

Proportionate Liability Bulletin

Litigation solicitors should be aware of recent legislation at both the Victorian and Commonwealth levels relating to proportionate liability.

There are important differences in the legislation.

Legislation

Victoria

The *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003* introduced Part IVAA into the *Wrongs Act 1958*.

Commonwealth

The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* amended the -

- *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- *Corporations Act 2001*; and
- *Trade Practices Act 1974* (TPA).

Commencement Times

Victoria

The Victorian reforms apply to **proceedings commenced after 1 January 2004**.

Commonwealth

The Commonwealth reforms apply to **causes of action which arise on or after 26 July 2004**.

Proceedings Covered

Victoria

The Victorian legislation applies to the following proceedings (section 24AF(1)):

- a claim for damages for economic loss or property damage arising from the failure to take reasonable care whether that claim is brought in tort, contract, pursuant to statute or otherwise; and

- a claim for damages for a contravention of section 9 of the *Fair Trading Act 1999* (misleading or deceptive conduct).

The Victorian Act does not apply to claims arising out of a personal or bodily injury or claims made pursuant to a number of statutes, **including** -

- Part 3, 6 or 10 of the *Transport Accident Act 1986*;
- Part IV of the *Accident Compensation Act 1985*;
- A work injury under the *Workers Compensation Act 1985*;
- A complaint under the *Equal Opportunity Act 1995*;
- A claim for compensation under Division 6 of Part 2 of the *Education Act 1958* applying to volunteers engaging in work at state schools and students engaging in voluntary approved community work.

Commonwealth

The Commonwealth reforms apply to claims for damages brought under the relevant sections of each Act (section 12GP of ASIC Act, section 1041L of the *Corporations Act 2001* and section 87CV of the TPA) for economic loss or damage to property caused by conduct in contravention of the relevant consumer protection sections of the legislation.

How does it work?

The legislation in both the Victorian and Commonwealth jurisdictions limits the liability of a defendant who is a “concurrent wrongdoer” to an amount reflecting the proportion of loss or damage that the court considers just, having regard to the extent of the defendant’s responsibility for the loss and damage. The court is obliged to apportion liability in a claim to which the regime applies.

The key difference between the Victorian and Commonwealth reforms

The key difference between the two reforms is in their application to concurrent wrongdoers who are **not** parties to the litigation.

In Victoria, the court may only apportion responsibility between “defendants” to the proceeding (which includes third and subsequent parties for these purposes). The court cannot have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding (unless the concurrent wrongdoer is not a party because they are dead or wound up). In essence, the responsibility rests with the **defendants’ solicitors** to ensure all responsible parties have been joined to the proceeding for the purposes of apportionment.

In the Commonwealth reforms, the court is empowered (but not obliged) to apportion responsibility between “defendants” (which includes third and subsequent parties for these purposes) having regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding. Therefore, responsibility will essentially be left with the **plaintiff’s solicitor** to ensure that all relevant parties are before the court.

The Commonwealth reform does put the onus on the existing defendants to an apportionable claim to notify the plaintiff of any information as to the identity of other concurrent wrongdoers. Failure to do so may result in cost orders on an indemnity basis against the relevant defendants.

The Commonwealth reforms also provide for the plaintiff to bring a second proceeding in respect of the same loss to recover any proportion of loss not recovered from the first proceeding by reason of the non joinder of concurrent wrongdoers.

Fraud

The Victorian legislation provides that the defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is **jointly and severally liable** for the damages awarded against **any other defendant** in the proceedings. It appears any finding of fraud, whether it is related to the apportionable claim or not, will result in the fraudulent defendant being jointly and severally liable for damages for the **whole** proceeding.

The Commonwealth reforms exclude operation of the proportionate liability rules from a wrongdoer who fraudulently or intentionally caused the loss or damage. In those circumstances, liability, so far as it applies to that person, is to be determined in accordance with the usual legal rules.

Conclusion

Solicitors need to carefully consider these legislative reforms and ensure they understand fully the implications of the reforms in order to properly protect the interests of their clients.

Legal Practitioners' Liability Committee
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