SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

TESSERACT INTERNATIONAL PTY LTD v PASCALE CONSTRUCTION PTY LTD

[2022] SASCA 107

Judgment of the Court of Appeal

(The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice Bleby)

21 October 2022

ARBITRATION - CONDUCT OF ARBITRAL PROCEEDINGS - STATING CASE TO COURT IN COURSE OF REFERENCE - QUESTIONS OF LAW

TORTS - GENERALLY - MULTIPLE WRONGDOERS, PROPORTIONATE LIABILITY AND CONTRIBUTION

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - THE CONTRACT - CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS - IMPLIED TERMS

ARBITRATION - CONDUCT OF ARBITRAL PROCEEDINGS - POWERS, DUTIES AND DISCRETION OF ARBITRATOR

This is an application for the determination of a question of law arising in the course of an arbitration, made under s 27J of the *Commercial Arbitration Act 2011* (SA).

The arbitration concerns a contractual dispute between the applicant company and respondent building company in relation to certain engineering and consultancy services performed by the applicant for the design and construction of a warehouse building in South Australia. The respondent advances claims for breach of contract, in negligence, and for misleading and deceptive conduct contrary to s 18 of the *Australian Consumer Law*.

The applicant denies any liability. In the alternative, it contends that any damages payable should be reduced by reason of the respondent's contributory negligence (under Part 2 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (Law Reform Act) and Part XI of the *Competition and Consumer Act 2010* (Cth) (CCA)). Further, or in the alternative, it contends that any damages should be reduced to reflect the proportionate liability of a third party concurrent wrongdoer (under Part 3 of the Law Reform Act and Part VIA of the CCA).

Applicant: TESSERACT INTERNATIONAL PTY LTD ACN 605 897 596 Counsel: MR B WALKER SC WITH MR T MARGETTS KC AND MR L CONNOLLY - Solicitor: FENWICK ELLIOTT GRACE

Respondent: PASCALE CONSTRUCTION PTY LTD ACN 008 073 676 Counsel: MR F HICKS SC WITH MR B MCMANUS - Solicitor: FBR LAW

Hearing Date/s: 10/03/2022

File No/s: CIV-21-013642

A

The respondent contends that the Arbitrator is not entitled to invoke the proportionate liability provisions in the arbitration proceedings. Accordingly, an application was made to, and granted by, the Court for leave to obtain a determination of a question of law arising in the arbitration. The question of law arising is:

Does Part 3 of the Law Reform Act and/or Part VIA of the CCA apply to this commercial arbitration proceeding conducted pursuant to the legislation and the Commercial Arbitration Act 2011 (SA)?

The applicant contends that the question should be answered in the affirmative. It relies on three strands of reasoning: first, that the proportionate liability provisions constitute applicable rules of law as part of the substantive law of South Australia; secondly, that properly construed the provisions in the Law Reform Act apply to arbitration proceedings by force of their own terms; and thirdly, that the provisions are able to be applied in the proceedings by reason of an implied term that the Arbitrator has authority to grant the parties any relief that would have been available in a court of appropriate jurisdiction.

The respondent submits that the question should be answered in the negative. It emphasises the private and consensual nature of arbitration, the incongruity inherent in binding third parties not subject to those proceedings, and that the language of the provisions tells against the application of those provisions to arbitration proceedings.

Held, per Doyle JA (Livesey P and Bleby JA agreeing), answering the question 'No':

1. While the proportionate liability regimes under the Law Reform Act and CCA form part of the substantive law governing the resolution of the dispute between the parties under s 28(3) of the Commercial Arbitration Act 2011 (SA), that section does not require that every substantive law within the regimes apply to the arbitration proceedings. It is therefore necessary for the provisions to apply either by force of their own terms, or by reason of an implied term in the arbitration agreement.

2. The proportionate liability provisions in the Law Reform Act and the CCA do not apply to arbitration proceedings by force of their own terms in arbitration proceedings.

3. The parties have, through the dispute resolutions provisions in the contract, impliedly conferred the arbitrator with the power to determine their dispute as though it were being determined in a court of law with appropriate jurisdiction.

4. However, this conferral of power was subject to such qualifications as required by statute. There are features of the proportionate liability regimes under both the Law Reform Act and the CCA that indicate an objective intention on the part of the relevant legislature that they not apply arbitration proceedings.

Civil Liability Act 2002 (NSW); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (Qld); *Commercial Arbitration Act 1986* (SA) s 22; *Commercial Arbitration Act 2011* (SA) ss 27J, 28; *Competition and Consumer Act 2010* (Cth) ss 87CB, 87CC, 87CD, 87CE, 87CF, 87CG, 87CH, 87CI, 137B; Sch 2, ss 18, 236; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 3, 4, 7, 8, 9, 10, 11, referred to.
620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 3) [2006] VSC 492; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; *Alliance Petroleum Australia NL v Australian Gas Light Co* (1983) 34 SASR 215; *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89; *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASSFC 3; *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656; *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Cufone v Cruse* [2000] SASC 17; *Cufone v Cruse* [2000] SASC 304; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Kerr v Australian Executor Trustees (SA) Ltd* [2019] NSWSC 1279; *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (1993) 43 FCR 439* (1993) 43 FCR 439; *Passlow v Butmac Pty Ltd* [2012]

NSWSC 225; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Re Form 700 Holdings Pty Ltd* [2014] VSC 385; *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) 246 ALR 589; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398; *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1996) 66 SASR 509; *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49; *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418, considered.

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Court of Appeal – Civil: Livesey P, Doyle and Bleby JJA

1 **LIVESEY P**: I agree with the reasons of Doyle JA.

2 **DOYLE JA:** The applicant seeks the determination of a question of law that has arisen in the course of an arbitration between the parties. In essence, the question is whether the proportionate liability provisions under the relevant South Australian[1] and Commonwealth[2] legislation apply to the arbitration proceedings.

Background

3 The applicant (**Tesseract**) is a company that provides engineering consultancy services. The respondent (**Pascale**) is a building company.

4 Tesseract and Pascale entered into a sub-contract dated 14 October 2015 (**the Contract**) by which Tesseract agreed to provide engineering consultancy services to Pascale in relation to the design and construction of a warehouse building for Bunnings Group Ltd in Windsor Gardens, South Australia. Tesseract and Pascale are referred to in the Contract as the Consultant and the Builder respectively.

5 A dispute has arisen between the parties as to the quality of the work undertaken by Tesseract under the Contract. Pascale alleges, *inter alia*, that Tesseract's work was not performed to the standard required under the Contract and that it has thereby suffered loss and damage. Tesseract denies this allegation.

6 The Contract contains a process for resolving disputes under clauses 20 to 22. Under clause 20.1, if a dispute between the Builder and Consultant arises "in connection with this Contract", then either party must deliver to the other a notice of dispute identifying and providing details of the dispute. The balance of clause 20 provides for a process of conciliation of the dispute, and, in the event that the dispute is not resolved through conciliation, clause 21 provides for a process of arbitration. Clause 22 sets out various rules applicable to the contemplated conciliation and arbitration processes.

7 In November 2019, Pascale sent Tesseract a notice of dispute. The dispute was subsequently referred to arbitration under clause 21 of the Contract. The Honourable Wayne Martin AC KC was appointed arbitrator (**the Arbitrator**). Pascale is the claimant, and Tesseract the respondent, in the arbitration proceedings.

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1 Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA).
2 Part VIA of the *Competition and Consumer Act 2010* (Cth).

8 In its statement of claim, Pascale makes a number of allegations against Tesseract. It alleges that Tesseract's work in connection with the design and construction of the warehouse building for Bunnings, both during the tender process and following entry into the Contract, was in several respects deficient and not performed to the standard represented and required under the Contract. For the purposes of this appeal, there is no need to summarise the detail of the allegations. It is enough to observe that Pascale's allegations include claims for breach of various terms of the Contract, for breach of a duty of care in negligence, and for misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law* (**ACL**) (which appears in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**)).[3] The relief sought by Pascale includes not only common law damages but also damages under s 236 of the ACL.

9 In its defence, Tesseract denies any breach of the contractual or tortious duties pleaded against it, or that it engaged in any misleading or deceptive conduct in contravention of s 18 of the ACL. In the alternative, Tesseract pleads that any damages payable by it should be reduced by reason of the contributory negligence of Pascale, under s 7 of Part 2 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**the Law Reform Act**) in the case of the allegations of breach of a contractual or tortious duty of care, and under s 137B of Part XI of the CCA in the case of the allegations of misleading or deceptive conduct under s 18 of the ACL.

10 Importantly for present purposes, Tesseract also pleads, in the alternative to its denial of liability, that any damages payable by it should be reduced by reason of the proportionate liability provisions under Part 3 of the Law Reform Act (in the case of the allegations of breach of a contractual or tortious duty of care), and Part VIA of the CCA (in the case of the allegations of misleading or deceptive conduct under s 18 of the ACL). In invoking these proportionate liability provisions, Tesseract pleads that a Mr Penhall is a wrongdoer vis-à-vis Pascale. In particular, Tesseract alleges that Mr Penhall was engaged by Pascale to assist it in preparing its tender for the design and construction of the warehouse building; that Mr Penhall owed Pascale a duty of care in carrying out that work; that Mr Penhall breached his duty of care to Pascale; and that in the event that Pascale establishes an entitlement to recover a sum in damages from Tesseract, Mr Penhall is a concurrent wrongdoer, with the result that any damages payable by Tesseract should be reduced to an amount reflecting its proportionate responsibility for the loss and damage suffered by Pascale under s 8(2) of the Law Reform Act or s 87CD of the CCA.

11 In its reply, Pascale denies the applicability of these proportionate liability provisions. It does so both on the basis that these provisions do not apply on the facts of the present case, and on the more fundamental basis that Tesseract is not entitled to invoke those provisions in the Arbitration proceedings. It is the issue

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[3] And applies as a law of the Commonwealth by reason of s 131 of the CCA.

raised by the second of these bases for Pascale's denial that is the subject of the present application for determination by this Court of a question of law.

12 The Arbitrator made an order that by 10 December 2021 Tesseract shall, pursuant to s 27J of the *Commercial Arbitration Act 2011* (SA), make an application to the Court for leave to obtain a determination of any question of law arising in the arbitration. That application was duly made, with the parties agreeing that the question of law be stated as follows:

> Does Part 3 of [the Law Reform Act] and/or Part VIA of [the CCA] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [*Commercial Arbitration Act*]?

13 On 21 December 2021, and with the consent of Pascale, Livesey P granted Tesseract leave to make an application for the determination of this question of law.

Proportionate liability

14 The introduction around Australia of various proportionate liability regimes, intended to entitle a defendant to confine its liability for a plaintiff's loss to the proportion of that loss for which it is responsible, represented a radical change from the common law approach of solidary liability.

15 Under the common law, any defendant wrongdoer who caused or contributed to the plaintiff's loss was liable for the entirety of that loss, regardless of whether there were other wrongdoers who also caused or contributed to the loss, and hence regardless of the defendant's individual share or proportion of the responsibility for that loss. Under this regime of solidary liability, it was for the defendant to join or separately sue the other wrongdoer(s), relying upon its right to contribution from the other wrongdoer(s), if it wished to confine its ultimate liability to its proportion of the responsibility for that loss. In this way, the defendant bore both the burden of joining or separately suing the other wrongdoer(s), and the risk of any shortfall in the event that another wrongdoer was uninsured or impecunious, or was otherwise unable to be located or sued for some reason.

16 Under a regime of proportionate liability, on the other hand, this burden and risk are transferred to the plaintiff. The defendant's liability is limited to its share or proportion of the responsibility for the plaintiff's loss, leaving it to the plaintiff, if it wishes to recover its full loss, to join the other wrongdoer(s) or to separately sue the other wrongdoer(s), and to bear the risk of any shortfall in recovery.

17 In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)*,[4] Finkelstein J summarised the background to, and impetus for, the introduction of

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[4] *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656.

the various proportionate liability regimes around Australia in the following terms:[5]

> Proportionate liability was introduced into state and federal legislation following an inquiry into the law of joint and several liability established by the Commonwealth and the New South Wales Attorneys-General in 1994. The impetus for the inquiry was the growing number of actions against professionals, particularly auditors, who were being singled out as targets for negligence actions not because of their culpability (which might be small) but because they were insured and had the capacity to pay large damages awards. One consequence was a sharp rise in insurance premiums payable by professionals. The inquiry was conducted by Professor Davis of the Australian National University. He published stage one of his report in July 1994 and stage two in January 1995. In his report Professor Davis recommended that joint and several liability for negligence which causes property damage or economic loss be replaced by liability which is proportionate to each defendant's degree of fault.
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> Draft model provisions that reflected the recommendation of the enquiry were published in July 1996 in the form of a part that could be inserted into appropriate legislation. The Commonwealth, State and Territory governments agreed to amend relevant legislation, based on the draft model provisions, to facilitate the introduction of a nationally consistent proportionate liability regime in respect of claims for economic loss or property damage. To implement its part of the agreement the Commonwealth amended the *Australian Securities and Investments Commissions Act 2001* (Cth), the *Corporations Act 2001* (Cth) and the *Trade Practices Act* so that proportionate liability applied to claims for economic loss or property damage arising from misleading and deceptive conduct. By amendments to the Wrongs Act, Victoria introduced proportionate liability in respect of claims for economic loss or property damage arising from a failure to take reasonable care.

18 The present application requires consideration of the proportionate liability regimes enacted in South Australia (under Part 3 of the Law Reform Act) and by the Commonwealth (under Part VIA of the CCA). While similar in their practical operation and effect, there are differences between the terms and detail of these two regimes. There are similar differences between these regimes and the various other proportionate liability regimes that have been enacted in the other states and territories of Australia.

19 In *Aquagenics Pty Ltd v Break O'Day Council*,[6] Evans J summarised the implications of the introduction of proportionate liability, and some of the differences between the regimes implemented in the various jurisdictions around Australia:[7]

> Speaking generally, where proportionate liability legislation applies, in order for a claimant to recover 100 per cent of the claimant's loss, the claimant must sue each and every wrongdoer who contributed to that loss. No wrongdoer is liable to the claimant for more than that wrongdoer's share of responsibility for the loss. This generalisation is, of course, subject to the terms of the proportionate liability provisions in the particular jurisdiction. For example, an important distinction to be drawn between the legislation in this jurisdiction and New South Wales, when compared with that in Victoria, is that under the

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5 *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [4]-[5] (Finkelstein J), being a passage cited in numerous subsequent decisions.

6 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3.

7 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [11]-[12] (Evans J, Wood J agreeing).

> Victorian legislation, a court may only have regard to the comparative responsibility of the parties before it, unless the reason for a wrongdoer not being a party is death or, if a corporation, that it has been wound up. In Tasmania and New South Wales, a court apportioning responsibility between defendants to proceedings is to have regard to the comparative responsibility of every concurrent wrongdoer, regardless of whether or not that wrongdoer is a party to the proceedings, see the *Civil Liability Act* (Tas), s43B(3)(b) and the *Civil Liability Act* 2002 (NSW), s35(4). To my mind, an important consequence of the application of the proportionate liability legislation to a claim is that it results in the claimant bearing the risk of the insolvency of any concurrent wrongdoer. See the provisions of the *Civil Liability Act* (Tas), already referred to, coupled with s43A(4). As to the significance of the changes made to the law by the proportionate liability legislation see McDonald B, *Proportionate Liability in Australia: The Devil in the Detail* (2005) 26 Australian Bar Review 29.
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> In view of the startling impact of these changes to the proportionate liability of wrongdoers in relation to claims covered by the legislation, it is not surprising that the relevant legislation in this jurisdiction, New South Wales and Western Australia includes a contracting out provision. There is no express provision, either way, as to contracting out in the proportionate liability legislation introduced in the Australian Capital Territory, the Northern Territory, South Australia or Victoria, nor in respect of the Commonwealth provisions contained in the *Trade Practices Act* 1974. Contracting out is prohibited in Queensland, see the *Civil Liability Act* 2003 (Qld), s7(3).

20 I shall return to the potential significance of some of these differences between the various regimes later in these reasons. For the moment it is appropriate to focus upon the terms of the proportionate liability provisions in the relevant South Australian and Commonwealth legislation.

The proportionate liability provisions in South Australian legislation

21 Under s 4(1) of the Law Reform Act, the provisions of that Act apply to any liability in damages that arises (a) under the law of torts, (b) for breach of a contractual duty of care, or (c) under statute.

22 Part 2 of the Act addresses the right of a defendant who is liable in damages to seek contribution from a third person liable in damages for the same harm (s 6), and to seek a reduction in the damages payable on account of the plaintiff's contributory negligence (s 7).

23 It may be observed in passing that while contribution and contributory negligence have long been an accepted feature of the Australian legal system, these statutory provisions, when first enacted, also represented radical departures from the common law.

