Problems with the New Regime of Proportionate Liability for Misleading or Deceptive Conduct

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In 2004, the federal government introduced into the Trade Practices Act 1974 (Cth) a system of proportionate liability in relation to section 52 of that Act. The States and Territories have adopted similar systems in relation to their corresponding laws. This article examines closely the text of the new provisions in the TPA. It argues that the provisions raise many uncertainties, especially where there are multiple claims against, or cross-claims between, several defendants who have contributed to a loss.

ON 30 June 2004, the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) ('the CLERP 9 Act') received Royal Assent. The CLERP 9 Act made sweeping changes to a suite of corporate legislation in Australia. In particular, it introduced regimes of proportionate liability into the Trade Practices Act 1974 (Cth)[1] ('the TPA') and cognate provisions under the Australian Securities and Investments Commission Act 2001 (Cth)[2] and the Corporations Act 2001 (Cth).[3] The changes to the TPA commenced on 26 July 2004. Most States and Territories have also introduced apportionment legislation that applies to certain causes of action arising within their jurisdiction.

This article considers the impact of the changes made to the TPA, although many comments will be equally applicable to the changes to the Australian Securities and Investments Commission Act and the Corporations Act. A reasonable amount has

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1. Clauses 5 and 6 of Sch 3 of the CLERP 9 Act, inserting sub-s 82(1B) and Pt VIA into the TPA.
2. Clauses 1 and 2 of Sch 3 of the CLERP 9 Act, inserting sub-s 12GF(1B) and ss 12GP–GW into the Australian Securities and Investments Commission Act 2001 (Cth).
3. Clauses 3 and 4 of Sch 3 of the CLERP 9 Act, inserting sub-s 1041I(1B) and Div 2A of Pt 7.10 into the Corporations Act 2001 (Cth).

already been written about these amendments on a general level,[4] about the commercial and political circumstances surrounding their introduction,[5] the appropriateness of proportionate liability as a general principle,[6] and other legal methods of apportionment or contribution.[7] This article does not traverse that ground again. Rather, its focus is a textual analysis of key aspects of the amendments from a commercial law perspective.[8] An integral part of the analysis illustrates the deficiencies in the legislation by considering how it would apply to the facts raised in a recent Federal Court case on section 52 of the TPA, *Lawson Hill Estate Pty Ltd v Tovegold Pty Ltd,*[9] which was decided using principles of equitable contribution.

The article begins by briefly outlining the principles of contribution and proportionate liability applicable to section 52 as they existed prior to, and developed during, the gestation of the CLERP 9 Bill. With this background, the article then moves to analyse critically how the new legislation will work in practice. The article identifies difficulties in the drafting of the legislation in terms of the scope of the claims it covers, its relationship with State and Territory apportionment schemes, its application to servants or agents of corporations and the process of contribution among wrongdoers.

THE LEGAL BACKGROUND

Contributory negligence

A simple question is this: if a defendant negligently harms a plaintiff and the plaintiff contributes to the harm by failing to take reasonable care, to what extent is the

4. See eg S Christensen 'Sharing Responsibility for Misleading Conduct: Is Professional Liability No Longer "All or Nothing"?' (2004) 19(4) APLB 37; M Blycha 'More Players But Missing the Target: The Effect of Proportionate Liability' (2005) 79(4) LIJ 28; I O'Neil 'Proportionate Liability Under the TPA: Some Practical Issues' (2004) 20(6) TPLB 79; F Lawson 'Proportionate Liability, Liability Capping and Contributory Negligence' (2005) 16(10) ACLB 130.
5. See eg B McDonald 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26 Aust Bar Rev 29; A Throssell 'Insurance "Crisis" and Civil Liability Reform: Where Are We Now?' (2004) 19(7) ILB 77.
6. Ibid. See also R Lindsay 'Liability for Economic Loss Under Common Law and Statute' (2004) 6 UNDALR 21; Commonwealth Government *Review of the Law of Negligence* Final Report (Aug 2002) (Ipp Report); I Ramsay *Independence of Australian Company Auditors* (Oct 2001) (Ramsay Report); and the recommendations of the Joint Standing Committee on Public Accounts and Audit's *Review of Independent Auditing by Registered Company Auditors* Report No 391 (Aug 2002).
7. See eg J Watson 'From Contribution to Apportioned Contribution to Proportionate Liability' (2004) 78(2) ALJ 126; N Bender 'Multiple Wrongdoers: One for the Money – or Something Different?' (2004) 12(2) TPLJ 66; L Gattuso 'Equitable Contribution in the Context of Misleading and Deceptive Conduct' (2002) 13(4) APLR 29.
8. For a good discussion of the amendments from a tort law perspective, see above n 5.
9. (2004) 214 ALR 478.

defendant culpable? At common law the issue was decided at least as far back as 1809 in the case of *Butterfield v Forrester*[10] with a simple answer: the plaintiff's contributory negligence was a complete defence to the principal claim in negligence. As time moved on, the common law attempted to ameliorate the harshness of the rule through devices such as the 'last opportunity' principle.[11] In 1945, the UK overrode the common law rule by statute,[12] apportioning liability based on the respective degrees of culpability of the plaintiff and defendant. This legislation formed the basis for legislative change in Australia.[13]

Until *Astley v Austrust Ltd*[14] in 1999, a related issue remained open in cases where there was a contractual duty that was concurrent and co-extensive with the tortious duty. An example is that of a solicitor's retainer to advise a client.[15] In such a case, where the defendant had breached both contractual and tortious duties, but the plaintiff also had failed to exercise reasonable care, did the apportionment legislation reduce liability for breach of both duties or only the tortious duty? In *Astley*, the High Court held that the apportionment legislation applied only to the tortious duty. The defendant's liability continued unabated for its breach of contractual duty, irrespective of the plaintiff's contributory negligence. This decision was met with trenchant criticism[16] and States quickly passed legislation reversing the effect of the decision.[17] Hence, the defence of contributory negligence became generally available under statute in respect of a claim for a breach of contractual duty that was concurrent and co-extensive with the tortious duty.

Astley did not deal with the issue of contributory negligence where there was concurrent liability under the TPA. Provisions of Part V of the TPA, especially section 52, can apply in situations similar to those involved in cases of negligent misstatement or deceit. As the High Court noted, while discussing the appropriate measure of damages under section 82 of the TPA:

> There is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. *Such conduct is similar both in character and effect to tortious conduct.*[18]

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10. (1809) 103 ER 926.
11. See *Alford v Magee* (1952) 85 CLR 437.
12. Law Reform (Contributory Negligence) Act 1945 (UK).
13. See eg Law Reform (Miscellaneous Provisions) Act 1965 (NSW) Pt 3 as affected by Civil Liability Act 2002 (NSW) Div 8 of Pt 1A; see also Wrongs Act 1958 (Vic) Pt V.
14. (1999) 161 ALR 155.
15. Which was in dispute in *Astley* ibid. See also the discussion in *NRMA Ltd v Morgan* (1999) 31 ACSR 435, Giles J 757.
16. G Davis & J Knowler '*Astley v Austrust Ltd* – Down But Not Out: Contributory Negligence, Contract, Statute and Common Law' (1999) 23 MULR 795.
17. See eg the definition of 'wrong' in s 8(b) of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW).
18. *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14 (emphasis added).

The TPA offers a plaintiff significant advantages over traditional actions based on negligence or deceit, because it imposes a form of strict liability on corporations.[19] There is no need to prove the existence of a duty of care and breach of the standard of care, as is necessary in cases of negligent misstatement.[20] Nor is there any requirement to prove fraud[21] as there is in deceit. Given this advantage, the possibility of a defence of contributory negligence assumes significant importance.

In 2001, the case of *Henville v Walker*[22] dealt finally with the interaction of the doctrine of contributory negligence, section 52 and section 82 of the TPA. The High Court took the view that section 82 did not permit a defence of contributory negligence. The correct question was framed in terms of causation: did the defendant's conduct cause the plaintiff's loss?[23] Shortly after, in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[24] the High Court clarified that section 87 did not permit a discretionary reduction in damages under section 82 due to a plaintiff's contributory negligence.

Contribution

Prior to the CLERP 9 amendments, there were two systems of contribution that might apply in the context of claims for negligent misstatement, deceit or contravention of section 52 of the TPA or its State or Territory equivalents.

