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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. The matter before the Court concerns a question of law arising in an arbitration and determined by the South Australian Court of Appeal. The question was:

> Does Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (the ***Law Reform Act***) and/or Part VIA of the *Competition and Consumer Act 2010 (Cth)* (the ***CCA***) apply to this commercial arbitration proceeding conducted pursuant to the legislation and the *Commercial Arbitration Act 2011* (SA) (the ***Commercial Arbitration Act***)?

3. The issues concern whether the whole of the *Proportionate Liability Regimes* apply to this commercial arbitration. It is accepted that this requires consideration of:

   a. s.28 of the *Commercial Arbitration Act*;

   b. the implied power described in *Government Insurance Office of New South Wales v Atkinson Leighton Joint Venture* (***GIO v Atkinson***);[1]

   c. whether the *Proportionate Liability Regimes* are amenable to arbitration; and

   d. whether the *Proportionate Liability Regimes* apply to arbitration by force of their own terms.

4. Upon the submissions which follow, the appeal should be dismissed. The respondent hereafter refers to the written submissions of the appellant filed 7 July 2023 as **AS**.

[1] (1981) 146 CLR 206.

Part III: Section 78B notices

5. No notices under s78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Facts

6. The primary facts summarised at AS [8]-[12] are agreed.

Part V: Summary of Argument

7. At AS [14]-[15], the appellant summarises its arguments that an arbitral tribunal is required to apply the *Proportionate Liability Regimes*, and that the SASCA erred in holding that this was not so on the basis that each statutory regime was not amenable or applicable to arbitration in its terms, structure, or operation. The following reasons are stated for the appellant:

   a. the *Proportionate Liability Regimes* are required to be applied by s.28(3) of the *Commercial Arbitration Act* and the parties' arbitration agreement;

   b. the *Proportionate Liability Regimes* can be comfortably applied in arbitral proceedings;

   c. it would be inconsistent with the overall objectives of the *Proportionate Liability Regimes*, and the *Commercial Arbitration Act*, to exclude arbitral proceedings from the scope of each statutory scheme;

   d. it would create significant disconformity between curial and arbitral proceedings; and

   e. the provisions of the *Proportionate Liability Regimes* can be 'moulded' where necessary for arbitral proceedings.

8. On the grounds which follow, these arguments should not be accepted.

9. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,[2] this Court described the proportionate liability provisions of Part 4 of the *Civil Liability Act 2002* (NSW) as a regime whereby liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. As such, it was therefore necessary that the plaintiff sue all wrongdoers in order to recover the total loss.[3]

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[2] (2013) 247 CLR 613.
[3] At 624, at [10].

10. The *Proportionate Liability Regimes* are a single law, or set of laws, designed to regulate the outcome of certain types of multi-party or multi-wrongdoer disputes.[4] The law or set of laws is substantive, but it would be contrary to the legislative intention to allow the application of some parts of the law in arbitration where the forum does not allow or cannot give effect to the whole of each statutory scheme. This would be to materially alter the *Proportionate Liability Regimes* and the balance intended to be struck for the reallocation of the burden and risk associated with multi-wrongdoer disputes from a defendant to the plaintiff.[5]

11. In requiring that a defendant provide information to the plaintiff as to any alleged concurrent wrongdoer(s) and giving a plaintiff the opportunity to join those third parties so that all claims against all potential wrongdoers are heard in one set of proceedings, the legislation struck a balance between the interests of parties. That critical balance cannot be given effect in arbitration.

12. The *Commercial Arbitration Act* provides that the arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable (s.28(1)) or, failing any designation, by applying the law determined by the conflict of laws rules which it considers applicable (s.28(3)). However, this is not determinative of the question of law stated.[6]

13. By agreeing to arbitration, the rules of law chosen by the parties exclude the *Proportionate Liability Regimes* which, in their terms, structure and operation, are not applicable to arbitration or amenable to arbitration. Alternatively, if there is no express designation or agreement, the law determined to be applicable does not include the *Proportionate Liability Regimes* on the same basis.

14. The implied power described in *GIO v Atkinson* must be addressed by considering the following matters:

    a. the qualification stated by Stephen J as to the implied conferral of power;

    b. what is the "law of the land" by reference to the *Proportionate Liability Regimes*;

    c. whether the parties impliedly clothe the arbitrator with some, but not all, powers under the *Proportionate Liability Regimes*.

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[4] CA [63] (CAB p 44).
[5] CA [201]-[204] (CAB p 83-84).
[6] CA [43], [70]-[72] (CAB p 39, p 46).

15. For the reasons addressed below, the "law of the land" is that the *Proportionate Liability Regimes* apply and arise in litigation and courts, in actions between plaintiff and defendant(s) where judgment is given. The "law of the land" is the single law, or set of laws, comprising the *Proportionate Liability Regimes* described in paragraph 12 above. The "law of the land" is not to apply only parts of each statutory scheme so as to impose a materially different scheme to that designed by the legislature.

16. The parties should not be taken to impliedly clothe the arbitrator with some, but not all, powers under the *Proportionate Liability Regimes*.