24 For reasons which will become apparent when later analysing the application of the provisions of Part 3, it is relevant to set out the terms of the s 7 limit upon a defendant's liability by reason of contributory negligence on the part of the plaintiff (referred to as the claimant):

7—Apportionment of liability in cases where the person who suffers primary harm is at fault

(1) If contributory negligence contributes to (but is not the sole cause of) the harm for which a claimant seeks damages, the claim is not to be defeated on the ground of the contributory negligence.

(2) If a claimant's harm is caused partly by another's negligent wrongdoing and partly by contributory negligence, the court must proceed as follows:

(a) the court must determine (and record) the amount of the damages to which the claimant would have been entitled assuming there had been no contributory negligence; and

(b) the court must then reduce the amount so determined to the extent the court thinks just and equitable having regard to the extent the contributory negligence contributed to the harm.

(3) This section applies subject to—

(a) any contractual modification, exclusion or limitation binding on the claimant or, in the case of a claim for damages for derivative harm, on the person who suffered the primary harm; and

(b) any statutory modification, exclusion or limitation.

(4) In this section, a reference to contributory negligence extends, in the case of a claim for derivative harm, to negligence on the part of the person who suffered the primary harm.

25 The proportionate liability provisions are contained in Part 3 of the Law Reform Act. They were enacted in 2005. Their operation is predicated upon a defendant's liability for damages being in respect of an apportionable liability. Under s 3(2):

(2) A liability is an ***apportionable liability*** if the following conditions are satisfied:

(a) the liability is a liability for harm (but not derivative harm) consisting of—

(i) economic loss (but not economic loss consequent on personal injury); or

(ii) loss of, or damage to, property;

(b) 2 or more wrongdoers (who were not acting jointly) committed wrongdoing from which the harm arose;

(c) the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent.

Example—

A, who acts with intention to defraud, prepares a false and deceptive statement. B, who is not aware of the fraud, negligently publishes the statement to C, who relies on it and suffers financial loss in

consequence. C brings an action against A and B under section 56 of the *Fair Trading Act 1987*. In this case, B's liability is an apportionable liability but A's is not.

26 The proportionate liability provisions of Part 3 are then in the following terms:

Part 3—Apportionable liability

8—Limitation of defendant's liability in cases of apportionable liability

(1) If a defendant's liability on a claim for damages is apportionable, the liability is limited under this section.

(2) If the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is fair and equitable having regard to—

(a) the extent of the defendant's responsibility for the harm; and

(b) the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm.

(3) For the purpose of subsection (2)—

(a) 2 or more wrongdoers who are members of the same group are to be treated as a single wrongdoer; and

(b) if the plaintiff was guilty of contributory negligence, that contributory negligence will be brought into account as wrongdoing and a percentage assigned to it; and

(c) if 2 or more wrongdoers are each entitled to the benefit of a limitation of liability under this section (for some reason other than that they are members of the same group), the aggregate percentage assigned to them cannot exceed—

(i) if there is no contributory negligence on the plaintiff's part—100%; or

(ii) if there is contributory negligence on the plaintiff's part—100% less a percentage representing the extent of the plaintiff's responsibility for his or her harm.

(4) In a case involving apportionable liability, the court must proceed as follows:

(a) the court first determines the plaintiff's notional damages;

(b) the court gives judgment against any defendant whose liability is not subject to limitation under this section for damages calculated without regard to this Part;

(c) the court determines, in relation to each defendant whose liability is limited under this section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability;

(d) the court then gives judgment against each such defendant based on the assessment made under paragraph (c) (but in doing so must give effect to any special limitation of liability to which any of them may be entitled).

Example—

A Ltd (which runs a forestry business) has engaged B (an independent contractor) to protect its forest from fire. C (an arsonist) sets the forest on fire. B is negligent in failing to detect and stop C's malicious act. A Ltd sues B and C for damages. In this case, B would be entitled to a limitation of liability under this section but C would not. In working out the amounts for which judgment should be given, the court would determine first the amount of damages necessary to cover the damage caused by the fire. Judgment for that amount would be given against C. In determining the amount for which judgment should be given against B, responsibility for the damage would be divided between B and C on essentially the same basis as would formerly have been applicable to an action for contribution between them. Judgment would be given against B for an amount reflecting the proportionate responsibility assigned to B on that basis.

(5) The plaintiff is not entitled to recover, by way of damages under the judgment, more than the amount fixed as the plaintiff's notional damages.

Example—

Suppose that A has suffered a loss of $1 000 for which B, C and D are liable. The liability of B and C is limited to 20% and 30% respectively, but D's liability is not limited. Judgment is therefore given against B for $200, against C for $300 and against D for $1 000. In this case, the court would fix $1 000 as the plaintiff's notional damages—thus limiting the damages that the plaintiff is entitled to recover under the judgment to that amount. If A proceeded first to recover in full against B and C, recovery against D would be limited to $500. Conversely, recovery in full against D would preclude recovery against B and C. But rights of contribution may arise—see section 9.

(6) However, this section does not affect the award of exemplary damages and, if such damages are awarded, they may be recovered in the ordinary way from a defendant against whom they were awarded.

9—Contribution

In a case in which the liability of one or more wrongdoers is limited under this Part, the provisions of Part 2 regarding contribution apply but subject to the following qualifications:

(a) no order for contribution between wrongdoers whose liability is limited may be made;

Exception—

Contribution will be allowed between wrongdoers who are members of the same group, in respect of the liability of the group, in the same way (and subject to the same exceptions) as apply under Part 2.

(b) no order for contribution may be made in favour of a wrongdoer whose liability is limited against a wrongdoer whose liability is not limited;

(c) no order for contribution may be made in favour of a wrongdoer whose liability is not limited (A) against a wrongdoer (B) whose liability is limited unless A has fully satisfied the judgment debt, and, if such an order is made, the amount of contribution awarded against B cannot exceed the amount of B's liability for damages under the judgment.

10—Procedural provision

(1) If a defendant entitled to a limitation of liability under this Part has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim, the defendant must, as soon as practicable, provide the plaintiff with information that is in the defendant's possession, or reasonably available to the defendant (and not equally available to the plaintiff), about—

(a) the other person's identity and whereabouts; and

(b) the circumstances giving rise to the other person's liability.

(2) If a defendant fails to comply with its obligation under this section, a court may order the defendant to pay costs incurred in proceedings that could have been avoided if the obligation had been carried out.

(3) A court may order that costs payable under this section be assessed on the basis of an indemnity.

11—Separate proceedings

If a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—

(a) the amount of the plaintiff's notional damages; and

(b) the proportionate liability of each wrongdoer who was a party to the action in which the judgment was given; and

(c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.

27 It will be necessary to return to some of the features of this legislation in due course, but I make the following observations by way of broad overview.

28 The regime for proportionate liability under the Law Reform Act operates in circumstances where a defendant is liable for damages in respect of an apportionable liability (being a liability in respect of which another wrongdoer is, or wrongdoers are, also liable) (ss 3(2) and 8(1)). It operates to limit the defendant's liability to a percentage of the plaintiff's notional damages that is fair and equitable having regard to the responsibility of the defendant and the other wrongdoer(s) (including those not party to the proceedings) for the relevant harm (s 8(2)).

29 Subsections 8(3) and (4) are ancillary provisions that set out the detail of the mechanism for determining and giving effect to the limitation upon the defendant's liability. In essence, the mechanism involves determining the plaintiff's notional damages (less a percentage reduction for any contributory negligence on the part of the plaintiff), assigning a percentage for the responsibility of each wrongdoer, and then entering judgment against each wrongdoer for a sum that reflects the extent of that wrongdoer's liability.

30 Subsection 8(5) operates to confine a plaintiff's ultimate recovery to the amount fixed as the plaintiff's notional damages, and s 8(6) excludes exemplary damages from the operation of the proportionate liability provisions.

31 Section 9 operates to ensure that a defendant's contribution rights are adjusted so that they operate consistently with the proportionate liability provisions.

32 Section 10 places an obligation upon a defendant, who has reasonable grounds to believe that a non-party may also be liable on the plaintiff's claim, to give the plaintiff certain information about that other potential wrongdoer and the circumstances giving rise to their potential liability (s 10(1)). It also exposes that defendant to consequences if it fails to comply with this obligation (ss 10(2) and (3)). Self-evidently this section is intended to assist the plaintiff to be in a position to make an informed decision whether or not to seek to join any other potential wrongdoer to its action against the defendant.

33 Section 11 addresses the prospect of subsequent actions by the plaintiff against other wrongdoers. As such, it plainly contemplates that, despite s 10, such wrongdoers may not have been included as parties to the original action. The section provides that the judgment first given determines for the purposes of all other actions:

(a) the amount of the plaintiff's notional damages;

(b) the proportionate liability of each wrongdoer who was a party to the first action; and

(c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.

The proportionate liability provisions in the Commonwealth legislation

34 Similar proportionate liability provisions exist in Part VIA of the CCA. They are in the following terms:

Part VIA—Proportionate liability for misleading and deceptive conduct

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 236 of the Australian Consumer Law for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 18 of the Australian Consumer Law.

(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).

(5) 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.

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

(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.

87CE Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

(1) If:

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the ***other person***) may be a concurrent wrongdoer in relation to the claim; and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person; and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

87CF Contribution not recoverable from defendant

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.

87CG Subsequent actions

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

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

87CH Joining non-party concurrent wrongdoer in the action

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

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

87CI Application of Part

Nothing in this Part:

(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

35 By way of overview, the proportionate liability provisions in the CCA apply to an apportionable claim, being a claim for damages under s 236 of the ACL for misleading or deceptive conduct in contravention of s 18 of the ACL (s 87CB(1)). They operate in circumstances where two or more persons (being concurrent wrongdoers) are liable in respect of that claim.

36 The provisions operate to limit the liability of a defendant who is a concurrent wrongdoer in relation to that claim 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 that damage or loss (s 87CD(1)). They provide

that in apportioning responsibility between the defendants, the court must exclude the proportion of the damage or loss in relation to which the plaintiff is contributorily negligent, and may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings (s 87CD(3)). Subsection 87CD(4) provides that s 87CD applies in all proceedings involving an apportionable claim, regardless of whether or not all concurrent wrongdoers are parties to the proceedings.

37 Section 87CE provides that a defendant who has reasonable grounds to believe that another person may be a concurrent wrongdoer in relation to the plaintiff's claim has an obligation to provide the plaintiff with certain information about that person and the circumstances that make them a potential concurrent wrongdoer. It also sets out the potential costs consequences for the defendant of failing to comply with that obligation.

38 Section 87CF addresses the consequences for contribution claims of the proportionate liability claims.

39 Section 87CG addresses subsequent actions by a plaintiff against concurrent wrongdoers. It permits a plaintiff to bring such an action, but ensures that the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of that damage or loss, would result in the plaintiff receiving compensation that is greater than the damage or loss actually sustained by the plaintiff.

40 Section 87CH makes express provision for the court to give leave for a person or persons to be joined as defendants in proceedings involving an apportionable claim.

The parties' arguments

41 In contending that the proportionate liability provisions of the Law Reform Act and the CCA apply to the arbitration proceedings between the parties, Tesseract relies upon three strands of reasoning.

1. First, the proportionate liability provisions in those Acts constitute rules of law applicable to the substance of the parties' dispute, which the Arbitrator is bound to apply pursuant to s 28 of the *Commercial Arbitration Act* as part of the substantive law of South Australia.

2. Secondly, properly construed, the proportionate liability provisions in the Law Reform Act apply to arbitration proceedings; that is, they apply by force of their own terms.

3. Thirdly, the arbitration agreement in the parties' contract requires the Arbitrator to apply the proportionate liability provisions in the Law Reform Act and the CCA. It does so by reason of an implied term of that agreement to the effect that the Arbitrator has authority to grant the parties any relief

that would have been available had the claimant sued in a court of appropriate jurisdiction.

42 In arguing against the applicability of the proportionate liability provisions in the Law Reform Act and the CCA, Pascale contends that the parties agreed by their Contract to resolve their disputes through conciliation and arbitration, and that having selected this essentially private and consensual mechanism for resolving their disputes they ought not be subjected to a legislative regime for proportionate liability which does not in its terms apply to arbitrations, which inherently involves and affects third parties, and which was not contemplated by the parties' agreement. In contending that there is no basis for construing the proportionate liability provisions as applicable to arbitration proceedings, or for finding any implied term in the parties' agreement to the effect that the parties intended to confer power upon the Arbitrator to apply those provisions, Pascale relies upon the use in those provisions of terminology that is more appropriate to describe court proceedings than arbitration proceedings (such as "plaintiff", "defendant", "proceedings", "action", "damages", "judgment" and "the court"). Pascale also emphasises that the proportionate liability provisions, and the shift in risk and burden from a defendant to the plaintiff to which they give effect, are predicated upon the capacity of a plaintiff to join any alleged third party concurrent wrongdoers to the litigation as defendants. While this course is open to a plaintiff in ordinary court proceedings, it is not available as of right in the context of an arbitration; it would, at the very least, require the consent of each of the parties and the alleged third party concurrent wrongdoer(s).

43 In analysing the parties' respective contentions, I shall commence by explaining that the parties agreed to resolve their dispute in accordance with the substantive law of South Australia applicable to that dispute. While the proportionate liability provisions in the Law Reform Act and the CCA form part of the substantive law of South Australia, I do not think that is determinative of their application to the parties' arbitration proceedings.

44 As to the second strand of Tesseract's argument, I accept Pascale's response; namely, that in accordance with the interstate authorities that have considered the issue in the context of similar interstate regimes,[8] the proportionate liability provisions in the Law Reform Act and the CCA do not apply to arbitration proceedings by force of their own terms.

45 However, as I shall explain, that is not the end of the matter. The issue then becomes whether the parties have, through the dispute resolution provisions in their Contract, impliedly authorised the Arbitrator to determine their dispute as though it were being determined in a court of law with appropriate jurisdiction.[9]

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8 *Aquagenics Pty Ltd v Break O'Day Council* [2019] TASFC 3; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.

9 In accordance with an implication, or implied term, of the type contemplated in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 (Stephen J), 246 (Mason J).

In my view, the parties did impliedly confer this power upon the Arbitrator. However, that conferral was subject to "such qualifications as relevant statute law may require",[10] and there are features of the proportionate liability regimes under both the Law Reform Act and the CCA that indicate an intention on the part of the relevant legislatures that these regimes not apply in the context of arbitration proceedings (that is, that they not be 'picked up' and applied in that context by the implied general conferral of power upon an arbitrator). The features leading to this conclusion are essentially those relied upon by Pascale; namely, that the proportionate liability regimes inherently involve and affect third parties, and contemplate that the plaintiff will have the opportunity to join any third party wrongdoer(s) to their proceedings against the defendant. This opportunity of joinder, which seems to me to have been an essential aspect of the balance struck by the various legislatures when reallocating the risk and burden from the defendant to the plaintiff in certain types of multi-wrongdoer cases, would not be available in arbitration proceedings. In my view, this is not merely a "rough edge" able to be accommodated by the terms of the relevant regimes, or otherwise satisfactorily worked through in the application of the proportionate liability provisions to arbitration proceedings. Rather, it is an integral feature of the proportionate liability regimes, which because it cannot be accommodated in the context of an arbitration, is indicative of a qualification to the general implied conferral of power.

The parties' agreement and the *Commercial Arbitration Act*

46 The starting point for consideration of the Arbitrator's mandate, or jurisdiction, is the parties' Contract, and in particular the dispute resolution provisions within that agreement.

47 As mentioned earlier, the dispute resolution provisions in the Contract apply to any dispute between Pascale and Tesseract that arises "in connection with this Contract" (clause 20.1). In the event that it is not resolved through a process of conciliation, clause 21.1 provides for the dispute to be referred to arbitration.

48 Accordingly, the scope of the parties' arbitration agreement, and hence the Arbitrator's jurisdiction, extends to any dispute "in connection with" the Contract. As the authorities make plain, these are words of wide import, particularly when construed in a context, such as the present, where it can readily be assumed that the parties would not have intended that there be a multiplicity of proceedings, with only some aspects of any dispute between them to be addressed through the agreed arbitration process.

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[10] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 (Stephen J).

49 As to this context, French J said in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd*:[11]

> When the language of the arbitration clause in question is sufficiently elastic, then the more liberal approach of the courts to which Kirby P and others have referred can have some purchase. A wide construction of such clauses can be supported on the basis advanced by Clarke JA that it is unlikely to have been the intention of the parties to artificially divide their disputes into contractual matters which could be dealt with by an arbitrator and non-contractual matters which would fall to be dealt with by the courts.

50 To similar effect are the observations of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*:[12]

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

51 In *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*[13] the Court was required to consider whether the scope of a particular arbitration clause, which authorised an arbitrator to determine disputes "arising out of the contract", was wide enough to encompass a *Trade Practices Act* claim. Allsop J (Finkelstein and Finn JJ agreeing) relevantly stated:[14]

> The width of the phrase 'arising out of' in this context and its synonymity with the expression 'in connection with' reflect the practical, rather than theoretical, meaning to be given to the word 'contract' out of which the disputes may arise. The notion of a contract can involve the practical commercial considerations of formation, extent and scope, and performance of the juridical bonds between the parties, out of which disputes may arise. In my view, there is no bright line to be drawn at the point of contract formation with all causes of action reliant on events prior to that point not being disputes arising out of the contract. It will be necessary in each case to assess the connection of the dispute with the contract – its formation, terms or performance – to see whether disputes fall within the clause, as well, of course, as the terms of the arbitration clause in the context in which they appear.