1. Tortfeasor contribution schemes

The first system comprised the various legislative schemes providing for actions against multiple tortfeasors and contribution among joint or several tortfeasors,[25]

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19. *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 225; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ 197.
20. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
21. In the sense of *Derry v Peek* (1889) 14 App Cas 337.
22. (2001) 206 CLR 459.
23. Ibid. See the various views: Gaudron J 479, applied the commonsense test of causation in *March v Stramare*, by asking whether something 'materially contributed' to the loss; McHugh J 490 noted that the test in *March*, 'as a matter of commonsense it should be regarded as a cause', is relevant in most cases but should not be applied mechanically; Hayne J 508 focused on whether the contravention 'played a role in the history of the events'.
24. (2002) 210 CLR 109.
25. Law Reform (Miscellaneous Provisions) Act 1955 (ACT) s 12; Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 5; Law Reform (Miscellaneous Provisions) Act 1955 (NT) s 12; Law Reform Act 1995 (Qld) s 5; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) s 6; Wrongs Act 1954 (Tas) s 3; Wrongs Act 1958 (Vic) s 23B; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA) s 5.

which overturned certain common law rules.[26] For example, section 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) provides:

> (1) (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.
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> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

As can be seen from the example above, the wording of these schemes is in general confined to contribution among those who are liable in tort as joint or several tortfeasors, and does not expressly apply to contribution among obligors more generally.[27] By 2003, there were conflicting lines of authority on whether provisions like section 5 could apply to breaches of the TPA or the equivalent State laws.[28] In a Victorian case,[29] Heerey J applied the contribution provisions in the Wrongs Act 1958 (Vic) to a claim brought under section 82, but that case seems correctly decided on the basis that the contribution provisions under the Wrongs Act are wider than the NSW equivalent above.[30] On the other hand, even on the more restrictive language in the NSW Act, the New South Wales Supreme Court in several cases had taken the view that section 5 allowed contribution where a defendant *could* have been sued in tort, even though tort was not pleaded.[31] A third approach was that contravention of section 52 was, itself, a tort. This view was advanced in an article by JC Campbell QC,[32] and received some favourable judicial comment.[33]

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26. *Brinsmead v Harrison* (1871) LR 7 CP 547 regarding multiple suits; *Merryweather v Nixan* (1799) 101 ER 1337 regarding contribution.
27. Some legislation, such as Wrongs Act 1958 (Vic) Pt IV, allows for statutory contribution between a wider range of obligors than joint or several tortfeasors.
28. For a detailed discussion, see N Bender 'Multiple Wrongdoers: One For the Money – or Something Different?' (2004) 12 TPLJ 66, 70.
29. *Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1, 201–202.
30. S 23A(1) of the Wrongs Act 1958 (Vic) applies 'whatever the legal basis of liability'.
31. The list of cases was summarised by the Full Federal Court in *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488, 548-549. They include: *Rap Industries Pty Ltd v Royal Insurance Australia Ltd* (1988) 5 ANZ Insurance Cases 60-876 and *AWA Ltd v Daniels* (1992) 7 ACSR 759. It is worth noting that none of these was a case on the TPA or FTA.
32. Now Campbell J. The article was JC Campbell 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act' (1993) 67 ALJ 87.
33. *Commonwealth Bank v White* [1999] 2 VR 681; *Dorrough v Bank of Melbourne Ltd* (1995) 8 ANZ Insurance Cases 61-290; *Jonstan Pty Ltd v Nicholson* (2003) 58 NSWLR 223.

Against these approaches was a line of decisions of the Federal Court to the contrary, that is, that breach of section 52 was not a 'tort' under the statutory contribution schemes.[34] This also appears to have been the view of Kirby J in *Burke v LFOT Pty Ltd*.[35] The position has been reiterated by the Federal Court recently.[36] In short, the position was unclear.

2. Equitable contribution

The second system of contribution was in equity, based on the principles described in *Dering v Earl of Winchelsea*.[37] It was explained by Gaudron ACJ and Hayne J in *Burke v LFOT Pty Ltd* as follows:

> In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage, either equally where they are liable in the same amount or proportionately, where the amount of their liability differs. The principle has regularly been applied between co-sureties, co-insurers, partners, co-owners, where payment is made by one in discharge of a common liability, and co-trustees who are in pari delicto.[38]

The case law refers variously to the existence of a 'common liability' or 'common obligation' of the 'same nature and extent', or to 'co-ordinate liabilities'.[39]

Burke was the first time the issue of equitable contribution for damages under section 82 of the TPA had gone to the High Court.[40] The Court, by a 4 to 1 majority (Kirby J dissenting), rejected the application of principles of contribution on the facts. However, Gaudron ACJ and Hayne J did not appear to doubt that equitable contribution might, in an appropriate case, apply to claims under section 82. McHugh J commented that to apply contribution principles to the facts would be contrary to the purpose of the TPA, because the person against whom contribution was sought had been, himself, misled by the defendant.[41] However, his Honour did

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34. *ANZ Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265, 277; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1, 11; *163 Clarence St Pty Ltd v New World Oil & Developments Pty Ltd* (1994) ATPR 41-322.
35. (2002) 209 CLR 282, 319.
36. *Lawson Hill Estate v Tovegold* above n 9, 507.
37. (1787) 1 Cox Eq Cas 318. There used to be differences between contribution at common law and equity but the equity system prevailed: see K Mason & JW Carter 'Restitution Law in Australia' (Sydney: Butterworths, 1995) para 609.
38. *Burke v LFOT* above n 35, 292 (footnotes omitted).
39. Ibid, Gaudron ACJ & Hayne J 292, 293; McHugh J 298-299, 301.
40. Although it had been discussed at Federal Court level: see *Trade Practices Commission v Manfal Pty Ltd No 3 (in liq)* (1991) 33 FCR 382, Lee J 385; see also Bender above n 28, 71, n 15.
41. *Burke v LFOT* above n 35, 308-309.

not appear to reject that such principles might apply in other cases. Callinan J, while rejecting the claim on the facts, was careful not to say that the possibility of contribution under the TPA was entirely excluded.[42]

The possibility of contribution adverted to in *Burke* was then applied by courts in subsequent decisions[43] and defendants in section 82 actions were permitted to reduce their liability or recover contribution against other wrongdoers.

OVERVIEW OF THE NEW LEGISLATION

The amendments to the TPA are in two parts. The first part inserted section 82(1B), which applies where a single wrongdoer caused the loss complained of:

> (1B) Despite subsection (1), if:
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> (a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:
>
> (i) economic loss; or
>
> (ii) damage to property;
>
> caused by conduct of another person (the ***defendant***) that was done in contravention of section 52; and
>
> (b) the claimant suffered the loss or damage:
>
> (i) as a result partly of the claimant's failure to take reasonable care; and
>
> (ii) as a result partly of the conduct referred to in paragraph (a); and
>
> (c) the defendant:
>
> (i) did not intend to cause the loss or damage; and
>
> (ii) did not fraudulently cause the loss or damage;
>
> the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

The second part of the amendments inserted a new Part VIA, comprising sections 87CB to 87CI. The provisions provide a statutory scheme of contribution among multiple wrongdoers. They operate on the notion of an apportionable claim, which is defined in sections 87CB(1), (2) and (4), and apply to those ('concurrent wrongdoers')[44] who contributed to the loss that is the subject of the apportionable claim:

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42. Ibid, 337-338.
43. *Scheuer v Bell* [2004] VSC 71, Kaye J paras 343-349; *Lawson Hill Estate v Tovegold* above n 9.
44. For a detailed discussion, see below pp 172-174.

87CB Application of Part

(1) This Part applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 82 for:
(a) economic loss; or
(b) damage to property;
caused by conduct that was done in a contravention of section 52.

(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

The overall object of Part VIA is to limit the liability of each defendant for the loss suffered by a plaintiff to the extent that each defendant is responsible for that loss.[45] Section 87CC excepts from this general rule wrongdoers who caused the loss fraudulently or intentionally. The key provisions are extracted below.

87CC Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

87CD Proportionate liability for apportionable claims

(1) In any proceedings 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 damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

45. See the Explanatory Memorandum to the CLERP 9 Bill, para 4.100(d).

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve 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 the provisions of 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 proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

Other provisions in Part VIA are extracted and discussed later in this article.

