HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

TESSERACT INTERNATIONAL PTY LTD
Appellant

and

PASCALE CONSTRUCTION PTY LTD
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Statement of issues

2. Does s 28 of the *Commercial Arbitration Act 2011* (SA) (**CAA**) empower an arbitrator to apply Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**Law Reform Act**) and/or Part VIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) , or do the terms of that legislation preclude the arbitrator from doing so?

3. Does the implied power conferred on the arbitrator to determine the parties' dispute, as though it were being determined in a court of law with appropriate jurisdiction, empower an arbitrator to apply Part 3 of the Law Reform Act and/or Part VIA of the CCA, or do the terms of that legislation preclude the Arbitrator from doing so?

4. Are the proportionate liability regimes established by the Law Reform Act and the CCA amenable to arbitration?

5. Do the proportionate liability regimes established by Part 3 of the Law Reform Act or Part VIA of the CCA apply to the arbitration by force of their own terms?

Part III: Section 78B notices

6. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Reasons for judgment below

7. The reasons of the Full Court of the South Australian Court of Appeal (**SASCA**) are at *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 (**CA**) (Core Appeal Book (**CAB**) p.25).

Part V: Facts

8. The Respondent (**Pascale**) brought a claim in an arbitration against the Appellant (**Tesseract**) alleging that its work was not performed to the standard required under the parties' Contract and alleged that it has thereby suffered loss and damage.

10 9. In its defence, Tesseract denies liability. Tesseract also pleads, in the alternative, that any damages payable by it should be reduced by the proportionate liability regimes established by Part 3 of the Law Reform Act) and/or Part VIA of the CCA (together, the **Proportionate Liability Law**).

10. On 21 December 2021, and with the consent of Pascale, Livesey P of the SASCA granted Tesseract leave to apply for the determination of the following question of law:

> 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 [CAA]?

20 11. The SASCA answered this question in the negative: (CA [208]) (CAB p.84).

12. The background facts are otherwise not in dispute and are set out in the judgment below: (CA [1]-[13]) (CAB pp.25-27).

Part VI: Summary of argument

13. The central issue to be determined in this appeal is whether the Proportionate Liability Law applies to the commercial arbitration proceeding. This requires consideration of the substantive law applicable to the parties' dispute. The 'substantive law' is determined by reference to s 28 of the CAA and the parties' arbitration agreement, including by reason of an implied term.

30 14. Both s 28 of the CAA and the parties' arbitration agreement require the arbitrator to apply the Proportionate Liability Law.

15. The SASCA recognised these two important sources of the arbitrator's powers but proceeded to exclude the Proportionate Liability Law on the basis that it considered such legislation was 'not amenable to arbitration'. It did so in error. First, the arbitrator's powers to apply the substantive law required by s 28(3) and the implied power in the parties' arbitration agreement require the arbitrator to apply the Proportionate Liability Law on the basis that it is part of the 'law of the land'. Second, the terms of the Proportionate Liability Law can comfortably be applied in the arbitration proceeding. Indeed, it would be inconsistent with the overall objectives of the scheme, as well as that of the CAA, to exclude arbitral proceedings from the scope of the Proportionate Liability Law. It would create significant disconformity between curial and arbitral proceedings. To the extent the provisions of that legislation require modification to operate effectively in bilateral arbitral proceedings, those provisions can be 'moulded' consistent with the principles expressed in, inter alia, *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*[1] (**GIO**) and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[2] (**Codelfa**).

S 28 of the CAA

16. The CAA is part of an integrated statutory framework for domestic[3] and international arbitration[4] which adopts – with some modifications to reflect the domestic nature of the state regime and modern drafting styles and conventions[5] – the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (**Model Law**)[6].

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[1] *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206.
[2] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.
[3] The South Australian Act is enacted in substantially the same form in each state and territory as the applicable supervisory law for domestic arbitrations seated within those jurisdictions: see *Commercial Arbitration (National Uniform Legislation) Act* 2011 (NT); *Commercial Arbitration Act* 2010 (NSW); *Commercial Arbitration Act* 2011 (Tas); *Commercial Arbitration Act* 2011 (Vic); *Commercial Arbitration Act* 2012 (WA); *Commercial Arbitration Act* 2013 (Qld); *Commercial Arbitration Act* 2017 (ACT).
[4] International Arbitration Act 1974(Cth).
[5] South Australia, *Parliamentary Debates,* Second Reading Speech, 07/07/2011, (Ms Chapman, Senator for Bragg and J.R. Rau, Attorney-General).
[6] *UNCITRAL Model Law on International Commercial Arbitration* (1985) with amendments as adopted in 2006 ('UNCITRAL').

