Civil Liability Reform
Recent Commonwealth Legislation
Finishing Touches?

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Recent Amendments to the Trade Practices Act - Finishing Touches?

It is now almost 2 years since the panel chaired by the Honourable David Ipp released its report recommending reforms to the law of negligence (the Ipp Report).

The latest round of legislation inspired by the Ipp Report was passed by the Commonwealth Government in the last 6 weeks. This legislation introduces a number of amendments to the Trade Practices Act 1974 (Cth) (Trade Practices Act) and the Australian Securities and Investments Act 2001 (Cth) (ASIC Act) and the Corporations Act 2001 (Cth) (Corporations Act) that are aimed at supporting the civil liability reforms introduced at State and Territory level.

In this paper, we will look at the following matters:

1. Why Commonwealth legislation is necessary to support the civil liability reforms of the States and Territories;
2. The recent laws passed by the Commonwealth; and
3. Whether the Commonwealth legislation is adequate.

Why is Commonwealth reform necessary?

If you impose a restriction on the recovery of damages, lawyers will seek out means to step around the restriction - they have a duty to their clients to do so!

An obvious way around a State or Territory law which may limit a plaintiff's rights is to allege contravention of a Commonwealth law. If the Commonwealth law does not limit or restrict the amount of damages recoverable, the fact that the State or Territory laws do is irrelevant. The plaintiff will be entitled to recover damages under the Commonwealth law using normal principles.

The various consumer protection provisions of the Trade Practices Act, the ASIC Act and the Corporations Act provide fertile ground for bringing tortious claims in a different guise. A recent example of this is the judgment of the new South Wales District Court in the matter of Johnson v Golden Circle Limited (5374/02 unreported).

The facts of this case were simple. The plaintiff, Ms Johnson, drank a sample of orange juice provided to her in a plastic cup. The cup contained a splinter of plastic which apparently had come from another cup which had broken. The splinter stuck in Ms Johnson’s throat, she coughed it up but continued to suffer some irritation.
The facts are not unlike those of the classic negligence case of *Donoghue v Stephenson* and the judge had no difficulty concluding that the damage was caused by the negligence of the defendant’s servant or agent. However, if the matter had ended there damages would have been assessed by reference to the rules under the *Civil Liability Act 2002* (NSW). As the judge observed, under those rules her injury did not exceed the threshold requirement and no general damages would have been awarded. The plaintiff would only have been entitled to $176.00, being her economic loss, and her medical expenses of $1,196.10. She in fact received a verdict for an additional $10,000.

The reason for this was that the case was also brought under section 75AD of the Trade Practices Act which provides, in effect, that where a corporation manufactures and supplies goods and they have a defect then the corporation is liable to compensate an individual who suffers damage as a result of that defect.

Section 75AA defines manufacture as including ‘grown, extracted, produced, processed and assembled’. Relying on *Glendale Chemical Products Pty Limited v The Australian Competition and Consumer Commission* (1999) ATPR 41-672, his Honour held that the pouring of the orange juice into the plastic cup was an act of manufacture and that the cup containing the orange juice had a defect, being the plastic splinter, which had caused an injury to an individual and so compensation was payable. In the *Glendale* case the full Federal Court had found that repackaging of caustic soda involved an act of manufacture.

**The Ipp Report**

The desire for harmony between State, Territory and Commonwealth laws was recognised in the Ipp Report.

Recommendation 1 suggested a national response whereby tort law reform should occur by the enactment of a single statute styled the ‘*Civil Liability (Personal Injury and Death) Act*’, in each jurisdiction. The panel indicated that its aim in making this recommendation was to provide the basis of the drafting of a model statutory provision that could be adopted in any and every Australian jurisdiction.

Recommendation 2 stated that any statute incorporating any or all of the recommendations should be expressed to apply to any claim for damages for personal injury or death resulting from negligence, regardless of whether the claim is brought in tort, contract, under statute or any other cause of action.

In the end neither of these recommendations was adopted, and the States, Territories and the Commonwealth have each introduced their own separate legislation to give effect to the recommendations.
The recommendations of the Ipp Report dealing with the Trade Practices Act and like provisions of the ASIC Act and the Corporations Act are set out in Recommendations 17 to 22 of the Ipp Report as follows:

**Recommendation 17**

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

**Recommendation 18**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

**Recommendation 19**

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div 1.