ANALYSIS

Meaning of 'claims' and 'concurrent wrongdoers' in Part VIA

As a threshold issue, the term 'claim' as used in Part VIA and section 82(1B) is not defined in the TPA. At first glance, it may appear that the apportionment provisions apply to the economic loss or property damage components of a broader claim, such as a typical claim for personal injury damages plus loss of past and future earnings. However, the background to the legislation makes it clear that section 82(1B) and Part VIA are directed at claims for pure economic loss or property damage.[46]

A theme that runs through both statutory and equitable contribution is that to apportion a liability between a set of potential debtors, the debtors must share some common connection to the plaintiff. In the context of equitable contribution, this 'common obligation'[47] is often expressed in the sense that the liability of the parties be 'of the same nature and to the same extent'.[48] Under the statutory schemes of

46. See eg R Coonan (Assistant Treasurer) 'The New Insurance Paradigm' (Speech delivered in Canberra on 14 Aug 2003); see also the Ipp Report above n 6, 175, n 2.
47. *Burke v LFOT* above n 35, McHugh J 299.
48. Ibid; *Caledonian Railway Co v Colt* (1860) 3 Macq 833, 844.

contribution among tortfeasors, generally there is the requirement that the contributors be tortfeasors (joint or otherwise) in respect of the same damage.[49]

In the new Part VIA, this connecting function is performed by sections 87CB(2)–(4), which were extracted above.

The definition of 'concurrent wrongdoer' in relation to a claim depends on causation of the loss claimed rather than legal liability for the claim. Literally, it may include the plaintiff where the plaintiff has been contributorily negligent, or innocent third parties who have played a part in causing the loss or damage but who have committed no legal wrong. Considering the purpose of Part VIA and the drafting of its other provisions,[50] it was surely not intended that a plaintiff fall within the definition of concurrent wrongdoer. In the case of third parties who have committed no legal wrong, it would be a curious result for them to be forced to contribute to a plaintiff's loss. Probably the best explanation is that the apportionment provisions in section 87CD operate on the assumption that primary liability has already been established by some other legal rule, such as a breach of the prohibition in section 52;[51] that is, the provisions merely apportion extant liability rather than impose it. If this analysis is not correct, perhaps an innocent wrongdoer would have their liability set at zero under section 87CD(1)(a), as nil liability is 'just having regard to the extent of [their] responsibility for the damage or loss'.[52]

The more difficult question is what is meant by a 'single apportionable claim' and how it interacts with section 87CD, which deals with apportionment in respect of a claim.[53] Section 87CB(2) makes clear that the loss or damage must be the same. However, the difficulty is added by the words 'even if the claim is based on more than one cause of action (whether or not of the same or different kind)'.[54]

The provision is probably directed towards ensuring that a set of claims against the same defendant or different defendants should be dealt with together because they are based on the same loss or damage. For example, if there are claims in respect of the same damage against D1, D2 and D3, arising from two independent events, one involving D1 and D2, the other involving D1 and D3, it may be complicated to apportion blame between D1 and D2 on one hand, then D1 and D3 on the other, and

49. See eg Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 5(1)(c); but contrast the wider categories of wrongs covered in the Wrongs Act 1958 (Vic) s 23A.
50. Eg s 87CD(1), which deals with apportioning liability, refers to 'a *defendant* that is a concurrent wrongdoer'.
51. But compare the view of McDonald above n 5, 42.
52. S 87CD(1)(a).
53. No commentator appears to have found a satisfactory meaning for this provision: compare McDonald above n 5, 34 and Christensen above n 4, 38-40.
54. Civil Liability Act 2003 (Qld) s 28(2) avoids this difficulty through clearer drafting. The result is basically the same as view (2), discussed below p 174.

then to reconcile their comparative responsibility to form an overall apportionment of blame. It is perhaps better to consider the comparative liability of D1, D2 and D3 as one issue.

Although this idea appears superficially attractive, the actual effect of the drafting in Part VIA is not clear. Assuming that the purpose of sections 87CB(2) and (3) is to direct that it is sufficient that one of the claims is an apportionable claim and the other claims cover the same loss or damage, does Part VIA:

(1) apportion liability between *all* relevant defendants in respect of *all* of those other claims (ie, it covers the entire field)? or

(2) apportion liability only for the subset of claims that are themselves apportionable claims, taking into account the relative culpability of other concurrent wrongdoers against whom non-apportionable claims have been made? or

(3) as for (2), but also join together claims on multiple bases by the plaintiff against the *same* defendant?

I will refer to possibility (1) as the 'broad' view, possibility (2) as the 'narrow' view and possibility (3) as the 'middle' view. These terms are used in a neutral sense. To explain the different possibilities, consider the situation where A sues B under sections 52 and 53, C under section 52 and D in negligence, all of whom have contributed to the same pure economic loss of A.

On view (1), Part VIA can be used to apportion the contributions between B, C and D (assuming that liability in all cases was established), apportioning liability for the whole loss, say, 30:20:50.

On view (2), the claims against B, C and D may be considered together for the purpose of assessing relative responsibility, but the only claims that actually can be apportioned are those claims that are themselves apportionable claims. That is to say, B's liability under section 52 and C's liability under section 52 may be apportioned taking into account the responsibility of B, C and D. Using the numbers above, the loss the subject of the section 52 claims may be apportioned 30 percent to B and 20 percent to C, on a view that D was 50 percent responsible. Any reduction of B's liability under section 53 and D's liability in negligence would be decided by any other relevant legal rules.[55]

On view (3), the outcome is as for view (2), but additionally the claim against B under section 53 can be merged and apportioned with the claim against B under section 52, and hence B is not severally liable for the loss on the claim under section 53.

55. S 87CD(2)(b).

1. Examining the text of sections 87CB, 87CC and 87CD in Part VIA

On its face, the wording in section 87CB(2) appears very broad and literally seems to favour view (1) or view (3), especially the words 'based on more than one cause of action (whether or not of the same or different kind)'. A second point in favour of view (1) is that section 87CC(3) states that the liability of *all* concurrent wrongdoers other than excluded wrongdoers is to be determined in accordance with Part VIA. Section 87CD(1) further speaks of limiting the liability of a defendant who is a concurrent wrongdoer in relation to an apportionable claim. Recall that the definition of 'concurrent wrongdoer' catches those who caused the loss that is the subject of a particular claim. A defendant may be a concurrent wrongdoer *in relation to* an apportionable claim, although the claim against it is not an apportionable claim per se. In the example of A, B, C and D used above, D is a concurrent wrongdoer in relation to the apportionable claim against C, even though the claim in negligence against D, on its own, is not an apportionable claim. Thus, this drafting potentially catches a much wider range of defendants than only the defendants against whom the principal section 52 claims were made.

On the other hand, there are several considerations in favour of a narrower view (2) or (3). First, in the absence of clear language, it is a bold step to suggest that Part VIA was intended entirely to override State apportionment legislation whenever a section 52 claim is made in respect of the same loss or damage. This supports view (2) and, in some cases, view (3). Second, the wording in section 87CB(4) seems circular: subsection (1) states that Part VIA applies to certain kinds of claims. Subsection (4) then states that apportionable claims are only those set out in subsection (1). It is not clear what other kinds of apportionable claims might have been caught by Part VIA but for subsection (4); perhaps this was intended to confine the operation of Part VIA to view (2)? Third, section 87CD(2) speaks of proceedings involving both claims that are apportionable claims and claims that are not apportionable claims and excluding the non-apportionable claims from the operation of Part VIA. This may provide some assistance for view (2) or (3), although it should be noted that even on view (1), section 87CD(2) still has work to do. Finally, one might note that the language in section 87CD(1) speaks of *limiting* liability in respect of an apportionable claim. This is arguably internally consistent with view (2), as it makes sense to speak of limiting the liability of the person against whom the apportionable claim was made directly, whereas it would be odd to speak of limiting one party's liability (arising under a non-apportionable claim), in respect of a different, apportionable claim against another. The riposte to this argument is that a broad reading of 'single apportionable claim', as in view (1), amalgamates the claims against different defendants and avoids this logical difficulty.

Case-law will have to decide which of the above possibilities is right, or whether some other construction is correct.

2. Applying Part VIA in practice

The facts in *Lawson Hill Estate Pty Ltd v Tovegold Pty Ltd*[56] show that these issues are not merely hypothetical.

In that case, Mr and Mrs Grace sold a vineyard in Mudgee to Lawson Hill Estate Pty Ltd, which was the corporate trustee of a unit trust of 14 beneficiaries. Prior to the sale in 1998, the Graces commissioned Mr Dalton to drill for water on the estate. Mr Dalton did so and found a water source capable of producing, in his estimate, 400 gallons of water per hour. In his written report Mr Dalton converted the flow rate to litres per hour but forgot to change the unit measurement. Hence, he wrote '1 800 gallons per hour' rather than 1 800 litres per hour. This document then formed part of a misrepresentation made by Mr Grace to the buyers. Mr Grace also miscalculated the size of the property. He gave this incorrect data to the real estate agents, who reproduced it in a brochure they published to advertise the property. The purchaser read this material. Mr Grace also communicated the incorrect figure directly to the purchaser.