17. Section 28 of the CAA provides, inter alia:

(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.

18. Section 28 is to be interpreted, and the functions of the arbitral tribunal are to be exercised, in accordance with the paramount object of the CAA: sub-s 1C(3). The CAA aims to achieve its paramount objective by enabling parties to agree on how their commercial disputes are to be resolved.

19. Section 28(1) empowers the parties to choose "rules of law" to govern the dispute. This provides the parties with greater amplitude to choose any particular set of rules to govern the resolution of their dispute. In contrast, s 28(3) requires the arbitral tribunal to apply 'the law' determined by the conflict of laws rules that it considers applicable. The tribunal function under s 28(3) is limited to deciding the conflict of laws rules to be used to determine the substantive law applicable and not the substantive law itself. The subsection was drafted in those terms as it was considered appropriate to provide increased certainty to the parties as opposed to empowering the tribunal to choose directly the applicable laws[7].

20. Whilst here the parties' arbitration agreement does not expressly designate the rules of law as applicable to the substance of the dispute, the parties have accepted that the system of law governing the determination of the dispute under s 28(3) – that is, the *lex causae* – is the law of South Australia: (CA [43] (CAB p.39) and [58] (CAB p.43)).

21. The contrast between the language used in s 28(1) and 28(3) is important. The reference in s 28(3) to '*the law*' (cf. the "rules of law" in s 28(1)) is taken to mean

[7] UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its 18th Session,* UN Doc A/40/17 (3 -21 June 1985), Art 28, para 236.

more than a discrete set of rules; in this instance, it means the interconnecting, interdependent laws of South Australia, as interpreted and applied by the Courts.

22. It is significant that section 28 is drafted in mandatory terms. The arbitrator *'must decide*' the dispute in accordance with such rules of law as chosen by the parties as applicable to the substance of the dispute and '*must apply the law*' determined by the conflict of laws rules which it considers applicable. There is no textual indication in section 28(3) to suggest the arbitrator's obligation to apply '*the law*' is conditioned upon the arbitrator finding that such laws are amenable to arbitration.

Implied term

23. In addition to s 28(3) of the CAA, the arbitrator's obligation to apply 'the law' also arises from the implied term in the parties' arbitration agreement. By referring their dispute to arbitration, the parties impliedly conferred upon the arbitrator the power to determine their dispute in accordance with the applicable substantive law.

24. In the seminal case of *GIO*, the High Court considered whether an arbitrator was empowered to order interest pursuant to s.94 of the *Supreme Court Act 1970* (NSW). The majority (Stephen, Mason and Murphy JJ, Barwick CJ and Wilson J dissenting) held that the arbitrator had power to award interest on the amount of the award since interest would have been recoverable in a court and the parties had impliedly given the arbitrator authority to determine all differences between them in light of the general law.

25. Mason J, with Murphy J concurring, posited that the "real question" 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. Justice Mason reasoned that in the United States it is accepted that "the parties are free to clothe the arbitrator with such powers as they may deem it proper to confer"[8]. His Honour said:

> "The parties' submission to arbitration of all their differences is to be construed in the 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 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)."

[8] *GIO* Op. Cit. at p 247.

26. Justice Stephen identified the desire to achieve conformity between the substantive laws applying in curial and arbitral proceedings as being the primary reason for the implication. Justice Stephen explained[9]:

> "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"

27. Barwick CJ also accepted the existence of an implied term in the manner contemplated by the majority but did not consider that it applied to encompass the procedural power to award interest. His Honour stated[10]:

> "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."

28. In *Codelfa,* Mason J (with whom Stephen, Aikin and Wilson JJ agreed) applied the principles in *GIO,* to recognise the power of an arbitrator to award interest under s 94 of the *Supreme Court Act 1970* (NSW)[11]. The majority identified that the terms of the statute are modified when they are applied in the arbitration to take account of differences between curial and arbitral proceedings[12]:

> "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 his 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….
>
> The obverse of this picture is that the 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

[9] Ibid at p 235.
[10] Ibid at p 224.
[11] *Codelfa* Op. cit. p 371.
[12] Ibid at p 368.

> power is therefore to be moulded so that it is expressed in terms appropriate to, and capable of being exercised in, an arbitration."

29. Justice Mason's recognition that the relevant statutory power can be *"moulded"* (so that it is expressed in terms and capable of being exercised in an arbitration) is critical to the issues falling for disposition in this appeal.

30. The principle derived from *GIO* and *Codelfa,* that the arbitration agreement shall contain an implied power for the arbitrator to grant such relief as would have been available in a court of appropriate jurisdiction has been consistently applied by the courts.