52 Also relevant in this context is *Incitec Ltd v Alkimos Shipping Corporation*.[15] The Court in that case was required to consider whether claims for contribution under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), and for equitable contribution, fell within the scope of an arbitration clause that

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11 *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439 at 448 (French J), referring to the reasons of Kirby P and Clarke JA in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466.

12 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airway Ltd* (1996) 39 NSWLR 160 at 165 (Gleeson CJ, Meagher and Sheller JJA agreeing).

13 *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

14 *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [175] (Allsop J, Finkelstein and Finn JJ agreeing).

15 *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496.

provided for any dispute "arising out of or in connection with the contract" to be referred to arbitration. After considering the relevant authorities, Allsop J observed that "[t]he clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, is to give width, flexibility and amplitude to them".[16]

53 Similarly, in *Cufone v Cruse*,[17] Bleby J gave the phrase "in connection with" appearing in the arbitration agreement under consideration in that case an "extremely wide" meaning. All that was required was a "link or association" between the dispute and one of the several nominated subject matters. As one of the nominated subject matters was "matters dealt with in this agreement" between the parties, his Honour considered that the arbitration agreement would extend to claims based upon mistake or misrepresentation in relation to entry into the contract, rectification of the contract, claims in tort having a sufficient nexus with the contract, and the implication of terms in the parties' contract.

54 Finally, in *Aquagenics Pty Ltd v Break O'Day Council*,[18] a decision considered in greater length later in these reasons, it was accepted that an arbitration clause predicated upon a dispute or difference "in connection with the Contract or the subject matter thereof" was apt to encompass the determination of a proportionate liability defence under the relevant Tasmanian legislation.[19]

55 In the present case, the allegations made by Pascale in its statement of claim, despite extending beyond claims in contract to include claims for breach of a tortious duty of care, and for misleading and deceptive conduct, all form part of a dispute between the parties that arises "in connection with" the Contract between them. In my view, the same is true of the issue that has arisen through Tesseract's defence as to the applicability of the proportionate liability provisions of the Law Reform Act and the CCA. The dispute in relation to the applicability of these provisions goes to the extent of Tesseract's liability for any breach of its contractual or tortious duties, or for any misleading or deceptive conduct in which it engaged. Understood in this way, the dispute in relation to the application of these provisions is just as connected to the parties' Contract as those allegations of liability are.

56 Accepting that the dispute between the parties as to the application of any regime of proportionate liability has arisen "in connection with" the Contract, such that the Arbitrator has jurisdiction to determine that dispute, it becomes necessary to consider how, and in particular, by reference to what legal system and legal principles, the dispute falls to be determined.

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16 *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at [36] (Allsop J).

17 *Cufone v Cruse* [2000] SASC 17 at [45]-[48]; upheld on appeal in *Cufone v Cruse* [2000] SASC 304 at [29] (Williams J, Prior and Martin JJ agreeing).

18 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [87]-[89] (Tennent J).

19 Although, for reasons explained later, his Honour held that those provisions had no application to the parties' arbitration proceedings.

57 The starting point in this regard is s 28 of the *Commercial Arbitration Act*:

> **28—Rules applicable to substance of dispute**
>
> (1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
>
> (2) Any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules.
>
> (3) Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable.
>
> (4) The arbitral tribunal must decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed to by the parties.
>
> (5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction.
>
> **Note—**
>
> This section (other than subsection (4)) is substantially the same as Art 28 of the Model Law.

58 The parties accept that, in the present case, s 28 requires that the Arbitrator determine their dispute in accordance with the substantive laws of South Australia. While the Contract does not contain any express choice or designation of the type contemplated by s 28(1), the parties accept that, given the parties' and the Contract's connections with South Australia (and the absence of any equivalent connections with any other jurisdiction or legal system), South Australian law is the proper law of the Contract, and the system of law governing the determination of the dispute between the parties the subject of the Arbitration more generally (that is, the *lex causae*). The applicable law, for the purposes of s 28(3), is the substantive law of South Australia.

59 Tesseract contends that the proportionate liability provisions in the Law Reform Act and CCA are substantive rather than procedural. In *John Pfeiffer Pty Ltd v Rogerson*,[20] the plurality said that a guiding principle in distinguishing between substantive and procedural issues for choice of law purposes is:[21]

> [M]atters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason J in *McKain*,[22] "rules which are directed to governing or regulating the mode or

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[20] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

[21] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[22] (1991) 174 CLR 1 at 26-27.

> conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.[23]

60 Their Honours later added:[24]

> [*A*]*ll* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti.*

61 In *Kerr v Australian Executor Trustees (SA) Ltd*,[25] Stevenson J applied these passages in concluding that apportionment legislation was concerned with matters of substance rather than procedure; that it directly affected the extent of the parties' rights or duties, as well as any amount of damages that might be payable.

62 I agree with this general characterisation of apportionment legislation as substantive, and that it extends to the proportionate liability regimes under the Law Reform Act and CCA under consideration in the present case.

63 It is possible, I suppose, that some of the particular provisions within those regimes might be regarded as merely procedural. However, in my view the regimes in Part 3 of the Law Reform Act and Part VIA of the CCA are each better seen as a single law, or set of laws, designed to regulate the outcome of certain types of multi-party (or multi-wrongdoer) disputes such that it would be artificial, and inappropriate, to treat some aspects of the regime as procedural when the overall effect of the scheme is plainly substantive. As elaborated upon in a slightly different context later in these reasons, it would seem contrary to the intention of the relevant legislatures to apply some but not all of the relevant provisions in circumstances where that would materially alter the balance intended to be struck when reallocating the burden and risk associated with multi-wrongdoer disputes from a defendant to the plaintiff.

64 Assuming, as I have concluded, that the proportionate liability regimes under the Law Reform Act and CCA form part of the substantive law governing the resolution of the dispute between the parties under s 28(3) of the *Commercial Arbitration Act*, Tesseract submits that this supports, if not requires, the application of those regimes to the parties' arbitration proceedings.

65 There are two potential difficulties with this submission. The first of these arises out of the reasoning of the Full Court in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd*.[26] An issue in that case was the arbitrator's power to make certain orders in relation to compound interest and costs. The case fell to be decided under the *Commercial Arbitration Act 1986* (SA) (the 1986 Act) (being the predecessor to the *Commercial Arbitration Act 2011*

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[23] *Stevens v Head* (1993) 176 CLR 433 at 445 per Mason CJ.

[24] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [100] (Gleeson CJ, Gaudron, McHugh, Gumow and Hayne JJ), emphasis in original.

[25] *Kerr v Australian Executor Trustees (SA) Ltd* [2019] NSWSC 1279 at [509] (Stevenson J).

[26] *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1996) 66 SASR 509.

(SA) (the 2011 Act)). Under s 22 of the 1986 Act, the Arbitrator was required to determine the dispute "according to law":

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

66 The Court rejected an argument that s 22(1) conferred an arbitrator with the powers to order compound interest and costs legislatively conferred upon the Supreme Court. Matheson J (Bollen and Millhouse JJ agreeing) said that the applicant in that case did not get any assistance from s 22(1), adding:[27]

> That section certainly does not authorise an arbitrator to make an order, for example, which the Supreme Court can make on a question of costs (or interest). The CAA contains sections expressly dealing with costs (and interest). In my opinion, the words "according to law" mean according to the principles of the common law.

67 In *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 3*),[28] Osborn J appeared to have some reservations as to the correctness of the view that the words "according to law" in the equivalent legislation applicable in that case were limited to principles of common law. And in *Curtin University of Technology v Woods Bagot Pty Ltd*,[29] a case considered in more detail later in these reasons, Beech J expressed similar reservations, albeit ultimately applying that view in respect of the equivalent provision in the Western Australian legislation under consideration in that case.[30]

68 I share these reservations as to the correctness of the view expressed as to the meaning of "according to law" in s 22(1) of the 1986 Act in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd.* It seems to me that the reference to a question being determined "according to law" under s 22(1) was simply in contradistinction to it being determined "by reference to considerations of general justice and fairness" under s 22(2), without any implicit limitation of the applicable law to the common law as opposed to statutory law.

69 Be that as it may, I do not need to express any concluded view as to the correctness of the suggested limit upon the words "according to law" under the 1986 Act. There is no direct equivalent of s 22(1) of the 1986 Act in the 2011 Act. While s 28 of the 2011 Act does use some similar language, its terms are different and, indeed, focus upon a slightly different issue. That section (particularly,

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27 *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1996) 66 SASR 509 at 512 (Matheson J, Bollen and Millhouse JJ agreeing).
28 *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 3)* [2006] VSC 492 at [37] (Osborn J).
29 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.
30 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [64]-[71] (Beech J).

ss 28(1) to (3))[31] is addressed to the choice of law issue as to the system of law that is to govern the arbitrator's determination of the parties' dispute. In that context, while the reference to the applicable law would be, as I have already suggested, confined to the substantive laws of the relevant system of law, I see no basis for limiting this to the common law, as opposed to statutory, manifestation of those substantive laws.

70 That leads me to the second potential difficulty with Tesseract's submission to the effect that, having concluded that the proportionate liability provisions form part of the substantive law of the system of law applicable under ss 28(3) of the *Commercial Arbitration Act*, the Arbitrator must apply those provisions in resolving the parties' dispute. In my view, s 28 does not go quite that far. While s 28 does operate to determine the system of law that is applicable to, or governs, the Arbitrator's determination of the parties' dispute, it does not operate to require that every substantive law within that system be applied. To my mind that is a separate issue that requires consideration of the other strands of Tesseract's argument; namely, that the proportionate liability provisions under the Law Reform Act and CCA apply either by force of their own terms or, alternatively, by reason of an implied term of the parties' arbitration agreement.

71 But even if I am wrong about this, I do not think it makes any practical difference. If I am wrong, and s 28 does operate to not only select the applicable system of law, but also require the application of each of the substantive laws within that system of law, I do not think this reading of s 28 could be given its full literal meaning and effect. I would read it as implicitly confined to the application of those laws that either apply by force of their own terms to arbitration proceedings or are otherwise amenable to application in arbitration proceedings. In this way, while there would no longer be any need to rely upon an implied term of the arbitration agreement as conferring authority upon the Arbitrator to apply statutory provisions such as the proportionate liability provisions under the Law Reform Act and CCA, the authority conferred under s 28 would be subject to an equivalent limitation to the one I have, later in these reasons, held is applicable to any implied term; that is, the conferral of authority would be subject to the amenability of the relevant provision(s) to application in arbitration proceedings.

72 For the reasons set out, I do not consider that s 28 is determinative of the question posed for this Court. It is thus appropriate to move to consideration of the second and third strands of Tesseract's submissions.

Application by force of their own terms

73 It is appropriate to review in some detail the two authorities that have directly addressed the issue of whether various of the regimes for proportionate liability enacted in Australia apply to arbitration proceedings by force of their own terms:

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[31] Noting that s 28(4) does contemplate the arbitrator deciding the dispute in accordance with "such other consideration as are agreed to by the parties", thus permitting some analogy with s 22(2) under the 1986 Act.

Aquagenics Pty Ltd v Break O'Day Council[32] ***(Aquagenics)*** and *Curtin University of Technology v Woods Bagot Pty Ltd*[33] ***(Curtin)***.

74 However, before doing so, it is useful to commence by mentioning the decision of Cavanough J in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd*.[34] In that case, his Honour was required to determine whether the proportionate liability provisions in Part IVAA of the *Wrongs Act 1958* (Vic) applied in determining a complaint made to the Financial Industry Complaints Service (FICS). The rules to be applied by the FICS panel required it to have regard to "applicable legal rules", and the financial planner against whom a complaint had been made argued that the norm of proportionate liability reflected in the provisions of the Victorian legislation was an applicable legal rule. Cavanough J rejected this argument, holding that the proportionate liability provisions were not an applicable legal rule required to be applied by the panel. The proportionate liability provisions in the Victorian legislation were not of universal application. They made no change to the law, or to the rights or obligations of individuals, outside the context of a claim within a proceeding involving an apportionable claim, and the whole tenor of Part IVAA suggested confinement to proceedings in court and closely comparable proceedings.

75 Given some of the similarities between the issues addressed by Cavanough J and those with which this Court is concerned, it is instructive to set out in full the relevant passage from his Honour's reasons:[35]

> Wealthcare's essential argument is that, in Victoria at least, proportionate liability is now a fundamental legal norm. It is true that, *where it applies*, Part IVAA of the *Wrongs Act 1958* makes fundamental changes to the law of Victoria. In *Gunston v Lawley*[36], on which Wealthcare relies, Byrne J said:
>
> > "The scheme of s 24AI is that any given defendant is at risk of liability and judgment for an amount limited to its proper share of the loss or damage the subject of the claim.
> >
> > The effect of the proportionate liability regime, therefore, is to transform fundamentally the relationship which exists between a plaintiff and a concurrent wrongdoer … ."
>
> However the provisions of Part IVAA are by no means of universal application. For example, they apply only in a "*proceeding*[37] involving an *apportionable claim*". "Apportionable claim" is defined to mean a claim to which Part IVAA applies. By virtue of s 24AF(1), the limits on that concept include that the claim must either be a claim for economic loss or damage to property in an *action* for *damages*[38] arising from a failure to

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32 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3.
33 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.
34 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418.
35 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418 at [37]-[39] (Cavanough J).
36 [2008] VSC 97 at [59] and [60].
37 Section 24AI(1). "Proceeding" is not defined.
38 "Damages" is defined to include any form of monetary compensation.

take reasonable care, or be a claim for damages for a contravention of s 9 of the *Fair Trading Act 1999*. Immediately one sees a contrast between Part IVAA and provisions such as s 9 of the *Fair Trading Act 1999* itself. That section directly regulates the conduct of persons and other entities. It prohibits misleading and deceptive conduct; and it does so in respect of a vast field of activity, namely trade or commerce. It may truly be said to be a legislative reflection of a norm of conduct.[39] Part IVAA of the *Wrongs Act* is different. It makes no change to the law or to the rights or obligations of individuals outside the context of a "claim" within a "proceeding". A "concurrent wrongdoer" is only defined "in relation to a claim": s 24H. The central provision – s 24AI - is expressly directed towards the position of a "defendant", as defined. At least insofar as Part IVAA relates to a claim arising from a failure to take reasonable care[40], the claim must be made in an "action": s 24AF(1)(a). In its context in Part IVAA, the word "action" does not bear its popular meaning of a proceeding commenced by writ, but it does, I think, mean, in substance, a *legal* proceeding.[41] It will extend to a legal proceeding conducted in a tribunal (because of the definition of "court") but the whole tenor of Part IVAA suggests confinement to proceedings in court and closely comparable proceedings. The central provision – s 24AI – is expressed to operate by reference to "the court". "Court" may be defined to include "tribunal" and, in relation to a claim for damages (as defined), to mean "any court or tribunal by or before which the claim falls to be determined", but, as Bennion says in relation to statutory definitions in general[42], it is "impossible to cancel the ingrained emotion of a word merely by an announcement". Moreover, the very subject matter of Part IVAA is the distribution of *liability*, meaning, I think, *legal* liability. Part IVAA hardly seems to be directed towards the proceedings of a domestic tribunal with an essentially discretionary jurisdiction. Writing extra-judicially, Byrne J has said that the regime of Part IVAA "does not appear to apply to arbitrations …"[43]. I think that his Honour was referring there to commercial arbitrations, as distinct from industrial arbitration and like processes. I need not and do not decide the very important question whether Part IVAA applies to formal commercial arbitrations,[44] but his Honour's comment is entirely consistent with the proposition that Part IVAA is inapplicable to a matter before a FICS panel.

Another feature of Part IVAA tends strongly in the same direction. Unsurprisingly, Part IVAA seems to proceed on the basis that, at least in the usual case, if possible, all putative "concurrent wrongdoers" should be before the court (or tribunal) in the one proceeding.[45] That principle can only happily operate in a forum which has jurisdiction over all potential defendants. Needless to say, FICS can only deal with its members and has no jurisdiction or power over anyone else.[46] Further, s 24AI(3) of the *Wrongs Act* prevents the court or tribunal from having regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or (being a corporation) has been wound-up. Section 24AK does contemplate the possibility of successive actions, but s 24AL(1) envisages the giving of leave for concurrent wrongdoers to be joined as defendants. Moreover, s 24AL(2) prevents the joinder of any

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

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

41 Compare *R v Day and Thomson* [1985] VR 261 at 266.

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

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

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

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

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

> person who was a party to any previously concluded proceeding in relation to the apportionable claim. The combination of s 24AI(1) and (3) and s 24AL(2) makes manifest the general undesirability of split proceedings in relation to apportionable claims.[47] Further, there is something to be said for the submission by FICS that even if the panel had purported to apply Part IVAA, it would necessarily have arrived at the same conclusion, because there still would have been only one "defendant" before it.[48]
>
> None of this is meant to imply that the provisions of Part IVAA should be characterised as procedural rather than substantive where that distinction may be significant.[49] But, even regarded as substantive provisions, they are relevantly quite limited in their scope.