17. The *Proportionate Liability Regimes* are not amenable to arbitration given that critical parts are simply not available in arbitration. There is no suggestion that the terms "court", "defendant" and "proceedings" as used in s.87CH of the *CCA* (which concerns the power to join alleged non-party concurrent wrongdoers) should be construed or 'moulded' to include arbitration or arbitrators. In contrast, the appellant contends that such wide and uncommon meanings should be ascribed to the same terms where used in other parts of the *Proportionate Liability Regimes* or should be 'moulded' to that effect.[7] Further, s.11 of the *Law Reform Act* plainly places arbitration outside the scheme and operation Part 3 of the *Law Reform Act*.

18. The *Proportionate Liability Regimes* do not apply to arbitration by force of their own terms. The text, context, and operation of the relevant statutory schemes do not support an alternative conclusion.

Section 28 of the *Commercial Arbitration Act*

19. In *Rinehart v Hancock Prospecting*,[8] Edelman J affirmed the *"fundamental principle that arbitration is a matter of contract"* and, consequently, that *"parties may specify with whom they choose to arbitrate their disputes."*[9]

20. The arbitration in the present case is a private contract and subject to the *Commercial Arbitration Act*. The agreement to arbitration reflects the parties' choice that the determination of disputes between them shall be exclusively or wholly *inter se*.

21. The paramount object of the *Commercial Arbitration Act* is to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense (s.1C(1)). The legislation aims to achieve this object by: (a) enabling the

[7] AS [87], [91].
[8] (2019) 267 CLR 514.
[9] At [85].

parties to agree about how their commercial disputes are to be resolved (s.1C(2)(a)); and (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally, and quickly (s.1C(2)(b)). The *Commercial Arbitration Act* must be interpreted, and the function of an arbitral tribunal must be exercised, so that (as far as practicable) that paramount object is achieved (s.1C(3)).

22. Where, as here, commercial parties agree that their disputes are to be determined privately by arbitration, they agree to exclude consideration of the role, interests, and position of third parties in respect of their rights and liabilities. There is nothing in the objects, language, structure, or purpose of the *Commercial Arbitration Act* which, in the context of the parties' private agreement for the final resolution of commercial disputes refers to, or facilitates reliance on, the *Proportionate Liability Regimes*.

23. It is not in issue that the applicable law for the purposes of s.28 of the *Commercial Arbitration Act* is the substantive law of South Australia[10] and that *Proportionate Liability Regimes* are part of the substantive law of South Australia.[11]

24. Where the parties have chosen the rules of law applicable, the arbitral tribunal must decide the dispute in accordance with those rules of law (s.28(1)). The agreement to arbitrate is itself a choice as to the rules of law applicable. In respect of the *Proportionate Liability Regimes*, as the statutory scheme is not applicable or amenable to arbitration, the choice to arbitrate is a choice that the *Proportionate Liability Regimes* are not part of the rules of law applicable to the disputes between the arbitrating parties.

25. Alternatively, if there is no express choice under s.28(1), the law that must be applied is determined by the arbitral tribunal on the basis of the conflict of laws rules that it considers applicable (per s.28(3)). This determination does not transform a law which is not applicable or amenable to arbitration into a law which is applicable or amenable to arbitration.

26. The obligation to apply the law or rules of law under s.28(3) does not require the application of the *Proportionate Liability Regimes*, as these do not apply to arbitration by force of their own terms and because they are not applicable or amenable to the forum of arbitration.

27. Indeed, the obligation under s.28 to apply the law requires that an arbitrator exclude the statutory schemes or *Proportionate Liability Regimes*, as the legislature has designed them for courts in actions for damages and judgments as between plaintiff and defendants, and not for private arbitration between certain parties by agreement.

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[10] CA [58] (CAB p 43).
[11] CA [62] (CAB p 44).

28. The operation and effect of s.28 is confined to the application of those laws that apply to arbitration either by force of their own terms, are amenable to arbitration or are within an implied conferral of power by the parties' arbitration agreement.[12]

Implied conferral of power

29. The respondent accepts that the arbitration agreement generally includes an implied conferral of power to determine the dispute as though it was being determined in a court with appropriate jurisdiction.[13] However, in accordance with *GIO v Atkinson*, this implied conferral of power is qualified. In the sentence prior to the passage from *GIO v Atkinson* quoted at AS [26], Stephen J stated at p 235:

> *"The principle to be extracted from this line of authority is that,* ***subject to such qualifications as relevant statute law may require****, an arbitrator may award interest where interest would have been recoverable and the matter been determined in a court of law."* (emphasis added)

30. This qualification was noted in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (***Codelfa***)[14] by Brennan J[15] and the SASCA.[16]

31. The exceptions or qualifications to the implied conferral of power may be found in the express terms of the parties' contract or the terms, scope, and structure of the relevant legislative provisions. The implied conferral of power is predicated upon the following bases stated in the quoted passage at AS [26] of Stephen J in *GIO v Atkinson*:

    a. arbitrators must determine the disputes according to the "law of the land"; and

    b. a claimant should be able to obtain from an arbitral tribunal just such rights and remedies as would have been available to the claimant had the claimant sued in a court of law of appropriate jurisdiction.

