HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A25 of 2014

BETWEEN

Ronald Selig and Janna Selig
Appellants

and

WealthSure Pty Limited ABN 93 097 405 108 and David Bertram
First and Second Respondents

and

Richard William Spencer, Silvana Perovich and Peter Maurice Townley
Third, Fourth and Fifth Respondents

and

Mark Richard Norton
Sixth Respondent

and

Neovest Limited (in Liquidation) ACN 104 915 906
Seventh Respondent

and

Norton Capital Pty Limited (Deregistered) ACN 086 207 169
Eighth Respondent

and

Daniel Geoffrey Lilley
Ninth Respondent

and

Damien Bernard Greer, Robert Noel Gallagher, Stephen James Dickens and Michael Joseph Crouch
Tenth, Eleventh, Twelfth and Thirteenth Respondents

First and Second Respondents' Submissions

Filed on behalf of the First and Second Respondents
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Part I: Suitability for publication

1. The first and second respondents (**the respondents**) certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues on appeal

2. The correct interpretation and operation of Division 2A of Part 7.10 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and, in particular, the meaning of an "apportionable claim" and a "single apportionable claim" in s 1041L.

3. Whether a "single apportionable claim" (involving a concurrent wrongdoer) is confined to a claim or claims made exclusively by reference to s 1041H or whether it is capable of embracing such a claim grounded on any cause or right of action provided it is for the same economic loss or property damage as that claimed against another defendant.

4. Whether or not the appeal is moot. The respondents file these submissions without prejudice to their preliminary contention that the appeal should be dismissed as moot, in accordance with the Summons filed by the respondents on 23 December 2014. That contention is supported by the submissions set out in Appendix A to these submissions.

Part III: Section 78B *Judiciary Act* 1903 (Cth) Certificate

5. The respondents certify that they have considered whether any notice should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and have concluded that no such notice is necessary.

Part IV: The respondents' additional facts

6. In March 2005, Neovest Limited (**Neovest**), the seventh defendant at trial, issued a prospectus to obtain finance from investors to lend to the Neolido Group. The Neolido Group comprised Queensland development companies owned directly or indirectly by Mr Spencer and Ms Perovich, who were property developers. In contravention of s 728 of the Corporations Act, the prospectus was misleading and deceptive[1]. The prospectus did not disclose the insolvency of the Neolido Group. In addition, Neovest was in effect a Ponzi scheme; dividends were paid to existing investors not from profits but from the investments of new investors[2].

7. The prospectus was issued and signed by the four directors of Neovest: Mr Spencer and Ms Perovich; Mr Townley, who was a partner of the law firm Nicol Robinson Halletts (**NRH**); and Mr Norton, the principal of Norton Capital Pty Limited (**Norton Capital**), a

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1 Trial judgment (**TJ**) [937].
2 TJ [737]-[758].

financial services business which actively promoted investments in Neovest and derived a commission from the placement of each investment[3]. Mr Spencer, Ms Perovich, Mr Norton and Mr Townley were the third to sixth defendants respectively. Norton Capital was the eighth defendant. The ninth to thirteenth defendants were Mr Townley's partners in NRH. The plaintiffs' claims against the ninth to thirteenth defendants were dismissed[4].

8. Mr Bertram, the second defendant (second respondent to the appeal), was a financial adviser and "authorised representative" of WealthSure, the first defendant (first respondent to the appeal). After a number of meetings and communications with Mr Bertram, including the provision of written advice in November 2004 and April 2005[5], the Seligs invested $450,000 in Neovest on 22 April 2005. That investment failed and Neovest eventually went into liquidation[6].

9. The Seligs commenced proceedings against WealthSure and Mr Bertram in 2010 in which they made a claim to recover loss and damage, being economic loss resulting from the loss of the $450,000 invested in Neovest and consequential loss through their borrowings and property investments[7]. All of the plaintiffs' claims of contraventions, breaches of contract and breaches of duty of care were in respect of the same loss or damage; this was common ground amongst all parties at trial[8].