31. In the case of *IBM Australia Ltd v National Distribution Services Pty Ltd* [13], the New South Wales Court of Appeal was required to consider whether an arbitrator had power to consider claims made under s 52 of the *Trade Practices Act 1974* (Cth), notwithstanding that an arbitrator could not make an award under s 87 of that Act to declare a contract void *ab initio*[14].

32. Kirby P, in finding that the Arbitrator was empowered to determine the claims, relied on the principles expressed in *GIO,* noting that it is sufficiently wide enough to accommodate the relief provided under the Trade Practices Act. His Honour stated[15]:

> "…[T]here 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 here was 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."

33. Kirby P clarified the principle derived from GIO in the following terms[16]:

> "Properly analysed, the holding of [GIO] 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

[13] *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466.
[14] Ibid at p 485 per Clarke JA.
[15] Ibid at p 482.
[16] Ibid.

> be so even where the language of the submission is expressed in perfectly general terms."

34. Clarke JA[17] and Handley JA[18] also found that the arbitrator was empowered to determine misleading or deceptive conduct claims made under s 52 of the legislation, on the basis of the principle expressed in *GIO*.

35. In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*[19], Gleeson CJ (Meagher and Sheller JJA concurring) held, applying the principle expressed in *GIO,* that an arbitrator would have authority to grant the relief available from a court in respect of a claim for breach of section 52 of the *Trade Practices Act*, including relief available under section 87 of that legislation[20].

36. In *Cufone v Cruse*[21], applying the same principles, the Full Court of the Supreme Court of South Australia held that an arbitrator had the power to order certain declaratory relief to the extent such declaratory relief could be granted by the Court[22].

37. The principles expressed in *GIO* have also been held to be broad enough to encompass claims involving the liability of third parties. In *Passlow v Butmac Pty Ltd*[23], Justice Adamson held that an arbitrator was empowered to determine a claim for statutory contribution pursuant to s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) on basis of the arbitrator's implied power to grant such relief as would have been available in a court of appropriate jurisdiction.[24]

International jurisprudence

38. The approach adopted in Australia concerning the recognition of an implied term is consistent with international jurisprudence.

39. In *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc*[25], the Supreme Court of the United States held that anti-trust claims under the *Sherman Act* 1890 (US) were arbitrable under an agreement which provided for arbitration by the Japanese

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[17] Ibid at 484 per Clarke JA.
[18] Ibid at 488 per Handley JA.
[19] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.
[20] Ibid p 166-167.
[21] *Cufone v Cruse* [2000] SASC 304.
[22] Ibid.
[23] *Passlow v Butmac Pty Ltd* [2012] NSWSC 225.
[24] See also: *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Seeley International Pty Ltd v Electra Airconditioning BV* (2008) 246 ALR 589.
[25] *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc* 473 US 614 (1985).

Commercial Arbitration Association, and under which the proper law of the contract was Swiss law. Blackmun J, speaking for the majority, said (at 636-637):

> "The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."

40. A similar approach was adopted by the House of Lords in *President of India v La Pintada Compania Navigacion SA*,[26] in which it was held:

> "Where parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise." [27]

41. The case of *Fulham Football Club (1987) Ltd v Richards and Another*[28] is also apposite. In that case Longmore LJ, with whom Rix LJ agreed, relevantly observed (at [103]):

> "It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect, see *Societe Commerciale de Reassurance ERAS (International) Ltd, Re ERAS EIL appeals* [1992] 1 Lloyd's Rep 570 at 610. The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved. The reason put forward by Mr Marshall for regarding the FAPL rules and FA rules as inapplicable to unfair prejudice petitions (because of the effect any award might have or might not have on third parties) is of even less substance than the supposed inability of an arbitrator to give any particular remedy."

42. In *Wealands v CLC Contractors*[29], the Court of Appeal of England & Wales recognised that an arbitral tribunal has the same authority to give to a claimant such rights and remedies as would have been available in a Court of law, in determining that the arbitral tribunal has the power to award contribution.

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[26] *President of India v La Pintada Compania Navigacion SA* [1985] AC 104.
[27] Ibid at [119].
[28] *Fulham Football Club* (1987) Ltd v Richards and Another [2012] 1 ER 414.
[29] *Wealands v CLC Contractors* [1999] 2 Lloyd's Rep 739 at p 743; see also *Societe Commerciale de Reassurance v Eras International Ltd* [1992] 1 Llyod's Rep 570.

