# Proportionate Liability - Where to from here?

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In 2014, the Full Court of the Federal Court of Australia (*Full Court*) handed down conflicting decisions on the application of the federal proportionate liability regime in circumstances where a number of claims are brought in relation to the same loss or damage arising from the same facts.

This session will explore the Federal Court's decisions in ***Wealthsure Pty Ltd v Selig*** [2014] FCAFC 64 (30 May 2014) and ***ABN AMRO Bank NV v Bathurst Regional Council*** [2014] FCAFC 65 (6 June 2014) and consider how to deal with the conflicting authorities.



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## Introduction

The proportionate liability regime under the *Corporations Act* 2001 (Cth) limits the liability of defendants for the loss suffered by a plaintiff to the extent to which each defendant is responsible for the plaintiff's loss.

The purpose of the regime is:

1. to prevent the targeting of 'deep-pocketed defendants' in litigation, and
2. to allow insurers to more accurately price risk by insuring only against the misleading conduct of the insured (and not third parties who may be jointly and severally liable).

The regime means the plaintiff, and not the defendants, bear the risk of one or more of the defendants being unable to satisfy a judgment debt.

The provisions apply principally to loss suffered as a result of contravention of s1041H and s 1041N of the *Corporations Act* 2001 which are as follows:

*1041H* ***Misleading or deceptive conduct (civil liability only)***

*(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.*

*1041N* ***Proportionate liability for apportionable claims***

*(1) In any proceedings involving an apportionable claim:*

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

*(b) the court may give judgment against the defendant for not more than that amount.*

*(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:*

*(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and*

*(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.*

*(3) In apportioning responsibility between defendants in the proceedings:*

*(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and*

*(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.*

*(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.*

*(5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Division, under rules of court or otherwise.*

However, may that loss and damage be apportioned between concurrent wrongdoers?

One decision of the Full Court says, ***yes***; ***Wealthsure Pty Ltd v Selig*** [2014] FCAFC 64 (30 May 2014) is a decision by a majority 2:1 which held that, in certain circumstances, liability for damages under claims which, on their face, are not subject to the proportionate liability provisions of the *Corporations Act* and the *ASIC Act* may, in fact, be subject to apportionment.

The other decision of the Full Court – says, ***no***; ***ABN AMRO Bank NV v Bathurst Regional Council*** [2014] FCAFC 65 (6 June 2014) and this time a unanimous 3:0, came to the opposite conclusion.

There are now conflicting authorities on the extent to which the proportionate liability regime applies where multiple claims are brought for essentially the same damages

arising from essentially the same set of facts.

How are we to resolve this conflict? (I will try to keep clear of too many extracts from the judgments for you – however, there will be some).

## Proportionate liability

As you are aware where proportionate liability applies, the various defendants to a claim are only liable to pay damages to the extent that a Court considers they contributed to the harm in question. For example, if there are multiple defendants who are "concurrent wrongdoers" and the Court considers that the first defendant's responsibility was only 40% and the second defendant was only 60%, the first defendant is only liable to pay 40% of the total amount of damages and the second defendant 60%. Otherwise, the plaintiff would obtain judgment against each and every defendant for 100% of the total amount of damages — allowing it to choose from which defendant to recover. This can be critical, for example, in circumstances where one defendant has become insolvent or is likely to become insolvent.

The application of proportionate liability is governed by legislation[2]. Claims for damages at common law (for example, for breach of contract, misrepresentation or negligence) "arising from a failure to take reasonable care" are subject to State proportionate liability legislation. By contrast, claims brought under the *Corporations Act* and the *ASIC Act* are subject to proportionate liability provisions in those Commonwealth Acts. These acts employ a different criterion of operation. For that reason, it is important to bear in mind that cases on State proportionate liability legislation are of limited assistance in determining when the proportionate liability provisions in the *Corporations Act* and the *ASIC Act* will apply.