76 His Honour later concluded:[50]

> The various considerations to which I have referred demonstrate the correctness of Wealthcare's concession that Part IVAA did not apply directly, or of its own force, to the complaint before the panel, and also demonstrate that the FICS panel was not obliged to apply any principles of proportionate liability to the Norrises' complaint. Accordingly, this proceeding will be dismissed.

77 Turning to the first of the two authorities that have directly addressed the application of proportionate liability provisions in arbitration proceedings by force of their own terms, *Aquagenics* involved a contract between the plaintiff and the first defendant Council for the design, construction and commissioning by the plaintiff of upgrading works in relation to the Council's waste water treatment plant. The plaintiff was referred to in the contract as the Contractor. The Council had transferred its rights and liabilities in relation to the plant to the second defendant company. A dispute arose between the parties to the contract, with the Council alleging that the plaintiff was in breach of contract. The Council sought to invoke its contractual rights to take the work still to be completed out of the plaintiff's hands. The plaintiff's position was that the Council thereby repudiated the contract. It brought proceedings in the Supreme Court of Tasmania against the defendant Council and second defendant company, seeking a declaration that it was entitled to terminate the contract by reason of the Council's repudiation, orders for a return of the security held by the Council under the contract, and damages for loss of profit.

78 The Council sought to invoke the dispute resolution provisions under the Contract, which provided for the dispute to be referred to arbitration. In support of this course, the Council sought a stay of the plaintiff's court proceedings, in order to permit a referral to arbitration under the contract to take its course.

79 In contending that the court proceedings should not be stayed, the plaintiff relied upon considerations which included a submission that novel and difficult questions of law were likely to arise concerning the proportionate liability

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47 See also Byrne, op cit, p 14-17 [28]-[33].

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

49 Compare *John Pfeiffer Pty Ltd v Rogers* (2000) 203 CLR 503.

50 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418 at [47] (Cavanough J).

provisions in Part 9A of the *Civil Liability Act 2002* (Tas), and that it was more appropriate for such questions to be determined by a judge, rather than an arbitrator.

80 It was in this context that the Court considered whether the proportionate liability provisions under the Tasmanian legislation would apply to an arbitration of the parties' dispute.

81 At first instance, Blow J (as he then was) commenced his analysis by considering whether the proportionate liability provisions in the Tasmanian legislation applied by force of their own terms. His Honour said:[51]

> Both counsel submitted to me that it was doubtful whether the proportionate liability provisions of the *Civil Liability Act* are applicable to arbitration proceedings. Under s 43B(1), the limit of the liability of a defendant who is a concurrent wrongdoer is the amount "that the court considers just". Under s 43B(1)(b), "the court" is not to give judgment for more than that amount. Counsel submitted that it is uncertain whether an arbitrator is a "court" for the purposes of s 43B(1). The types of "apportionable claims" listed in s 43A(1) are all described as claims "in an action for damages". The question arises whether a claim for damages that is litigated in arbitration proceedings is a claim "in an action for damages" for the purposes of s 43A(1).

82 After setting out the terms of the definitions of "court" (which included a tribunal) and "damages" under the Tasmanian legislation, and noting that the legislation did not contain any definition of "tribunal" or "action", Blow J acknowledged the potential difficulty in construing the references to "court" and "action for damages" in the operative provisions of the Tasmanian legislation as extending to an arbitrator and arbitral proceedings respectively:[52]

> The *Acts Interpretation Act 1931*, s 8A(1), requires, in the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of that Act to be preferred to one that does not. Interpretations that extend the operation of the proportionate liability provisions to arbitrations would obviously promote the purpose or object of the relevant part of the Act. Such interpretations would also avoid a very undesirable, and perhaps absurd, situation whereby the law applied by arbitrators would be very different from the law applied by judges. It is arguable that the word "tribunal" in the definition of "court" in s 3 should therefore be interpreted as to include an arbitrator, and that the words "action for damages" in s 43A(1) should therefore be interpreted as including arbitration proceedings in which monetary compensation is sought. On the other hand, it is also arguable that such interpretations stretch the language of the Act too far.

83 Blow J did not express a final view as to whether the Tasmanian legislation applied by force of its own terms. Rather, his Honour held that those provisions applied by reason of an implied term of the arbitration agreement. I shall return to this aspect of his Honour's reasoning in the next section of these reasons.

84 Blow J next considered an argument to the effect that the parties had contracted out of the proportionate liability provisions of the Tasmanian

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[51] *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89 at [17] (Blow J).
[52] *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89 at [20] (Blow J).

legislation. Having noted that the Tasmanian legislation included a provision that permitted the parties to contract out of proportionate liability, his Honour considered that the parties' contract expressed an intention to contract out of proportionate liability, but only in respect of the conduct of the plaintiff's subcontractors and their employees and agents. The proportionate liability legislation remained applicable to some of the other wrongdoers identified by the plaintiff.[53]

85 All of that said, Blow J did not consider that the potential (partial) applicability of the proportionate liability provisions under the Tasmanian legislation was a sufficient basis for not permitting the referral to arbitration to take its course. Accordingly, his Honour ordered that the court proceedings be stayed.[54]

86 The Full Court of the Supreme Court of Tasmania (Evans, Tennent and Wood JJ) dismissed the appeal from the decision of Blow J. While their Honours were unanimous as to this outcome of the appeal, their reasoning differed in material respects.

87 Evans J (with whom Wood J agreed) commenced his analysis by noting that the proportionate liability provisions in the Tasmanian legislation (like the provisions in the cognate legislation in New South Wales and Western Australia[55]) included a contracting out provision. In construing the parties' contract, his Honour considered that the parties had agreed to contract out of proportionate liability. Further, his Honour took a different view from Blow J as to the extent of that contracting out, concluding that the parties had wholly contracted out of the proportionate liability provisions of the Tasmanian legislation. It followed that those provisions had no application to the arbitration between the parties, regardless of whether they might otherwise have applied by force of their own terms to arbitrations, or might otherwise have applied by reason of an implication drawn from the parties' contract:[56]

> For these reasons, I conclude that the proportionate liability provisions contained in Pt9A do not apply to the action between the parties. It follows from this conclusion that those provisions have no application to the arbitration between the parties. This consequence follows if those provisions are construed as applying by their own force to arbitrations, as in that case the contracting out provision contained in s3A(3), also applies. It also follows notwithstanding the proposition that a contract provides for the resolution of disputes by arbitration will ordinarily contain an implied term that the arbitrator is to have the authority to give the parties such relief as would be available to them in a court of law. In the face of my finding, that in this case the parties have contracted out of proportionate liability provisions, there is no room for implying a term to the contrary in their contract.

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53 *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89 at [45]-[46] (Blow J).
54 *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89 at [50]-[57] (Blow J).
55 Noting the silence on this topic of the cognate legislation in South Australia, Victoria, the Australian Capital Territory and the Northern Territory, and of the Commonwealth provisions in the *Trade Practices Act 1974* (Cth); and that contracting out was prohibited under the Queensland legislation.
56 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [23] (Evans J, Wood J agreeing).

88 Evans J nevertheless made several observations as to the textual indicators suggesting that the proportionate liability provisions in the Tasmanian legislation did not apply to arbitration proceedings. His Honour noted the references in that legislation to "the court", "action" and "judgment".[57] His Honour also noted the references in the Tasmanian legislation to the court's power under s 43F to grant leave for persons to be joined as defendants in proceedings involving an apportionable claim. His Honour said that this mechanism for joinder could have no application to an arbitration.[58] His Honour concluded:[59]

> Like Blow J, I will not express a final view on this matter, although I should say that I lean to the view that the proportionate liability provisions of the *Civil Liability Act* are not, by force of those provisions, applicable to arbitration proceedings. For a discussion of this question, see the article written by David Levin QC, *Proportionate Liability in arbitrations in Australia?* (2009) 25 BCL 298.

89 His Honour also added that there was no occasion for him to address the reasoning of Blow J to the effect that the proportionate liability provisions applied by reasons of an implication from the parties' contractual agreement to refer their disputes to arbitration.[60]

90 Having found that the proportionate liability provisions did not apply to the parties' dispute, by reason of the parties having contracted out of those provisions, Evans J considered that it was appropriate to uphold Blow J's decision to order a stay so as to permit the referral to arbitration to take effect.[61]

91 Tennent J, on the other hand, agreed with Blow J's conclusion that the parties had only partially contracted out of the proportionate liability provisions.[62] Her Honour thus proceeded to make some observations in relation to the issues of whether the proportionate liability provisions of the Tasmanian legislation applied to arbitrations by force of their own terms, and the suggestion that those provisions might apply by reason of an implication of the parties' contractual referral of disputes to arbitration.

92 As to the former, Tennent J noted the difficulties that Blow J had identified in interpreting the proportionate liability provisions in the Tasmanian legislation so as to apply to arbitration proceedings. In her Honour's view, there were a number of factors that supported the contention that they did not apply to arbitration proceedings. There was nothing in the proportionate liability provisions in the Tasmanian legislation that expressly made those provisions applicable to arbitrations; nor was there anything to this effect, or which otherwise likened an arbitration hearing to a proceeding in a court, in the *Commercial Arbitration Act*

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57 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [26]-[28], [31]-[32] (Evans J, Wood J agreeing).
58 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [29]-[30] (Evans J, Wood J agreeing).
59 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [33] (Evans J, Wood J agreeing).
60 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [34] (Evans J, Wood J agreeing).
61 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [44] (Evans J, Wood J agreeing).
62 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [73] (Tennent J).

1986 (Tas). The proportionate liability provisions applied to an "action", whereas an arbitration dealt with a dispute, not an action. An arbitrator did not have the power to join parties in the manner contemplated by the proportionate liability provisions.[63]

93 Tennent J noted the second reading speech at the time of the introduction of the proportionate liability provisions of the Tasmanian legislation, which made reference to the implementation of national reforms. Her Honour also mentioned the articulation of the background and rationale for those national reforms set out in the reasons of Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)*.[64] In Tennent J's view, there was nothing in this background or context suggestive of any intention to extend the application of the proportionate provisions to arbitrations.[65]

94 Tennent J concluded her consideration of this issue by noting the existence of other legislation (such as the provisions in the predecessor *Wrongs Act 1952* (Tas) dealing with contribution between parties) that contained definitions of "court" and "action" that extended to arbitration proceedings. Her Honour reasoned that it might be expected that had Parliament intended the proportionate liability provisions of the Tasmanian legislation to apply in arbitration proceedings, it might have said so. But it did not. Her Honour was "not persuaded that, in all the circumstances, Parliament intended when it enacted Part 9A, that that part would apply to proceedings before an arbitrator."[66]

95 On the issue of whether the proportionate liability provisions might apply by reason of an implied term of the parties' contractual agreement to refer disputes to arbitration, Tennent J took a different view to that taken by Blow J. For reasons considered in more detail below, Tennent J did not accept that there was a proper basis to imply such a term.

96 Having concluded that the proportionate liability provisions of the Tasmanian legislation would not apply in an arbitration, Tennent J (like Evans J, Wood J agreeing) held that it was appropriate to uphold Blow J's decision to order a stay so as to permit the referral to arbitration to take effect.[67]

97 A similar issue arose in *Curtin*, being the second of the two authorities that have directly addressed the application of proportionate liability provisions to arbitration proceedings by force of their own term.

98 The parties in that case were in dispute in connection with a construction contract between them. In its points of defence in the arbitration, the respondent (Woods Bagot) invoked the proportionate liability provisions in Part 1F of the

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63 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [94]-[96] (Tennent J).
64 *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [4]-[5] (Finkelstein J), set out earlier in these reasons.
65 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [97] (Tennent J).
66 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [98] (Tennent J).
67 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [108]-[110] (Tennent J).

Civil Liability Act 2002 (WA). In its reply, the applicant (Curtin) denied that those provisions applied to the arbitration. With the consent of the arbitrator, a question of law arising in the arbitration was referred for determination by the Supreme Court of Western Australia, namely 'Does Part 1F of the *Civil Liability Act 2002* (WA) apply to commercial arbitration proceedings pursuant to the *Commercial Arbitration Act 1985* (WA)?'.

99 Significantly, Beech J determined the question on the basis it was confined to consideration of the issue of statutory construction; that is, whether the proportionate liability provisions applied by force of their own terms. Consistently with some correspondence with the arbitrator in relation to the scope of the question, his Honour proceeded on the basis that the question did not encompass consideration of "whether an implied term of an arbitration agreement, including that between Curtin and Woods Bagot, makes or may make Part 1F applicable to arbitration."[68] The rationale for limiting the question in this way lay in a view that the issue of whether there was an implied term was a matter that turned upon a construction of the parties' contract and hence fell to be determined by the arbitrator.

100 The proportionate liability provisions in the Western Australian legislation are again in similar terms to those in the Law Reform Act and the CCA. They include reference to "the court", "an action for damages", "proceedings", "judgment", "plaintiff" and "defendant".

101 Beech J commenced his analysis of the textual considerations in the proportionate liability provisions of the Western Australian legislation by observing that, in his opinion, the natural and ordinary meaning of the language used in the relevant provision supported Curtin's construction.[69] In explaining this opinion, he reasoned that the word "court" was not defined, and in its natural and ordinary meaning "does not comfortably encompass arbitrators."[70] There was no authority in which the word "court" had been interpreted to include an arbitrator.[71]

102 While the word "court" was only used in two sections of the Western Australian legislation, the contexts in which it was used were significant. The first use of the word was in the substantive operative provision (s 5AK), by which "the court" was confined to giving judgment for not more than the defendant's responsibility for the relevant damage or loss.[72] The second was in the provision (s 5AN) that gave "the court" power to join other persons as defendants in proceeding involving an apportionable claim.[73] Beech J said that it was clear that

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68 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [12] (Beech J).
69 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [43] (Beech J).
70 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [44] (Beech J).
71 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [45] (Beech J), but noting that there was authority (*Alliance Petroleum Australia NL v Australian Gas Light Co* (1983) 34 SASR 215 at 236 (King CJ)), in the context of the *Service and Execution of Process Act 1992* (Cth) for "civil proceedings" to include an arbitration.
72 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [47] (Beech J).
73 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [48] (Beech J).

s 5AN was an important part of the scheme created by Part 1F, although it was also clear that the proportionate liability regime operated notwithstanding that, in some cases, concurrent wrongdoers will not and cannot be joined as defendants.[74] His Honour added that because an arbitrator does not have power to join parties, other than by consent, it was clear that the reference to "the court" in s 5AN did not encompass an arbitrator.[75]

103 Having considered the text of Part 1F, Beech J then considered its purpose. In this respect he referred to the passage quoted above from the reasons of Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)*,[76] and its adoption in subsequent cases as an accurate statement of the background to the proportionate liability legislation around Australia.[77] His Honour said that it was evident that a central policy behind the proportionate liability legislation was to decrease the burden of insurance premiums, especially on professionals. The legislative change also aimed to deal with what has been referred to as 'deep pocket syndrome' by which a solvent or insured defendant would bear a disproportionate amount of joint liability between multiple defendants, or where the claimant selects a single or small number of parties as defendants regardless of the relative responsibility of multiple wrongdoers.[78]

104 Beech J also addressed the differences between arbitral and curial processes, and in particular the consensual and voluntary nature of the former.[79] In this context, his Honour mentioned the authorities addressing the implication of a term to the effect that an arbitration be conducted in accordance with the law applicable to the subject matter of the dispute (see below), but refrained from expressing any view as to the applicability of such an implication to the case at bar. The case was conducted on the basis that because that depended upon the construction of the contract between the parties, it was a matter for the arbitrator.[80]

105 In reaching a conclusion as to the appropriate construction of the proportionate liability provisions in the WA legislation, Beech J returned to the inability of an arbitrator to join a party (other than by agreement), describing it as a "weighty consideration militating against the construction invited by Woods Bagot".[81] His Honour explained:[82]

> I accept, as Woods Bagot emphasises, that the proportionate liability regime created by pt 1F is not limited in its operation to situations where all wrongdoers are parties. To the contrary, it is clear that pt 1F contemplates and expressly provides that liability will be proportionate in some circumstances when not all of the wrongdoers are parties. …

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74 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [48] (Beech J).
75 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [49] (Beech J).
76 *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [4]-[5] (Finkelstein J).
77 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [53]-[54] (Beech J).
78 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [57] (Beech J).
79 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [61] (Beech J).
80 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [72]-[84] (Beech J).
81 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [85] (Beech J).
82 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [85]-[86] (Beech J).