Lawson Hill Estate Pty Ltd and its 14 investor beneficiaries (whom I will refer to collectively as 'Lawson Hill Estate') claimed damages for, among other things, the difference between the actual value of the property and the amount paid for it, and trading losses incurred by the consortium.[57] Some of the defendants cross-claimed against others. The claims were, in summary:

(1) Claim by Lawson Hill Estate against Mr Grace under sections 42 and 45(1) of the Fair Trading Act 1987 (NSW).[58]
(2) Claim by Lawson Hill Estate against the real estate agent under sections 52 and 53A of the TPA.[59]
(3) Claim by Lawson Hill Estate against Mr Dalton under sections 42 and 45(1) of the FTA.[60]
(4) Cross-claim by the real estate agent against Mr Grace under section 42 of the FTA, seeking a remedy under section 72 of the FTA or section 5(1) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) or equitable contribution.
(5) Cross-claim by Mr Grace against Mr Dalton under sections 42 and 45(1) of the FTA,[61] seeking an indemnity.
(6) Cross-claim by Mr Dalton against Mr Grace, alleging negligence, tortious misrepresentation and/or deceit,[62] seeking contribution under the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).

56. Above n 9.
57. Ibid, 511.
58. Ibid, 490.
59. Ibid, 493.
60. Ibid, 499.
61. Ibid, 508.
62. Ibid.

Wilcox J found that Mr Grace, Mr Dalton and the real estate agent had all engaged in misleading or deceptive conduct.[63] The case preceded the operation of Part VIA, so Wilcox J cut the Gordian knot by applying principles of equitable contribution to determine their respective liabilities,[64] relying on the High Court decision in *Burke*.

How would this case be decided under Part VIA? All of the claims brought by Lawson Hill Estate related to the same damage: its pure economic loss. Only one of the causes of action was based on section 52 of the TPA (Lawson Hill Estate against the real estate agent). The other claim against the real estate agent was based on section 53A and was not of itself an 'apportionable claim'. The other claims were further removed: several claims under the Fair Trading Act 1987 (NSW), and cross-claims among the defendants under that Act, in tort or for contribution under the tortfeasor statute.

On a broad view (1) of Part VIA, the non-section 52 claims by Lawson Hill Estate are claims 'in respect of the same loss or damage...based on...cause[s] of action...of a different kind'. As Part VIA is activated by one section 52 claim, the apportionment provisions would apply to all of the defendants individually to apportion their liability on Lawson Hill Estate's claims, including those claims not under section 52. Whether the provisions of Part VIA would also settle the cross-claims among the defendants is discussed below.[65]

On the other hand, consider a narrower view (2) of Part VIA. Part VIA could permit an apportionment of liability on the section 52 claim against the real estate agent, taking into account the activities of Mr Dalton and Mr Grace. This leaves the liability of the real estate agent on the section 53A claim and the liability of Mr Dalton and Mr Grace under sections 42 and 45(1) of the FTA. Any apportionment of these claims would need to be decided according to any other relevant legal rules.[66]

While the facts in *Lawson Hill Estate* were amenable to equitable contribution, it is important to note that Part VIA of the TPA applies a statutory test focusing on the definition of 'apportionable claim' and the kind of damage or loss, rather than the flexible approach of equitable contribution. A broad application (view (1)) of Part VIA on these facts resembles the outcome based on equitable contribution, but

63. Wilcox J's decision was subsequently appealed to the Full Federal Court. After this article was written, the Full Federal Court handed down its decision in *Dalton v Lawson Hill Estate Pty Ltd* [2005] FCAFC 169 (22 Aug 2005). Reviewing the facts, the Court (Lindgren, Finn & Emmett JJ) exonerated Mr Dalton and the real estate agent, and held Mr and Mrs Grace solely liable. This different outcome on the facts does not affect the validity of the legal analysis here.
64. Ibid, [169]–[197].
65. See discussion below pp 189-191 regarding the situation where one concurrent wrongdoer seeks to sue another concurrent wrongdoer on a different legal basis.
66. S 87CD(2)(b). For a discussion of how the NSW apportionment legislation would apply to these claims, see below pp 180-181.

might produce results very different from the previous law where there are claims based in contract, breach of trust or rights arising under statutes other than the TPA or the Fair Trading Acts.

Interaction of federal and State or Territory laws

The CLERP 9 reforms were designed as part of a coordinated Commonwealth and State approach to apportioned liability[67] and most States and Territories have introduced corresponding legislation. While a detailed consideration and comparison of these laws is beyond the scope of this article,[68] two issues will be discussed: first, do those laws cover the State or Territory laws equivalent to section 52 of the TPA?[69] Second, how will those laws interact with claims under the TPA?

1. Coverage of State or Territory equivalents of section 52

At the time of writing, the Australian Capital Territory,[70] New South Wales,[71] Queensland,[72] South Australia,[73] Tasmania,[74] Victoria[75] and Western Australia[76] had enacted apportionment schemes. The schemes are broadly similar to the federal laws, although the exact drafting and coverage varies. All schemes provide for the apportionment of claims made under the relevant State or Territory Fair Trading Act equivalent of section 52.[77] All schemes provide for the apportionment of claims in negligence, although the precise drafting varies: some Acts refer to claims based on breach of duty of care,[78] while others refer to claims based on failure to take reasonable care.[79] In contrast to the TPA, even on a narrow interpretation of these provisions (a view corresponding to view (2)), a claim based on lack of care and a claim under the Fair Trading Act could be considered and apportioned together under the one State or Territory apportionment law.

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67. See Explanatory Memorandum to the CLERP 9 Bill, para 5.351.
68. For further information, see McDonald above n 5; Lindsay above n 6.
69. Fair Trading Act 1992 (ACT) s 46; Fair Trading Act 1987 (NSW) s 42; Consumer Affairs and Fair Trading Act (NT) s 42; Fair Trading Act 1989 (Qld) s 38; Fair Trading Act 1987 (SA) s 56; Fair Trading Act 1990 (Tas) s 14; Fair Trading Act 1999 (Vic) s 9; Fair Trading Act 1987 (WA) s 10.
70. Civil Law (Wrongs) Act 2002 (ACT) ch 7A.
71. Civil Liability Act 2002 (NSW) Pt 4.
72. Civil Liability Act 2003 (Qld) Pt 2.
73. Law Reform (Contributory Negligence And Apportionment Of Liability) Act 2001 (SA) ss 4(1)(c) and 6.
74. Civil Liability Act 2002 (Tas) Pt 9A.
75. Wrongs Act 1958 (Vic) Pt IVAA.
76. Civil Liability Act 2002 (WA) Pt 1F.
77. Civil Law (Wrongs) Act 2003 (ACT) s 107B(2)(b); Civil Liability Act 2002 (NSW) s 34(1)(b); Civil Liability Act 2003 (Qld) s 28(1)(b); Civil Liability Act 2002 (Tas) s 43A(1)(a); Wrongs Act 1958 (Vic) s 24AF(1)(b); the definition of 'apportionable claim' in Civil Liability Act 2002 (WA) s 5AI(1)(b).
78. See eg Civil Liability Act 2003 (Qld) s 28(1).
79. See eg Civil Liability Act 2002 (NSW) s 34(1); Civil Liability Act 2002 (WA) s 5AI(1).

In some States and Territories, certain claims are expressly excluded from the operation of the apportionment scheme. One of the most important exceptions is for 'consumer' claims in the ACT and Queensland.[80] The Queensland legislation goes further, taking the unique approach of stipulating that a concurrent wrongdoer who has contravened section 38 of the Fair Trading Act 1989 (Qld) still remains severally liable in respect of the damages awarded against any other concurrent wrongdoer to the apportionable claim.[81]

2. Interaction of TPA and State or Territory laws applied to *Lawson Hill Estate*

It is not unusual for a set of facts to disclose a claim against a corporation under section 52 of the TPA, and claims against individuals under the corresponding State or Territory laws. *Lawson Hill Estate* is an example of such a case. So how would State or Territory apportionment legislation interact with the TPA on the facts of *Lawson Hill Estate*?

If a broad reading of 'single apportionable claim' in Part VIA of the TPA were taken (view (1) above), the court would consider whether Mr Grace and Mr Dalton has breached sections 42 and 45(1) of the Fair Trading Act 1987 (NSW) and had contributed to the loss claimed. Assuming this were the case, Part VIA of the TPA would be applied to apportion liability in respect of the 'single apportionable claim' of Lawson Hill Estate among Mr Dalton, Mr Grace and the real estate agent (sued under sections 52 and 53A). The New South Wales apportionment legislation would have no work to do.