## Why is the distinction important?

Claims for essentially the same damages arising from essentially the same set of facts at both common law and under the *Corporations Act* and or the *ASIC Act* are often brought against multiple defendants in the one proceeding. If one of those claims is not "apportionable", the plaintiff may seek to recover 100% of the total amount of damages from a particular defendant.

In those circumstances, the question is whether proportionate liability will apply to all of the claims (because they are for essentially the same damage and arise from essentially the same set of facts) or only some of them (because they are of a particular type).

The extent of a defendant's liability for damages will depend upon the answer. However, as has been noted already, the Full Court of the Federal Court has recently – and within the space of one week - given conflicting answers.

***Wealthsure Pty Ltd v Selig*** [2014] FCAFC 64; Mansfield and Besanko JJ; White J[3]

In this matter the Seligs acted on the financial advice of the second appellant, Bertram, and invested $450,000 in Neovest. Their investment failed. At the time the advice was given, Bertram was an 'authorised representative' of the first appellant, Wealthsure Pty Ltd.

The Seligs claimed damages for the loss of their investment and consequential losses against several persons including Wealthsure and Bertram. At first instance[4], before Lander J, judgment was entered against Wealthsure, Bertram and two other respondents in the sum of $1,760,512 as being jointly and severally liable.

A key question arising on appeal was whether the proportionate liability provisions in the *Corporations Act* 2001 (Cth) applied to the liability of the respondents to the Seligs, so that each respondent is only liable for a proportion of the Seligs' damages calculated with reference to the extent of their responsibility for the loss or damage. Those provisions are ordinarily applicable to a cause of action founded on s1041H.

At first instance, Lander J held that proportionate liability provisions applied in respect those causes of action based on s1041H, but not to those that did not rely on s1041H, despite the common ground between the parties that the losses flowing from all causes of action were the same.

The Full Court focused on interpreting the relevant statutory framework.

Section 1041N (1) provides that in any proceedings involving an apportionable claim (that is, claims for loss caused by conduct in contravention of s1041H), the liability of a defendant who is a concurrent wrongdoer in relation to that claim is to be apportioned.

Section 1041N(2) provides that if the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the 'proportionate liability regime', and
(b) liability for the other claim is to be determined 'in the ordinary way'.

Sections 1041L (2) and (3) are also significant. In essence, they provide that:

(2) there is a single apportionable claim in the proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than

one cause of action (whether or not of the same or a different kind); and,

(3) a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused the damage or loss that is the subject of the claim.

Specifically, what the Full Court had to determine was whether the phrase 'the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)' refers only to causes of action which are themselves apportionable claims or, alternatively, to causes of action more generally.

In the Full Court, two of the three members of the Full Court (Mansfield and Besanko JJ) overturned the trial judge's finding that the damages for the various claims other than those under s 1041H and s 12DA were not apportionable — in large part because of the view they took of the meaning of s 1041L(2) of the *Corporations Act* and s 12GP(2) of the *ASIC Act*, which provide that "there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind)". In essence, they focused on the loss or damage claimed, rather than the nature of the cause of action, with the result that once there is one claim in respect of the loss or damage suffered which is apportionable covered by the legislation, all other claims in respect of that same loss or damage would be subject to apportionment, even if not of themselves apportionable claims. Arguably this would extend to fraud and breach of contract claims, which are for the same loss or damage caused by the misleading or deceptive conduct. As may be appreciated, this approach would limit recovery in a much wider range of cases.

Besanko J found that while it might be 'surprising' that the proportionate liability provisions applied to causes of action removed from the proscribed application to

misleading and deceptive conduct, it is common for one set of facts to give rise to a number of causes of action. Accordingly, it would be 'artificial' if the application of proportionate liability provisions could be avoided by pleading one cause of action and not another. (The dissenting decision of White J becomes relevant and will be discussed in the ***ABN AMRO*** decision later).

If this decision of the majority in this Full Court is to be preferred it means that plaintiffs will find it more difficult to recover the entirety of their loss where they claim contravention of s1041H and one or more defendants is impecunious. A plaintiff will not be able to rely on the existence of other claims to avoid the operation of the proportionate liability provisions where a s1041H cause of action would apply on the facts.