The amenability of the Proportionate Liability Law to arbitral proceedings

43. The SASCA correctly accepted that pursuant to s 28(3) of the CAA the arbitrator is required to apply "the law" of South Australia and that pursuant to principles in *GIO* and *Codelfa,* the arbitrator possessed an implied power to grant such relief as would have been available in a court of law and appropriate jurisdiction: see (CA [70]-[71] (CAB p.46); [171]–[172] (CAB p.74)). The Court also correctly held the Proportionate Liability Law to be substantive law: (CA [62] (CAB p.44)).

44. That being so, a conclusion should have followed that the Proportionate Liability Law applies to the arbitration. However, the SASCA proceeded, in error, to determine that the Proportionate Liability Law does not apply to the arbitral proceedings. Justice Doyle reasoned that each of those regimes is to be excluded as they are "*not amenable to arbitration proceedings*" or put another way, "*not able to be moulded so that they are expressed in terms appropriate to and capable of being exercised in an arbitration*": see CA at [178] (CAB p.75).

Proportionate Liability Law

45. As explained below, the text, context and purpose of the Proportionate Liability Law indicate that Parliament did not intend to exclude arbitration from its operation. The SASCA erred in concluding that there are features of those regimes, including the mechanisms through which the South Australian and Commonwealth Parliaments have chosen to implement them, that lead to a conclusion that the relevant provisions are not amenable to arbitration: (CA [186] - [189] (CAB p.79-80)).

Law Reform Act: the text

46. The proportionate liability regime in Part 3 of 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)).

47. 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 wrongdoers, including those not a party to the proceedings, for the relevant harm: sub-s 8(2). The detailed mechanism for apportioning liability is set out in sub-ss 8(3) and (4). Subsection 8(4) provides that in a case involving apportionable liability, the court is to determine, in relation to each defendant who is

entitled to the benefit of the section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability and give judgment against each defendant based on that assessment. The CA correctly accepted that these key operative provisions are capable of operating in arbitral proceedings: (CA [190] (CAB p.80)).

48. Part 3 of the Law Reform Act also includes a procedural requirement for a defendant who has reasonable grounds to believe that there is another potentially liable party to provide the plaintiff with information regarding the person: sub-s 10(1). A defendant that fails to comply with that obligation may be subject to cost sanctions: sub-s 10(2).

49. Moreover, Part 3 of the Law Reform Act contemplates multiparty disputes where a plaintiff brings separate proceedings for the same harm against wrongdoers who are entitled to a limitation of liability under part 3: s 11. The inclusion of such a provision supports a finding that Parliament contemplated that a Plaintiff may not be able to sue all concurrent wrongdoers in the first proceeding. This comfortably accommodates the joinder limitations that arise in the context of bipartite arbitral proceedings.

CCA: the text

50. The proportionate liability regime in the CCA applies to an *apportionable claim,* being a claim for damages under s 236 of the CCA Sch 2 (**ACL**) for misleading or deceptive conduct in contravention of s 18 of the ACL: s 87CB(1).

51. It operates to limit the defendant's liability in relation to that claim to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for that damage or loss: s 87CD(1). It applies in all proceedings involving an apportionable claim, regardless of whether or not all concurrent wrongdoers are parties to the proceedings: s 87CD(4).

52. It also includes a requirement for a defendant who has reasonable grounds to believe that there is another potentially liable party to provide the plaintiff with information regarding the person: ss 87CE.

53. It also contemplates multiparty disputes where a plaintiff brings separate proceedings for the same harm against wrongdoers who are entitled to a limitation of liability

under s 87CH. It makes provision for the court to give leave for the joinder of further defendants in proceedings involving an apportionable claim.

54. Section 87CG expressly confirms that nothing in the legislation 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. In those subsequent proceedings it will not be able to recover compensation for damage or loss which is greater than the actual damage or loss it has sustained: s 87CG(2).

The context

10 55. The statutory context of Part 3 of the Law Reform Act further supports Tesseract's contention that parliament did not intend to exclude arbitral proceedings from its scope.

56. Section 6 addresses the right of a defendant who is liable for damages to seek contribution from a third person liable for damages for the same harm, and to seek reduction in damages on account of the plaintiff's contributory negligence. Each of these provisions also use language consistent with that employed in Part 3: "*proceedings*" (sub-s 6(3)(a)), "*court*" (sub-s 6(6)) and "*judgment*" (sub-ss 6(8)(a) and(b)). Section 7 addresses contributory negligence. It also refers to a "court" (sub-s 7(b)).