If a narrow approach were taken (view (2)),[82] the consequences are less clear. The real estate agent's liability on the section 52 claim could be apportioned using Part VIA of the TPA.[83] This still leaves the claim against the agent under section 53A of the TPA, and the claims against Mr Grace and Mr Dalton under sections 42 and 45(1) of the Fair Trading Act 1987 (NSW).

Part 4 of the Civil Liability Act 2002 (NSW) could apportion liability in respect of the claims under section 42 of the FTA, but probably not those under section 45(1) of the FTA[84] nor that under section 53A of the TPA. There is a contrary argument,

80. Civil Law (Wrongs) Act 2002 (ACT) ss 107B(3), 107C; Civil Liability Act 2003 (Qld) ss 28(3)–(4), 29. The definition of 'consumer' in the Civil Liability Act 2003 (Qld) refers to an individual whose claim is based on rights relating to goods or services, or both, acquired for personal, domestic or household use or consumption, or professional advice acquired for the individual's personal, non-business use.
81. Civil Liability Act 2003 (Qld) s 32F.
82. See the discussion above pp 172-174.
83. Ibid.
84. Assuming, ex hypothesi, that if a narrow interpretation were given to Part VIA of the TPA, the same interpretation would be given to similar language under Pt 4 of the Civil Liability Act 2002 (NSW). See the definition of relevant claims in s 34 of the Act.

although probably weak. It runs thus: first, the actions based on section 45(1) of the FTA and section 53A of the TPA could have been pleaded in negligence. Second, the NSW apportionment legislation applies to negligence claims.[85] Third, as these actions could have been pleaded in a way that would allow apportionment, the law should consider the substance and not the form of the claim, and thus permit apportionment. The first step in the argument will depend on the facts of the case. The last step is a question of law and uses reasoning similar to that used for contribution under the tortfeasor statutes discussed above. It is this last step that is open to debate.[86]

Interestingly, if view (3) were taken, the additional claims under section 53A of the TPA and section 45(1) of the FTA could be joined with the claims under section 52 of the TPA and section 42 of the FTA respectively, so that the federal and State legislation together neatly cover the plaintiffs' claims.[87]

3. Interaction of TPA and State or Territory equivalents of section 52 generally

Given the facts of *Lawson Hill Estate*, it is possible to work backwards to select an interpretation (view (1) or (3)) that neatly covers all issues. Yet this obviously inverts the proper process of legal reasoning, which begins with the law and applies it to the facts.

Depending on what becomes the accepted construction of Part VIA, it may be that a corporation is entitled to apportionment under section 52, but that other concurrent wrongdoers who are liable under State laws for the same kind of loss are treated more harshly. On view (2) or often on view (3) of Part VIA, for example, individuals in the ACT and Queensland would be subject to the relevant State/Territory scheme and hence not entitled to apportionment for 'consumer' claims. Furthermore, if the Queensland wrongdoer had breached section 38 of the Fair Trading Act 1989 (Qld), the 'Clayton's' apportionment rule would apply.[88] To illustrate this point, assume that B Ltd, C and D have contributed to the loss of the plaintiff. B Ltd is found liable under section 52 and has its liability for the loss apportioned at 40 per cent under Part VIA. C and D are sued under section 38 of the Fair Trading Act 1989 (Qld). A

85. The term 'negligence' is used here as shorthand for a 'claim arising from ... a failure to take reasonable care'; exact phrase used in Civil Liability Act 2002 (NSW) s 34(1)(a).
86. The key question here seems to be: does the phrase 'arising from a failure...' in s 34(1)(a) of the NSW Act require that such a failure to take reasonable care be a necessary element in the cause of action (which it is not under the FTA), or does it merely describe a factual, causal, connection which is sufficient, but not necessary, to found the action?
87. Assuming, ex hypothesi that the interpretation of 'single apportionable claim' in s 87CB of the TPA would also be applied to the corresponding provision in the Civil Liability Act 2002 (NSW).
88. Civil Liability Act 2003 (Qld) s 32F.

court fixes their respective contributions under the Civil Liability Act 2003 (Qld) notionally at 30 per cent each. In the result, B Ltd is liable for 40 per cent, while C and D remain severally liable for the amount of 60 per cent.[89]

Section 52 and other bases of liability under Part V of the TPA

An obvious limitation of the new provisions is that they are expressed to apply only to claims for economic loss or property damage caused by conduct done in contravention of section 52; they do not refer to breaches of other provisions of the TPA, particularly those in Part V. This leaves uncovered misleading conduct concerning the sale or promotion of land,[90] or the characteristics or the nature or suitability of goods and services.[91] The omission is perhaps explained by the motivation for the amendments, which was a concern for the liability of auditors and other professional service providers.[92]

If a construction of Part VIA in line with view (1) or (3) were adopted, this gap could be filled at least where section 52 was also pleaded. On either of these views, the other causes of action would be caught by Part VIA and apportioned together with the section 52 claim. This analysis is clearly unsatisfactory as a general solution. Even if view (1) or (3) is correct, the plaintiff may sidestep the 'merger' effect by pleading another relevant Part V provision instead of section 52. Alternatively, if view (2) is the correct interpretation, then the plaintiff can plead under all relevant provisions of Part V and apportionment would apply only to the claim under section 52.

As a simple illustration, in *Lawson Hill Estate,* the claim against the real estate agent for misrepresenting the size of the land was pleaded under section 52 and also section 53A (presumably section 53A(1)(b)) of the TPA). Section 53A(1)(b) prohibits, in connection with certain dealings in land, 'false or misleading representation[s] concerning the nature of the interest in land...the characteristics of the land, the use to which the land is capable of being put...or the existence or availability of facilities associated with the land'. Wilcox J found for Lawson Hill Estate without stating under which particular provision it succeeded;[93] on the facts it seems both. If this aspect of the case had been litigated under the new regime, Lawson Hill Estate might have chosen initially to sue only the real estate agents (as they carried insurance) and only under section 53A. This would have avoided the operation of Part VIA and left the real estate agents to chase the other parties for contributions. Lawson Hill Estate would still have had the chance of suing the Graces or Mr Dalton in later proceedings.

89. Ibid.
90. TPA s 53A.
91. TPA ss 53, 55, 55A.
92. See Explanatory Memorandum to the CLERP 9 Bill, para 4.100.
93. *Lawson Hill Estate v Tovegold* above n 9, 498.

Contributory negligence of the plaintiff under section 82(1B) and Part VIA

1. Meaning of 'contributory negligence' (sections 82(1B) and 87CD)

The amendments to the TPA introduce the notion of contributory negligence into section 82(1B) and Part VIA.

The language used in section 82(1B) is similar to that used in the contributory negligence legislation of the States,[94] referring to a plaintiff's 'failure to take reasonable care' and a reduction of liability to the extent that is 'just'.[95] In a case on a different section of the TPA that uses language similar to section 82(1B)(b), the Full Federal Court observed that the principles in that section were 'not materially different' to the principles of contributory negligence as a defence to negligence.[96] If anything, the language in section 82(1B) is closer to the contributory negligence statutes than the provision in question in that case. It seems that section 82(1B) will follow closely if not exactly the principles of contributory negligence already established at general law.

An express reference to contributory negligence appears in section 87CD(3). That provision requires the court, in the process of apportioning liability between defendants, to exclude the proportion of loss in relation to which a plaintiff is contributorily negligent 'under any relevant law'. The law must be 'relevant' presumably in the sense that it is applicable to the cause of action or claim. The reference would cover State or Commonwealth laws that establish presumptions of contributory negligence in certain circumstances, for example, relying on the skill and care of a person known to be intoxicated,[97] or the plaintiff being intoxicated[98] or failing to comply with certain road regulations.[99] 'Relevant laws' aside, if the plaintiff has simply failed to take reasonable care, this factor will presumably be taken into account under section 87CD(1) in respect of each defendant as the court arrives at an amount that is just having regard to the defendant's responsibility for the loss.