Further, the decision makes the apportionment of liability a more viable mechanism to assist deep pocketed or well-insured defendants to guard against the possibility of absorbing the entire judgment debt. The proportionate liability provisions can be relied upon as long as one of the plaintiffs' claims is for contravention of s1041H, and the loss suffered is the same with respect to all claims. This will also assist deep-pocketed defendants to properly insure against litigation risks.

Precisely one week later, a differently constituted Full Court reached a contrary decision – with knowledge of the decision made a week earlier in ***Wealthsure***.

***ABN AMRO Bank NV v Bathurst Regional Council*** [2014] FCAFC 65[5] (JACOBSON, GILMOUR AND GORDON JJ)

The facts involved claims brought by a number of local councils against each of the councils' financial adviser, Local Government Financial Services (LGFS), ABN Amro

and Standard & Poor's (S&P). ABN AMRO had been responsible for creating the structured credit product, which was at the centre of the dispute, which were two series of Constant Proportion Debt Obligations (CPDOs), whilst S&P's role was in issuing the CPDOs with a AAA credit rating. LGFS, whose business was in marketing products to local councils and government bodies in Australia, had in 2006 procured the creation by ABN AMRO of $40m of Australian dollar-denominated issues of the CPDOs, which were known as the Rembrandt Notes.

The councils between them purchased $16m of the Rembrandt Notes, leaving LGFS holding $24m (and, therefore, LGFS was itself a claimant against ABN AMRO and S&P). However, after their purchase, the Rembrandt Notes suffered a catastrophic fall in value caused by the dramatic change in credit conditions following the onset of the Global Financial Crisis. In particular, the Rembrandt Notes depended for their performance on the interaction between the mark-to-market value of a large number of CDS contracts underlying the notes and the premium income, which the structure was generating on those contracts. In simple terms, whilst their performance was expected to be strong if benign market conditions continued, the onset of the financial crisis caused the notes to fail.

In an enormously detailed judgment, Jagot J found in favour of the councils in their claims against LGFS, ABN AMRO and S&P, and also in favour of LGFS (in respect of the retained $24m worth of the Rembrandt Notes) against both ABN AMRO and S&P.

The claims against ABN AMRO and S&P were each put in terms of:

a) a specific statutory claim under s 1041E and s 1041H of the *Corporations Act* for misleading or deceptive conduct; and,
b) breach of a duty of care to investors. In issuing the AAA rating it gave to the Rembrandt Notes (and in ABN AMRO's case deploying that rating in its

marketing materials), S&P had assumed a duty to exercise due skill and care to ensure that such an opinion was reasonably capable of being held. Having identified a number of flaws in the rating process and the assumptions which were adopted by S&P in issuing the AAA rating, S&P (together with ABN AMRO) was found to have breached this duty and to be liable to each of the investors for their losses.

At first instance, the councils who had lost money on the CPDOs were awarded damages for contravention of both s 1041E and s 1041H of the *Corporations Act*. Section 1041E prohibits the making of an intentionally or recklessly false or misleading statement in relation to a financial product: that is, essentially the same conduct as that which is prohibited by s 1041H, but with the addition of the mental element of intention or recklessness.

The trial judge held that each of three defendants was liable for an apportioned one-third of the total amount of damages.

On appeal, S&P in essence, contended as follows:

Indeterminate liability

One of the key factors on which S&P had sought to rely was that the rating agency did not know the identity of the ultimate investors in the Rembrandt Notes or even how many investors there would be. More fundamentally, S&P argued that it publishes tens of thousands of opinions as to future likelihood of repayment by issuers and does so in a way that means that almost anyone, anywhere could access those opinions. Accordingly, if a duty of care arose as a result of its ratings, the class of potential claimants would be so vast and indeterminate that it offended one of the primary limitations that the common law was concerned to impose for establishing a

duty of care.