<u>The "law of the land"</u>

32. In respect of the *Proportionate Liability Regimes*, which operate as a whole as the "law of the land", it is clear from the terms, context, and structure of each of the statutory schemes that they do not apply to arbitration proceedings.[17]

33. The use of terminology such as *"court", "proceedings", "plaintiff*" and *"defendant"* does not, of itself, provide a sufficient basis for excluding those provisions from an

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[12] See CA [70]-[72] (CAB p 46).
[13] See CA [137]-[156], [171]-[172] (CAB p 64 – 70, p 74).
[14] (1982) 149 CLR 337.
[15] At 421
[16] CA [45], [176]-[179] (CAB p 39-40, p 75 – 76).
[17] CA [45], [63], [186]-[187] (CAB p 39-40, p 44, p 79).

implied conferral of power upon the arbitral tribunal, but does provide significant or substantial support for the proposition.[18] It is not to be ignored that each of the statutory schemes is expressed in terms exclusively concerning courts and litigation, and there is no indication that the ordinary or usual meaning of these terms is to be eschewed in favour of a broader, unusual construction which includes arbitrators and arbitral proceedings.

34. The operative mechanisms for notification of other potential wrongdoers to the plaintiff, the circumstances giving rise to that wrongdoer's potential liability, and the opportunity to join such wrongdoers to the proceedings, are only relevant to courts and litigation. These are key provisions which are simply pointless or cannot be engaged in arbitration.

35. Properly understood, the "law of the land" as to apportionable liability is the whole of each statutory scheme comprising the *Proportionate Liability Regimes* and which constitute a carefully designed and balanced regime. As described above, they are a single law or set of laws for reallocating the risk and burden of certain types of multi-party litigation from the defendant to the plaintiff.

36. It is not the "law of the land" that certain parts of each statutory scheme are to be imposed on a claimant without the corresponding benefits and opportunities stipulated for information as to alleged concurrent wrongdoers and the joinder of those parties so that all issues and claims can be determined (if possible) in a single set of proceedings.

37. An arbitral tribunal would not be applying the "law of the land" by applying some parts of the *Proportionate Liability Regimes* but not others.

<u>The implied conferral of power to obtain the relief and remedies as would have been available in a court of competent jurisdiction</u>

38. Further, to paragraph 31.b above, Mason J held in *GIO v Atkinson*[19] that the fundamental issue was whether an arbitrator is to have the authority to give the claimant such relief as would be available in a court of law having jurisdiction with respect to the subject matter by the parties' submission to arbitration. Stephen J made a statement to similar effect.[20]

39. As addressed at AS [30]-[37], the courts have consistently held that there is such an implied conferral of power. However, none of the cases referred to concern the role,

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[18] CA [88], [92], [100]-[103], [116], [132], [188] (CAB p 52, p 52-53, p 54 – 55, p 58, p 62-63, p 79-80), citing the reasons of Evans J and Tennent J in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3; 20 Tas R 239; (2010) 26 BCL 263 (***Aquagenics***) and Beech J in C*urtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 (***Curtin***).

[19] At 246.

[20] At 235.

interests, and position of any third party or the application of parts, but not the whole, of a law or set of laws comprising a statutory scheme.

40. At AS [37], the appellant refers to *Passlow v Butmac Pty Ltd*[21] as an example where the principles in *GIO v Atkinson* were considered broad enough to encompass claims involving the liability of third parties. However, in *Passlow* the "third party" was actually a cross defendant in existing NSW Supreme Court proceedings, who argued successfully that the cross claim against it should be stayed in favour of an arbitration agreement concerning liability as between them.[22] It was not a "third party" case of the kind contemplated by the *Proportionate Liability Regimes*.

41. A claimant cannot obtain from an arbitrator such remedies or relief under the *Proportionate Liability Regimes* as would be available in a court of competent jurisdiction, as joinder of third parties is not possible and a claimant cannot include all alleged wrongdoers in a single set of proceedings. This is precisely why the implied conferral of power does not include the *Proportionate Liability Regimes*.

42. The conclusion that the implied conferral of power upon an arbitrator does not extend to the *Proportionate Liability Regimes* does not substantially erode the principles laid down in *GIO* v *Atkinson*. Rather, it is a clear example of the qualifications central to the reasoning in that case.

Other authorities

43. A number of cases have recognised that there are limits on laws that can be applied by an arbitrator, as was recognised by the SASCA.[23]

44. In *ACD Tridon Inc v Tridon Australia*,[24] Austin J observed that an arbitration agreement is an exercise of consensual power having binding effect as between the parties by force of their agreement.[25] It was further noted that there are qualifications or limitations upon the ability of an arbitrator to apply statutory provisions – relevantly, where the provisions concern or affect the rights and interests of third parties.[26] This point arises in this matter given the terms and effect of s.11 of the *Law Reform Act*.

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[21] (2012) NSWSC 225 (***Passlow)***
[22] At [50].
[23] CA [180]-[185] (CAB p 76 – 79).
[24] [2002] NSWSC 896
[25] [2002] NSWSC 896 at [180]
[26] [2002] NSWSC 896 at [189], [191] citing *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170, and [194].