> Nevertheless, the existence of a power on the part of the court, conferred by s 5AN, seems to be to be an integral part of the scheme of pt 1F. It is one thing to decide to impose proportionate liability upon a plaintiff in a framework where the court has power to join other concurrent wrongdoers. To impose proportionate liability in the absence of such a power is a quite different thing. The absence of a power to join other wrongdoers has the prospect that a proportionate liability regime may cause injustice or hardship to a claimant.
>
> Because an arbitrator has no power to join other concurrent wrongdoers, a claimant would be obliged to commence subsequent court proceedings against other concurrent wrongdoers on account of whose responsibility the claimant's loss and damage had been reduced in arbitration. Obviously, the court would not be bound by, or even influenced by, the arbitrator's findings on the conduct and responsibility of those other concurrent wrongdoers. Consequently, the claimant would face the risk of a conflicting judgment from a court in the subsequent proceedings.

106 Beech J noted that s 5AKA provided for adverse costs orders against a defendant who fails to give the plaintiff notice that another person may be a concurrent wrongdoer, the evident purpose of which was to facilitate the joinder of such other concurrent wrongdoer(s) by the plaintiff.[83] His Honour also noted that an arbitrator had power to consolidate arbitration proceedings, but that this was confined to a situation in which the other concurrent wrongdoer was party to an arbitration agreement, and an arbitration had been initiated.[84]

107 Beech J concluded:[85]

> The absence of power for an arbitrator to join a concurrent wrongdoer provides a plausible reason why Parliament might have chosen, in the sphere of disputes determined by arbitration, not to advance its purpose of imposing proportionate liability.
>
> For the reasons I have given, I am not satisfied that there is any sufficient justification to depart from the ordinary meaning of the language of pt 1F. As I have said, that ordinary meaning favours Curtin's construction, which I would adopt.

108 His Honour then mentioned two further considerations that he said reinforced this conclusion.

109 The first was the existence of other Acts in which the legislature had made express reference to their applicability to arbitrations. Referring to the observations of Evans J and Tennent J in *Aquagenics* to the same effect, Beech J considered it significant that the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), which overlapped to some extent with the operation of the proportionate liability provisions of the WA legislation, and indeed had been amended to make its provisions subject to Part 1F of that legislation, included definitions of "action" and "court" that extended to arbitration proceedings and an arbitrator respectively. In his Honour's view, "in that framework it might be thought that had Parliament intended Part 1F to apply to arbitrations, explicit definitions for the words "action" and "court" along the lines

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83 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [87] (Beech J).
84 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [88] (Beech J).
85 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [89]-[90] (Beech J).

of those contained in the 1947 Act would have been included in Part 1F of the CLA."[86]

110 The second was the existence of obiter comments in similar contexts which supported his construction.[87] He referred in this context to the decision in *Aquagenics*.[88] He also referred to the decision of Cavanough J in *Wealthcare Financial Planning Pty Ltd*.[89]

111 Returning to the present case, in determining whether the proportionate liability provisions of the Law Reform Act and CCA apply by force of their own terms, it is appropriate to apply the ordinary rules of statutory interpretation. This requires consideration of the text, context and evident purpose of the relevant provisions. As the High Court explained in *Project Blue Sky Inc v Australian Broadcasting Authority*,[90] the primary object of statutory construction is to construe the relevant provision(s) in a manner consistent with the language and purpose of all of the provisions of the statute.[91] The process involves commencing with the text, and giving the words the meaning that the legislature intended them to have, having regard to the context of the provision(s) being construed. Ordinarily, the legal meaning will correspond with the literal or grammatical meaning of the provision. However, the context of the words, the consequences of a literal or grammatical construction, the purposes of the statute, and the canons of construction may ultimately require that the words of a legislative provision be read in a way that does not correspond with their literal or grammatical meaning.[92]

112 I have ultimately reached the same conclusion in relation to the proportionate liability provisions in both the Law Reform Act and the CCA. However, focusing first upon the proportionate liability provisions in Part 3 of the Law Reform Act, there is no express indication in those provisions of any intention that they apply to arbitration proceedings. Neither the provisions of Part 3, nor any of the definitions of the terms used in those provisions, make any reference to arbitration proceedings. To the contrary, those provisions are in several respects expressed in terms descriptive of court proceedings.

113 Under s 8(1), the provisions apply to limit a "defendant's liability" in respect of a "claim for damages" that is "apportionable". While this terminology, and the equivalent terminology used in the definition of "apportionable liability" in s 3(2)

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86 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [92] (Beech J).

87 *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [93]-[94] (Beech J).

88 Although noting that their Honours in that case refrained from expressing a final view, and that the Tasmanian legislation, unlike the Western Australian legislation, included a definition of the word "court".

89 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418; [2009] VSC 7 at [37]-[38], but noting that Cavanough J expressly refrained from deciding whether those provisions might apply in an arbitration.

90 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

91 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 (McHugh, Gummow, Kirby and Hayne JJ).

92 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 (McHugh, Gummow, Kirby and Hayne JJ).

of the Law Reform Act, is more naturally referrable to court proceedings than arbitration proceedings, it might, considered alone, be capable of referring to arbitration proceedings.

114 Similarly, s 8(2), being the key operative provision of the proportionate liability provisions under the Law Reform Act, is expressed in terms that "the defendant's liability is limited" to the extent then prescribed in that subsection (that is, by reference to the defendant's proportionate share of the responsibility for the harm). Unlike, for example, the equivalent provisions in proportionate liability provisions in the Tasmanian and Western Australian legislation under consideration in *Aquagenics* and *Curtin* (which were expressed in terms that prevented "the court" from giving judgment beyond the reduced amount),[93] s 8(2) of the Law Reform Act does not include reference to "the court" as the relevant decision-maker. It is thus potentially capable of being construed as applying to not only a court's determination of the reduced amount of any judgment sum against a defendant, but also an arbitrator's determination of the reduced amount of any arbitral award against a defendant.

115 However, the significance of the absence of any reference to "the court" in ss 8(1) and (2) must be considered in the context of s 8 as a whole. Section 8(4), which is intended to give effect to the limit upon a defendant's liability determined under s 8(2), makes repeated references to "the court" as the body determining the defendant's limited liability, and to the court giving "judgment" for that limited amount. Considered in this context, I do not think there is any material distinction between the proportionate liability provisions in the Law Reform Act, and the equivalent provisions in the Tasmanian and Western Australian legislation under consideration in *Aquagenics* and *Curtin*. The application of each of these regimes is directed to "the court".

116 The concept of "the court" is not defined in the Law Reform Act, and like each of the judges who considered the meaning of "the court" in those cases, I do not think the natural meaning of these words extends to an arbitrator or arbitral tribunal.

117 I mention in this context the decision of the Victorian Court of Appeal in *Subway Systems Australia Pty Ltd v Ireland*.[94] In that case, the majority (Maxwell P and Beach JA, Kyrou AJA dissenting) held that the word "court" in s 8(1) of the *Commercial Arbitration Act 2011* (Vic) encompassed the Victorian Civil and Administrative Tribunal (VCAT). Section 8(1) was a provision that empowered a "court" before which an action was brought, and in circumstances where the action related to a dispute which was subject to an arbitration agreement between the parties, to refer the parties to arbitration. Tesseract relied upon this decision as demonstrating the potential breadth and flexibility of the meaning to be attributed to the word "court", given that VCAT, while an adjudicative tribunal,

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93 See also s 87CD of the CCA.

94 *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49.

was not generally regarded as a court, and was different in several important respects from the bodies typically regarded as courts.[95]

118 Noting the various references in the *Commercial Arbitration Act 2011* (SA) to the "arbitral tribunal", it might be said that this decision provides some support for the words "the court" in the proportionate liability provisions in the Law Reform Act (and CCA) extending to an arbitral tribunal. However, I do not place much weight on *Subway Systems Australia Pty Ltd v Ireland* in this context. The reason for this is that the reasoning of the majority in that case as to the meaning of the words "the court" drew heavily upon the significance of those words appearing in the *Commercial Arbitration Act 2011* (Vic), being legislation that was to be construed by reference to the special principles governing the interpretation of an enactment of a model law (the UNCITRAL Model Law on International Commercial Arbitration), and having regard to its evident purpose of prohibiting parties who have agreed to have a relevant dispute dealt with by arbitration from taking the dispute to the adjudicative processes of a contracting State. In that context, it was considered appropriate to interpret "the court" as a reference to a decision-making arm of the State (which included VCAT), as opposed to a private and consensual arbitration.[96]

119 The references to "the court" in the proportionate liability provisions in the Law Reform Act appear in a very different context. There is nothing in that context, in my view, to warrant construing "the court" as extending to an arbitrator or arbitral tribunal.

120 To the contrary, there are aspects of the context which tell against such a broad construction of those words. I refer primarily in this respect to the apparent assumption underpinning the proportionate liability provisions in the Law Reform Act; namely, that the plaintiff will have an opportunity to join any other wrongdoer(s) to the proceedings so as to enable it to recover damages for the entirety of its loss in the one set of proceedings.

121 In the case of the proportionate liability provisions in the Tasmanian and Western Australian legislation, the court's power to join any other wrongdoer(s) is contained within those provisions. There is no equivalent provision for joinder within Part 3 of the Law Reform Act. However, I do not think this is a difference of any significance. The requirement in s 10(1) of the Law Reform Act that a defendant provide the plaintiff with information as to the identity and whereabouts of any other wrongdoer(s), and as to the circumstances giving rise to their

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95 Kyrou AJA reasoned that VCAT could not be characterised as a court under the common law because it was not bound by the rules of evidence; could not enforce its own decisions; some of its members were not legally qualified; it could be required to apply a statement of government policy; and it could be required to provide advisory opinions (*Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49 at [96]).

96 *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49 at [39]-[48] (Maxwell P) and [90]-[91] (Beach JA).

liability,[97] is plainly intended to facilitate the potential joinder of any such wrongdoer(s). While there is no express power of joinder conferred under the relevant proportionate liability provisions of the Law Reform Act, this was presumably considered unnecessary in light of the court's general joinder powers under the applicable rules of court. Further, while the proportionate liability provisions in the Law Reform Act do not require that a wrongdoer be joined for "the court" to take into account the wrongdoer's responsibility for the plaintiff's harm in arriving at the defendant's (limited) liability for the same, they nevertheless contemplate the possibility that "judgment" will be entered against multiple wrongdoers in the one set of proceedings (s 8(4)).

122 In circumstances where an arbitrator or arbitral tribunal does not have the power, in the absence of the consent of the parties and the additional wrongdoer(s),[98] to join the additional wrongdoer(s) to the arbitration proceedings, it would seem unlikely that Parliament intended that the proportionate liability provisions in Part 3 of the Law Reform Act would apply to arbitration proceedings. The ability and entitlement of a plaintiff to join any additional wrongdoer(s) is a significant aspect of the balance struck between the parties under the proportionate liability provisions in the Law Reform Act. While those provisions involve a reallocation of risk and burden to the plaintiff, the consequences of this from the plaintiff's perspective are less significant in circumstances where the plaintiff nevertheless has an opportunity to ensure that all potential or likely wrongdoers are joined in the one set of proceedings. Put another way, the opportunity for the plaintiff to join other wrongdoers so as to remain entitled to recover the entirety of its loss in the one set of proceedings is, in my view, an integral aspect of the balance struck by Parliament upon the reallocation of risk and burden to the plaintiff under the proportionate liability provisions in the Law Reform Act.

123 Tesseract contends that, despite the inability of an arbitrator to join an additional wrongdoer to arbitration proceedings, the proportionate liability provisions could nevertheless be applied to arbitration proceedings. In other words, while perhaps expressed in terms more apposite to court proceedings, those provisions can accommodate, or bear, application to arbitration proceedings. Tesseract contends, for example, that a plaintiff, even though unable to join other wrongdoers to the arbitration, and hence unable to achieve full recovery from a defendant in the arbitration, would nevertheless be able to separately sue the other wrongdoer(s) in subsequent proceedings.

124 That said, Tesseract also acknowledges that the application of the proportionate liability provisions to arbitration proceedings would result in some difficulties or "rough edges".

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97 Supported by the costs incentives provided in ss 10(2) and (3), which contemplate orders made by "a court".

98 Or in the circumstances warranting consolidation of arbitral proceedings under s 27C of the *Commercial Arbitration Act.*

125 One example of the contemplated "rough edges" is the operation of s 10 of the Law Reform Act. Tesseract contends that a defendant in arbitration proceedings would be required to provide the information contemplated by s 10(1). While there would be no practical difficulty with a defendant having this obligation, it would be a curious requirement in circumstances where the information could not (without consent) result in any joinder to the arbitration of another wrongdoer by the plaintiff. Further, there would be a difficulty with any application of the costs incentives provided for in ss 10(2) and (3). The potential costs orders contemplated under those subsections are expressed in terms that tend to assume the existence of court proceedings, and the incurring of unnecessary costs in those proceedings by reason of the defendant's failure to comply with s 10(1). It is difficult to see how they could be sensibly applied in the context of arbitration proceedings.

126 Another example is the application of s 11 of the Law Reform Act. That section is intended to operate to ensure that the "judgment" in the first proceeding determines, for the purposes of all other actions, each of: (a) the plaintiff's notional damages; (b) the proportionate liability of each wrongdoer who was a party to the first proceeding; (c) and the fact and extent of any contributory negligence on the part of the plaintiff. There is no significant difficulty in giving a judgment in court proceedings this effect in circumstances where it is contemplated that all wrongdoers have either been joined or at least could have been joined. However, the section would have quite different implications were it to be applied in circumstances where the first proceedings involved an arbitration confined to the plaintiff and defendant. Other wrongdoers would be bound, in several respects, by the outcome of the essentially private and consensual arbitration process engaged in between the plaintiff and defendant, in circumstances where those wrongdoers, even if aware of the arbitration proceedings, are unlikely to have had any opportunity or ability to participate in them.

127 While acknowledging that the application of the proportionate liability provisions to arbitration proceedings would result in various "rough edges", Tesseract contends that these could be satisfactorily worked through; that they are not insurmountable obstacles to the application of those provisions to arbitrations.

128 I shall return to the significance of these "rough edges" in the application of the proportionate liability provisions to arbitration proceedings in the context of my consideration of the implied term contended for by Tesseract, where the issue is more along the lines of whether the language of those provisions can accommodate, or bear, application to arbitration proceedings. However, in the present context (namely, whether the proportionate liability provisions apply by force of their own terms), the issue is what the legislature intended. In my view, the references to "the court", and the existence of various "rough edges" associated with any attempt to apply those provisions to arbitration proceedings, tell against any legislative intention that the proportionate liability provisions in Part 3 of the Law Reform Act apply to arbitration proceedings.

129 I have reached the same conclusion in relation to the proportionate liability provisions in Part VIA of the CCA. Those provisions include reference to "the court" in the key operative provision (s 87CD), and make express provision for "the court" to order the joinder of any other wrongdoer(s) (s 87CH), and so are closer in their terms to the proportionate liability provisions in the Tasmanian and Western Australian legislation under consideration in *Aquagenics* and *Curtin* than those in the South Australian legislation. While they also contemplate costs orders being made by "the court" in the event that a defendant does not provide the required information in relation to any other wrongdoer(s) (s 87CE), it is to be noticed that they do not include any equivalent of the s 11 provision in the Law Reform Act (making the judgment in the first action determinative of various matters in any subsequent proceedings). However, despite the absence of this second of the two "rough edges" that I identified in respect of the proportionate liability provisions in the Law Reform Act, I am satisfied that there are nevertheless sufficient textual and contextual indicators in the proportionate liability provisions in Part VIA of the CCA to conclude that Parliament did not intend that those provisions would apply, by force of their own terms, in arbitration proceedings.

130 I have not to this point made any direct reference to the evident purpose of the proportionate liability provisions. Tesseract submits that to deny the proportionate liability provisions operation in arbitration proceedings would run contrary to the apparent intention and purpose of the South Australian and Commonwealth Parliaments in implementing the proportionate liability regimes in the Law Reform Act and CCA as part of a national scheme of proportionate liability; namely, to effect a general transfer of the risk and burden in cases involving multiple wrongdoers from the defendant to the plaintiff.

131 Expressed at this level of generality, I do not think much weight can be attached to Tesseract's submission. As Cavanough J pointed out in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd*,[99] it is plain that the proportionate liability provisions under each of the regimes implemented around Australia were not intended to be of universal application. They only purport to apply to the subset of cases involving multiple wrongdoers that fall within the various definitions of an "apportionable claim" that have been adopted by the relevant legislatures. It is thus not as though claims determined in arbitrations would be the only multiple wrongdoer claims not subject to proportionate liability were Tesseract's construction to be accepted.

132 In circumstances where the very construction issue is how far, and in what circumstances, the general policy underpinning the imposition of proportionate liability was intended to apply, I do not think it assists to assert, in general terms, that Parliament intended to implement that policy, or even that Parliament intended

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[99] *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418 at [37].

to apply that policy to all apportionable claims.[100] The relevant issue is whether Parliament intended to extend that policy choice to the resolution of apportionable claims in arbitration proceedings. For the reasons I have set out, I see no textual basis for concluding that the relevant Parliaments intended to extend that policy to arbitrations, and several textual and contextual indications to the contrary. Insofar as there might have been a general purpose of giving effect to a policy of reallocating the risk and burden of cases involving multiple wrongdoers to a plaintiff with an "apportionable claim", it would seem that the policy was one that struck a balance that assumed that the plaintiff would have the opportunity to join all wrongdoers to the one set of proceedings (so as to ensure that it could obtain a full recovery in those proceedings). Given the inability of an arbitrator to order joinder of all wrongdoers, it would seem that the contemplated balance would be struck differently in the case of arbitration proceedings were they to be subject to the application of the proportionate liability provisions.