## Vulnerability

S&P contended that the relationship between rating agency and investor did not require the law of tort to intervene and protect the investors. It submitted that neither LGFS nor the councils were vulnerable and each was capable of protecting itself from the harm, which it had suffered. S&P said that vulnerability was a prerequisite for a duty of care to avoid economic loss and, accordingly, no such duty arose in the circumstances.

## Absence of a contractual relationship

S&P further contended that it had no contractual relationship with either LGFS or the councils, a factor which is commonly found to be a pointer against a duty of care being present. S&P argued that the absence of direct dealing between itself and the investors ought to preclude the finding that it owed them a duty of care.

## Result

The Full Court unanimously held that the councils' damages for contravention of s 1041E were not apportionable. As a result, the councils can elect to enforce judgment for the total amount of damages — on the basis of the successful claim for damages for contravention of s 1041E — against any one or more of the three defendants (who are then left to recover contribution from one another).

The Full Court was seemingly unimpressed by contentions that the important questions were ones of law and policy and instead concluded that S&P's liability to the investors turned simply on the application of established legal principles to the facts. Having described the applicable legal principles, the three key factors were considered in the context of whether such a duty should be imposed in these

circumstances.

The Full Court disposed of the main contentions as follows:

## Indeterminate liability

The Full Court found that liability in respect of the Rembrandt Notes was not indeterminate because, whilst it may not have known the precise identity or number of investors, S&P was aware that there were to be members of a class the essential characteristic of which was that they were to purchase Rembrandt Notes. Moreover, on the facts S&P, knew the size of the issue and the minimum level of subscription (and could thus establish that the maximum number of investors in the issue would be 80), and that S&P's potential liability would be limited in time for as long as S&P retained its rating (or the 10 year tenor of the Rembrandt Notes).

## Vulnerability

The Full Court emphasised that vulnerability is the consequence, not an additional requirement, of reasonable reliance by an ascertainable class of potential claimants. Additionally, the court placed great weight on the finding that neither LGFS nor the councils could replicate or "second-guess" the rating, which S&P had given to the Rembrandt Notes. In having to rely on S&P's rating for the purpose of assessing the credit-worthiness of the Rembrandt Notes, neither LGFS nor the councils were able to protect themselves and were therefore vulnerable in the sense required.

## Absence of a contractual relationship

The Full Court forcefully rejected this submission. In circumstances where ABN AMRO had engaged S&P for the purpose of communicating the AAA rating to an ascertainable class of investors, the Full Court was clear that the authorities did not preclude such a duty on the basis that there was no contractual relationship.

The unanimous view of the Full Court was to expressly decline to follow the decision of the majority in ***Wealthsure*** and indicated its preference for the reasoning of White J, who dissented on this issue in ***Wealthsure***.

Relevantly, the Court stated:

*1572 …… The reason for the excision of these sections from the reach of s 1041H was explained by Lander J in Selig v Wealthsure Pty Ltd (2013) 94 ACSR 308 at 453 [1089]-[1091]. We respectfully agree with his Honour's analysis and conclusions.*

*[1089] Specifically, however, s 1041H(3) provides that conduct that contravenes s 670A (misleading or deceptive takeover document) or s 728 (misleading or deceptive fundraising document) or conduct in relation to a disclosure document or statement within the meaning of s 953A or conduct in relation to a disclosure document or statement within the meaning of s 1022A is not conduct that contravenes s 1041H.*

*[1090] The reason why conduct of the kind mentioned in s 1041H(3) is not conduct which s 1041H(1) proscribes is because each of those sections have their own section that provides for a remedy for contraventions, independently of s 1041H. Section 670B provides a remedy for a contravention of s 670A against the persons mentioned in the table to s 670B(1). A remedy is given for a contravention of s 728 by s 729, but only as against the persons mentioned in the table in s 729(1). The remedy for failing to comply with s 953B(1)(b) is given by s 953B(2) but only against the persons mentioned in s 953B(3). The remedy for failing to comply with*

*s 1022B(1) is given by s 1022B(2) but only against the persons mentioned in s 1022B(3). A person who suffers damage as a result of a contravention of any of ss 670A, 728, 953B(1) and 1022B(1) is given a remedy, but only against the persons mentioned in the sections giving the remedies.*