45. In *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd,*[27] Ball J considered that there were exceptions to the principles stated by Stephen J in *GIO v Atkinson* where it was apparent from the nature of the subject matter or the way that it is dealt with by the legislature that disputes concerning that subject matter were to be resolved by the courts. The class of case is identified by the existence of some legitimate public interest in seeing such disputes resolved by public institutions or in accordance with structures established by parliament.[28] The language and structures established under the *Proportionate Liability Regimes* identify disputes concerning alleged third party wrongdoers as apportionment of liability as matters for the court, and not arbitral tribunals.[29]

International jurisprudence

46. The fact that in general terms an implied power to apply the laws of a country in arbitration agreements is recognised in international jurisprudence says nothing as to the scope of application of the implied power to a particular case in Australia (or for that matter in foreign countries).

47. The decision in *Mitsubishi Motors Corporation v Soler-Chrysler Plymouth*,[30] cited at AS [39], settled a dispute in American jurisprudence concerning whether statutes with a public policy component, such as the *Sherman Act*, were arbitrable. However, the consideration was at a level of generality and policy which did not consider whether the particular characteristics of the legislation in question rendered the statutory provisions arbitrable; such issues did not arise in that case. Notes of caution were also included in the judgment of the majority.[31]

48. The decision in *President of India v La Pintada Compania*,[32] cited at AS [40], concerned the basis upon which interest could be awarded by an arbitrator in England where there were different possible approaches (rule at common law v rule in the Admiralty jurisdiction). Thus understood, the passage quoted is no more than a general statement as to what particular law is applicable. The question still remains to determine what is the law and whether it applies, or can apply, in an arbitral context.

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[27] (2011) 80 NSWLR 398; [2011] NSWSC 195.
[28] At [37]-[38], 80 NSWLR p 407
[29] See also *Re Form 700 Holdings Pty Ltd* [2014] VSC 385.
[30] 473 US 614 (1985).
[31] For example at p.627: *"That is not to say that all controversies implicating statutory rights are suitable for arbitration"*, and at p.628: *"Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."*
[32] (1985) AC 104.

49. The decision in *Fulham Football Club (1987) Ltd v Richards and Another*,[33] cited at AS [41], is of no assistance as it did not concern the implied conferral of power on an arbitrator but whether an arbitration should be stayed.

50. The decision in *Wealands v CLC Contractors*,[34] cited at AS [42], involved existing court proceedings and whether a third party claim for contribution should be stayed due to an arbitration agreement between the defendant and another party to the litigation. It was held that the third party claim should be stayed. This does not assist in the current context where a critical factor is the inability of the arbitrator to join a third party; in *Wealands*, the arbitration was between parties engaged in litigation.

Amenability of the *Proportionate Liability Regimes* to arbitration

51. In response to AS [43] and [44], the SASCA, having held that the arbitrator is required to apply the law of South Australia and that the *Proportionate Lability Regimes* are substantive law[35] did not err in finding that each statutory scheme was not applicable or amenable to arbitration.[36]

52. There is no question that the *Proportionate Liability Regimes* may be applied in an arbitration by express agreement.[37] However, where the issue is the implied intention of the parties, consideration must be given to the subject matter of the relevant statutory provisions, and the terms and mechanisms through which they address that subject matter.[38]

53. Specifically, as was held by the SASCA, there may be features of the relevant provisions that lead to a conclusion that they are not amenable to arbitration, or which could not sensibly be given effect by an arbitrator, or which, if applied by an arbitrator, would be so changed in their operation as to warrant a conclusion that it could not have been intended that an arbitrator would have authority to apply those provisions.[39]

<u>The *Law Reform Act*: the text</u>

54. The text of Part 3 of the *Law Reform Act* uses the terms "plaintiff", "defendant", "proceedings", "judgment", and "the court". These are strong textual indicators that the

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[33] (2011) EWCA Civ 855; [2012] Ch 333; [2012] 1 All ER 414
[34] [1999] 2 Lloyds Rep 739 at 732.
[35] CA [62], [70-71] (CAB p 44, p 46).
[36] CA [178], [186]-[206] (CAB p 75, p 79 – 84).
[37] CA [205] (CAB p 84).
[38] CA [186] (CAB p 79).
[39] Ibid.

legislative scheme was not intended to, and does not, apply to arbitrations, and does not apply to arbitration by force of its own terms.[40]

55. While s.8(1) to s.8(3) do not specifically refer to the court, s.8(4) expressly states how the court must proceed concerning a case involving apportionable liability. While this of itself is not determinative, the balance of the statutory scheme, which is integral to the overall operation, are of no point or incapable of application in arbitration proceedings.

56. The provisions concerning contribution between wrongdoers (s.9) are of no relevance or effect in arbitral proceedings, where ordinarily there will be only one respondent to the claim.