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94. See eg Law Reform (Miscellaneous Provisions) Act 1965 (NSW) ss 8 and 9(1), as affected by Civil Liability Act 2002 (NSW) Div 8; Civil Liability Act 2003 (Qld) ss 23-24; Civil Law (Wrongs) Act 2002 (ACT) ss 101-102; Wrongs Act 1958 (Vic) ss 25-26.
95. Many of the tortfeasors contribution statutes use the words 'just and equitable', but nothing should turn on the omission of the word 'equitable'.
96. *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40, 49 regarding s 75AN of the TPA.
97. Eg, under Civil Liability Act 2003 (Qld) s 48; Civil Liability Act 1936 (SA) s 47.
98. Eg, under Civil Liability Act 2002 (NSW) s 50(3); Personal Injuries (Liability and Damages) Act 2003 (NT) s 14; Civil Liability Act 1936 (SA) s 46.
99. Eg, under Civil Law (Wrongs) Act 2002 (ACT) s 97; Motor Accidents Act 1988 (NSW) s 74; Civil Liability Act 1936 (SA) s 49.

2. Circumstances where a defendant cannot raise contributory negligence to reduce its liability (sections 82(1B)(c) and 87CC)

A defendant who has intentionally or fraudulently[100] caused the plaintiff's loss cannot take advantage of the provisions on contributory negligence and apportionment.[101] This exception roughly parallels that in the general law regarding fraudulent misrepresentation. In *Redgrave v Hurd*, Jessel MR said:

> Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.[102]

It was put even more widely by Lord Hoffman recently:

> If a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either.[103]

His Lordship concluded that 'in the case of fraudulent misrepresentation ... there is no common law defence of contributory negligence'.[104]

While these rules are favourable to the plaintiff, one must bear in mind that neither the common law nor the new statutory regime gives the plaintiff a 'blank cheque'. In an action for deceit the plaintiff must still prove causation and mitigation[105] of the loss allegedly flowing from the fraud, although the rules on remoteness of damages perhaps do not apply.[106] The common law does not give the plaintiff 'free rein' to aggravate damages through its own stupidity. As Gibbs CJ noted in *Gould v Vaggelas*, a plaintiff's 'folly, error or misfortune' may constitute a supervening act and break the chain of causation.[107]

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100. On the meaning of fraud, see below pp 185-188.
101. S 82(1B)(c) (single wrongdoer) and ss 87CC(1)–(2) (excluded concurrent wrongdoers).
102. (1881) 20 Ch D 1, 13-14.
103. *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] 1 All ER 173, 178.
104. Ibid, 179.
105. *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, Lord Steyn 795: 'The plaintiff is not entitled to damages in respect of loss which he could reasonably have avoided. This limiting principle has no special features in the context of deceit'.
106. Contrast the view of Gibbs CJ in *Gould v Vaggelas* (1984) 157 CLR 215, 221 with that of Wilson J 242; and *South Australia v Johnson* (1982) 42 ALR 161, 169-170 where the High Court cited with approval the comments of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 that damages included all losses directly flowing from the fraud, regardless of whether they were reasonably foreseeable.
107. *Gould v Vaggelas* ibid, 222.

Judicial views on causation, mitigation and remoteness under section 82 of the TPA have varied from case to case. It is beyond the scope of this article to examine this point in detail, [108] but it can be noted shortly that in cases under Part V courts sometimes draw an analogy with the tort of deceit, [109] although they also insist that they are not bound by any particular analogy.[110] Where the defendant's fraud prevents them from relying on the new contributory negligence provisions of the TPA, the similarities with deceit are obvious.

Regarding causation under section 82 in particular, there is authority supporting the view that a principle similar to that mentioned by Gibbs CJ in *Gould* would apply. In *Henville v Walker*, Gleeson CJ commented:

> Negligence on the part of the victim of a contravention is not a bar to an action under section 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage. [111]

In the same case, McHugh J and Hayne J each noted that the conduct of a plaintiff may break the causal connection. McHugh J gave an example of a kind of negligence of the plaintiff.[112] Hayne J referred to a plaintiff's 'extraneous conduct'.[113] So, even though a fraudulent defendant still cannot raise a defence of contributory negligence under the new regime, this does not mean that he or she must be held responsible for every act of the plaintiff however errant or foolhardy.

Fraudulent conduct under section 82(1B) and Part VIA and accessorial liability

1. Meaning of 'fraudulently' (sections 82(1B) and 87CC)

It is a reflection of the policy behind and standards imposed by the TPA that the term 'fraud' and its cognate adjectival and adverbial forms are not used elsewhere in the Act. The most influential interpretation in this context will probably be derived from the law that developed around fraudulent misrepresentation. In the seminal case of *Derry v Peek,* Lord Herschell said:

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108. Compare eg *Gates v City Mutual Life Assurance Society Ltd* above n 18; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539, Lee J 556; and, more recently, comments by the various members of the High Court in *Henville v Walker* above n 22. For a general discussion of these topics, see *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991–) para 110-5345.
109. *Gates v City Mutual Life Assurance Society* above n 18; see also *Henjo Investments v Collins Marrickville* ibid, Lee J 555; *Henville v Walker* above n 22, Gleeson CJ 470-473, especially para 31.
110. *Henjo Investments v Collins Marrickville* ibid Lee J 556.
111. *Henville v Walker* above n 22, Gleeson CJ 468.
112. Ibid, 492-493.
113. Ibid, 510.

> Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. [114]

There is a legion of case-law applying and amplifying these principles. Little is to be gained from reciting it here. There are two points to note. First, *Derry v Peek* concerned misrepresentation at common law. Common law misrepresentation was narrower than the current position under the TPA because, among other things, it was largely confined to present facts rather than opinions or predictions.[115] On the other hand, the TPA now requires a corporation that makes a representation about a future matter to have reasonable grounds for it.[116] Even in this new context, an opinion or prediction that is honestly but not reasonably held would not be fraudulent.[117]

Second, the interaction of section 82(1B) or Part VIA and the accessorial liability provisions in section 75B may require courts to draw fine distinctions in their assessment of the facts of a case. Section 75B renders liable persons who have aided and abetted[118] or been knowingly concerned in[119] a contravention of section 52. In *Yorke v Lucas,*[120] the High Court formulated the relevant standard for liability under section 75B as: knowledge of the essential matters which go to make up the contravention, whether or not the defendant knows that those matters amount to a contravention.[121]

If a person is rendered liable under section 75B, it will often be that he or she has acted fraudulently. The paradigm case arises where an employee or director of a company in the course of his or her duties deliberately conveys a false representation to another.[122] This would render the corporation liable under section 52,[123] and the

114. *Derry v Peek* above n 21, 374.
115. But see *Edgington v Fitzmaurice* (1885) 29 Ch D 459.
116. TPA s 51A.
117. The leading case on predictions and opinions under s 52 prior to the introduction of s 51A was *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25, 31: 'A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or by implication) that the maker of the statement had a particular state of mind when the statement was made and, commonly at least, that there was basis for that state of mind.'.
118. TPA s 75B(1)(a).
119. TPA s 75B(1)(c).
120. (1985) 158 CLR 661.
121. Ibid, 667-668 regarding s 75B(1)(a); ibid, 670 regarding s 75B(1)(c).
122. Eg Mr Saade in the classic case *Henjo Investments Pty Ltd v Colliers Marrickville Pty Ltd (No 1)* (1988) 79 ALR 83.
123. TPA s 84(2).

individual liable under section 75B. It would also amount to fraud assuming that the procedural and evidentiary requirements were satisfied.[124]

There may, however, be factual circumstances that enliven accessorial liability under section 75B but do not amount to fraud. One situation might be where an employee or director acting for a corporation made a prediction, honestly believing it would come true but without reasonable grounds for it. He or she would probably be liable under section 75B, but would not have acted fraudulently because he or she had a genuine, albeit misguided or unsubstantiated, belief in the truth of the matter. Another example might be where an employee's or director's silence, in all the circumstances, conveys a misrepresentation but that conduct has not been so egregious as to constitute fraud or fraudulent concealment.

2. Apportionment under Part VIA where there is accessorial liability (sections 75B, 84, 87CB, 87CC, 87CD and 87CI)

If the acts of an employee or director have caused a corporation to breach section 52 and rendered him or her personally liable under section 75B, how is liability for the loss to be apportioned between them under the new regime? From the above discussion, it is clear that a key question is whether the employee/director was acting fraudulently and whether this state of mind is attributed to the corporation.