133 It is suggested that there would be an awkwardness associated with a conclusion that a legislature intended that the same claim or dispute might be determined differently (at least in the first set of proceedings, and subject to any subsequent proceedings involving other wrongdoers) depending upon whether the proceedings are determined by a court or an arbitrator. However, given the essentially private and consensual nature of arbitration proceedings, and the respect for the parties' autonomy usually associated with those proceedings, I do not attach much weight to this suggested awkwardness. It merely reflects a choice made by the parties.

134 I would also note in this context that most of the proportionate liability provisions enacted in Australia appear to contemplate that the parties may contract out of those provisions,[101] suggesting that the relevant Parliaments contemplated that the parties might choose not to subject themselves to proportionate liability even in cases where, if heard in a court, those provisions would ordinarily apply.

135 For completeness, I accept that it would seem to follow from my reasoning as to the proportionate liability provisions in Part 3 of the Law Reform Act and Part VIA of the CCA, and in particular the significance I have attached to the legislature's use of "the court" in those provisions, that the contributory negligence provisions in s 6 of Part 2 of the Law Reform Act, and s 137B in Part XI of the CCA, would also not apply, by force of their own terms, in arbitration proceedings. This might, at first blush, seem a surprising conclusion, given what I understand to be a routine assumption, including by the parties in the present case, that those contributory negligence provisions do apply in arbitration proceedings. Any

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[100] A similar observation was made in Levin QC, '*Proportionate liability in arbitrations in Australia*?' (2009) 25 BCL 298 at 304.

[101] Contracting out is expressly contemplated under the legislation in Tasmania (*Civil Liability Act 2002* (Tas), s 3A(3)), Western Australia (*Civil Liability Act 2002* (WA), s 4A) and New South Wales (*Civil Liability Act 2002* (NSW), s 3A(2)); not precluded in South Australia, Victoria, the Northern Territory and the Australian Capital Territory; and only expressly excluded in Queensland (*Civil Liability Act 2003* (Qld), s 7(3)).

surprise or difficulty associated with this conclusion can, however, be put to one side given my additional conclusion, later in these reasons, that there would appear to be no difficulty with those contributory negligence provisions applying in arbitration proceedings by reason of the implied term which I consider will ordinarily govern an arbitrator's power. It is to that implied term that I now turn.

Application by reason of an implied term

136 Tesseract contends that the parties' referral of their dispute to arbitration under their Contract impliedly conferred upon the Arbitrator jurisdiction to determine their dispute in accordance with the applicable (substantive) law, with the parties having available to them such rights and remedies as would have been available to them had they sued in a court of law of appropriate jurisdiction.

137 In support of this implication, Tesseract relies upon the decision of the High Court in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*[102] ***(GIO)***.

138 An issue in that case was whether the arbitrator who decided a dispute between the parties had power, under s 94 of the *Supreme Court Act 1970* (NSW), to award interest on the amount of an arbitral award. The dispute between the parties arose under a policy of insurance that the respondent had with the appellant insurer, and that included a clause which provided that "[a]ll differences arising out of this Policy shall be referred to the decision of an Arbitrator". The policy did not mention, nor did the parties otherwise expressly agree, that the arbitrator would have any power to award interest. There was also no power to award interest under the *Arbitration Act 1902* (NSW). The arbitrator nevertheless made an award in the respondent's favour that included an amount for interest under s 94 of the *Supreme Court Act*. The power to award interest under that section was conferred upon "the Court" and in terms which referred to "proceedings" and to a "judgment".

139 The majority (Stephen, Mason and Murphy JJ, Barwick CJ and Wilson J dissenting) upheld the decision of the Court of Appeal to the effect that the arbitrator did have this power; that interest would have been recoverable in a court, and the parties had impliedly given the arbitrator authority to determine all differences between them in accordance with the general law as it would have been applied in a court of law of appropriate jurisdiction.

140 In holding that the arbitrator had power to award interest upon the same principles as applied to awards of interest by the Supreme Court, Stephen J explained:[103]

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[102] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206.

[103] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 (Stephen J).

> The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable [had] the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. Subject to certain exceptions, principally related to forms of equitable relief which are of no present relevance and which reflect the private and necessarily evanescent status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction.

141 After setting out the line of authority supporting the existence of this implication, his Honour said:[104]

> In those circumstances I would affirm the views expressed by the New South Wales Court of Appeal concerning arbitrators' powers regarding the award of interest. Not only is it in conformity with the great weight of authority; that authority appears to me to involve no error of principle. Moreover, it is wholly beneficial in its operation, conferring, as it does, upon arbitrators power to do justice as between parties to a submission by enabling them to award interest, up to the date of the award, upon amounts found due.

142 Mason J reasoned similarly. His Honour framed the issue in the following terms:[105]

> The real question, as it seems to me, is whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.

143 His Honour then explained the basis upon which the arbitrator had power to award interest:[106]

> The question, then, is whether the parties by their submission authorized the arbitrator to award interest. The provision in the policy which constitutes the submission does not specifically refer to interest. It merely requires the reference to arbitration of "All differences arising out of this Policy". But it contemplates that all such differences shall be arbitrated in the light of the general law applicable to the subject matter in dispute.
>
> By s 94 of the *Supreme Court Act* the Court is empowered to award interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect. … Although s 94 is expressed in the form of an authority of the Court, its effect is to alter the antecedent principle of law regulating the payment of interest on monies included in judgments between the date when the cause of action arose and the date when the judgment takes effect. The parties' submission to arbitration of all their differences is to be construed in light of the new principle of law regulating the payment of interest enshrined in s 94. There is to be implied in the submission an authority in the arbitrator to award interest conformably with s 94 because the Supreme Court is given by the

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[104] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 237 (Stephen J).

[105] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246 (Mason J).

[106] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 247 (Mason J).

> *Arbitration Act* a supervisory function in relation to an arbitration and because an award of an arbitrator is enforced as if it were a judgment or order of the Court (s 14).

144 Murphy J agreed with Mason J.

145 While Barwick CJ dissented as to the power to award interest, his Honour nevertheless accepted the existence of an implication along the lines contemplated by the majority. But it would seem that his Honour held that the implication did not extend to what he considered to be the procedural power to award interest under s 94:[107]

> Then it is said that the power is derived by implication from the terms of the reference. In this case, there is nothing in those terms in this case on which, in my opinion, any such implication can be specifically based. So it is said in substance that there should be implied in every consensual reference an authority to the arbitrator to award interest on any sum he shall find to have been due. This is said to be so because the agreement of the parties is that the arbitrator shall decide the matter before him according to the law of the land. So much, I think, may be granted. But the next steps which the submission takes is, in my opinion, unwarranted. It is said that the power or authority to award interest is part of the law of the land within this mutual concession. But, as I have already indicated, the relevant law – the procedural law – is that specified tribunals have such authority. I am unable to accept the submission that it is an implied term of a consensual reference that the arbitrator has authority to award interest in cases falling outside the common law categories.

146 Wilson J agreed with the approach of Barwick CJ:[108]

> I find the question of the power of the arbitrator to award interest to be a difficult one. The existence of such a power must be found either in statute or in the agreement of the parties to the reference. There is no statute conferring such a power on arbitrators in New South Wales; indeed, it was only as recently as 1970 that such a power was conferred on the Supreme Court itself (*Supreme Court Act 1970*, s 94). There is no express authority to be found in the contract. It is said that a term is to be implied in the contract that the arbitrator should decide according to the existing law of the contract and should exercise every right and discretionary remedy given to a court of law. I have no quarrel with the first part of that statement, but the concluding phrase in my respectful opinion goes too far. The process of implying terms in a contract is to be embarked upon with caution, as recent cases have reminded us: *Liverpool City Council v Irwin*; *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*. In the result, I would agree with the reasoning of Barwick CJ and conclude that the arbitrator was without authority to award interest.

147 In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,[109] Mason J referred to the above passages from his and Stephen J's reasons in *GIO*, and explained the process by which the terms of a relevant statutory power, 'picked

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[107] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 224 (Barwick CJ).

[108] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 248 (Wilson J).

[109] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

up' by the implied term, may be "moulded" so that they may be expressed in terms appropriate to, and capable of being exercised in, an arbitration:[110]

> Accordingly … s. 94 should be regarded as defining the powers of an arbitrator with such variations as the nature of the circumstances requires, subject of course to any specific provision in that behalf which may be contained in the contract constituting the submission to arbitration. The terms of s. 94 are necessarily modified when they are imported into the submission in order to take account of those characteristics which distinguish an arbitration from court proceedings. For the purpose of exercising this implied authority to award interest the Arbitrator proceeds on the footing that the arbitration and the award are to be assimilated to court proceedings and to a curial judgment respectively. The hypothesis is that his award which determines the dispute or difference is the equivalent of a judgment which determines a cause of action.
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> … [T]he parties by arming the Arbitrator with implied authority to award interest have recognized that the arbitration has taken the place of court proceedings. The statutory power is therefore to be moulded so that it is expressed in terms appropriate to, and capable of being exercised in, an arbitration.

148 Several subsequent cases have applied the reasoning of Stephen and Mason JJ in *GIO*.

149 In *IBM Australia Ltd v National Distribution Services Ltd*,[111] the arbitration agreement applied to "any controversy or claim arising out of or related to this Agreement or the breach thereof". In the arbitration, the claimant made claims for relief under the *Trade Practices Act* for misleading or deceptive conduct by the respondent. The issue on appeal was whether the arbitration clause was sufficiently wide to include the claim under the *Trade Practices Act*.

150 In holding that the claim under the *Trade Practices Act* had been referred to arbitration, Kirby P applied the reasoning of Stephen and Mason JJ in *GIO*. His Honour rejected an argument that the width of the relief available under the *Trade Practices Act* was an argument against imputing to the parties any intention to provide for all of the relief of the kind afforded to the courts by that Act:[112]

> It is sufficient to answer this argument by saying that the holding in *Government Insurance Office of New South Wales v Atkinson-Leighton* contemplates that the very purpose of a reference to arbitration will frequently be to confer on the arbitrator the powers which would be enjoyed, even by statute only, by the court of law of competent jurisdiction that would otherwise hear the case.

151 Kirby P explained that the reasoning of Stephen and Mason JJ in *GIO* was consistent with decisions in the United States recognising an arbitrator's implied authority to determine claims based upon breaches of securities and anti-trust

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[110] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 368-369 (Mason J).
[111] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466.
[112] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 480 (Kirby P).

legislation, and in England recognising an arbitrator's implied authority to grant relief under the frustrated contracts legislation.[113]

152 His Honour continued:[114]

> In the present case the relief claimed, as particularised by the solicitors, is not so exceptional as to cast doubt on the construction of the arbitration clause in a way similar to that adopted in *Government Insurance Office of New South Wales v Atkinson-Leighton*. Whilst it is true that the respondent may later seek to enlarge its claim and whilst the clause must be given meaning irrespective of the way in which the claim for relief is later particularised, there is nothing in the relief claimed which undermines the application to this arbitration clause of the *Government Insurance Office of New South Wales v Atkinson-Leighton* principle. Until reversed or refined by the High Court its holding binds this Court to conclude that the submission to arbitration was here intended to give the arbitrator authority to provide the claimant with the relief available to it in a court of law of competent jurisdiction dealing with the dispute. This is so even though such relief is itself only provided by statute. In respect of a claim, related to the agreement, based upon the *Trade Practices Act* (Cth), that principle confers upon the arbitrator (subject to any constitutional inhibitions yet to be determined) the power to provide at least those remedies under the Act which are the only remedies that the respondent has claimed in the present case.
>
> A distinction must be drawn between disputes concerning the authority of the arbitrator and disputes as to the way in which the arbitrator's authority should be *exercised*. At this level of the present controversy, it is enough to say that the former question is determined for this country by *Government Insurance Office of New South Wales v Atkinson-Leighton*. Properly analysed, the holding of that case is not confined solely to an authority to award interest. It concerns the entitlement of parties to confer upon an arbitrator by agreement, express or implied, authority to resolve their dispute in the same way as a court of law of competent jurisdiction would do utilising its powers. The holding stems from the proposition that, in determining the arbitrator's authority, the powers conferred upon such a court by statute may be taken to be agreed within the submission to the arbitrator. This may be so even where the language of the submission is expressed in perfectly general terms. How the arbitrator exercises such authority in the particular case presents an issue which has not yet arisen in the present case.

153 Clarke JA also applied the reasoning of Stephen and Mason JJ in *GIO*, holding that "it should be implied that the parties authorised the arbitrator to grant, subject to certain exceptions which arise primarily from his status, such relief as would be available in a court of law having jurisdiction with respect to the subject matter".[115] As the Supreme Court of New South Wales had power to determine claims involving contraventions of s 52 of the *Trade Practices Act* (Cth), and to grant the relief available under ss 82 and 87 of that Act, it followed that the arbitrator had power to determine the claimant's claim. It did not matter that an arbitrator might not be able to grant all of the forms of relief potentially available under those sections:[116]

> … But the fact that it is not open to an arbitrator to exercise all of the remedies set out in the relevant sections of the Act does not mean that he is not entitled to determine claims

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[113] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 480 (Kirby P).
[114] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 480-481 (Kirby P).
[115] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 485 (Clarke JA).
[116] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 486 (Clarke JA).

made under s 52 and to grant a successful party one or more of the remedies enumerated in s 82 and s 87 of the Act to the extent that it is appropriate that an arbitrator grant such a remedy.

I have pointed out that an arbitrator does not have power to declare a contract void ab initio and it may be that there are other powers exercisable by a court under s 87, such as the power to grant an injunction, which may not be open to an arbitrator. In this case the remedies sought are not said to be of such a nature as not to be open to an arbitrator and therefore it is unnecessary to express a concluded opinion on the remedies under s 87 which are open to an arbitrator.

Mr Einstein QC also submitted that once it is recognised that an arbitrator has no power to declare the contract containing that submission void ab initio it is but a small step to conclude that the parties did not intend that he should be clothed with the power to determine any claims under the Act or to grant any of the relief referred to in s 87 of the Act. The essence of this submission was that once it was recognised that the parties did not intend to clothe the arbitrator with all the powers of the court the more likely conclusion was that they did not intend to give him any of those powers rather than selective ones. For my part the preferable interpretation is that the parties intended to grant to the arbitrator all those powers under the Act which could be exercised by an arbitrator consistently with his office. In this respect it should not be overlooked that the enforcement of arbitration awards requires the leave of the court: *Commercial Arbitration Act*, s 33. It follows that there is a measure of court control over orders made by arbitrators. It is, however, presently unnecessary to discuss the extent of that control.

154 Handley JA reasoned likewise:[117]

The relevant implied term in the submission which this Court is bound to recognise is that referred to in the judgment of Mason J in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246-247, namely a term that the arbitrator is to have the authority to give the claimant such relief as would be available in a court of law having jurisdiction with respect to the subject matter. Since the Supreme Court as a court of general jurisdiction under State law now has jurisdiction with respect to claims under Part V of the *Trade Practices Act* (Cth) it must follow that the arbitrator has the same powers. It also follows, in my opinion, that a submission in the present form, without more, would not confer on the arbitrator any authority to exercise the powers of specialist tribunals established under State law such as the Industrial Commission, the Commercial Tribunal, or the Landlord and Tenant Tribunal. Such tribunals are not courts of law and do not have general jurisdiction over all controversies and claims arising out of or related to an agreement or the breach thereof.

155 In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*[118] the main issue was whether a claim under the *Trade Practices Act* was a dispute or difference "arising out of" the agreement in question. Having determined that it was, the New South Wales Court of Appeal then considered whether the arbitrator would have authority to grant the relief available from a court in respect of such a claim. Gleeson CJ (with whom Meagher and Sheller JJA agreed), relying upon Mason J in *GIO*, answered that question in the affirmative:[119]

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[117] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 488 (Handley JA).
[118] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.
[119] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 167 (Gleeson CJ, Meagher and Sheller JJA agreeing).

> In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246, Mason J identified as the central question, which was resolved affirmatively, whether there was to be implied in the parties' submission to arbitration a term that the arbitrator is to have the authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter. The same question is central to the present case, and is to be answered in the affirmative.