10. WealthSure and Mr Bertram denied liability to the Seligs but contended, in the alternative, that to the extent they were found liable to the Seligs, each of the third to thirteenth defendants was a "concurrent wrongdoer" within the meaning of s 1041L(3) and the other respondents (the directors and promoters of what was effectively a Ponzi scheme) should bear the bulk of the liability. Each of the additional defendants was joined (as a "concurrent wrongdoer") by WealthSure and Mr Bertram. The Seligs subsequently amended their claim to include all these additional defendants as defendants to the Statement of Claim. On appeal, WealthSure and Mr Bertram did not challenge adverse findings against them on the issues of liability but maintained their contention that the liabilities they had incurred were apportionable.

11. The trial judge found[9] that WealthSure and Mr Bertram had (as pleaded by the plaintiffs):

    11.1 in providing written advice to the Seligs, made no inquiries to determine the Seligs'

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3 TJ [448], [703], [708].
4 TJ [993].
5 TJ [14],[16].
6 TJ [827], [839].
7 TJ [2], [3], [30], [31].
8 TJ [1065].
9 Findings which the Full Court did not disturb: Full Court judgment (**FCJ**) [10]-[11] (Mansfield J); [35]-[37] (Besanko J); [318] (White J).

personal circumstances in contravention of s 945A of the Corporations Act[10];

11.2 taken no steps to warn the Seligs that the advice given was based on incomplete information in contravention of s 945B of the Corporations Act[11];

11.3 made false or materially misleading statements concerning the Neovest Foundation redeemable preference shares and the reliability of that investment in contravention of s 1041E of the Corporations Act[12];

11.4 engaged in misleading and deceptive conduct in contravention of s 1041H of the Corporations Act and s 12DA of the ASIC Act[13];

11.5 represented, when they had no reasonable grounds to do so, that Neovest would pay a dividend of 20 percent per annum on certain redeemable preference shares, and that those shares could be redeemed after 12 months in contravention of s 12BB of the ASIC Act[14];

11.6 falsely represented the standard, quality and value of the services that they would provide by the provision of a financial services guide, strategy papers and statements of advice to the plaintiffs in contravention of s 12DB of the ASIC Act[15];

11.7 breached the implied warranty in a contract between the Seligs and Mr Bertram and WealthSure[16] that services would be rendered with due care and skill in contravention of s 12ED of the ASIC Act[17];

11.8 breached two express terms and the implied terms of the contract between the Seligs and WealthSure and Mr Bertram in that they[18]:

11.8.1 did not recommend an investment that was suitable for the Seligs[19];

11.8.2 failed to exercise the care and skill required of an ordinarily competent financial adviser[20]; and

11.8.3 failed to carry out an appropriate inquiry into the financial products[21];

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10 TJ [900], [902], [903], [906]; FCJ [11] (Mansfield J).
11 TJ [905], [906].
12 TJ [923], [924], [925], [939].
13 TJ [913], [926], [932], [959].
14 TJ [919], [920]. The analogue of s 12BB (of the ASIC Act) in the Corporations Act is s 769C.
15 TJ [915], [916].
16 TJ [350].
17 TJ [867], [917].
18 TJ [873], [874], [881].
19 TJ [873], [874].
20 TJ [876].
21 TJ [877], [878], [879].

11.9 breached a duty to take reasonable care in providing financial advice so as to avoid the Seligs suffering loss or damage[22].

12. The trial judge also found[23] that (as pleaded by the plaintiffs):

12.1 Mr Spencer, Ms Perovich, Mr Townley, Mr Norton and Neovest had either created or published the Neovest Prospectus which contained "significant" misleading statements in contravention of s 728 of the Corporations Act[24];

12.2 Mr Spencer, Ms Perovich, Mr Townley, Mr Norton, Neovest and Norton Capital had made false or materially misleading statements in contravention of s 1041E of the Corporations Act[25];

12.3 Mr Spencer, Ms Perovich, Mr Townley, Mr Norton, Neovest and Norton Capital had engaged in conduct in relation to financial services that was misleading or deceptive in contravention of s 1041H of the Corporations Act and s 12DA of the ASIC Act[26]; and

12.4 Mr Spencer, Ms Perovich, Mr Norton, Neovest and Norton Capital had induced other people to deal in financial products by making or publishing a statement, promise or forecast in the knowledge that, or whilst being reckless as to whether, the statement, promise or forecast was misleading, false or deceptive in contravention of s 1041F of the Corporations Act[27].