**Recommendation 20**

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

**Recommendation 21**

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A and Part VA.

**Recommendation 22**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part 5 Div 2A or Part VA.

**Legislation introduced by the Commonwealth**

In this paper we will be focusing upon the legislation most recently introduced by the Commonwealth. However we also note the following Commonwealth Acts that have been introduced to support the State and Territory reforms:

- *Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth)*
- *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002 (Cth)*
- *Commonwealth Volunteers Protection Act 2003 (Cth)*

The *Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth)*, inserts a new section 68B in the Trade Practices Act, which in effect allows a contract for supply by a corporation
of recreational services to limit liability for death or personal injury arising from a breach of the warranty implied by section 74. Such a limitation of liability would otherwise be void under section 68.

Section 74 of the Trade Practices Act provides that where a corporation which supplies services to a consumer in the course of a business under a contract, that contract will be subject to an implied term that the services are rendered with due care and skill and that material supplied in connection with those services will be reasonably fit for the purposes for which they are supplied. Obviously, if this provision applied in relation to the supply of recreational services, then the reforms by States and Territories to allow persons to limit their liability in respect of the provision of such services would be seriously undermined.

The Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002 (Cth), deals with the tax treatment of structured settlements.

The Commonwealth Volunteers Protection Act 2003 (Cth), provides that an individual who is a volunteer does not incur a civil liability in doing work for the Commonwealth, or a Commonwealth authority, if it is voluntary and organised by the Commonwealth or Commonwealth authority. In circumstances where the volunteer would be liable but is not because of the Act, the Commonwealth, or the Commonwealth authority, incurs that liability. In other words the liability is shifted from the volunteer to the Commonwealth.

The following Commonwealth Acts received the Royal Assent in the last 6 weeks:

- Trade Practices Amendment (Personal Injury and Death) Act (No. 2) 2004 (Cth) (13 July 2004)

We will also address the reforms proposed by the Trade Practices Amendment (Personal Injuries and Death) Bill (No. 1) 2003 (Cth), which currently remains in limbo between the House of Representatives and the Senate.

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth)

The focus of this Act, which is better known as CLERP 9, is the improvement of the corporate governance and financial reporting framework in Australia. As such, it introduces a number of reforms relating to the independence of auditors and the application of audit principles.

It also introduces some important provisions relating to proportionate liability.

Schedule 3 amends the Trade Practices Act (and the ASIC Act and the Corporations Act) to ensure that ‘proportionate liability’ applies to claims for damages for economic loss or property damage
arising from a breach of section 52 for misleading or deceptive conduct (or the equivalent provisions of the ASIC Act and the Corporations Act). In the context of the legislation ‘proportional liability’ applies to both contributory negligence and the abolition of joint and several liability.

The amendments appear in sections 82 to 87 of the Trade Practices Act relating to the recovery of damages.

In relation to contributory negligence, section 82 of the Trade Practices Act is amended as follows:

(1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the defendant) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant’s failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant’s share in the responsibility for the loss or damage.

Accordingly, a defendant will not be able to assert contributory negligence in respect of a claim arising from a breach of section 53 of the Trade Practices Act where the breach was intentional or fraudulent.

Proportionate liability is introduced by new sections 87CB to 87CI of the Trade Practices Act (and the equivalent provisions of the ASIC Act and Corporations Act).

We will not set out the proportional liability provisions in full, but observe as follows:

1. The amendments largely follow the model found in the New South Wales Civil Liability Amendment (Personal Responsibility) Act 2002 as amended by the Civil Liability Amendment Act 2003 (NSW).

2. The provisions do not apply to intentional or fraudulent conduct.

3. The apportionment of liability between joint tortfeasors is by reference to what the court considers to be just having regard to the extent of each defendant’s responsibility – this differs slightly from the provisions relating to contributory negligence which require the
court to consider a ‘just and equitable’ apportionment of liability between the plaintiff and the defendant.

4. The provisions allow apportionment even if all concurrent wrong doers are not joined as parties, although cost consequences can apply if a defendant does not provide the plaintiff with information about those who he or she has reasonable grounds to believe may be a concurrent wrong doer.