20 57. Whilst such language of those provisions does not readily encompass arbitral proceedings, it is not seriously controversial an arbitrator has the power to determine such claims: see, for example: *Cufone v Cruse*[30]; *Incitec Ltd v Alkimos Shipping Corporation*[31].

58. Following cases such as *IBM Australia Ltd v National Distribution Services Pty Ltd* [32] and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*[33], the position in Australia at the time the Proportionate Liability Law was introduced was that arbitrators are empowered to award relief under s 87 of the Trade Practices Act in respect of claims made for misleading or deceptive conduct, notwithstanding the language used in the legislation did not naturally extend to arbitration.

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[30] *Cufone v Cruse* [2000] SASC 304 at [29]; [45] – [48].
[31] *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at [36].
[32] *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466.
[33] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

59. It is notable that the legislature has expressly identified that certain types of claims are excluded from the proportionate liability scheme, including intentional or fraudulent claims[34], where proportionate liability is excluded by other legislation[35], vicarious liability and the liability of a partner[36] and claims arising from personal injury[37].

60. As such, it can readily be assumed that if parliament intended to exclude arbitral proceedings from the scope of the proportionate liability regimes, particularly in light of the principles expressed in cases such as *GIO, Codelfa, IBM and Francis Travel Marketing,* it would have likewise included clear words to that effect.

The purpose

61. The introduction of proportionate liability legislation throughout Australia fundamentally altered the regime of 'solidary liability,' whereby liability may be joint or several, but each wrongdoer can be found liable for the entirety of the plaintiff's loss.

62. In *Hunt & Hunt (a firm) v Mitchel Morgan Nominees Pty Ltd,*[38] the High Court observed that such legislation was introduced due to a "perceived crisis regarding the cost of liability insurance"[39], with a fear that such insurance would become unobtainable[40]. It was further observed that the evident purpose of such legislation is to give effect to a legislative policy that, in respect of certain claims, a defendant should only be liable to the extent of his or her responsibility[41].

63. A principal recommendation of the final report of the inquiry into the law of joint and several liability completed by Professor Davis in 1995[42], was that *"joint and several liability be abolished, and replaced by a scheme of proportionate liability, in*

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[34] S 87C(1)(a) and (b) of the CCA and s 3(2)(c) of the Law Reform Act.
[35] S 87CA(c) of the CCA.
[36] S 87CI(a) and (b) of the CCA and s 3(1) of the Law Reform Act.
[37] S 3(2)(a)(i) and s 8(6) of the Law Reform Act.
[38] *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656.
[39] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, 1995, p 11.
[40] *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656 at [17].
[41] Ibid at [16].
[42] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two,* (1995).

all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss"[43].

64. In 1996, the Standing Committee of Attorneys-General released draft model provisions which reflected the recommendations of the Davis Report[44].

65. Those draft model provisions have been largely adopted and there are now similar but not identical proportionate liability regimes[45] that have been introduced by the Commonwealth and in each state and territory[46]. It is evident from the Law Reform Act Second Reading speech that the introduction of the regime was directed to "creating a legal environment more conducive to the continued availability and affordability of insurance"[47].

66. It is further evident from the Second Reading Speech that parliament expressly contemplated that all concurrent wrongdoers may not be joined to the initial proceeding[48]:

> For this reason, it can be expected that, as at present, plaintiffs will **usually** seek to join all potentially liable parties in the first proceedings. If there are subsequent proceedings, however, the earlier determinations about the amount of damages, and the shares of each wrongdoer, including the plaintiff, cannot be relitigated. **Further, to encourage joinder of all the parties in one action**, the Bill requires a defendant to pass on to the plaintiff any information he or she may have about the identity and whereabouts of any other potential defendant and the circumstances giving rise to his or her liability. **Failure to do so puts the defendant at risk of an order for the costs of any subsequent proceedings that could have been thereby avoided**.
>
> (emphasis added)

67. There is nothing in the extrinsic materials[49] that supports a conclusion that Parliament did not intend the Proportionate Liability Law to apply to arbitration proceedings.

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[43] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) p. 34.
[44] Standing Committee of Attorneys-General, *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996).
[45] For an overview of some key differences between the legislative regimes, see the schedule at 'Annexure A'.
[46] *Wrongs Act* 1958 (Vic), Pt IVAA; *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), Pt 3; *Civil Liability Act* 2003 (Qld), Ch 2, Pt 2; *Civil Liability Act* 2002 (WA), Pt 1F; *Civil Liability Act* 2002 (Tas), Pt 9A; *Proportionate Liability Act* 2005 (NT); *Civil Law (Wrongs) Act* 2002 (ACT), Ch 7A; *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW).
[47] South Australia, *Parliamentary Debates,* Second Reading Speech, 4 July 2001, p 1983 (R.J Kerin, Deputy Premier).
[48] Ibid.