57. The requirements for the provision of information by a defendant to a plaintiff (s.10) where a defendant has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim to provide the plaintiff with information as to the identity and whereabouts of the person and the circumstances giving rise to the other person's liability is pointless in the context of arbitration. There is no capacity to join any such person to the arbitration. The costs sanctions are meaningless as there cannot be any costs avoided if the obligation is not performed.

58. The provisions concerning separate proceedings (s.11) are a failsafe, and it is clear from the Second Reading speech and the passage at AS [66] that Part 3 of the *Law Reform Act* contemplates multiparty disputes but only in circumstances where a plaintiff is first given an option of joining additional parties to a single set of proceedings. Moreover, on the grounds addressed below, the binding operation and effect of the "judgment first given" under s.11 for the purposes of all subsequent actions strongly militates against any conclusion that the statutory regime applies, or was intended to apply, to arbitration.[41]

<u>The *CCA*: the text</u>

59. The respondent refers to paragraph 56 above, which applies equally to the text of Part VIA of the *CCA*. Further, s.87CE of the *CCA* is in substantially the same terms as s.10 of the *Law Reform Act*, and the respondent refers to its submissions at paragraph 59 above.

60. Furthermore, the appellant's approach involves giving different meanings to the same terms used in different parts of Part VIA of the *CCA*. The terms "court", "defendant" and "proceedings" are not to be construed or 'moulded' to include arbitration or arbitrators for the purposes of s.87CH. It would be an extraordinary outcome if this

[40] CA [88], [92], [100]-[103], [116], [132], [188], (CAB p 52, p 52-53, p 54 – 55, p 58, p 62-63, p 79-80), citing the reasons of Evans J and Tennent J in *Aquagenics* and Beech J in *Curtin*.
[41] South Australia, Parliamentary Debates, Second Reading Speech, Legislative Council, 3 May 2005, p 1720.

section was held to give arbitrators the power to join third parties to arbitral proceedings and be subject to any award given. In contrast, it is contended by the appellant that such wide and uncommon meanings should be ascribed to the same terms where used in other parts of the *Proportionate Liability Regimes* or should be 'moulded' to that effect.[42]

Context

61. Contrary to the suggestions at AS: [55]-[60], the statutory context indicates that parliament intended to exclude arbitral proceedings from the scope of the *Proportionate Liability Regimes*. Reference to issues of contributory negligence do not assist the appellant. In the context of any claim made, an assertion of contributory negligence is plainly *inter se* and does not give rise to any concern as to, or consideration of, the role, interests, and position of any third party.

62. Neither of the authorities referred to as AS [57] concerned third parties or a statutory scheme in respect of multi-wrongdoer disputes. Each was concerned with the scope of arbitration agreements and the relief that could be granted as between them as a matter of their agreement. Specifically, *Cufone v Cruise*[43] concerned the power of an arbitrator to make a declaration affecting the rights of the parties to the arbitration agreement and *Incitec v Alkimos Shipping Corporation*[44] concerned a claim for contribution as between parties to an arbitration agreement sued by third parties not a party to that agreement.

63. The exclusion of the *Proportionate Liability Regimes* from certain types of claims, as referred to by the appellant at AS [59], illustrates that the statutory schemes are not meant to be of universal application. Contrary to AS [60], if the legislature had intended to include arbitral proceedings within the scope of the *Proportionate Liability Regimes*, it would have included clear words to do so, rather than using terms which, in their ordinary, accepted, and usual meaning, do not encompass or extend to arbitration.[45]

Purpose

64. The concern giving rise to the *Proportionate Liability Regimes*, being the perceived crisis as to the cost of liability insurance, was recognised in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*.[46] However, this point does not substantially

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[42] AS [87], [91].
[43] (2000) SASC 304.
[44] (2004) 138 FCR 496.
[45] CA [88], [92], [100]-[103], [116], [132], [188], (CAB p 52, p 52-53, p 54 – 55, p 58, p 62-63, p 79-80), citing the reasons of Evans J and Tennent J in *Aquagenics* and Beech J in *Curtin*.
[46] (2013) 247 CLR 613.

advance the arguments of the appellant.

65. There is no doubt that the *Proportionate Liability Regimes* were designed to effect a transfer of the risk and burden in cases involving multiple wrongdoers from the defendant to the plaintiff. However, the *Proportionate Liability Regimes* were not intended to be of universal application[47] and were intended to operate as a whole scheme so as to strike a balance.[48] The fundamental reallocation of risk and burden, from solidary to proportionate liability and from a defendant to a plaintiff, was not of general or unqualified application under any statutory scheme.

66. As was held by the SASCA:[49]

a. the issue is how far, and in what circumstances, the general policy for the imposition of proportionate liability was intended to apply, and simply referring to the general policy is of no real assistance;

b. there is no textual basis for concluding that the *Proportionate Liability Regimes* were intended to extend that policy to arbitrations, and several textual and contextual indications against that conclusion;

c. while there may have been a general purpose of giving effect to a policy of reallocating the risk and burden of cases involving multiple wrongdoers to a plaintiff by the creation of an "apportionable claim", the legislature did so by striking a balance and creating a whole scheme under which a plaintiff would have the opportunity to join all wrongdoers to the one set of proceedings.