5. Vicarious liability, liability of partners between each other or the imposition of several liability is unaffected.

Significantly the provisions do not deal with other provisions of the Trade Practices Act (or the equivalent provisions of the ASIC Act or Corporations Act) that give rise to a civil liability in circumstances that are similar to, or in some way related to the provisions found in section 52. We will deal with this in more detail later.

The provisions relating to proportionate liability came into effect on Monday, 26 July 2004. Sources at the New South Wales Attorney General's Department say that the New South Wales provisions on proportionate liability will commence with effect from 26 July as soon as transitional provisions to match those of the Commonwealth legislation can be passed early in the next sitting.

**Practical effect of the legislation**

The practical effect of these changes will be in the area of claims and have the potential to reduce both the financial burden faced by a defendant and the manner in which the litigation is conducted.

No longer will it be possible for the plaintiff to simply target the defendant, or potential defendant, with the deepest pockets or highest amount of insurance cover. Rather, if the plaintiff is to recover 100% of the loss suffered, he or she will bear the onus and cost of identifying and commencing proceedings against all potential defendants. Because the provisions apply even where others are not parties to the proceedings, the burden of another wrongdoers insolvency or elusiveness will also be borne by the plaintiff.

In relation to the obligation to notify a plaintiff of other potential wrongdoers, this may create problems for intermediaries, such as brokers if they are joined to proceedings. There does not appear to be any limitation upon this obligation and hence intermediaries who are aware that another one of their clients may also be liable will be obliged to notify the plaintiff of this.

There is some irony in the introduction of reforms targeting proportionate liability. The Ipp Report declined to recommend its introduction in personal injury cases on the grounds that there was a risk that plaintiffs would not fully recover their losses.
Trade Practices (Personal Injuries and Death) Act 2004 (Cth)

The subject matter of this Act is claims for damages for compensation for death or personal injury where those proceedings relate to Part IVA, Division 1A or 2A of Part V or Part VA of the Trade Practices Act.

Part IVA deals with unconscionable conduct. Division 1A of Part V relates to product safety and product information. Division 2A relates to actions against manufacturers and importers of goods and Part VA deals with the liability of manufacturers and importers of defective goods. The Act does not apply to Division 1 of Part V relating to unfair practices.

The subject matter of the Act is as follows:

1. **Limitation periods (ss87F to 87K)** - The limitation periods are those recommended in the Ipp Report and provide that in the case of personal injury damages, proceedings must be commenced 3 years from the date of discoverability of the death or injury or after the end of a long stop period. The date of discoverability is dealt with in section 87G and is essentially defined as the first date on which the plaintiff knows or ought to know each of the following:
   
   (i) that the death or personal injury has occurred;
   
   (ii) that the death or personal injury was attributable to a contravention of the Trade Practices Act; and
   
   (iii) that in the case of personal injury, the injury was sufficient to justify bringing an action.

   Paragraphs (ii) and (iii) raise some concerns. Paragraph (ii) seems to require knowledge of the law and paragraph (iii) seems to require detailed knowledge of the compensation provisions of the Trade Practices Act. Some protection is given to defendants by a provision dealing with constructive knowledge on the assumption that the plaintiff has taken all reasonable steps to ascertain the particular facts. In relation to minors, incapacitated persons and proceedings by personal representatives, additional protection is provided for defendants. For example, minors are taken to know what the parent or guardian may know.

   With the exception of personal injuries and death related to tobacco products, s87H provides a long stop period of 12 years but permits this period to be extended by the court. This period operates from the date of the act or omission alleged to have caused the death or injury.

2. **Damages for non economic loss (sections 87L to 87T)**: These provisions introduce similar provisions to those in the New South Wales Civil Liability Act, but with the maximum amount of non economic loss recoverable being $250,000, which is subject to annual indexation. As in the case of New South Wales, the threshold for general damages is an
injury which is 15% of the most extreme case. Where the severity of the injury is greater than 15% a sliding scale applies up to 100% of the most extreme case.

3. **Cap on damages for loss of earning capacity (sections 87U to 87V):** These provisions place a cap on damages for loss of earning capacity of twice the average weekly wage earnings. This may be contrasted with the New South Wales limit of 3 times average weekly earnings.

4. **Limits on the recovery of damages for gratuitous attendant care services are provided (sections 87W and 87X):** The provisions follow the recommendations of the Ipp Report and impose the same limits as those found in the New South Wales Civil Liability Act.