Amenability to arbitral proceedings

68. At CA [190] (CAB p.80), the Court accepted (correctly) that the key operative provisions in the Proportionate Liability Law "would be capable of operation in arbitration proceedings".

69. Notwithstanding this finding, the Court proceeded to identify certain features of the legislation which it concluded to be "integral to their overall operation and yet which are inapposite for (if not incapable of) application in arbitration proceedings": CA at [189] (CAB p.80). Properly analysed, none of those features render the Proportionate Liability Law unsuitable for arbitral proceedings.

Benefit of information

70. At CA[192] (CAB p.80), the Court stated that both regimes contemplate that a defendant will only have access to the benefit of the regime "*after the Plaintiff has had the benefit of information from the defendant as to the identity (and whereabouts) of any wrongdoer, and as to the circumstances giving rise to that wrongdoer's potential liability, and after the plaintiff has had the opportunity to join any such wrongdoer(s) to the proceedings against the defendant*". That statement is plainly wrong. To the contrary, s 10(2) of the Law Reform Act expressly envisages that a plaintiff may not be given the benefit of that provision and provides for potential cost consequences in the event of such a failure. That is also consistent with the Second Reading speech: see [66] above.

Inability to join third parties

71. At CA[193] (CAB p.81), the Court reasoned that in the absence of consent of each of the parties and the alleged wrongdoer, it will not be possible to join a third party wrongdoer to an arbitration.

72. The mere fact that third parties cannot be joined, absent consent, does not render the proportionate liability regime in either the Law Reform Act or the CCA unamenable to arbitration. If a respondent successfully raises a proportionate liability defence in a bipartite arbitration, the applicant will need to decide whether to commence subsequent proceedings to recover from any concurrent wrongdoer. There are specific provisions included in each of the relevant proportionate liability regimes

[49] South Australia, *Parliamentary Debates,* Second Reading Speech, 4 July 2001, p 1983 (R.J Kerin, Deputy Premier); see also Commonwealth, *Parliamentary Debates,* Second Reading Speech, 4 December 2003, p 23761, (P Costello, Treasuerer).

that facilitate the commencement of a subsequent proceeding in those circumstances: see, for example, s 11 of the Law Reform Act and 87CG of the CCA.

73. The potential for the bipartite nature of arbitration to impact upon the operation of the legislative scheme does not warrant a conclusion that the legislation is unamenable to it. It is essential to recognise that parties who arbitrate do so in the knowledge that third parties cannot readily be joined to the proceeding. It is an essential feature of the scheme.

74. The limitations of bipartite arbitration to resolve the potential liability of a third-party concurrent wrongdoer would exist even if the proportionate liability regime were excluded from arbitration proceedings. In a claim involving a third-party concurrent wrongdoer that is not able to be joined to the arbitration proceedings, it would be left to the respondent to those arbitration proceedings to commence subsequent court proceedings against the concurrent wrongdoer, thereby carrying the attendant risk of any non-recovery. That is precisely the vice that the Proportionate Liability Law was enacted to address. The SASCA's decision does not offer any solution to the limitations of bipartite arbitration to resolve multiparty disputes; it merely shifts the attendant difficulties and risk of non-recovery from one party to another.

Parties are aware of the limitations of arbitration

75. The risk of inconsistent findings between two proceedings – one curial, one arbitral – is not something new. That risk is concomitant with multi-party disputes where only two of those parties have agreed to arbitrate their disputes.

76. Prior to the enactment of the Model Law, the potential fragmentation of an arbitration dispute as a result of the involvement of a third party and the potential for inconsistent findings might have been a reason to refuse a stay and keep the dispute in court[50].

77. Under the Model Law, the Court no longer possesses a discretion to grant a stay in those circumstances[51]. It can therefore be assumed that parliament, by adopting the Model Law, was aware that the private nature of arbitration carries with it a risk of inconsistent findings where there are two pieces of litigation that are inextricably bound up.

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[50] See, for example, See for example *Halifax Overseas Freighters Ltd v Rasno Export* [1958] 2 Lloyds Rep 146 at 151 per McNair J; *Taunton-Collins v Cromie* [1964] 1 WLR 633 at 635, per Lord Denning MR; *Tasmanian Pulp & Forest Holdings Ltd v Woodhall Ltd* [1971] Tas SR 330 at 345-346.

[51] CAA s 8.