156 The reasoning of Stephen and Mason JJ in GIO has also been applied in a number of subsequent decisions, including: *Cufone v Cruse*,[120] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[121] *Seeley International Pty Ltd v Electra Air Conditioning BV*[122] and *Passlow v Butmac Pty Ltd*.[123]

157 In the last of these cases, the issue was whether the arbitrator had authority to determine a claim for statutory contribution pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The legislation did not apply by force of its own terms. However, applying the reasoning of Stephen and Mason JJ in *GIO*, Adamson J held that the arbitrator had authority to determine the claim. Significantly, her Honour was satisfied that this was so despite s 5 being expressed by reference to the amount found by "the court" to be just and equitable having regard to the extent of the person's responsibility:[124]

> Section 82 of the *Trade Practices Act*, which arose in *Comandate*, does not refer to a Court, but rather provides that a person who suffered loss or damage by the conduct of another person that was done in contravention of various provisions of the Act may recover the amount of the loss by action against that person. However, s 80 expressly confers power on a Court to grant injunctions, and s 87 confers power on the Court to provide other relief. There was no suggestion in *Comandate* that any distinction ought to be drawn, for the purposes of determining the arbitrability of the dispute, whether the claim was made under s 82 on the one hand, or s 80 or s 87 on the other. Accordingly, what was said in *Comandate* would not seem to be inapplicable to a claim under s 5 of the 1946 Act on the basis that there is a specific reference to a court in that section.

158 In support of the conclusion reached by Adamson J, I would repeat my earlier reference to the fact that the power to award interest that was held in *GIO* to have been impliedly conferred upon the arbitrator was a power that the legislature had conferred upon "the court" and in terms that included reference to "proceedings" and a "judgment".

159 In *Aquagenics*, Blow J considered the potential applicability of the proportionate provisions under the Tasmanian legislation to an arbitration by reason of an implied term. After referring to *GIO* and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*, his Honour held that, despite the provisions

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120 *Cufone v Cruse* [2000] SASC 17 at [54]-[58] (Bleby J); on appeal, *Cufone v Cruse* [2000] SASC 304 at [30]-[36] (Williams J, Prior and Martin JJ agreeing).

121 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [241] (Allsop J, Finn and Finkelstein JJ agreeing).

122 *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) 246 ALR 589 at [27]-[28] (Mansfield J).

123 *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 at [40]-[41] (Adamson J).

124 *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 at [42] (Adamson J).

being expressed in terms of "the court" and an "action for damages", they were applicable pursuant to an implied term:[125]

> I think it must follow that, subject to any inconsistent express contractual terms, a contract by which a dispute is referred to arbitration contains an implied term that a claimant is entitled to such rights and remedies as would have been available in a court of appropriate jurisdiction. The effect of such an implied term must be that, when a claimant's damages would have been reduced by a court pursuant to proportionate liability legislation, they must be similarly reduced by an arbitrator. I think it must also follow that, when there is such an implied term, and a claimant would have had its damages reduced by a court because of its contributory negligence, an arbitrator must similarly reduce that claimant's damages, even though the legislation concerning contributory negligence requires a reduction to such extent "as the court thinks just and equitable": *Wrongs Act* 1954, s4(1).
>
> In this case, there is no reason not to hold that the contract contains an implied term whereby the rights and remedies available in arbitration proceedings would be those available in a court of appropriate jurisdiction. I therefore hold that the proportionate liability provisions would apply in arbitration proceedings between these parties it if were applicable in court proceedings between them, and to the same extent that it would apply in court proceedings between them.

160 I would observe in passing that in concluding that the proportionate liability provisions might apply by reason of an implied term, Blow J did not address whether any aspect of those provisions (such as the provisions governing the joinder of other wrongdoers) might give rise to a qualification or exception to the usual scope of the implied terms. This is an issue I have addressed later in these reasons.

161 On appeal in *Aquagenics*, Evans J (Wood J agreeing) held that the parties had contracted out of the proportionate liability provisions, and hence that there was no occasion to address the issue of whether those provisions might otherwise have applied by reason of an implied term.[126] That said, his Honour had earlier in his reasons made a passing observation to the effect that a contract that provides for the resolution of disputes by arbitration "will ordinarily contain an implied term that the arbitrator is to have the authority to give the parties such relief as would be available to them in a court of law".[127]

162 Tennent J, on the other hand, having agreed with Blow J that the parties only partially contracted out of those provisions, did address the issue. Her Honour noted that, at first instance, neither party had contended for an implied term.[128]

163 After referring to the decisions in *GIO* and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*, upon which Blow J had relied, Tennent J observed that neither of those cases had involved any issue about the potential for claims involving multiple parties.[129] Her Honour considered that there was an issue with

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[125] *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89 at [24]-[25] (Blow J).
[126] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [34] (Evans J, Wood J agreeing).
[127] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [23] (Evans J, Wood J agreeing).
[128] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [83] (Tennent J).
[129] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [86]-[87] (Tennent J).

the application of those authorities to the case with which she was concerned. She noted that, because the arbitrator would have no power to join a third party to the arbitration proceedings, he or she would be precluded from exercising at least one of the powers conferred by the proportionate liability provisions under the Tasmanian legislation.[130]

164 Given the difficulty associated with the implication of a term in circumstances where the intended forum cannot give effect to the law sought to be invoked, Tennant J considered that it was not a situation where it was appropriate for the primary judge to have ignored the usual principles governing the implication of terms:[131]

> Because of this difficulty, this is in my view not a situation where, as suggested by counsel for the respondent, it was appropriate for the learned judge to simply ignore the principles contained in *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. At 282, Lord Simon of Glaidsdale, who delivered the majority judgment of the Privy Council, said:
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> > "Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract."

165 Tennent J was not persuaded that the so-called *BP Refinery* conditions for an implied term had been made out:[132]

> Applying those principles to the present case, while it might be said that conditions 4 and 5 are satisfied, it cannot be said that the remainder are. The appellant and the Council entered into a contract. There were no other parties to that contract. The parties agreed that any dispute between them would be referred to arbitration. As the learned judge pointed out, the parties must have anticipated, given the nature of the project in which they became involved, that there would be other parties involved in the project and that perhaps disputes might arise which involved those parties. Notwithstanding that, they still provided that any dispute between them should go to arbitration, with the attendant restriction that they would be the only parties to the arbitration, and hence potentially left to become involved in other disputes depending on the outcome of the arbitration.
>
> There is no basis for any conclusion that the implied term found by his Honour was reasonable and equitable, that it was necessary to give business efficacy to the contract because the contract was ineffective without it, and that it was of a nature that it was so obvious that it went without saying. In my view, his Honour made an error when he found that an implied term existed. It follows that, insofar as his determination that proportionate liability provisions could apply in an arbitration between these parties is predicated upon the existence of that implied term, his Honour has made an error.

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130 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [90] (Tennent J).
131 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [91] (Tennent J).
132 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [92]-[93] (Tennent J).

166 It was for these reasons that Tennent J concluded that Blow J had erred in recognising an implied term.

167 I return at this point to the reasons of Beech J in *Curtin*.[133] It will be recalled that his Honour concluded that the proportionate liability provisions of the WA legislation did not, as a matter of statutory interpretation, apply by force of their own terms. Various aspects of the language used in those provisions told against any intention that they apply by force of their own terms.

168 However, having earlier referred to authority for the proposition that the provisions might nevertheless apply by reason of an implied term,[134] his Honour left open the possibility that such an approach might be apposite in the context of the proportionate liability provisions in the WA legislation:[135]

> The authorities referred to in the previous section of these reasons support the view that a term is generally implied into arbitration agreements that the arbitration be conducted in accordance with the law applicable to the subject matter in dispute, with the arbitrator having the authority to give the claimant such relief as would be available in a court of law having jurisdiction with respect to the subject matter. Arguably at least, depending on and subject to the terms of the arbitration agreement, that implied term may make the proportionate liability regime in pt 1F of the CLA applicable to an arbitration. On that basis, to the extent that the purpose of pt 1F is advanced by applying proportionate liability to an arbitration, that is achieved through an implied term of the arbitration agreement, so long as that is consistent with the intention of the parties as expressed in the arbitration agreement. It would not be necessary to read the words of the legislation in an unnatural and extended way to achieve that outcome.

169 In suggesting in the final sentence of this passage that the application of the proportionate liability provision would not require an "unnatural and extended" reading of the words used, his Honour appears to have accepted the slightly different emphasis of the legislative construction task in this context; the issue being not so much the intended meaning of the legislation having regard to its text, context and purpose, but rather whether it is capable of bearing a meaning that would permit or accommodate its operation in arbitration proceedings by means of the contemplated implied term.

170 That said, Beech J made it plain that he did not intend to express any opinion as to whether there was any such implied term in the contract between the parties in that case. He accepted that that depended upon the proper construction of the contract, and in conformity with the position reached between the parties and the arbitrator, was a matter that was to be left for the arbitrator to determine.[136]

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[133] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.
[134] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [50] (Beech J), referring to *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 at [33]-[41] (Adamson J).
[135] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [83] (Beech J).
[136] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 [84] and [96]-[97] (Beech J).

171 The above review of the authorities provides a sound basis for the implication of a term in an arbitration agreement to the effect contemplated by Stephen and Mason JJ in *GIO*; namely, that the arbitrator shall have authority, in determining the dispute contractually referred by the parties for his or her determination, to grant such relief as would have been available were the claimant to have sued in a court of law of appropriate jurisdiction. The authority implicitly conferred upon an arbitrator in this way extends to statutory provisions which do not apply by force of their own terms to arbitration proceedings. As mentioned, that was the case in *GIO*, where the power to award interest was conferred upon "the Court", and in terms which referred to "proceedings" and to "judgment";[137] the terms of the legislation were able to be "moulded" so as to make them appropriate for application in an arbitration.[138] Indeed, it is precisely in this situation that it becomes necessary to have recourse to an implied term to ground the arbitrator's authority to grant the relevant relief.

172 Such a term will ordinarily be implied in an arbitration agreement, and should be implied in the arbitration agreement between the parties in the present case. In my view, this involves an implication drawn from the parties' express referral of their disputes to an arbitrator. As such, I would regard it as a matter arising from the construction of the express terms used by the parties, or at least a term generally to be implied in an arbitration agreement, rather than an implied term of the type that requires any direct or close consideration of the *BP Refinery* conditions[139] for the implication of contractual terms.

173 That said, even if the *BP Refinery* conditions require consideration, I would respectfully differ from the approach taken by Tennent J in *Aquagenics*.[140] I do not think that the *BP Refinery* conditions would fall to be considered by reference to the particular legislative provisions which the arbitrator is said to have implied authority to apply. Assuming, as I do, that the implied term is to be expressed at a general level (that is, conferring the arbitrator with authority with respect to all of the rights and relief that would have been available in a court of law), any requirement to apply the *BP Refinery* conditions would fall to be considered at that same level of generality. The question to be considered in applying those conditions would be whether this general authority on the part of the arbitrator is reasonable and equitable, necessary for business efficacy, obvious, able to be expressed in clear terms, and consistent with the express terms of the contract; not whether authority to apply the particular proportionate liability provisions in question may be so described. And when the question is framed in this way, it

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137 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 234 (Stephen J).

138 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 369 (Mason J).

139 Conveniently listed in the passage extracted above from the reasons of Tennent J in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASCFC 3 at [91].

140 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [92]-[93] (Tennant J).

seems to me that the contemplated term would ordinarily satisfy the *BP Refinery* conditions.

174 That said, it is important to acknowledge that there will be exceptions or qualifications to the existence and extent of this implied term. These exceptions or qualifications may, it seems to me, be found in either the express terms of the parties' contract, or in the nature and terms of the relevant legislative provisions said to be 'picked up' by the implied term.

175 As to the former, it is not difficult to imagine circumstances in which the parties might agree, and expressly provide, for their dispute to be determined by an arbitrator without reference to particular legislative provisions. Assuming the legislative provisions are ones in respect of which the parties are entitled to 'contract out', there would seem to be no difficulty in giving effect to this manifestation of the parties' usual contractual freedom. Indeed, this would be consistent with the approach taken in each of the judgments in *Aquagenics* (with Evans and Wood JJ holding that the parties had contracted out of the proportionate liability provisions of the Tasmanian legislation, and Blow and Tennent JJ holding that they had done so partially).

176 As to the latter, there will be circumstances in which the nature and terms of the relevant legislative provisions will prevent their application to arbitration proceedings. The possibility of such exceptions was expressly contemplated by Stephen J in *GIO*. In the very passage in which his Honour identified the potential for an implied term in an arbitration agreement that confers power upon an arbitrator to grant such relief as would have been available in a court, his Honour also noted that the principles permitting this implication were "subject to such qualifications as relevant statute law may require".[141]

177 Most obviously, a qualification to the reach of the usual implied term might arise in circumstances where the terms of the legislative provisions in question include an express indication that they do not apply to arbitration proceedings.

178 However, there will also be situations where a more subtle analysis of the legislative provisions reveals that, by reason of the nature of the legislative provisions (in particular, the subject matter they address, or the terms and mechanism through which they address that subject matter), they are not apposite or amenable to application in arbitration proceedings. Put another way, this analysis may reveal that the statutory power is not able to be "moulded so that it is expressed in terms appropriate to, and capable of being exercised in, an arbitration."[142]

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[141] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 (Stephen J).

[142] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 369 (Mason J).

179 It seems to me that the basis for this qualification probably lies in the recognition of a limit upon the parties' implied (objective) intention under their arbitration agreement; that the parties only intended to confer authority upon the arbitrator to determine such rights, or grant such relief, as are amenable to determination in arbitration proceedings. Alternatively, it may be the recognition of some overriding (objective) intention on the part of the relevant legislature that the relevant legislative provisions are not amenable to arbitration, and hence not to be 'picked up' by any general implication of the type contemplated by Stephen and Mason JJ in *GIO*.[143] That said, given the objective nature of both forms of analysis, and given that both ultimately turn upon the amenability of the relevant provisions to application in arbitration proceedings, there is unlikely to be any significant practical difference between these two approaches.

180 In considering what 'amenability to application in arbitration proceedings' entails in this context, there are several authorities of potential assistance.

181 In *ACD Tridon Inc v Tridon Australia Pty Ltd*,[144] an issue was the amenability to arbitration of claims brought under various provisions of the *Corporations Act 2001* (Cth), including shareholder oppression claims. In considering this issue, Austin J referred to various decisions that have recognised the ability of the parties to an arbitration agreement to refer statutory claims to arbitration:[145]

> The question for determination is whether it is competent for parties to an arbitration agreement to agree with one another, in this fashion, to empower the arbitrator to exercise the powers of a Court under the Corporations Act. The purpose of such an agreement could not and would not be to have the arbitrator's award operate as an order of the Court. The arbitrator's determination would be an exercise of consensual power equivalent in scope to the power of a Court under the Corporations Act, having binding effect as between the parties by force of their agreement.

182 However, his Honour then addressed what he considered to be two qualifications to, or limitations upon, this ability of an arbitrator to apply statutory provisions.[146] The first is not relevant for present purposes. His Honour described the second in the following terms:[147]

> The second kind of limitation was described by MJ Mustill & SC Boyd, *Law and Practice of Commercial Arbitration in England* (second edition, 1989), p 149. After stating the general principle that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration, and noting that the

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[143] This would be the analysis if the qualification is to be seen as a limit upon s 28 of the *Commercial Arbitration Act* (a possibility contemplated earlier in these reasons), as opposed to a limit upon an implied term in the parties' arbitration agreement.

[144] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.

[145] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [160] (Austin J), and referring at [181] in that context to *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

[146] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [184] (Austin J).

[147] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [189]-[194] (Austin J).

general principle was subject to some reservations, the authors proceeded to explain the reservations, including the following:

> "Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85 (3) of the Treaty of Rome." [footnotes omitted]

In the *Metrocall* case, the Industrial Relations Commission in Court Session applied these observations to hold that a disputed claim to relief under s 106 of the Industrial Relations Act 1996 (NSW) is not capable of settlement by arbitration. The Commission drew attention to the specialist nature of the jurisdiction and powers of the Commission in Court Session (52 NSWLR at 25), and the nature of the considerations required to be taken into account. They emphasised that those considerations include matters relating to the industrial relations system and the public interest.

In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170, the parties to a joint venture agreement agreed to arbitrate any dispute, difference or question touching, inter alia, the dissolution or winding up of the "association" which was their joint venture entity. Warren J declined an application for an order staying a winding up proceeding, under the Victorian commercial arbitration legislation, on the ground that the arbitration clause was null and void because it had the effect of "obviating the statutory regime for the winding up of a company" (at paragraph [18]). Her Honour's decision was partly based on public policy considerations surrounding the process of winding up a company pursuant to court order. An additional ground seems to have been that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause.

In my opinion, the latter ground is a strongly persuasive one, in keeping with the general observations by Mustill & Boyd. I accept, as well, that public policy considerations operate against referring to arbitration a determination to wind up a company on the grounds upon which a court may order that a company be wound up. However, I would not regard these public policy considerations as preventing parties to a dispute from referring questions to arbitration merely because those questions arise under the Corporations Act. I see nothing special about the Corporations Act that would distinguish it, as a whole, from other legislation such as the Trade Practices Act. This seems to be the position reached by United States courts: see *Dean Witter Reynolds Inc v Byrd* 470 US 213 (1985); *Shearson Lehman Hutton Inc v Wagoner* 944 F 2d 114 (2nd Cir 1991); also *Pick v Discover Financial Services Inc* 2001 No.Civ.A 00-935-SLR (D) Del Sept 28, 2001.

