

## CHAPTER 3: PROPORTIONATE LIABILITY

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### Overview

363. The Bill will amend the ASIC Act and the *Trade Practices Act 1974* (Trade Practices Act) to ensure that proportionate liability applies to damages for economic loss for misleading or deceptive conduct.

364. The Commonwealth, State and Territory Treasury Ministers, the Standing Committee of Attorneys-General and the Ministerial Council for Corporations have endorsed the following key features of a model of proportionate liability:

- in applying proportionate liability to a claim, a Court will be able to have regard to the comparative responsibility of any wrongdoer who is not a party to the proceedings;
- a defendant to a claim to which proportionate liability can apply, will be obliged to notify the plaintiff in writing, at the earliest possible time, of the identity and alleged role of any other person(s) of whom the defendant is aware, who could be held liable for the plaintiff's loss or any part of it;
- where a defendant fails to discharge the disclosure obligation proposed, the Court will have a discretion to order that the defendant pay any or all of the plaintiff's costs, on an indemnity basis or otherwise; and
- intentional torts and claims involving fraud will be excluded from the application of proportionate liability, and the law governing contributory negligence, vicarious liability, the liability of partners in a partnership and the liability of a principal for acts of an agent within the scope of the agent's commission, will not be affected.

365. Schedule 3 of the Bill implements the agreed model in relation to the relevant Commonwealth legislation. The final form of the legislative provisions implementing the proposed proportionate liability reforms is subject to further discussions within the Commonwealth, State and Territory ministerial bodies referred to above.

366. To implement proportionate liability, Schedule 3 of the Bill makes corresponding amendments to the ASIC Act, the Corporations Act and the Trade Practices Act.

367. The Bill applies the proportionate liability regime to claims for damages in respect of a contravention of the misleading and deceptive conduct provisions contained in the ASIC Act (subsection 12GF(1)), the Corporations Act (subsection 1041I(1)) and the Trade Practices Act (section 52) (see items 1 to 6).

## **Amendments to the ASIC Act**

### **Claims to which proportionate liability applies**

368. Proposed subsection 12GP(1) provides that Subdivision GA applies to a claim for damages if :

- the claim is made under section 12GF for economic loss or damage to property caused by conduct that was done in a contravention of section 12DA; and
- the economic loss, or the damage to property, was not caused intentionally or fraudulently.

369. Proposed subsection 12GP(2) defines the term 'concurrent wrongdoer'. A concurrent wrongdoer, in relation to a claim, is one of two or more persons whose acts or omissions, independently of each other or jointly, caused the damage or loss that is subject to the claim.

370. Proposed subsection 12GP(3) provides that for the purposes of this Subdivision, apportionable claims are limited to those claims specified in subsection (1).

371. Proposed subsection 12GP(4) provides that for the purposes of this Subdivision, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

### **Proportionate liability for apportionable claims**

372. Proposed subsection 12GQ(1) provides that the liability of a defendant who is a concurrent wrongdoer in proceedings involving an apportionable claim is to be limited to an amount reflecting that person's responsibility for the loss or damage in question. It also provides that the court may give judgment against the defendant for not more than that amount.

373. Proposed subsection 12GQ(2) provides that if proceedings involve both an apportionable claim and some other claim, then only the apportionable claim is to be determined in accordance with the proposed Subdivision GA. Existing law will continue to apply to the non-apportionable claim.

374. Proposed subsection 12GQ(3) provides that in apportioning responsibility between defendants in the proceedings:

- the court is to exclude that proportion of the loss attributable to a plaintiff's contributory negligence under any relevant law; and
- the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

375. Proposed subsection 12GQ(4) provides that the section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

376. Proposed subsection 12GQ(5) provides that a reference in this Subdivision 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 Subdivision, under rules of court or otherwise.

#### Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

377. Proposed section 12GR provides that where a defendant who has reasonable grounds to believe that a particular person may be a concurrent wrongdoer in relation to the claim, fails to give the plaintiff, as soon as practicable, written notice about the identity of the person, then the court may order the defendant to pay all of the costs in the proceedings which the plaintiff has unnecessarily incurred. The costs order may be made on an indemnity basis or on some other basis.

#### Contribution not recoverable from defendant

378. Proposed section 12GS provides that a defendant against whom judgment is given under this Subdivision cannot be required to contribute to any damages or contribution recovered from another wrongdoer in respect of the apportionable claim and cannot be required to indemnify any such wrongdoer.

#### Subsequent actions

379. Proposed section 12GT enables a plaintiff to bring an action against a concurrent wrongdoer even though the plaintiff has previously brought an action against another concurrent wrongdoer in respect of the same damage or loss. However, in such subsequent proceedings the plaintiff cannot recover damages that would result in the plaintiff receiving compensation greater than the loss or damage actually sustained by the plaintiff.

### Joining non-party concurrent wrongdoer in the action

380. Proposed section 12GU enables the court to join any one or more persons as defendants in proceedings involving an apportionable claim, unless a person was a party to any previously concluded proceedings in respect of the apportionable claim.

### Application of Subdivision

381. Proposed section 12GV provides that certain matters are not affected by the proposed Subdivision. In particular:

- a person can still be held vicariously liable for a proportion of any apportionable claim;
- a partner can still be held severally liable with another partner for the proportion of an apportionable claim for which the other partner is liable; and
- any other statutory provisions imposing several liability will not be affected.

## **Amendments to the Corporations Act and the Trade Practices Act**

382. Items 4 and 6 replicate the amendments described above in the context of the Corporations Act and the Trade Practices Act.