13. On the basis of those findings, judgment was entered against WealthSure, Mr Bertram and the fifth and sixth defendants, Mr Norton and Mr Townley respectively, in the sum of $1,760,512, being the full amount of the plaintiffs' loss (as determined at trial). Leave to enter judgment against Mr Spencer, Ms Perovich, Neovest and Norton Capital for the same amount was not granted because of their respective insolvency or bankruptcy.

14. In finding that judgment should be entered for the full amount of the plaintiffs' loss, the trial judge found the claim made by the Seligs was not apportionable[28]. Nevertheless, in case the matter went on appeal and it was determined that the claim was apportionable, the trial judge stated that he would have reduced the Seligs' claims by an amount of 15% for contributory negligence and then apportioned the remaining liability as to 60% to WealthSure and Mr Bertram, 25% to Mr Norton and Norton Capital, and 15% to the other

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22 TJ [885], [886], [887], [888], [889].
23 Findings which the Full Court did not disturb: FCJ [10] (Mansfield); [23], [35], [38] (Besanko J); [319] (White J).
24 TJ [937], [944]; FCJ [214] (White J).
25 TJ [939]; FCJ [214] (White J).
26 TJ [939], [959]; FCJ [214] (White J).
27 TJ [950].
28 TJ [1101].

directors of Neovest[29].

15. WealthSure and Mr Bertram appealed on the ground, amongst others, that the trial judge incorrectly construed the proportionate liability provisions of Division 2A, Part 7.10 of the Corporations Act. The Full Court (Mansfield and Besanko JJ, White J dissenting) allowed that part of the appeal, concluding that the trial judge erred in construing s 1041L and s 1041N , and that apportionment applied.

Part V: The respondents' additional statutory references

16. Apart from the statutory provisions referred to in the appellants' submissions, the respondents refer to the analogue provisions in the ASIC Act (Part 2, Subdivision GA, ss 12GP to 12GW).

Part VI: The respondents' answering argument

Introduction of the apportionment regime

17. The proportionate liability provisions for dividing and assigning a liability to claims of misleading and deceptive conduct were introduced into the Corporations Act in 2003 as Division 2A of Part 7.10 (which Part addresses market misconduct and other prohibited conduct relating to financial products and financial services), Part 7.10 being within Chapter 7 (which deals with financial services and markets)[30].

18. Division 2A of the Corporations Act was introduced as part of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), which generally implemented the CLERP 9 policy proposal paper released in September 2002 (**CLERP 9**)[31].

19. CLERP 9 proposed[32] the introduction of proportionate liability, with reference to the final report of the Inquiry Into the Law of Joint and Several Liability completed by Professor Davis in 1995[33], and noted that issues associated with proportionate liability needed to be considered in a wider context than the Corporations Act, especially in view of its central importance in the general common law of negligence, and that inappropriate and inconsistent results might arise if joint and several liability were to be removed from one

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29 TJ [1131]; the trial was conducted on the basis that various defendants could be grouped for the purposes of apportionment and the trial judge proceeded accordingly.

30 The proportionate liability provisions of the ASIC Act (Part 2, Subdivision GA, ss 12GP to 12GW) are materially identical to those in the Corporations Act. As a result, the trial judge referred only to the provisions of the Corporations Act: TJ [1016], an approach followed by the Full Court: FCJ [3] (Mansfield J); [56] (Besanko J); [314] (White J). These submissions adopt the same approach. The proportionate liability provisions of the *Trade Practices Act 1974* (Cth) are materially identical (Part VIA, ss 87CB to 87CI), now *Competition and Consumer Act 2010* (Cth), Part VIA, ss 87CB to 87CI.