78. It can also be readily assumed that the contracting parties have taken the perceived benefits that arbitration may present – such as speed, informality, confidentiality and freedom to choose how their commercial disputes are to be resolved – and have done so in the knowledge that third parties cannot readily be joined to the proceeding absent the consent of the parties.

79. These inherent features of arbitration – the inability to join third parties and the attendant risk of inconsistent findings – are not cured by excluding the proportionate liability regimes from the arbitration framework.

80. In this context, noting that arbitration is a consensual process, there are measures that parties can take to address such concerns. *First,* it is feasible for a third party to be joined to the proceeding, either by the consent of the parties, or by the consolidation procedures facilitated by s 27C of the CAA. *Second,* it is feasible for parties to enter into an 'umbrella' arbitration agreement that binds all potentially relevant parties to arbitration as the dispute resolution mechanism. *Third,* the parties may choose to adopt certain institutional rules[52] that facilitate the joinder of such third parties, noting that the consent of the third party would of course still be required. *Lastly*, parties may choose not to arbitrate if the perceived risks outweigh the perceived benefits.

Subsequent proceedings

81. At CA [199] (CAB p.82), Justice Doyle considered it unlikely that the outcome of an essentially private consensual dispute resolution process would be determinative of the outcome in subsequent court proceedings involving another party or parties. But there is nothing unusual about that. As the court acknowledged (CA [200] (CAB p.82)), if a respondent to an arbitration proceeding was to pursue a subsequent curial proceeding for contribution in respect of any liability owed to the applicant in the initial arbitral proceedings, its claim for contribution would necessarily be informed by the findings made in the initial arbitration proceedings.

82. In *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government,*[53] Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ observed:

> "It is, however, unnecessary for us to say definitively that the ascertainment of the liability must be by judgment to the exclusion, for example, of

[52] See, for example, London Court of International Arbitration Rules and the Japan Commercial Arbitration Rules.
[53] Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government (1955) 92 CLR 200.

> arbitral award or of agreement itself amounting to accord and satisfaction or of an agreement amounting to accord executory followed by satisfaction. But the meaning of "liable" where it first occurs should be held at least to include ascertainment by judgment. So construed the provision is satisfied by the facts pleaded or at all events substantially so."[54]

83. Their Honours further stated:

> "The Court, however, is required to find what is just and equitable as an amount of contribution having regard to the extent of the responsibility for the damage of the tortfeasor against whom the claim is made. There does not seem to be any valid reason why that tortfeasor may not say to the tortfeasor making the claim, *if he has improvidently agreed to pay too large an amount* or by unreasonable or negligent conduct in litigation has incurred or submitted to an excessive verdict, that the excess is due to his fault and not to that of the tortfeasor resisting the claim. It would be a matter for the Court to consider under the heading of 'just and equitable'"[55].

84. The principles expressed in *Bitumen* apply with equal force to the Proportionate Liability Law. In the event that the plaintiff brings a subsequent proceeding against a concurrent wrongdoer; the plaintiff would be able to rely on the arbitral award for the purposes of establishing its loss or damage. However, there would be nothing stopping the respondent to the second proceeding from arguing that the arbitral award is excessive and unreasonable. The principles derived from the *Bitumen* line of authority provide a natural release valve to ensure that a third-party concurrent wrongdoer is not unfairly prejudiced in connection with an arbitration it has not participated in.

The scope of the legislation

85. The following observations may be made in respect of the provisions contained in Part 3 of the Law Reform Act.

86. *First*, construed literally, ss 8(1) to (3) can be read as enabling an arbitrator to limit a defendant's liability, having regard to the extent of the defendant's liability.

87. *Second*, terms such as "court", "damages", "proceedings", "defendant" and "judgment" should not be construed too narrowly, particularly given the remedial nature of the legislation[56]. Whilst there are cases in which those terms have been

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[54] Ibid at 212.
[55] Ibid at 212-213.
[56] *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426; 58 ALJR 243, 433 (Gibbs CJ; Brennan, Deane and Dawson JJ agreeing) (CLR); *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622; 58 ALJR 502, 638 (Mason CJ, Brennan, Deane and Dawson JJ) (CLR); *Waugh v Kippen* (1986) 160 CLR 156; 60 ALJR 250, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ) (CLR).

given a restrictive interpretation[57], the better construction, having regard to the purpose of the legislation, is that those terms can be read as encompassing arbitration.

88. Similar observations may be made in respect of the language in Part VIA of the CCA.

89. The purpose of the proportionate liability legislation would be significantly impeded if claims in arbitration were excluded. If parliament intended to exclude arbitration from the scope of the legislation, it may be presumed that it would have employed words to that effect. It would create a backdoor for parties to circumvent that legislation, in circumstances where neither the Law Reform Act or the CCA include mechanisms to contract out.