67. It is contrary to the intention and enactment of the *Proportionate Liability Regimes* to apply some, but not all, of the statutory scheme established. This would involve the application of a different regime tom that enacted by each statutory scheme.[50]

68. Moreover, the perceived mischief that the *Proportionate Liability Regimes* were directed might be colloquially described as 'defendant shopping' or 'deep pocket syndrome':[51] i.e., a plaintiff seeking out, and only commencing proceedings against, one of a number of potential defendants on the grounds that that party was insured and therefore had 'deep pockets'. This does not occur in the context of arbitration, where

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[47] CA [131] (CAB p 62) citing *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418 [37], having set out the relevant parts of *Wealthcare* at CA [75]-[76] (CAB p47 – 49).
[48] CA [201] (CAB p83).
[49] CA [132] (CAB p 62 – 63).
[50] CA [45], [63], [122], [132], [189] to [204] (CAB p 39-40, p 44, p 60, p 62-63, p 80-84).
[51] CA [103], citing Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 at [4]-[5].

the agreement to arbitrate is usually made before any dispute has arisen.

69. At AS [66], the Second Reading Speech for the *Law Reform Act* is quoted. This passage confirms that:

a. it is to be expected that plaintiffs would usually seek to join all potentially liable parties to the first proceedings;

b. that was to be encouraged by various provisions in the legislation; and

c. the failure of a defendant to perform the required tasks put that defendant at significant costs risks.[52]

70. While all concurrent wrongdoers do not have to be joined, it is plain that the South Australian legislature encouraged this to occur and intended that a plaintiff would have the opportunity to do so. In addition, a defendant is obliged to facilitate that opportunity by the obligations to provide certain information. Further, on 4 July 2005, an amendment was agreed whereby a defendant is obliged to provide information to the plaintiff as to other concurrent wrongdoers "*as soon as practicable*" (the current form of s.10(1)) as otherwise information could be withheld "*to the plaintiff's detriment*". This is consistent with a plaintiff having the opportunity to join all concurrent wrongdoers to one set of proceedings.[53]

71. Contrary to the submission at AS: [67], the extrinsic materials support the conclusion that the *Proportionate Liability Regimes* were not intended to apply to arbitration.

Amenability to arbitration proceedings

Benefit of information

72. The contention stated at AS [70] does not reflect the conclusions reached by the SASCA. It was not held, nor was it submitted, that an apportionable claim can only be made after a plaintiff has had the benefit of information and the opportunity to join third parties identified as concurrent wrongdoer. It was held[54] that the *Proportionate Liability Regimes* contemplate a plaintiff's recovery may be proportionally reduced by reference to the wrongdoing of who is not necessarily a party to the action and that this may occur after

[52] South Australia, Parliamentary Debates, Second Reading Speech, Legislative Council, 3 May 2005, p 1720. A reference was given in the appellant's submissions to debates from 4 July 2001, p.1983 (RJ Kerin, Deputy Premier). However the 2001 Act only introduced provisions to deal with *Astley v Austrust*. The 2005 amendments to the relevant Act introduced the proportionate liability provisions.
[53] House of Assembly, South Australia, 4 July 2005, p 3055
[54] CA [192] (CAB p 80).

a plaintiff has had the benefit of information that a defendant is requrd to provide and an opportunity to join any such wrongdoer(s) to the proceedings against the defendant.

73. This is entirely correct. As these balancing provisions cannot be given effect (or are pointless) in arbitration, this strongly militates against the conclusion that the *Proportionate Liability Regimes* are applicable or amenable to arbitration.

Inability to join third parties

74. There is no doubt that the joinder of third parties in the way contemplated and encouraged by the *Proportionate Liability Regimes* cannot occur in arbitration absent consent. The fact that the statutory scheme allows for separate proceedings does not overcome this, particularly in light of s.11 of the *Law Reform Act*.

75. Contrary to the submissions at AS [72], the statutory provisions support the conclusion that the statutory schemes are not amenable to arbitration. The respondent refers to paragraphs 54 to 60 above. In *Curtin*, at [85]-[87], Beech J held that the inability of an arbitrator to join a party (other than by agreement) was a "*weighty consideration militating against*" the construction that the WA Apportionment Legislation applied to or was available in arbitration proceedings. Observations of the same kind were made in *Aquagenics* by Evans J (with whom Wood J agreed) and Tennent J.[55]

76. As submitted by the appellant at AS [73], parties who arbitrate do so in the knowledge that third parties cannot be readily joined. Further, parties who arbitrate do so in the knowledge that the *Proportionate Liability Regimes* do not apply, in terms, to arbitral proceedings. As stated at paragraph 22 above, by the agreement to arbitrate the parties agree to exclude consideration of the role, interests, and position of third parties respect of their rights and liabilities.

77. Each of the *CCA* and the *Law Reform Act* allow for claims for contribution where a respondent has been found liable to a claimant in arbitration. It is for the respondent to seek recovery or contribution (AS [74]). These are not limitations, but a feature of the legislation as a whole. As set out in paragraphs 67 to 69 above, the general purpose may be accepted but the fundamental reallocation of risk and burden was not universal nor of unqualified application. Moreover, the vice or mischief of "defendant shopping" does not arise in the context of arbitration.