5. **Limits on the recovery of damages for loss of superannuation entitlements (section 87Z)**

6. **Limits on the amount of interest payable on damages (section 87ZA):** No interest is payable on an award of damages for non economic loss or gratuitous attendant care services.

7. **The abolition of exemplary and aggravated damages for death or personal injury (section 87ZB)**

8. **Awards may be made for structured settlements (s87ZC):** The Court may approve agreements that provide for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

**Practical effect of the legislation**

The intention of this Act is to complement the caps and thresholds legislation introduced by the States and Territories in relation to the Trade Practices Act (and the equivalent provisions of the ASIC Act and the Corporations Act). If Ms Johnson was to bring her claim now, she would not be entitled to recover general damages by resorting to section 75AD of the Trade Practices Act.

With regard to the effect that the caps and thresholds legislation has had generally, present anecdotal evidence and some statistical evidence is showing that there has been a significant drop in claims and in court filings in the personal injury arena. However, while premiums appear to have stabilised and cover is now available where it was not before, there is little indication that premiums are declining. It is probably too early to say whether either of these effects are because of the success of tort law reform, or whether there are other factors at play.

**Treasury Legislation Amendment (Professional Standards) Act (No. 2) 2004 (Cth)**

This Act supports the proposed professional standards legislation at State and Territory level by amending the Trade Practices Act, ASIC Act and Corporations Act.

It provides that professional standards laws of the States or Territories apply to limit liability relating to an action for contravention of section 52 of the Trade Practices Act (and the equivalent
provisions of the ASIC Act and the Corporations Act) in the same way as it limits liability arising under a law of the relevant State or Territory.

However, the professional standards law, or scheme, is stated only to apply if:

- it is prescribed by relevant Commonwealth regulations at the time of contravention; and
- any modifications prescribed by the Commonwealth regulations had been made to the scheme.

Accordingly the Commonwealth retains a significant degree of control over how professional standard schemes are to operate.

Separate from the provisions relating to professional standards, the Act also limits or precludes the amount of damages that may be recoverable pursuant to the implied warranties under section 74 of the Trade Practices Act (and equivalent provisions of the ASIC Act) to the extent of the applicable State or Territory law.

The text of the amendment which is made to section 74 of the Trade Practices Act is as follows:

\[
(2A) \quad \text{If:}
\]

\[
(a) \quad \text{there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and}
\]

\[
(b) \quad \text{the law of the State or Territory is the proper law of the contract;}
\]

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

**Practical effects of the legislation**

At a practical level professionals who join accredited schemes such that they are entitled to limit their liability should benefit from reduced premiums. However, if a professional is allowed to contract out of the limitation provisions (for example, if they have signed up to the scheme solicitors in New South Wales are prevented from contracting out of it by the Law Society) this is likely to raise issues relating to the duty of disclosure. In addition, assuming the policy of insurance contains a term or condition requiring an insured to notify its insurer of any fact or circumstance arising during the currency of the policy that may alter the risk, it is arguable that any such contracting out will need to be brought to the attention of insurers.

**Trade Practices Amendment (Personal Injuries and Death) Bill (No. 1) 2003**

Somewhat ironically this Bill was the first in this series of legislation to be introduced, but has not yet been passed.

The Bill proposes to amend the Trade Practices Act by preventing a person from recovering damages for a contravention of Part V, Div 1 where the loss or damage is or results from death or personal injury.
Part V, Div 1 contains consumer protection measures, the most commonly used ones being those that deal with misleading and deceptive conduct (section 52) and false and misleading representations (section 53).

On December 2003 the Opposition and Democrats proposed amendments in the Senate so that instead of excluding personal injury and death claims, the damages recoverable would be limited to those under the civil liability law of the relevant State or Territory. These amendments were rejected by the House of Representatives and an impasse appears to have been reached as the Senate subsequently insisted on the amendments. This is slightly surprising given that the Labor Governments in New South Wales and Tasmania have amended their Fair Trading legislation so that it is line with the Government position. As yet there is no indication that the impasse is likely to be resolved in the near future.

**Practical effect of the legislation**

Given that a claim for loss arising from personal injury and death pursuant to a breach of Part V, Div 1 of the Trade Practices Act is likely to give rise to a claim in negligence, whether or not this Bill is passed with the amendments proposed by the Opposition and Democrats is unlikely to be of any significant practical effect.