31 Commonwealth of Australia, Parliamentary Debates, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Second Reading Speech, 4 December 2003.

32 As proposal 13 in "Part 5: Auditor Liability".

33 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage 2* (1995).

area of law while being left to operate in others[34].

20. A provision in Division 2A is to be construed so that it is consistent with the text and context and purpose of all of the provisions in the Division (and the cognate Division 2)[35]. The purpose and policy of Division 2A, as for its State and Territory counterparts, is to prescribe that in proceedings where there is a claim for economic loss or property damage marked out for apportionment, all defendants should only be liable to the extent of their own responsibility where another or others have also caused the loss or damage the plaintiff claims[36]. The central or moving consideration is to impose liability for loss and damage only to the extent of a defendant's relevant responsibility.

10 ***Structure and operation of Division 2A***

21. Section 1041L of Division 2A identifies an "apportionable claim" by reference to the circumstances in which the "claim" obtains. Section 1041N prescribes the process or rules of apportionment. On general principle, a "claim" in this context is the object that is claimed, not the cause of action or causes of action by which the claim may be supported or the ground on which it may be based[37].

22. Section 1041L is the gateway to apportionment of liability.

22.1 By s 1041L(1), for Division 2A to apply, there must be an "apportionable claim", that is a claim for damages for economic loss or property damage caused by conduct done in contravention of s 1041H.

20 22.1.1 Section 1041L(1) does not in terms distinguish curial and non-curial claims. However, for an order to be made effecting apportionment pursuant to s 1041N, obviously the claim must be made in proceedings.

22.1.2 In any event, the claim must be made under or by reference to s 1041I. It is important to observe that while s 1041L(1) requires that the stipulated conduct must have the character of conduct done in contravention of s 1041H, it is not required that the claim for damages under s 1041I invoke, or be framed as, a contravention of s 1041H.

22.2 Section 1041L(2) contemplates actual proceedings involving multiple causes of action of any kind whatsoever grounding a claim for the same loss or damage[38].

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[34] CLERP 9, page 96.
[35] *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; cf. *Carr v State of Western Australia* (2007) 232 CLR 138 at 143 [5]-[6] per Gleeson CJ.
[36] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 626 [16].
[37] *West Wake Price & Co v Ching* [1956] 3 All ER 821, 829.
[38] Cf. *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 627 [18].

22.2.1 This serves to emphasise that the essential criterion of operation of the Division is the existence of a claim for loss or damage and not the legal basis of the claim[39].

22.2.2 The object and function of s 1041L(2) is to disregard or obliterate the legal forms of action forming the substratum of a particular claim so as to leave standing for apportionment the overarching claim itself.

22.2.3 At this point in the logical progression of s 1041L, subs (2) does not distinguish between the case of multiple causes of action against a single wrongdoer and multiple causes of action against different wrongdoers. However, its obvious rationale is to avoid the anomaly which would arise if a plaintiff could readily frustrate the apportionment regime by pleading another or other causes of action in addition to a claim for damages under s 1041I.

22.3 Section 1041L(3) progresses to the definition of a "concurrent wrongdoer", without whom an apportionable claim could not be apportioned. It simply requires that a person whose conduct along with that of another caused the same loss or damage that is the subject of a claim be regarded as a concurrent wrongdoer.

22.3.1 Critically, the basis of the liability of the concurrent wrongdoer for the claim is left indeterminate, and is therefore irrelevant[40].

22.3.2 Indeed, subs (3) does not even in terms require that the claim against the concurrent wrongdoer, standing alone, be an apportionable claim. The status of a defendant[41] as a concurrent wrongdoer only becomes relevant for the purposes of Division 2A if they are a defendant in "proceedings involving an apportionable claim" (s 1041N).