*[1091] There is no need for s 1041H to proscribe the conduct contemplated in ss 670A, 728, 953B(1) and 1022B(1) because that conduct is already proscribed and the persons who suffer damage already have a statutory remedy, although only against the particular persons who are identified in the sections giving the remedy. Because these sections target particular persons, it would be inappropriate to proscribe that conduct in general terms because it would apply to any person who has engaged in the proscribed conduct.*

*1573 While amendments were introduced to s 1041H(3) in July 2013, the provision in this case is the same as it was in the case before Lander J. These aspects of the decision of Lander J were overturned on appeal, by majority (Mansfield and Besanko JJ): Wealthsure Pty Ltd v Selig [2014] FCAFC 64. With respect to Mansfield and Besanko JJ, for the reasons just stated we agree with the conclusion reached by White J in Wealthsure on appeal that the expression in s 1041L that "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)" refers only to causes of action which are themselves apportionable claims.*

Though the Full Court in ***ABN AMRO*** did not discuss the meaning of s 1041L(2) of the *Corporations Act* and s 12GP(2) of the *ASIC Act*, White J in ***Wealthsure*** held that it

"refers only to causes of action which are themselves apportionable claims [as opposed to] causes of action more generally". The ***ABN AMRO*** Full Court did not make any adverse observation on this dicta.

The Full Court in dealing with the actual award of damages and whether they were to be joint and several – or - apportioned, stated as follows:

*1608* *To the extent that each of LGFS, ABN Amro and S&P were concurrent wrongdoers in the claims for economic loss suffered by the PA Councils caused by their respective conduct in contravention of s 1041H, those fell to be treated as apportionable claims and to be determined in accordance with the provisions of Div 2A: s 1041N(2)(a). To the extent that they were each found liable for the same economic loss caused by their conduct in contravention of s 1041E these were not apportionable claims. Under s 1041N(2) the former are to be determined in accordance with the provisions of Div 2A and the non-apportionable claims are to be determined in accordance with the legal rules that, apart from Div 2A, are relevant.*

*1609* *That being so the PA Councils in relation to their claims for damages for economic loss would be entitled to joint and several judgments against each cross-respondent in respect of the damages flowing from their conduct in contravention of s 1041E and for judgments involving apportionment, as provided for in s 1041N(1), in respect of the conduct done in contravention of s 1041H. The contraventions of s 1041E cannot be ignored, which, in effect, is what the primary judge did.*

*1610* *Whilst the damages assessed in respect of each cause of action would be in the same amount, by reason of the proportionate liability provisions and to that extent, the damages remedies for these two separate causes of*

*action brought pursuant to s 1041I are mutually inconsistent. This entitles the PA Councils to elect the remedy they want. Self-evidently, by bringing this cross-appeal they have made their election clear: that available for making out their cause of action based in the contraventions of s 1041E.*

1611 *Accordingly, ABN Amro and S&P will each be liable for 100% of the PA Councils' losses for the conduct they engaged in in contravention of s 1041E. LGFS will be liable for 100% of the losses caused to … [the councils] … to whom it represented that the Rembrandt notes were tailored for local councils, that being the conduct that the primary judge found was a contravention of s 1041E.*

## Recommended Approach

Now for the challenging part and the subject matter of this seminar: *which Full Court is to be followed?*

- Well it will depend on which side of the Bar Table you are briefed.
- What is best for your client?
- Apportionment or a joint and several damages award?

Understandably the issue is going to have to make its way to the High Court at some stage to decide on the point, as in this writer's opinion the issue will be a suitable vehicle for the grant of special leave.

Yet, in the meantime, in my opinion and for the purposes of this discussion only, the tally is: one unanimous Full Court (Jacobson, Gilmour and Gordon JJ) endorsing the reasons given by a minority judge in the other Full Court (White J) and endorsing the comments of the original trial judge (Lander J) as opposed to a

simple majority in the other Full Court (Mansfield and Besanko JJ).