In some ways the amendments proposed by the Opposition and Democrats are more consistent with a 'national' approach to civil liability reform. However, if a plaintiff is precluded from recovering loss or damage arising from personal injury of death pursuant to a breach of Part V, Division 1, an additional avenue of debate will be shut down.

**Is the Commonwealth legislation adequate?**

Leaving aside the obvious gap that remains by the failure to introduce the Trade Practices Amendment (Personal Injuries and Death) Bill (No. 1) 2003, it appears that the legislation may not be watertight.

**Part V, Division 1 of the Trade Practices Act**

As identified above, the legislation in respect of proportionate liability (Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth)) and professional standards (Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth)) is limited to breaches of section 52 of the Trade Practices Act (and the equivalent provisions of the ASIC Act (section 12DA) and Corporations Act (section 1041H)) only. This raises a number issues in relation to the other sections of Part V, Division 1 of the Trade Practices Act.

**Section 52**

Section 52(1) of the Trade Practices Act provides as follows:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
Section 52(1) is written in general terms and is ‘a comprehensive provision of wide impact’\(^1\). As noted in the Ipp Report, section 52 of the Trade Practices Act has had a vast influence on the law of contract and is a major source of litigation in Australia. The reason for this was identified in paragraph 5.24 as follows:

Section 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault. Often, a plaintiff will plead, as an alternative to a claim under section 52, a claim for negligent misrepresentation or deceit. In order for such common law claims to succeed it would be necessary for the plaintiff to prove not only that the defendant made a false representation, but also that he or she did so negligently, or dishonestly (as the case may be). Under section 52, however, the plaintiff can succeed merely by proving that the statement was misleading or deceptive, even if the defendant made the statement with the utmost care and with complete honesty. [our emphasis]

Bearing this observation in mind, is there any reason why the legislation in respect of proportionate liability and professional standards should not extend to the other sections of Part 5, Division 1?

**Section 53**

Section 53 of the Trade Practices Act provides as follows:

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

\begin{enumerate}
\item falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
\item falsely represent that services are of a particular standard, quality, value or grade;
\item falsely represent that goods are new;
\item falsely represent a particular person has agreed to acquire goods or services;
\item represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
\item make a false or misleading representation with respect to the price of goods or services;
\item make a false or misleading representation concerning the need for any goods or services; or
\item make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
\end{enumerate}

\(^1\) see Fox J in *Brown v Jam Factory Pty Ltd* (1981) 53
There are a number of concepts involved in understanding section 53 that do not appear in section 52. In particular, in a number of instances the conduct referred to will only constitute a breach of section 53 if it ‘falsely’ represents the position.

In *Murphy v Farmer* (1988) 165 CLR, a case involving the application of section 229(1) of the *Customs Act 1901*(Cth), the High Court was inclined to interpret ‘false’ to mean ‘purposely untrue’ in circumstances where the importer of a motor vehicle had made an incorrect, but not deliberately incorrect, customs declaration. If this was the case in relation to section 53, a clear distinction could be drawn between it and section 52. However, in *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212, where the defendant offered for sale a car with an odometer reading of 23,700 miles, when in fact it had travelled substantially in excess of that mileage, Franki J said (at page 217):

> The next matter to consider is whether the words ‘falsely represent’ in s 53(a) are satisfied if the representation is not correct, or whether it must be known to be false by the person making the representation…I am satisfied that, if a representation is in fact not correct it comes within the words of the section, even if it is not false to the knowledge of the person making the representation.

This view was endorsed by the Full Court in *Darwin Bakery Pty Ltd v Sully* (1981) 51 FLR 90 (see also *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 and *TPC v The Vales Wine Company Pty Ltd* (1996) 6 FCR 336.

**Section 53A**

Section 53A applies to corporations which, in trade or commerce:

...make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land...

As to the term misleading, the test to be applied is simply whether the representation was false or misleading as to the use to which the land could be put at the time of settlement. The representor’s intention or belief at the time of the representation is irrelevant (*Bowler v Hilda Pty Ltd* (1998) 80 FCR 191).

Accordingly, as with section 52 a plaintiff can succeed in an action for breach of sections 53 and 53A merely by proving that a representation is incorrect and there is no requirement for dishonesty or knowledge that this is the case.