22.4 Section 1041L(4) has several functions.

22.4.1 Negatively, it dispels the possibility of an (arguably unconstitutional) interpretation of the section which would permit a defendant to plead and rely on apportionment under s 1041L in circumstances where the plaintiff's claim did not invoke or otherwise attract it[42].

22.4.2 Positively, it affirms that while there must be a claim for damages under s

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39 FCJ [10] (Mansfield J); [77], [79] (Besanko J).

40 Cf. *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 627 [18]-[19].

41 If there are on foot proceedings involving an apportionable claim, the claim may nonetheless be an apportionable claim for which concurrent wrongdoers are potentially liable without all such concurrent wrongdoers being joined to the proceedings (s 1041O), and apportionment is nevertheless effected having regard to the responsibility of a non-party concurrent wrongdoer.

42 The initial link to the conduct proscribed by s 1041H(1) and (2) (as opposed to all conduct giving rise to causes of actions, however arising) permits the exercise of Commonwealth legislative power.

> 1041I, it need not be a claim framed around a contravention of s 1041H as opposed to a claim framed around a contravention of ss 1041E, 10141F or 1041G but by reference to conduct which contravened s 1041H.

23. As already observed, while the claim identified in s 1041L must be one for damages caused by conduct done in contravention of s 1041H[43], critically the section does not require a claim of contravention of s 1041H. The only relevant limitation is that the claim must be one made under s 1041I. Accordingly, reliance on s 1041H is simply referential[44]; it is a legislative device which catches misleading or deceptive conduct in whatever form coming within s 1041H without those qualifications on liability attached to a claim for damages under s 1041I which specifically invokes or is framed around ss 1041E, 1041F or 1041G[45].

24. Hence, the fact that the loss or damage should be caused by conduct in contravention of s 1041H does not exclude that such conduct may also represent a contravention of some other norm of conduct resulting in the same loss or damage[46].

25. It should also be observed that while s 1041L(2) designates a claim based upon multiple causes of action as a "single apportionable claim", there is no requirement that the conduct constituting such multiple causes of action be the same conduct[47].

26. The identification or definition of an "apportionable claim" in s 1041L(1) as a claim for damages for economic loss or property damage caused by conduct that was done in contravention of s 1041H means that the same conduct may, in some (indeed, most) cases, also *prima facie* contravene ss 1041E, 1041F and 1041G[48]. This is in the sense that the conduct proscribed in ss 1041E, 1041F and 1041G will almost invariably also qualify as misleading or deceptive conduct in contravention of s 1041H but with the added requirement in the former sections that the misleading or deceptive conduct be engaged in with particular states of mind generally amounting to dishonesty.

27. This reflects the explanatory memorandum on the introduction in 2003 of the Bill to enact Division 2A which observed (at [5.355]) that:

> "[t]he Bill applies the proportionate liability regime in relation to claims for damages for economic loss or property damage in respect of a contravention of the misleading and deceptive conduct provisions contained in the ASIC Act (subsection 12GF(1)), the Corporations Act (**subsection 1041I(1)) *[ie, not merely s 1041H]*** and the Trade Practices Act (section 52)."

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43 FCJ [10], [15] (Mansfield J); [77] (Besanko J).
44 FCJ [15] (Mansfield J).
45 FCJ [10], [16] (Mansfield J); [77], [84] (Besanko J).
46 FCJ [10], [13] (Mansfield J); [79], [84] (Besanko J).
47 FCJ [10] (Mansfield J); [79] (Besanko J).
48 FCJ [13] (Mansfield J).

28. Section 1041I(1) was introduced into the Corporations Act prior to the introduction of Division 2A, and provides a civil remedy to a person who suffered loss or damage by conduct of another person engaged in in contravention of ss 1041E, 1041F and 1041G in addition to s 1041H.