What moulding needs to be done?

90. Any parts of that statute that require modification to account for the bilateral nature of arbitral proceedings, can be adequately '*moulded*' in the manner contemplated by Justice Mason in *Codelfa*.

91. Terms such as "court", "proceedings", "plaintiff", "defendant", "judgment" can be moulded to become "arbitrator/ arbitration", "arbitral proceedings", "applicant", "respondent" and 'determination".

92. The legislation is otherwise capable of operating according to its usual terms in arbitral proceedings. The concerns raised by the SASCA regarding the risk of inconsistent findings and the inability to join parties to arbitral proceedings absent their consent do not warrant a departure from the requirements of s 28(3) or confining the implied power recognised in *GIO.*

Conclusion

93. For the reasons outlined above, both section 28 of the CAA and the implied power conferred on the arbitrator to determine the parties' dispute (as though it were being determined in a court of law with appropriate jurisdiction) empower an arbitrator to apply Part 3 of the Law Reform Act and/or Part VIA of the CCA. The terms of the Proportionate Liability Law, properly construed, extend to arbitral proceedings. To the extent the language employed in that legislation does not naturally encompass arbitral proceedings, it can be "moulded" in the manner contemplated by Justice

[57] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [43] to [52]; *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 at [26] to [33]; [95] to [98].

Mason in *Codelfa.* The findings reached by the SASCA are contrary to the modern trend in arbitration, both domestically and internationally, to facilitate the promotion and use of arbitration and to minimize judicial intervention in the arbitral process.

Part VII: Orders

94. The Appellant seeks the following orders:

1. Appeal allowed.
2. Set aside order 1 made by the Full Court on 21 October 2022 and in lieu thereof make the following orders:

10 The question of law reserved, 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)?, is answered "Yes".

3. The Respondent pay the Appellant's costs.

Part VIII: Estimate:

95. The Appellant estimates that it will need 1.5 hours to present its argument.

Dated: 7 July 2023

20 Bret Walker

T J Margetts

L J Connolly

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Andrew Graham McAdam
Lawyer for the Appellant

ANNEXURE A

Relevant Legislation

VIC Wrongs Act 1958 (Vic) (Version 127)– Part IVAA
NSW Civil Liability Act 2002 (NSW) (Version as at 16 June 2022) – Part 4
QLD Civil Liability Act 2003 (Qld) (Version as at 2 March 2020) – Part 2
WA Civil Liability Act 2002 (WA) (Version as at 1July 2022) – Part 1F
SA Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) (Version 1.10.2005) – Part 3
TAS Civil Liability Act 2002 (Tas) (Version as at 1May 2020) – Part 9A
ACT Civil Law (Wrongs) Act 2002 (ACT) (Version R71) – Chapter 7A
NT Proportionate Liability Act 2005 (NT) (Version as at 1 January 2011)

ISSUE	VIC	NSW	QLD	WA	SA	TAS	ACT	NT
Can the court have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding?	No – see s 24AI(3)	Yes – (s 35(3))	Yes– (s 31(3))	Yes – (s 5AK(3)(b))	Yes–(s 8(2)(b))	Yes–(s 43B(3)(b))	Yes–(s 107F(2)(b))	Yes–(s 13(2)(b))
Does the regime apply to concurrent wrongdoers acting jointly (as well as independently)?	Yes (s 24AH(1))	Yes (s 34(2))	No - concurrent wrongdoers must have acted independently of each other and not jointly (s 30)	Yes (s 5AI)	No - as in QLD (s 3(2)(b))	Yes (s 43A(2))	Yes (ss 107A & 107D)	Yes (ss 3 & 6(1))
Is contracting out permitted?	The Act is silent	Yes (s 3A(2)	No (s 7(3))	Yes (s 4A)	The Act is silent	Yes (s 3A(3)	The Act is silent	The Act is silent

ISSUE	*ASIC Act 2001* (Cth) (Version as at 10 August 2022)	*Competition and Consumer Act 2010* (Cth) (Version as at 1 January 2023)	*Corporations Act 2001* (Cth) (Version as at 1 March 2023)
Can the court have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding	Yes (s 12GR(3)(b))	Yes (s 87CD(3)(b))	Yes (s 1041N(3)(b))
Does the regime apply to concurrent wrongdoers acting jointly (as well as independently)?	Yes (s 12GP(3))	Yes (s 87CB(3))	Yes (s 1041L(3))
Is contracting out permitted?	The Act is silent	The Act is silent	The Act is silent