**Section 55A**

By section 55A a corporation shall not, in trade or commerce:

...engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.
TPC v J&R Enterprises Pty Ltd (1991) 99 ALR 325 involved the sale by the defendants to businesses of advertising space in an advertising scheme called the ‘System 2000’ which was a home organiser and information centre, at a time when they knew there was no prospect of the System 2000 be available in the Adelaide area in the foreseeable future.

O’Loughlin J held (as with sections 53 and 53A) that there was no need to show any intention to mislead on the part of the defendants.

Relying upon the authority of Westpac Banking Corporation v Northern Metals Pty Ltd (1989) 14 IPR 499, the Court found that the term 'liable to mislead' in section 55A was narrower than the words 'likely to mislead' in section 52. Hence a greater degree of evidence is required to establish a breach of section 55A.

The words 'the public' did not mean the world at large or the whole community. It was sufficient that an approach had been made that was general and at random and that the number of people approached was sufficiently large.

**Example**

To illustrate this point further, let us consider whether a decision concerning a breach of section 52 which has given rise to a claim for economic loss is capable of giving rise to a claim for breach of any of the other sections of Part V, Division 1.

In Smith v State Bank of NSW Limited [2001] FCA 946, the plaintiffs had emigrated from England in 1998. They placed $300,000 in the hands of a Mr Johnston, an undischarged bankrupt with a criminal history of dishonesty offences, who was conducting a business as a taxation and business consultant called Cranbourne Park Accounting Services Pty Ltd (Cranbourne). At the time the applicants invested their money upon the advice of Mr Johnston, Cranbourne was an accredited agent of the defendant bank. The bank provided Cranbourne with a certificate of accreditation for display, which represented Mr Johnston as having been assessed by the bank as meeting its proscribed levels of competency, and further, as being able to provide professional advice on 8 listed subjects, including financial matters.

Mr Johnston persuaded the plaintiffs to invest their money in an investment company which he controlled, Greenacres, promising high rates of return, thus increasing their chances of obtaining a home loan with the bank. The plaintiffs received three interest payments, the third by way of a cheque that was dishonoured and subsequently sought and obtained a guarantee from Mr Johnstone that the sum of $150,000 would be repaid in 60 days. When this did not occur, the plaintiffs sued Greenacres and Mr Johnstone in the Supreme Court of Victoria. They obtained judgment for damages and costs, however, the judgment remained unsatisfied.

The plaintiffs subsequently sought to recover their loss from the bank under section 52 on the basis that by issuing the certificate of accreditation, the bank represented that Mr Johnston had been assessed to be competent and was competent, which was untrue.
Gray J held that in accrediting Cranbourne, the bank was undoubtedly acting in trade or commerce. Its object was to sell its services, which it regarded as ‘products’, to members of the public and to use Cranbourne as a means of attracting customers to itself.

The representation conveyed in the certificate of accreditation was plainly false: the holder of the certificate had been assessed by the bank as meeting its prescribed levels of competency. The process through which Mr Johnston had been put was far from rigorous and was, indeed, wholly inadequate to determine that he was competent to do anything of significance and the plaintiffs were entitled to recover their economic loss suffered.

Taking the findings of his Honour, it would appear that this case would sit comfortably within section 53(aa) of the Trade Practices Act, namely a false representation that services are of a particular standard, quality, value or grade.

A question arises as to whether the representations in this case arose ‘in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services’. This concept has not been considered in detail by the courts in the context of section 53. However, in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants (Aust)* [2001] FCA 1056, the court considered the term ‘in connection with’ in section 51 AC and decided that it required the conduct complained of to ‘accompany’ or ‘go with’ or ‘be involved in’ the supply of goods and service. In *ACCC v Woolworths (South Australia) Pty Ltd* [2003] FCA 530, Mansfield J considered the term in relation to section 87 B. Applying the test in *Berry v Federal Commissioner of Taxation* (1953) 89 CLR 653, to the effect that there needs to be a substantial relationship, in a practical sense, between the conduct complained of and the undertaking accepted. His Honour also noted the view expressed by Wilcox J in *Our Town FM Pty Limited v Australian Broadcasting Tribunal* (1987) 16 FCR 465 that the test did not require ‘an immediate causal relationship’. Accordingly, given the finding that the bank used the accreditation to attract customers to itself, it seems likely that any representation arose in connection with the provision of services and hence, that the defendant could also have been liable for a breach of section 53(aa).

