Taunton-Collins v Cromie [1964] 1 WLR 633 at 637: on the one hand that parties should be held to their agreement to arbitrate; on the other that multiplicity of proceedings is undesirable.

In Vasp Group Pty Limited v Service Stream Ltd [2008] NSWSC 1182 Hammerschlag J might have been faced with the question whether the NSW legislation applied to arbitrations under the Commercial Arbitration Act 1984 (NSW). An application for a stay of Supreme Court proceedings pursuant to s.53 of that Act was opposed on the grounds, inter alia, that the agreed alternative dispute resolution mechanism agreed would give rise to a multiplicity of proceedings with a risk of inconsistent concurrent findings, a powerful factor when determining whether or not to compel adherence to an alternative dispute resolution procedure.[47] However the defendant in the Supreme Court proceedings made a binding assertion[48] not to contend that either the Civil Liability Act or the Trade Practices Act would apply and also that if the plaintiff were otherwise entitled to recover damages, any component of any damages suffered by it would be susceptible to reduction by virtue of the conduct of any concurrent wrongdoer. On the basis of these unequivocal concessions the judge concluded that the discretion of the Court should not be exercised against the stay.

In Tasmania, similarly, the issue of whether the proportionate liability provisions contained in Pt 9A of the Civil Liability Act 2002 (Tas) applied to arbitrations was brought before the Supreme Court in Aquagenics Pty Ltd v Break O'Day Council [2009] TASSC 15 but did not have to be determined. In that case the applicant sought a stay of court proceedings, seeking to compel the opposing party to arbitrate its claim. In opposing the application for a stay, the respondent raised the contention that the proportionate liability legislation in Tasmania did not apply to arbitrations and would lead to the possibility of inconsistent outcomes in different proceedings. When it was plain that the stay would be refused, the applicant sought to have the question of whether the proportionate liability provisions applied at all determined by the Full Court. In the exercise of his discretion the Judge refused the application. In the course of his judgment Porter J did not need to express a view definitively as to whether the provisions would apply in arbitral proceedings, although both parties accepted, apparently, that the legislation did not apply to arbitrations. Insofar as it is relevant the Judge stated:

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47 The Judge referred in this context to Savcor Pty Ltd v State of New South Wales (2001) 52 NSWLR 587 at 600 and Paharpur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110

48 Noted by Hammerschlag J at [16]

"[6] The second point relied on by the plaintiff in resisting the application to stay is that it wishes to rely on the proportionate liability provisions contained in Pt 9A of the Civil Liability Act 2002 ("the Act"). The plaintiff says that the foreshadowed claims are apportionable claims within the meaning of s 43A(1) of that Act. The plaintiff says that, at the least, there is no certainty that the proportionate liability provisions could be relied on in any arbitration. The defendant seems to accept the proposition that the provisions of the Act would not apply in the arbitration, but responds to the suggested difficulty by maintaining that it is illusory because the plaintiff would not be entitled to rely on the provisions in any event; that is, in the court proceedings.[49]

…

[24] The exercise which will arise in the stay application is to assess the extent to which the plaintiff may be disadvantaged by the inability to avail itself of the proportionate liability provisions. The defendant says there is no disadvantage because they do not apply. It follows from what I have said that the question must be whether those provisions apply to the particular claims to be made by the defendant, rather than one of general principle as to the application of Pt 9A to contractual claims. It is conceivable that the question of whether Pt 9A actually applies to the defendant's proposed claims is readily apparent from the terms of the proposed draft pleadings. However, it should be borne in mind that, in strict terms, in the stay application it may only be possible to determine the likelihood of whether it applies to the defendant's proposed claims, rather than conclusively decide its application. This is because, as the following discussion shows, issues of "apportionable claim" and "concurrent wrongdoer" are really only to be resolved after relevant findings have been made at trial."

At some time a superior court will have to resolve the question of the applicability of proportionate liability legislation to commercial arbitrations. I venture to suggest that in all States and Territories it will be found that the relevant apportionment legislation does not apply to arbitrations conducted under the applicable Commercial Arbitration Act.

[49] Per Porter J in Aquagenics Pty Ltd v Break O'Day Council [2009] TASSC 15