[55] 20 Tas R 239 at 254 per Evans para [30], at 272-273 per Tennent J para [90-92].

78. In addition, in any subsequent proceedings for contribution, the claiming party will have the full suite of court processes and remedies available in the prosecution of a claim against a third party. In contrast, the claimant at arbitration is deprived of these procedures and of the presence of the third party itself.

The parties are aware of the limitations of arbitration

79. At AS [75], it is contended that the risk of inconsistent findings in the event of subsequent proceedings was a consideration relied upon by the SASCA for concluding that the *Proportionate Liability Regimes* (or at least certain parts of them) could not be invoked in arbitrations. However, it is not the risk of inconsistent findings that is the critical point. The real issue is that the risks of inconsistent findings and multiple proceedings are matters which the legislatures allowed, and intended to allow, a plaintiff to avoid by the enacted scheme of the *Proportionate Liability Regimes*. However, those risks are unavoidable in arbitration if apportionable liability is applicable in the partial way proposed by the appellant.[56]

80. Further, there is far less, if any, risk of inconsistent findings where a respondent to a claim in arbitration is the subject of an award and subsequently sues for contribution than where a claimant is required to prove its claim, loss and damages in several and separate proceedings. In the former case, the claimant's claim and the respondent's liability is established (other than in exceptional circumstances) and the claim for contribution proceeds on that basis. In the latter case, there is far wider scope for inconsistencies of findings.

81. Further to paragraph 78 above, it is accepted that parties agree to arbitration aware of the process, benefits and limitations (AS [78]-[79]). It should also be accepted that parties have agreed to arbitration on the understanding that that *Proportionate Liability Regimes*, in their terms, do not concern or refer to arbitration.

82. There is nothing in the arbitration agreement which indicates that the parties chose to incorporate the *Proportionate Liability Regimes* as part of the rules of law applicable to the substance of the dispute. In fact, the contrary is the true position – objectively, the parties chose arbitration with the knowledge that, and precisely because, the *Proportionate Liability Regimes* do not refer to, incorporate, or facilitate the involvement of any third party as an alleged concurrent wrongdoer or any alleged apportionment.

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[56] CA: [192]-[196] (CAB p 80).

83. Where, as here, the parties have considered their position and agreed that they do not want to submit to the courts and litigation, and they agree to submit disputes to a private and exclusive forum that does not admit non-parties, effect should be given to their agreement. It would produce significant uncertainty and disruption if, having bargained for and agreed that the process of dispute resolution was to be private and *inter partes*, liability could be determined by reference to alleged concurrent wrongdoers who could not be joined to the only dispute resolution process that the parties were permitted to undertake.

84. As to AS [80], the measures suggested are speculative and unrealistic. The first and third measures require a third party to consent to participate in arbitration. The second measure requires multiple parties to consent to an 'umbrella' arbitration agreement, which is theoretically possible but practically uncertain (at least). The fourth measure is simply the abandonment of arbitration as a form of dispute resolution.

Subsequent proceedings

85. The effect of s.11 of the *Law Reform Act* is a critical matter which stands against the conclusion that the *Proportionate Liability Regimes* are applicable or amenable to arbitration. This provision stipulates that if a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under Part 3, the judgment first given determines for the purpose of all other actions:

a. the amount of the plaintiff's notional damages;

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

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

86. As was held,[57] s.11 allows for less risk of inconsistency in separate and subsequent proceedings as it binds a third party to the outcome of public court proceedings in which it had the opportunity to participate by being joined, either upon the application of the plaintiff or its own application. However, to apply s.11 to an arbitral award binds a third party to the outcome of private arbitration proceedings to which it was not a party and which it may not even have known about. This is plainly a very different circumstance with different implications than one which occurs pursuant to a judgment by a court, and an outcome which is not envisaged by the legislature.

[57] CA [126], [198]-[199] (CAB p 61, p 81-82).

87. It is no answer to this to say, as is asserted at AS [81]-[84], that s.11 is not unusual or that the principles stated in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government*[58] apply to s.11 of the *Law Reform Act*.

88. First, these circumstances do not ordinarily arise. As was stated by SASCA, where a respondent is held liable under an arbitral award and seeks contribution, the award may constitute, or at least be probative of, the liability to which the third party wrongdoer would be required to contribute.[59] In contrast, s.11 is binding upon any third party and mandates the position for the third party as against the claimant / plaintiff and the respondent / defendant following the arbitral proceedings.

89. Secondly, *Bitumen* concerned a claim for contribution and what sum might be recovered as just and equitable. There is no such provision in s.11. Further, their Honours were concerned with whether the liability for a judgment for which contribution was sought could be challenged as excessive because of fault on the part of the party seeking contribution – where the party claiming contribution *"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."*

90. No such circumstances or issues could possibly arise under s.11. AS [84] suggests that a third party sued in subsequent proceedings can simply relitigate the matters of damages, proportionate liability and contributory negligence, contrary to the express terms of s.11. There is no basis for this conclusion.