This conclusion illustrates further the inconsistency in the Commonwealth’s approach. If this claim were litigated today, the liability of the defendant bank under section 52 would be assessed using the proportionate liability principles and hence, it would only be liable to the extent of its contribution to the loss. The liability of Mr Johnston and Greenacres would be taken into account notwithstanding that they may be unable to satisfy any debt to the plaintiffs. However, the plaintiffs would be able to bypass this and recover 100% of their losses from the bank by bringing their claim under section 53(aa).

**Rationale for the Commonwealth’s approach**

The rationale for the Commonwealth’s approach appears to be that a distinction should be drawn between provisions of the Trade Practices Act which are capable of giving rise to an offence (eg.
section 53) and those which are not (section 52). However, the distinction is a curious one. Such a distinction was not drawn by the Ipp Report in Recommendation 19 which suggested that the Trade Practices Act be amended to prevent individuals bringing actions for damages for personal injury and death under Part V, Division 1 generally. It was not the approach followed by the Commonwealth in giving effect to this recommendation in the Trade Practice Act (Personal Injuries and Death) Bill (No. 1) 2003. We doubt that plaintiffs will draw this distinction and that any competent lawyer will be able to frame those claims where circumstances permit, to bring claims under sections of Part V, Division 1 other than section 52.

**Proportionate liability provisions**

The current condition of the State, Territory and Commonwealth legislation that has been adopted is such that a patchwork of different approaches exists. These differences clearly have the potential to cause problems and inject a degree of uncertainty into the claims process.

The issue is illustrated further by the reforms, or proposed reforms that have been introduced in the area of proportionate liability:

**New South Wales, Western Australia & the Commonwealth**

As indicated above, the reforms introduced by the Commonwealth in the area of proportionate liability, largely follow the model found in the New South Wales Civil Liability (Personal Responsibility) Act 2002 as amended by the Civil Liability Amendment Act 2003 (NSW). Western Australia\(^2\) adopts a similar approach, which as with the New South Wales legislation has been passed but not commenced. The main distinction between the legislation passed in Western Australian and that of New South Wales and the Commonwealth, is that in Western Australia there is no duty imposed upon a defendant to inform a plaintiff of the identity of wrongdoers.

**Victoria**

The provisions relating to proportionate liability in Victoria are found in sections 24 AE to 24 AS of the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Vic). These provisions are deemed to have been in operation since 21 May 2003.

As with the New South Wales and Commonwealth legislation, the provisions apply to claims for economic loss or property damage. However, by section 24 Al(3), in apportioning responsibility between defendants a court must not have regard to the comparative responsibility of any person who is not a party to the proceedings unless that person is dead or, in the case of a corporation, has been wound-up.

\(^2\) sections 5AI – 5AO, Civil Liability Act 2003 (WA)
Queensland

The proportionate liability provisions of the Civil Liability Act 2003 (Qld) are set out in sections 28 to 33 of Part 2 of Chapter 2 (which have been passed but not proclaimed). However, amendments to these provisions have recently been proposed in Part 8 of the Professional Standards Bill 2004 (the Bill) that was introduced to the Queensland parliament on 18 May 2004. In the circumstances, there appears to be some doubt as to whether the provisions currently set out in sections 28 to 33 of the Civil Liability Act 2003 (QLD) will ever be proclaimed and we, therefore, intend to focus upon the proposed legislation contained in the Bill.

The provisions set out in the Bill apply to claims for economic loss or damage to property in an action for damages arising from a breach of a duty of care, or under section 38 of the Fair Trading Act 1989 (Qld) (the Fair Trading Act) for misleading and deceptive conduct. This is subject to the exception of claims made 'by a consumer'.

A 'consumer' means an individual whose claim is based on rights relating to goods or services, or both, in circumstances where goods or services are being acquired for personal domestic or household use or consumption, or relate to advice given by a professional to the individual for the individual's use, other than for a business carried on by the individual.

Section 32F of the Bill contains a unique provision to the effect that a concurrent wrongdoer who breaches section 38 of the Fair Trading Act is 'severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.'