29. Section 1041M then has particular application. It provides in proceedings involving an apportionable claim (which, on the above premise, proceedings framed on s 1041E, s 1041F or s 1041G will be), a prima facie "concurrent wrongdoer" is to be regarded as an "excluded concurrent wrongdoer" if they caused the relevant loss or damage intentionally or fraudulently. As intention to cause harm or dishonesty is an element of the right of action conferred by ss 1041E, 1041F and 1041G (with the exception of that arising under s 1041E(1)(c)(ii) ("ought reasonably to have known")), a person who engaged in conduct in contravention of s 1041H with the requisite state of mind also sufficient to contravene s 1041E, s 1041F or s 1041G would (subject to the above-mentioned exception) be an "excluded concurrent wrongdoer".

30. Despite the wide ambit of the exclusion effected by s 1041M, this is no reason to give s 1041L(1) a narrow interpretation so as to confine it to claims expressly framed as contraventions of s 1041H. This is because:

    30.1 the language in s 1041L(1) would have been different had that been intended;

    30.2 the language that is used in s 1041L(1) is consistent with the use of the legislative device; and

    30.3 the legislative device is consistent with an intention to catch the conduct in s 1041E(1)(c)(ii) where the relevant state of mind is that the defendant "ought reasonably to have known".

31. The practical effect of the narrow interpretation of s 1041L(1) would be that a plaintiff is faced with a choice in an action against multiple defendants for causing the same harm of:

    31.1 making a claim in terms of a contravention of ss 1041E, 1041F or 1041G involving actual knowledge or recklessness as to falsity, or dishonesty, and succeeding entirely without apportionment (because it is not a claim made in terms of contravention of s 1041H) or not succeeding at all if the relevant state of mind or dishonesty cannot be proved; or

    31.2 making a claim in terms of a contravention of s 1041H and then asserting, in response to a defence of apportionment, a state of mind coming within s 1041M,

and succeeding in recovering a judgment exposed to the risk of apportionment, but succeeding at least to some extent if the mental state required by s 1041M cannot be proved.

32. The legislative intention should not be seen to pose such a choice or dilemma for the plaintiff in the framing of proceedings, but rather to leave the issue of apportionment, having regard to the character of the conduct and accompanying state of mind, to be entirely determined at trial once a claim to recover damages under s 1041I is pleaded.

33. Section 1041H(3) contains an express exclusion or carve-out, from conduct which contravenes the section, of conduct that contravenes ss 670A, 728, 953A and 1022A of the Corporations Act.

34. Section 1041H, including subs (3), was included in the Corporations Act in 2001, that is prior to the introduction of Division 2A.

35. The obvious purpose of the carve-out at the time it was introduced was to maintain the availability of the statutory defences under those provisions which otherwise would be denied if a plaintiff could proceed against the defendant under s 1041H for conduct which also amounted to conduct in contravention of a carved-out provision[49].

36. While s 1041H(3) has the effect of excluding a claim based on conduct done in contravention of a carved-out provision from the definition of an "apportionable claim" in s 1041L(1), it does not exclude a cause of action based upon such a contravention from the concept of a cause of action forming part of the basis of a single apportionable claim within s 1041L(2)[50], nor deny that a wrongdoer liable under a carved-out provision may be a concurrent wrongdoer for the purposes of s 1041L(3).

37. The construction of s 1041L(2) contended for entails that the concept of a "single apportionable claim" would pick up not only Commonwealth statutory causes or rights of action pursued in proceedings involving a claim under s 1041I, it would also pick up common law or State or Territory-based causes or rights of action pursued in such proceedings. There is no reason why this should not be the case and it is rational and convenient that it should be so. A court exercising federal jurisdiction has jurisdiction to adjudicate such causes within the so-called "accrued jurisdiction" where they form part of the same matter as the cause which gives rise to the occasion to exercise federal

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[49] The exclusions were included at the time of the major Financial Services reforms in 2001 prior to the apportionment liability provisions being included (in 2004). The reforms were enacted separately for separate reasons. There was no deliberate carving-out of these provisions to ensure that the apportionment provisions did not apply to those types of claims. The purpose of the carve-out was intended to be protective of those persons who might otherwise attract liability under those provisions: Explanatory Memorandum, *Financial Services Reform Bill 2001*, [15.8]-[15.10]. It follows that the reason for the exclusions was to ensure the defendant benefitted from the defences available not to ensure the claim was not apportionable.