If we examine the application of these cases since June 2014 ***Wealthsure*** and ***ABN AMRO*** have been considered in the Federal Court by 2 trial *judges*.

In ***Rivercity Motorway Finance Pty Managers Appointed) v AECOM Australia Ltd (Administrators Appointed) (Receivers and Pty Ltd (No 2)*** [2014] FCA 713, Nicholas J, having distilled the ratio of the majority in ***Wealthsure*** went on to observe:

> *38 In ABN AMRO the Full Court expressed a preference (at [1573]) for the view of s 1041L(2) taken by White J in Wealthsure (at [346]-[347]) that the words "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)" refer only to causes of action that are themselves apportionable claims.*
>
> *39 Of particular relevance for present purposes is the Full Court's approval in ABN AMRO of the decision of Finkelstein J in BHPB Freight. The Full Court said at [1586]: Finkelstein J, correctly in our view, when considering the proportionate liability scheme under Pt VIA of the then TPA in BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2) [2008] FCA 1656, accepted that an "apportionable claim" was limited to one brought for damages pursuant to s 82 TPA for a contravention of s 52. This reflects the confined language of s 87CB(1) of the TPA in the same vein as s 1041L of the Corporations Act limits an apportionable claim to one made under s 1041I for conduct in contravention of s 1041H.*
>
> *40 It does seem odd that a claim for damages for conduct in contravention of s 52*

*brought under s 82 might be an apportionable claim, but that a claim that relies upon precisely the same contravention of s 52, and giving rise to precisely the same loss and damage, would not also be an apportionable claim if brought under s 87. If that is the effect of the relevant provisions then the mischief which Pt VIA was intended to avoid as discussed in BHPB Freight, Bennett and ABN AMRO, will not be avoided except in so far as the discretion to award damages or compensation conferred on the Court by s 87 is exercised in accordance with the same considerations that inform the assessment of damages under s 82(1) by reason of s 82(1B) and Pt VIA of the TPA.*

*41 Be that as it may, the Full Court in ABN AMRO has clearly approved Finkelstein J's reasoning in BHPB Freight. In the circumstances, and even if the Full Court's observations in relation to the relevant provisions of the TPA were not necessary to the decision in that case, I consider that I must proceed on the basis the views of Finkelstein J and Reeves J in relation to the operation of s 87CB are correct. ……..*

Finally, in ***McGraw-Hill Financial Inc v City of Swan*** [2014] FCA 665 by Jacobsen J also grappled with the controversy but then simply stated:

[52] A third reason why the interests of justice limb is not satisfied is that Swan and Moree have brought claims in the present proceeding under s 1041E of the *Corporations Act* 2001 (Cth), and its analogue under the *ASIC Act*, to which the proportionate liability legislation does not apply: see *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [1573], [1589]-[1590].

[53] It is true that the decision on that issue in ABN Amro is at odds with the views expressed by the majority in *Wealthsure Pty Ltd v Selig* [2014] FCAFC

> 64. However, the conflict in the authorities is not a matter which would weigh in favour of a grant of leave to appeal, particularly at this stage of the proceedings.

So the tally is simply now stated as 7:2 endorsing the view that loss and damage suffered as a result of contravention of s1041H of the *Corporations Act* 2001 is not apportionable – perhaps?

Watch this space.

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[1] I wish to thank the students at Victoria University Law School who assisted in research collated on this topic for this article.

[2] See discussion more particularly covered in *Full Federal Court at Odds on Proportionate Liability* – 27 June 2014: ashurst.com

[3] See discussion more particularly covered in http://www.herbertsmithfreehills.com/insights/legal-briefings/full-court-settles-position-on-apportionment-of-claims-under-the-corporations-act-2001

[4] *Selig v Wealthsure Pty Ltd & Ors* [2013] FCA 348

[5] See discussion more particularly covered in http://clmr.unsw.edu.au/article/deterrence/court-cases/liability-credit-rating-agencies-confirmed-federal-court-appeal