The scope of the legislation

91. The *Proportionate Liability Regimes* established by the legislation do not apply by force of their own terms. As held, there is no textual basis for this conclusion, and several textual and contextual indications to the contrary.[60] The ordinary, usual, or generally accepted meaning of the terms identified do not encompass or embrace arbitration. Further, operative provisions of each statutory scheme (the *Law Reform Act*: s.8(4), s.9, s.10 and s.11; the *CCA* (s.87CH)) plainly stand against the attribution of such wide and unusual meaning being given to these terms.[61]

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[58] (1955) 92 CLR 200 at 212-23 (*Bitumen*)
[59] CA [200] (CAB p 82-83).
[60] CA [88], [92], [100]-[103], [116], [132], [188], (CAB p 52, p 52-53, p 54 – 55, p 58, p 62-63, p 79-80), citing the reasons of Evans J and Tennent J in *Aquagenics* and Beech J in C*urtin*.
[61] CA [119]-[126], [128], [129] (CAB p 59-61, p 61, p 62).

92. As to AS: [89], the purpose of the *Proportionate Liability Regimes* is not significantly impeded. There is no real prospect of "defendant shopping" in the context of arbitration. The respondent refers to paragraphs 65 to 69 above. If the intention was to include arbitration in the scope of each statutory scheme, it would have been an easy matter to include wording to that effect, including giving a wider definition to the term *"the court"*. In addition, it may be expected that Parliament would have identified how an arbitrator was to deal with issues arising from each statutory scheme which: (a) cannot be accommodated (joinder); (b) are pointless (s.10 of the *Law Reform Act*; s.87CE of the *CCA*); or (c) are highly problematic (s.11 of the *Law Reform Act*).

What "moulding" can be done

93. The 'moulding' suggested by the appellant at AS: [90] serves little purpose.

94. In *Codelfa*, Mason J[62] dealt with the issue of the power of an arbitrator to award interest. Relevantly, the legislative power to award interest (s.94 of the *Supreme Court Act 1970* (NSW)) provided that the Court could award interest for the period between the date that the cause of action arose and the date when judgment took effect. Under what was described as a *Scott v Avery* arbitration clause, the making of an award was a condition precedent to the existence of a cause of action.

95. The 'moulding' that was considered appropriate was to define the arbitrator's power in the terms of s.94, allowing only for the substitution of "award" for "judgment" and for the reading of proceedings as it applies to arbitration. This was a straightforward exercise.

96. Legislation may be able to be 'moulded' if the process does not involve critical components of the legislation falling away. The *Proportionate Liability Regimes* are a single law or cognate set of laws. It is not possible to 'mould' then to be capable of application in arbitration other than to simply exclude important or integral elements of each statutory scheme. This is not 'moulding', but the creation of a very different regime to that enacted by parliament.[63]

97. Further, both *GIO v Atkinson* and *Codelfa* emphasised that the implied power was "*subject to such qualifications as relevant statute law may require",* that the arbitrator in the words of Stephen J was to give "*just such rights and remedies as would have been available to him"* were the matter brought in a Court*,* or as expressed by Mason J*,*

[62] At 367-370, as his Honour then was, and with whom Stephen, Aickin and Wilson JJ agreed at 345, 392 and 392 respectively.
[63] CA [201] (CAB p 83).

"such relief as would be available to him in a court of law." In moulding, the power thus has a number of limitations, both as to the qualifications the statute may require, and on account of whether the arbitrator can give the "rights", "remedies" or "relief" which the Court is able to provide. An arbitrator cannot all give the "rights", "remedies" or "relief" which the Court can give under the *Proportionate Liability Regimes*, and accordingly the power is to be qualified.

98. There appears to be little or no difference in the submissions of the appellant (at AS 87) as to the construction of terms such as "court", "damages", proceedings", "defendant" and "judgment" and the submissions (at AS 91) as to the 'moulding' of these terms.

99. In addition, the respondent refers to paras 17 and 62 as to the inconsistencies created by the appellant's approach, most particularly with respect to s.87CH of the *CCA*.

Conclusion

100. For the reasons stated above, the appeal should be dismissed.

Part VI: Time Estimate

101. The Respondent estimates that it will need 1.5 hours to present its oral argument.

Dated: 4 August 2023

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Annexure A

Relevant legislation

Title
Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) – Part 3 - (version 1.10.2005)
Commercial Arbitration Act 2011 (SA) - (version 22.9.2011)
Competition and Consumer Act 2010 (Cth) – Part VIA
Wrongs Act 1958 (Vic) Part IV AA - (Version 127)
Civil Liability Act 2002 (NSW) (Version as at 16 June 2022)–Part 4
Civil Liability Act 2003 (Qld) (Version as at 2 March 2020) –Part 2
Civil Liability Act 2002 (WA) (Version as at 1July 2022)–Part 1F
Civil Liability Act 2002 (Tas) (Version as at 1May 2020)–Part 9A
Civil Law (Wrongs) Act 2002 (ACT) (Version R71) –Chapter 7A
Proportionate Liability Act 2005 (NT) (Version as at 1 January 2011)