[50] FCJ [11] (Mansfield J); [79] (Besanko J).

jurisdiction. The *Judiciary Act 1903* (Cth), by s 79, would oblige the Court to apply any State or Territory enactment to such State or Territory-based cause of action providing for apportionment as a surrogate law of the Commonwealth "except as otherwise provided by...the laws of the Commonwealth". Division 2A is such a law.

38. It might have been expected that, in what was apparently intended to be a nationally coordinated or harmonised scheme of apportionment, the supremacy of the Commonwealth enactment would be thought to be of no particular significance. To the extent that there might be minor variations or departures from a common template as between Division 2A and State and Territory counterparts, it is entirely rational and sensible that the Commonwealth regime should prevail in a uniform way in a matter determined in the exercise of federal jurisdiction, particularly since the fundamental lynchpin of the scheme is a (single) claim for loss or damage.

39. If it were otherwise, there would be the real potential for a patchwork of judgments in an action brought in federal jurisdiction. This might be so if an action brought by a single plaintiff relied upon State or Territory-based causes of action whether arising in the one law area or different law areas, and in an action involving multiple plaintiffs (including a representative action) with multiple State or Territory-based causes of action. This would defeat the object of uniformity and consistency of judgments which is implicit in the Division 2A regime.

40. Section 1041N decrees the rules and procedures pertaining to apportionment.

41. Section 1041N applies once there exist:

    41.1 proceedings (ie, the action at large);

    41.2 involving (ie, playing some, but not the only, part) an apportionable claim;

    and

    41.3 concurrent wrongdoers;

    41.4 in relation to that claim;

    41.5 being, by definition, the persons who have caused the same loss or damage the subject of the claim.

42. Section 1041N(1) mandates that the liability of a concurrent wrongdoer in those circumstances 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". This language confirms that the Division 2A regime proceeds by reference to apportionment of the claim for loss or damage, although the determination of relative responsibility invites attention back to the underlying causes of action.

43. Section 1041N(1)(b) also provides that "the court may give judgment against the defendant for not more than that amount".

44. The language of subs (1) is of particular significance. The threshold condition is extremely wide ("any proceedings involving an apportionable claim"); that is, the proceedings only need involve an "apportionable claim". By s 1041N, the apportionable claim might be present in proceedings against multiple defendants for a claim for the same loss or damage merely because the allegation against one of them is of conduct done in contravention of s 1041H. But the other defendant or defendants will each be constituted a concurrent wrongdoer by s 1041L(3) together with the first defendant and all defendants will be entitled to have their individual liability for the claim limited in accordance with s 1041N(1).

45. Section 1041N(2) addresses the case of different claims in the same proceeding, in contrast to s 1041L(3) which defines concurrent wrongdoers by reference to causative responsibility for the same claim.

    45.1 Section 1041N(2) provides that if proceedings involve both an apportionable claim and a claim that is not apportionable then the liability for the apportionable claim needs to be determined in accordance with the rules in Division 2A, whereas liability for the other claim is to be determined in accordance with any other relevant legal rules.

    45.2 This provision does not gainsay the interpretation of s 1041L advanced above. It does not have the effect of distinguishing between a right of action under s 1041I and some other right of action and ordain the latter not to be an apportionable claim. To so conclude would be to focus on the underlying cause or right of action, not the lynchpin concept of "claim". It would also deny s 1041L(2) and the concept of a "single apportionable claim" their obvious intended effect of obliterating (for definitional purposes) the underlying causes of action.

    45.3 In the context of the Division 2A regime, a claim which is not an "apportionable claim" is a claim which is not for the same loss or damage as a s 1041L(1) claim either, for example, because it relates to economic loss or damage to

property but different economic loss or damage to property or because it relates to damages on some other account (such as pain and suffering for personal injury). (In the proceedings below, the second appellant initially made a claim (subsequently abandoned) for damages for personal injury suffered as a result of the failed investments[51].)