As a starting point, section 84 of the TPA provides a broad scheme for attributing to a corporation the conduct of certain individuals acting on its behalf. Under section 84(2), where a director, agent or servant of a corporation acts on behalf of the corporation within the scope of his or her actual or apparent authority, the corporation for whom he or she acts is deemed to have engaged in that same conduct. Under section 84(1) of the TPA, where the state of mind of a corporation must be established,[125] it is sufficient to show the state of mind of the relevant director, servant or agent provided he or she was acting within the scope of his or her actual or apparent authority. This 'state of mind' includes knowledge, intention, opinion, belief or purpose.[126] Furthermore, section 84 does not exclude the operation of other principles of law that impose primary or secondary liability on the corporation for breach of section 52.[127]

124. Fraud is notoriously difficult to establish. Plaintiffs in s 52 cases have, until now, usually pleaded their case under s 75B rather than fraud as s 75B renders the individual liable anyway. Where the pleading or evidence is not sufficient to support fraud, courts have sometimes found breach of s 75B instead: see *Pobjie Agencies Pty Ltd v Vindex Tubemakers Pty Ltd* (2000) Aust Contract R 90-112.
125. For the purposes of various provisions of the TPA, including s 52.
126. S 84(5).
127. *TPC v Queensland Aggregate Pty Ltd* (1982) 44 ALR 391, Morling J 404. See also S Fisher *Agency Law* (Sydney: Butterworths, 2000) 197-198. For example, liability may be established directly under the principles in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; liability may be established indirectly by common law principles of agency.

In the next two examples, I shall assume for the purposes of analysis that sections 84(1) and (2) apply to the conduct so as to avoid issues of primary or secondary liability arising under other principles of law.

If the employee/director has knowledge of the essential matters of the contravention and acts fraudulently, the employee/director is liable under section 75B, but not entitled to the benefit of the apportionment provisions. The state of mind of the employee/director is attributed to the corporation[128] and the corporation is also denied the benefit of apportionment provisions.[129] The corporation and the individual are liable severally. This is the same as under the TPA prior to the amendments.

If the employee/director has knowledge of the essential matters of the contravention, but his or her conduct falls short of being fraudulent, the corporation and employee/director are liable under sections 52 and 75B respectively. Assuming there is no additional fraudulent state of mind on the part of the corporation, the next question is whether the employee/director and corporation can claim the benefit of the apportionment provisions.

This point turns on the definition of concurrent wrongdoers in section 87CB(3) as two or more persons 'whose ... act or omission caused, independently ... or jointly, the damage or loss'. Under section 84(2), any conduct engaged in by the employee/director is deemed to have been engaged in by the corporation for the purposes of the TPA, which obviously covers Part VIA. A reference to 'engaging in conduct' includes doing or refusing to do an act, and advertently refraining from doing any act.[130] Thus, on a strict view, acts or advertent omissions of the employee/director are also jointly the acts or advertent omissions of the corporation and the two are concurrent wrongdoers under section 87CB(3) as regards those acts or advertent omissions.[131] If this analysis is correct, it will be interesting to see how the courts apportion liability between the wrongdoers, especially when one or more of the wrongdoers has limited assets.[132] This will be the case in two extreme (though not uncommon) situations: first, where the corporation is financially viable but the individual has few or no assets; second, where the corporation is a '$2 company' (say, an incorporated sole trader) and the individual employee/director possesses

128. TPA s 84(2).
129. TPA ss 87CC(1)(b) and (2).
130. TPA s 4(2).
131. Query what happens when the employee/director makes an inadvertent omission; common law principles may supplement the Act at this point. As cases under s 75B require knowledge of the essential matters of the contravention, it will be unlikely that inadvertent omissions will be an issue.
132. On the relevance of insolvency, see below pp 192-193. On another point, assume that a court apportions liability 60% to the corporation and 40% to the employee/director. If the corporation were also vicariously liable for the acts of the employee/director under some other principle of law, would s 87CI(a) mean that the corporation was also liable for the employee/director's share of the loss? See also below n 146.

the only real assets. It was in these circumstances that the old system of several liability offered the best prospects of recovery for the plaintiff.

One commentator has suggested that this difficulty can be avoided by reading down the definition of 'concurrent wrongdoer' in section 87CB so as to exclude situations where a director or senior manager commits an act singly but the company is primarily liable by operation of the principles in *Tesco*.[133] This argument is difficult to support because it does not give effect to section 84. First, section 84 already covers much of the ground that is covered by the principles of primary liability in *Tesco*. Second, section 84 contains clear deeming provisions and a clear statement that the section operates 'for the purposes of this Act'. Third, it would mean that misleading conduct perpetrated by the directing mind and will of a corporation would fall outside the apportionment process, but that the misleading conduct of a less important employee, caught by section 84, would be subject to apportionment. Why should there be such a distinction?

If the acts of the employee/director fall outside section 84, they may be of such an extraordinary nature that the corporation is not liable under any legal principles, although the individual may be liable personally under the relevant Fair Trading Act.[134] In other cases, the corporation may be rendered primarily or secondarily liable by operation of some other principle of law. How apportionment will work in these situations is a difficult question. There is some force in the view that, at least where only secondary liability arises, the actor and the corporation responsible will not generally be concurrent wrongdoers. This is because secondary liability implicitly distinguishes the act itself from responsibility for that act. The definition of concurrent wrongdoer in section 87CB refers only to 'acts' and section 87CI(a) recognises that a person may be vicariously liable for a proportion of a claim for which another person is liable.

The process of contribution among wrongdoers under Part VIA

Part VIA purports to provide a complete mechanism for dealing with claims that fall within its ambit.[135] There are provisions encouraging defendants to disclose other possible concurrent wrongdoers (by threat of a costs order being made against them)[136] and for adding those other potential wrongdoers to the proceedings.[137] The court has significant discretion to allocate the burden of the loss among the wrongdoers. The court may award against a defendant 'an amount reflecting that

133. McDonald above n 5, 47-48, appearing to refer to direct liability under the 'directing will and mind' principle in *Tesco Supermarkets Ltd v Nattrass* above n 127.
134. *Wong v Citibank Ltd* [2004] NSWCA 396.
135. However, the meaning of 'single apportionable claim' is not clear: see discussion above pp 172-174.
136. TPA s 87CE.
137. TPA s 87CH.

proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss'.[138] In doing so, the court may consider the comparative responsibility of non-party concurrent wrongdoers.[139]

How closely these apportionment provisions will follow the developed rules of equitable contribution or contribution between tortfeasors under statutory schemes remains to be seen. Several points can be made at this stage.

First, the reference in section 87CD to a contribution that is 'just' having regard to a defendant's responsibility appears similar to notions of 'general principles of justice'[140] or 'natural justice'[141] as used in equitable contribution.[142] It is also quite similar to the drafting of the tortfeasors' contribution statutes, which generally provide that the contribution 'shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage'.[143]

Second, as several commentators have noted, there may be difficulties where other alleged wrongdoers are not party to proceedings. Facts and issues that are decided in one proceeding are not binding in a later proceeding against a different party.[144] Different courts may make different findings of fact or reach different conclusions on the quantum of the plaintiff's loss or the respective responsibilities of alleged wrongdoers. Plaintiffs may also find that defendants in earlier proceedings shifted blame to non-parties who, when sued in later proceedings, can provide evidence that partly or entirely exculpates them.

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138. TPA s 87CD(1).
139. TPA s 87CD(3)(b). The approaches of some States differ on this point. In Victoria, the court generally must *not* have regard to the responsibility of non-parties: Wrongs Act 1958 (Vic) s 24AI(3); in Western Australia, the court generally 'is' to have regard to the responsibility of non-party wrongdoers: Civil Liability Act 2002 (WA) s 5AK(3)(b).
140. *Burke v LFOT* above n 35, McHugh J para 39, citing *Dering v Earl of Winchelsea* above n 37, 321.
141. Ibid, Gaudron ACJ & Hayne J para 22, citing Kitto J in *Albion Insurance Co v Government Insurance Office (NSW)* (1969) 121 CLR 342, 351.
142. But see below pp 192-193 regarding insolvency.
143. Eg Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 5(1)(c); Wrongs Act 1958 (Vic) Pt IV.
144. Estoppel by judgment binds only the parties to the proceedings except to the extent that a judgment operates in rem: *P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437, Hope JA 442. In the context of claims under s 82 for contraventions of s 52 by multiple wrongdoers, it is difficult to conceive of circumstances where a judgment would operate in rem. There are similar problems with issue estoppel or *Anshun* estoppel. In NSW and federally, under the uniform Evidence Acts, evidence of a previous finding of fact is not admissible in later proceedings to prove that fact: Evidence Act 1995 (Cth) s 91. For a good discussion of this issue, see Watson above n 7, 146-148.

Third, unlike the tortfeasor contribution statutes generally,[145] section 87CF of the TPA provides:

> 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 any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
>
> (b) cannot be required to indemnify any such wrongdoer.