The statutory powers of a Court under the Corporations Act are, generally speaking, comparable to the powers exercised by a court under the general law (the power to make a winding up order being an exception to this proposition). They are generally not special powers to be exercised having regard to specialist public interest criteria.

Specifically, the public policy considerations held by Warren J to be applicable to a disputed claim to wind up a company do not seem to me to prevent the parties from referring to arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act, or for access to corporate information under s 247A. However, the "in rem" nature of an order for rectification of the share register of a company may prevent reference of that power to an arbitrator.

183 In *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd*,[148] an issue was whether the parties' dispute arising under s 15(2)(a)(i) of the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (the SOP Act) was amenable to arbitration. In considering this issue, Ball J observed that whether or not a particular dispute was capable of determination by arbitration "depends upon the subject matter of the dispute and, in some cases, the mechanism that has been established to resolve it".[149] After then setting out the key passage from the reasons of Stephen J in *GIO*,[150] Ball J said the following in relation to the principle to be derived from this passage, and the qualifications or exceptions to it:[151]

> Applying this principle, courts have held that, as well as a claim for interest, an arbitrator has power to determine various statutory claims such as those arising under ss 82 and 87 of the Trade Practices Act for contraventions of s 52 of that Act (see *Comandate Marine Corp* and *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466) and those under ss 175, 233, 247A and 1071B of the *Corporations Act 2001* (Cth) (*ACD Tridon v Tridon Australia* [2002] NSWSC 896).
>
> However, in certain circumstances, it may be apparent from the nature of the subject matter or the way that it is dealt with by the legislature that it is appropriate for disputes concerning that subject matter to be resolved by the courts, or specialist tribunals established for that purpose. What normally distinguishes this class of case is the existence of some legitimate public interest in seeing that disputes of the type in question are resolved by public institutions or in accordance with structures that are established by parliament rather than institutions and structures established by the parties: see *Comandate Marine Corp* at [200] per Allsop J. Examples include proceedings to recover fines, proceedings relating to insolvency and competition law claims: see *ACD Tridon v Tridon Australia* at [189]-[194] per Austin J; *Comandate Marine Corp* at [200] per Allsop J. In *Metrocall Inc v Electronic Tracking Systems Pty Ltd* [2000] NSWIRComm 136, the Full Bench of Industrial Relations Commission sitting in Court Session thought that the same approach should apply to claims under s 106 of the *Industrial Relations Act* 1996. In reaching that conclusion, the Full Bench pointed to the fact that jurisdiction in respect of claims under s 106 was conferred on a specialist tribunal and the matters that that tribunal is required to take into account in determining whether to grant relief under that section include matters such as whether the contract is "against the public interest".

184 Ball J concluded that there were several aspects of the SOP Act that suggested that it established a particular regime for the recovery of progress payments which could not be made the subject of arbitration; and hence that an arbitrator did not have any implied power to determine a claim under s 15(2)(a)(i) of the SOP Act.[152]

185 Similarly, in *Re Form 700 Holdings Pty Ltd*,[153] Robson J considered whether an oppression proceeding under s 233 of the *Corporations Act 2001* (Cth) was amenable to arbitration. His Honour said that it was "well established by

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148 *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398.
149 *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398 at [37] (Ball J).
150 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 (Stephen J).
151 *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398 at [37]-[38] (Ball J).
152 *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398 at [40]ff.
153 *Re Form 700 Holdings Pty Ltd* [2014] VSC 385.

Australian authorities that an arbitration agreement may invest in an arbitrator the power to exercise statutory powers that a court would have in the same circumstances",[154] citing not only *GIO*, but also *IBM Australia Ltd v National Distribution Services Ltd*,[155] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*[156] and *ACD Tridon Inc v Tridon Australia Pty Ltd*.[157] However, his Honour then referred at length to the reasons of Austin J in the last of these cases as to the second of the limitations upon the ability of the parties to invest authority upon an arbitrator.[158] While noting that Austin J had accepted that an oppression proceeding may be amenable to arbitration, Robson J explained that whether this was so in a particular case would depend upon the terms of the relevant arbitration agreement, and the nature of the claim made and the relief sought. His Honour concluded that some of the claims made by the plaintiffs against the defendants in that case were claims between shareholders and sought relief that only affected those shareholders. These claims involved a dispute under the shareholders agreement and were amenable to resolution under the arbitration provision in that agreement.[159] However, some of the other claims were against the defendants in their capacity as directors and so fell outside the ambit of the referral to arbitration.

186 Returning to the issue in the present case, it seems to me that the implied term contemplated by Stephen and Mason JJ in *GIO* will not extend to the substantive laws of South Australia which are not amenable to application in arbitration proceedings. To the extent that this is a question that must ultimately be framed by reference to the (implied) intention of the parties, it is nevertheless an issue that requires consideration of the subject matter of the relevant statutory provisions, and the terms and mechanisms through which they address that subject matter. There may be features of the relevant provisions (such as the policy considerations underpinning the relevant provisions, or the intervention of the rights of third parties in the relevant subject matter) that lead to a conclusion that the relevant provisions are not amenable to arbitration. There may be features of the relevant provisions which could not sensibly be given effect by an arbitrator, or which, if applied by an arbitrator, would be so changed in their operation as to warrant a conclusion that it could not have been intended that an arbitrator would have authority to apply those provisions.

187 There are features of the proportionate liability provisions under both the Law Reform Act and the CCA that have led me to conclude that they are not amenable to application in arbitration proceedings in the relevant sense.

188 The basis for this conclusion does not lie in the relevant legislature's use of terms such as "plaintiff", "defendant", "proceedings", "judgment" or even "the court". For the reasons developed earlier, these are strong textual indicators that

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[154] *Re Form 700 Holdings Pty Ltd* [2014] VSC 385 at [74] (Robson J).
[155] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466.
[156] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.
[157] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.
[158] *Re Form 700 Holdings Pty Ltd* [2014] VSC 385 at [82] (Robson J).
[159] *Re Form 700 Holdings Pty Ltd* [2014] VSC 385 at [96], [125]-[130] (Robson J).

the legislative provisions were not intended to, and hence do not, apply to arbitrations by force of their own terms. However, I do not think that they provide a sufficient basis for excluding those provisions from any implied conferral of authority upon the Arbitrator.[160] It is noteworthy in this respect that the power to award interest under consideration in *GIO* was conferred upon "the court". Consistently with this, the contributory negligence provisions in Part 2 of the Law Reform Act and Part XI of the CCA would, in my view, be 'picked up' by the implied conferral of authority, despite those provisions being expressed by reference to "the court".

189 Rather, the basis for this conclusion lies in a broader consideration of the nature of the proportionate liability provisions in both the Law Reform Act and the CCA, and the mechanisms through which the South Australian and Commonwealth Parliaments have chosen to implement them. In the case of both, it seems to me that there are aspects of those legislative regimes that are intended to be integral to their overall operation and yet which are inapposite for (if not incapable of) application in arbitration proceedings. Any attempt to apply those provisions to arbitration proceedings would result in a materially different proportionate liability regime from the one intended by the relevant Parliament.

190 I accept that the key operative provision in each of the regimes would be capable of operating in arbitration proceedings; that is, the provision limiting the defendant's liability to its share in the responsibility for the plaintiff's harm (being s 8(2) of the Law Reform Act and s 87CD of the CCA). In the case of Part 3 of the Law Reform Act, an arbitrator could, quite sensibly, determine the extent of a party's liability in conformity with the terms of ss 8(1) to 8(6). While those subsections use language applicable to court proceedings, they are nevertheless capable of bearing the equivalent meanings that would be applicable in the context of arbitration proceedings. The same is true of the equivalent provisions under Part VIA of the CCA.

191 The difficulty comes in the broader application of those two regimes for proportionate liability, and in particular the "rough edges" that I have earlier suggested would arise in an attempt to apply those regimes to arbitration proceedings.

192 It is true that both regimes contemplate the potential for a plaintiff's recovery to be (proportionately) reduced by reference to the wrongdoing of a person other than the defendant without that other wrongdoer necessarily being a party to the action.[161] However, both also contemplate that this will only occur after the plaintiff has had the benefit of information from the defendant as to the identity (and whereabouts[162]) of any other wrongdoer, and as to the circumstances giving

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[160] Or from any conferral of power under s 28 of the *Commercial Arbitration Act.*

[161] cf the proportionate liability regime applicable in Victoria, which confines consideration to those wrongdoers who are party to the proceedings.

[162] In the case of the Law Reform Act, s 10(1)(a).

rise to that wrongdoer's potential liability,[163] and after the plaintiff has had an opportunity to join any such wrongdoer(s) to the proceedings against the defendant.

193 While the regime under the CCA expressly provides for the Court to join another potential wrongdoer as a party,[164] the Law Reform Act does not. But I do not think this difference is of any significance. It is plain that the requirement that a defendant provide the plaintiff with information about any other wrongdoer is intended to facilitate an informed decision by a plaintiff as to whether to seek to join such a person to the proceedings, and the Court's general joinder powers under the applicable rules of court would suffice for the purpose of achieving any such joinder.

194 While both regimes thus contemplate that the plaintiff will have the opportunity to join all wrongdoers in the one set of proceedings, this opportunity cannot be given effect in the context of arbitration proceedings. In the absence of the consent of each of the parties and the other wrongdoer(s),[165] it will not be possible for the other wrongdoer(s) to be joined to an arbitration.

195 It is true that a plaintiff who obtains an arbitration award against a defendant, which has been reduced on account of the responsibility of another wrongdoer, might subsequently bring proceedings against that other wrongdoer in order to recover the balance of its loss. While apparently geared towards encouraging the resolution of multi-wrongdoer disputes in a single set of proceedings, the proportionate liability regimes in both the Law Reform Act and the CCA nevertheless permit this to occur.

196 However, requiring the plaintiff to proceed in this way would inflict an additional burden and risk upon the plaintiff which both legislatures intended that the plaintiff would have an opportunity to avoid. Subsequent proceedings will burden the plaintiff with the additional time and expense associated with a second set of proceedings. And there will be at least some risk of inconsistent findings in those subsequent proceedings that may result in a shortfall in the plaintiff's recovery.

197 Under the proportionate liability regime in the CCA, there would seem to be no barrier to a court in the subsequent proceedings reaching a different conclusion as to any or all of: the plaintiff's loss; the various wrongdoers' proportionate responsibility for that loss; and the existence and extent of any contributory negligence on the part of the plaintiff.

198 Under the proportionate liability regime in the Law Reform Act, there is less risk of inconsistency. By reason of s 11 of the Law Reform Act it would seem that

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[163] Law Reform Act, s 10(1); CCA, s 87CE(1).
[164] CCA, s 87CH(1).
[165] Or circumstances warranting the consolidation of arbitration proceedings under s 27C of the *Commercial Arbitration Act.*

the outcome of the initial arbitration would determine the amount of the plaintiff's notional damages (s 11(a)), and the existence and extent of any contributory negligence on the part of the plaintiff (s 11(c)). Although that section also provides for the earlier proceedings to determine the proportionate liability of each wrongdoer, that is only so in respect of wrongdoers who were party to the original proceedings (s 11(b)). Thus, while the outcome of the original proceedings (that is, the arbitration proceedings) would determine the proportionate liability of the defendant (who was a party to the arbitration), it would not seem to determine the proportionate liability of the other wrongdoer(s) (who would not have been a party to the arbitration), at least not in circumstances where the other wrongdoer(s) establishes responsibility on the part of yet another wrongdoer or wrongdoers. There would thus remain some scope for inconsistency in outcomes that might be detrimental to a plaintiff's recovery.

199 Even though the risk of inconsistency appears to be less in the context of the proportionate liability regime under the Law Reform Act, this would only be by reason of the legislation giving the outcome of the arbitration proceedings a binding effect in respect of various aspects of subsequent court proceedings. In my view, it is unlikely that Parliament would have intended that the outcome of an essentially private and consensual dispute resolution process between two parties (the plaintiff and defendant) would be determinative of the outcome in subsequent court proceedings involving another party or parties (the other wrongdoer(s) subsequently sued by the plaintiff). From the perspective of the third party wrongdoer(s), it is one thing to bind it to the outcome of public court proceedings in which it had the opportunity to participate by being joined (upon the application of the plaintiff, or indeed upon their own application). It is quite another thing to do as s 11 appears to do, and bind it to the outcome of essentially private arbitration proceedings to which it was not a party, and indeed of which it might not even have been aware.

200 I acknowledge that prior to the introduction of the proportionate liability provisions in the Law Reform Act, a defendant sued by a plaintiff might (by reason of an arbitration agreement between those parties) be required to participate in an arbitration and therefore not have any ability or opportunity to seek contribution from any other third party wrongdoer(s) other than through subsequent separate proceedings. Further, in this scenario, assuming the defendant was found liable in the arbitration proceedings and did subsequently separately sue a third party wrongdoer for contribution, the defendant's liability under the arbitral award against it might constitute, or at least be probative of, the liability to which the third party wrongdoer would be required to contribute,[166] despite it being the outcome of a private arbitration between the plaintiff and defendant to which the third party wrongdoer was not a party. But none of this, in my view, detracts from

[166] *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 212 (Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ); applied and considered in several subsequent cases in the context of claims for contribution to a defendant's liability under a settlement agreement, including most recently in *BI (Contracting) Pty Ltd v David Jones Pty Ltd* [2019] SASCFC 138 at [54]-[63] (Kelly J, Kourakis CJ and Nicholson J agreeing).

the proposition that any attempt to apply the proportionate liability provisions under the Law Reform Act (or CCA) to arbitration proceedings would result in difficulties and differences not contemplated by the relevant legislatures in enacting those regimes.

201 In my view, these difficulties and differences in the operation of the relevant proportionate liability provisions in the context of an arbitration, as opposed to court proceedings, are not mere matters of detail that can simply be ignored. They are not merely "rough edges" in the application of those regimes to arbitration proceedings that can be ignored, or worked through in some satisfactory manner. To the contrary, I regard them as an important part of the balance struck by the relevant legislatures when reallocating the risk and burden in certain types of multi-party litigation from a defendant to a plaintiff. They are an integral aspect of the mechanisms enacted by the South Australian and Commonwealth Parliaments to achieve this balance that is not able to be given effect in the same way in the context of arbitration proceedings. To apply either of those proportionate liability regimes in arbitration proceedings would be to apply a regime that differed materially in its operation from the regime that the relevant legislature intended to enact.

202 For these reasons, I do not think that it would be appropriate to conclude that the parties intended to confer the Arbitrator with authority to apply these provisions in this changed way; or indeed that the relevant legislatures intended that the regimes they enacted might be 'picked up' and applied, in a materially changed way, by an implied term of an arbitration agreement.[167]

203 To my mind, this conclusion is supported by an appreciation that it is inherent in the very nature of a regime for proportionate liability that it is designed to govern the resolution of disputes involving multiple wrongdoers, rather than the usual bipartite disputes between a plaintiff and a defendant. While a regime for proportionate liability might be said to focus upon the allocation of the risk and burden between the plaintiff and defendant, it nevertheless inherently does so in a way that potentially affects the interests of third parties (that is, the other wrongdoers), and the rights of the plaintiff and defendant vis-à-vis those third parties. The interests of third parties thus intrude in a way that they would not in resolving ordinary bipartite disputes, including in relation to issues such as contributory negligence. Given this intrusion of third party rights, it is not surprising that a proportionate liability regime might not be amenable to application in bipartite arbitration proceedings.

204 I do not accept that the difficulty associated with the "rough edges" I have identified in the application of the proportionate liability provision can be resolved by simply not applying those aspects of the relevant regime. Inherent in my conclusion that these aspects are integral to the balance intended to be struck by the relevant legislatures is a view that those provisions were all intended to be

[167] Or pursuant to s 28 of the *Commercial Arbitration Act.*

applied as one overall regime. To apply only some parts of that regime and not other parts would be to apply materially different regimes from the ones intended.

205 This is not to say, however, that the parties might not agree between themselves to permit some partial application of the relevant proportionate liability regimes in question in arbitration proceedings between them. While this would result in a different regime from the ones intended by the relevant legislatures, there would be no difficulty with this in circumstances where it is plain that that is what the parties have agreed to do.

206 However, in a case such as the present, where Tesseract relies upon an implied conferral of authority upon the Arbitrator, I do not think this authority can be understood as permitting some partial application of a regime for proportionate liability. As essential features of both of the regimes under consideration in the present case are not amenable to application in arbitration proceedings, I consider that the question posed for consideration by this Court must be answered in the negative.

Conclusion

207 The question of law to be determined by this Court is:

> Does Part 3 of [the Law Reform Act] and/or Part VIA of [the CCA] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [*Commercial Arbitration Act*]?

208 For the reasons given, I would answer this question:

> No.

209 **BLEBY JA:** I agree with the reasons of Doyle JA.