It is not clear what is intended by this provision. If a person is misleading or deceptive and thereby contributes to another's economic loss, the Bill states (in section 31(a)) that they are proportionately liable. However, by section 32F, they are also 'severally liable' for the wrongdoing of all concurrent wrongdoers.

By section 31(a), in any proceedings involving a claim that is covered by the Bill:

    the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage.

Section 31(3) provides that in apportioning liability between defendants in a proceeding, the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

A 'concurrent wrongdoer' is defined by section 30(a) as:

    ...a person who is 1 or 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.

This definition causes some concern as it represents a significantly different position to those taken by the Commonwealth, New South Wales, Victoria and Western Australia. In each case
'concurrent wrongdoer' includes persons whose actions jointly caused the loss or damage claimed. The Bill, however, only refers to concurrent liability.

The important point to note here is that there is a difference between a tort which is committed jointly, a series of successive torts committed by different persons where the loss, damage or injury is indivisible and a series of successive torts committed by different persons where the loss, damage or injury is divisible. In the latter case, the liability is severable i.e. it is apportioned between tortfeasors by reference to the divisible loss caused to each of them. In the first 2 instances, there is joint and several liability.

**Practical effect**

The easiest way to illustrate the practical effect of these differences is by reference to an example.

Let us consider the situation of a plaintiff based in Queensland who has suffered economic loss as a result of the negligence of two defendants. To determine whether the Bill applies, it will be necessary to consider whether the tort is a joint tort or a series of successive torts. This can be an extremely complex process.

Next let us assume that the two defendants are jointly liable, but in addition to being negligent, they have also engaged in misleading and deceptive conduct. In these circumstances, proportionate liability will not apply to the claim in negligence and both parties will be liable for 100% of the loss and damage suffered by the plaintiff. However, in respect of the claim for misleading and deceptive conduct, liability is to be apportioned. If the plaintiff only decides to bring a claim against one of the defendants, what is the correct measure of damage? Are the proportionate liability provisions of the Trade Practices Act to apply, or is the defendant liable for 100% of the loss suffered? Who should make this decision?

A similar discord would arise if the tort was governed by the laws of Victoria and the plaintiff had only decided to join one defendant, notwithstanding that two wrongdoers could be liable under section 52 of the Trade Practices Act.

**Implied warranties**

Concern has been expressed in respect of the problems associated with the implied warranties under the Trade Practices Act and in particular section 74 which implies a warranty in a contract for services with a consumer.

Clearly the amendments made to section 74 of the Trade Practices Act and the equivalent provision in the ASIC Act go a long way towards remedying these concerns.

However, what, in fact, does the amendment achieve?

The first point to be made about the new provision in the professional standards legislation is that all it does is permit a State or Territory law to limit or preclude liability for breach or in relation to the recovery of that liability. In other words, if the State or Territory law says that in relation to a breach
of a duty of care there are limits upon the damages which may be recovered, then that limit will operate. However, it has no effect on section 68 of the Trade Practices Act, which does not allow contracting out of the obligations under section 74. Accordingly, the ability of the States and Territories to limit or preclude damages, or the mechanism by which they may choose to do so is not unfettered.

In *Wallis v Downward Pickford (North Queensland) Pty Limited* (1994) 120 ALR 440 the High Court was asked to deal with the situation where a police officer’s goods were damaged in transit as a result of the failure of a carrier to use due care and skill when transporting the goods. Queensland legislation limited the liability of carriers to goods and contained deeming provisions that applied to limit a carrier’s liability pursuant to contracts of carriage. The High Court held that these provisions were inconsistent with the provisions of section 68 of the Trade Practices Act and hence, constitutionally invalid. As a consequence, State and Territory legislation that purports to allow a defendant to limit its liability in contract, or any professional standards law or scheme that allows its members to do so, may be rendered invalid by the operation of the Australian constitution.

**Conclusion**

It is clear that the piecemeal approach taken by the States, Territories and Commonwealth gives rise to the potential for uncertainty and that plaintiffs who are appropriately advised will target weak spots to try and forge a way round the reforms that have been introduced.

What then should the insurance industry do? The answer appears to be that insurers need to think carefully about the coverage they provide in relation to of the weak points and, to the extent it is unpractical to exclude cover for such issues, ensure that premium pricing properly reflects the risks covered.