The scope of this constraint is practically important, because concurrent wrongdoers may make cross-claims against each other. Also, where there are potential cross-claims among concurrent wrongdoers, how are these to be taken into account (if at all) when apportioning liability on the plaintiff's claims?

The first issue turns on the interpretation of the phrases 'required to contribute to any damages or contribution' and 'required to indemnify'. A narrow construction would confine the reference to equitable contribution or contribution or indemnity under another statute.[146] A broader construction could cover damages or contribution under a claim arising by other means, for example, through a contractual indemnity or a breach of contract or breach of trust. There is significant appeal in a narrow construction for three reasons. First, the language does not speak of barring all claims for damages, only claims for contribution or indemnity. Second, it fits with the purpose of Part VIA that this Part, and not some other system of contribution, ultimately apportions responsibility to the plaintiff for those claims that fall within its scope.[147] Third, it would be a bold step to assert that the legislation intended to override other types of claims, for example, indemnities under existing agreements, without clear words to that effect.[148]

Whatever the ambit of section 87CF, how will claims between concurrent wrongdoers be dealt with? The facts of *Lawson Hill Estate*, for example, essentially involved a chain of reliance and misrepresentation from Mr Dalton to Mr Grace, and from Mr

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145. Compare the text of s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW), above pp 167-170.
146. Such as the tortfeasor contribution statutes. If breach of s 52 is considered a 'tort' (see above n 32), query whether s 87CF was intended to affect provisions such as s 3(1) of the Employees Liability Act 1991 (NSW), which provides: 'If an employee commits a tort for which his or her employer is also liable ... (b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability)'.
147. See s 87CC(3).
148. McDonald above n 5, 44; Watson above n 7, 143-144. Different drafting in some State legislation more clearly preserves the operation of contractual indemnities: see eg Civil Liability Act 2002 (NSW) s 3A; Civil Liability Act 2002 (WA) s 5AL(2).

Grace to the real estate agent. Each link in the chain sued the preceding link, claiming damages or indemnity. In that case, all potential wrongdoers were party to the proceedings and the difficulties were resolved by applying the flexible principles of equitable contribution.

To explore the situation under Part VIA, consider a simple set of similar facts: C provides incorrect information to B who adopts it and presents it to A. A suffers loss. A sues C successfully for part of that loss. A subsequently sues B for the remainder. B obviously wants to shift responsibility to C. Does B (1) sue C for breach of section 52 and/or negligent misstatement, seeking compensation in respect of the amount B has to pay A?[149] or (2) argue that its liability as a concurrent wrongdoer in respect of A's loss is to be reduced considering C's responsibility for the loss? or (3) do both?

On these facts, the second approach is the simplest and probably best promotes the purpose of Part VIA. The court apportions B's liability for A's loss by an appropriate amount and disregards the legal claim between B and C. The alternative approaches result in an initial apportionment of C's liability, followed by proceedings by B that may ultimately change the overall allocation of responsibility. However, query whether the language of Part VIA and section 87CF in particular requires B to adopt the simplest approach.[150] If the court were to justify the simplest approach by a broad interpretation of the prohibition on contribution or indemnity in section 87CF, it is difficult to see how the court could avoid the conclusion that the prohibition also extends to other kinds of claims for contribution or indemnity, such as claims based in contract.

The above example is somewhat beguiling because C's conduct was both a cause of A's loss and a cause of B's contribution to A's loss, and B was suing C under section 52 to meet B's liability to A. In other situations, the facts may clearly suggest that the cross-claims are purely a matter for the defendants inter se and should be treated as logically distinct from the plaintiff's claims. For example, B's claim against C may arise under an agreement that is unconnected to their misleading conduct towards A, or B's claim against C may be for an amount different from that which B must pay A.[151]

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149. B faces two practical problems with this strategy. First, s 87CF (see above) may prevent B from suing C. Second, C may argue that B has not suffered any real loss due to C's misleading conduct unless and until A receives judgment against B. Hence, B may not be able to commence an action under s 82 against C until A's action against B is decided. S 87 does not permit indemnity orders in advance of judgment: *Lawson Hill Estate* above n 9, 507.

150. B's claim against C is, strictly, not in respect of the same loss or damage as A's claim against B and C, and so they cannot necessarily be treated as part of a single apportionable claim under s 87CB.

151. Perhaps B has suffered additional loss, or B's claim in damages is based on a contractual, rather than tortious, measure of damages.

It will be interesting to see what rules the case-law develops for determining when claims among concurrent wrongdoers should be dealt with as part of the apportionment process and when they should be kept separate.

Insolvency of wrongdoers under Part VIA

Section 87CB(5) of the TPA provides:

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

Commentators have interpreted this paragraph in isolation as directing that the plaintiff bear the risk of a wrongdoer's insolvency or disappearance, death or extinction.[152] While for the reasons given below this view of the effect of section 87CB(5) is correct, this conclusion cannot be sustained on those words alone and requires more detailed explanation.

By way of background, the Explanatory Memorandum is not particularly helpful on this point. It states:

> Under this proposal, the costs to plaintiffs of the risk of the insolvency or inability to trace defendants *may* be transferred from co-defendants to the plaintiff.[153]

The grammar is not ideal, but note that the word 'may' is used, rather than 'is' or 'will be'.

Furthermore, section 87CB(5) applies to all provisions of Part VIA and not just section 87CD, which deals with the apportionment of liability per se. So, for example, a solvent defendant who knows of another, insolvent, concurrent wrongdoer would still be expected to disclose that fact.[154] Likewise, insolvent companies would receive the protection of section 87CF against claims for further contribution.

The next step is to consider the interplay between sections 87CB(3) and (5) and section 87CD(1). The drafting in sections 87CB(3) and (5) makes clear that an entity that is a concurrent wrongdoer in respect of the relevant loss or damage remains so, regardless of whether it is now insolvent or has ceased to exist. Under section 87CD(1), the liability of a defendant who is a concurrent wrongdoer is limited to an amount that is 'just having regard to the extent of the defendant's responsibility for the damage or loss'. Under principles of equitable contribution, justice requires that all solvent debtors contribute to discharge the common obligation. If one or

152. Above nn 5, 7.
153. See the Explanatory Memorandum to the CLERP 9 Bill, para 4.129 (emphasis added).
154. TPA s 87CE.

more of the debtors is insolvent, the burden on the solvent ones is increased because 'those who can pay must not only contribute their own shares but they must also make good the shares of those who are unable to furnish their own contribution'.[155] Where Part VIA departs from the equitable rule is that the use of the word 'just' in section 87CD(1) is expressly conditioned upon assessment of responsibility for the loss. Hence, the proper focus, on the drafting, is 'how much of a role did the defendant play in causing the loss?' rather than 'what is a fair amount, considering others' capacity to pay?' It is for this reason that the plaintiff bears the risk of a defendant's insolvency.

CONCLUSION

From the foregoing discussion, several things are clear. The efficacy of the new amendments depends greatly on what claims are caught by them, and how those claims are joined together to be apportioned. The omission of the other provisions of Part V from the scope of apportionable claims means that some plaintiffs may now frame their pleadings carefully to obtain a tactical advantage. Part VIA may also interact with corresponding State and Territory laws in an inconsistent or unusual manner, so that in some cases corporations may receive more beneficial apportionment than individuals. Finally, it is not clear how the contribution and apportionment process will operate when employees or directors of corporations, or cross-claims among concurrent wrongdoers, are involved.

It is somewhat surprising that legislation so long in its gestation leaves so many questions unanswered. When the legislation is compared against the objectives stated in the Explanatory Memorandum (viz, to prevent deep-pocket syndrome, limit a defendant's liability to their responsibility for the loss, and improve insurance premiums for professionals) it seems to be a limited success. Its coverage is uncertain and uneven. One may wonder whether an auditor who breaches section 52 and contributes to a corporate collapse will be any better off; a small contribution to a huge loss is still a significant amount of money. Finally, it is difficult to find consensus among professionals on whether professional insurance premiums have fallen.

If the policy objectives of the amendments are still considered important, a more thorough and diverse regime, incorporating professional standards[156] or an alteration of the threshold standard of liability,[157] may prove more effective.

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155. Mason & Carter above n 37, para 614, citing *Love & Sons v Dixon & Sons* (1885) 16 QBD 455, Lopes LJ 458.
156. A framework for this already exists in s 87AB of the TPA.
157. See the discussion in the Ipp Report, and also in the Explanatory Memorandum to the CLERP 9 Bill, paras 4.103–4.105.