46. The provisions in relation to a reduction for contributory negligence in Division 2 and Division 2A, respectively, fit coherently within the scheme articulated in these submissions.

47. Section 1041I(1B), in paragraph (a), in identifying a claim liable to reduction for contributory negligence, uses the same formula in relation to a claim as is used in s 1041L(1) to identify an apportionable claim. That is, it uses the formula "caused by conduct that was done in contravention of section 1041H" as a touchstone to catch all forms of qualifying conduct irrespective of any underlying cause of action to which it may attach.

48. Section 1041I(1B), in paragraph (b), prescribes the second of three pre-conditions for a reduction in the amount the claimant may recover, namely a cause of the claimant's loss and damage being the "claimant's failure to take reasonable care".

49. This harmonises with s 1041N and the rules of apportionable claims and, in particular, with subs (3).

50. Section 1041N(3) provides that in apportioning responsibility between the defendants in the proceedings, 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. In other words, s 1041N(3) provides that a defendant's liability on the claim as found is to be reduced by an amount attributable to the plaintiff's contributory negligence before apportionment takes place[52].

51. Critically, section 1041N(3) provides for a reduction for contributory negligence under "any relevant law". Section 1041I(1B) is such a law ("the claimant's failure to take reasonable care" is plainly equivalent to the plaintiff being "contributorily negligent"). The reference to "any" relevant law, however, must be to more than s 1041I(1B) because otherwise there is no need for the adjective "any" and the draftsman would simply have referred to s 1041I(1B).

52. The reference to "any relevant law" also reflects the concept of a "cause of action" in s

[51] TJ [28]-[29].
[52] FCJ [8] (Mansfield J).

1041L(2) underlying the apportionable claim identified in s 1041L(1), since a "relevant law" will conventionally attach a rule for a reduction for contributory negligence to, or in relation to, causes of action.

53. The clear intention of s 1041N(3) is that if there is any such relevant law or legal rule which provides for a reduction for contributory negligence in relation to a cause of action underpinning an apportionable claim, then the apportionable claim must be the subject of a reduction pursuant to that law or rule before apportionment is to be effected. Most commonly, an enactment creating a defence of contributory negligence applies to the common law causes of action for negligent breach of duty in tort and contract. This tends to confirm that the foundation of a claim which is a "single apportionable claim" within s 1041L(2) (and which grounds the liability of a concurrent wrongdoer) may be a common law cause of action.

Reasons of Full Court below

54. The reasons of each Mansfield J[53] and Besanko J[54] essentially follow the course of argument propounded in these submissions. Neither judge distinctly addressed the question whether s 1041L(1) required a claim actually formulated as a contravention of s 1041H or merely conduct which comprised contravening conduct. Strictly, it was not necessary to do so because the trial judge's undisturbed finding was that a right of action, as pleaded, for contraventions of s 1041H succeeded.

55. By way of contrast, White J in effect held that a "single apportionable claim" could only comprise a claim against multiple wrongdoers if it relied on conduct of each such wrongdoer which of itself represented or gave rise to an apportionable claim as defined (ie, under s 1041I)[55], and that a reference to a "cause of action (whether or not of the same or a different kind)" in s 1041L(2) was a reference to the "fact or combination of facts which gives rise to a right to sue"[56] and, in the context, facts amounting to conduct in contravention of s 1041H alone.

56. Hence, it follows on the reasoning of White J that a plaintiff might make a claim for economic loss or property damage against D1 which qualifies as an apportionable claim under s 1041L(1), and a claim against D2 which does not independently so qualify (eg, in reliance on conduct which only gave rise to a right in the plaintiff to sue in contract or tort), apparently rendering D2 a concurrent wrongdoer (per s 1041L(3)) but the claim not a single apportionable claim, with the result that the liability of D1 could be apportioned

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53 FCJ [6] – [15].
54 FCJ [73] – [84].
55 FCJ [348]-[349].
56 FCJ [354]-[358].

under s 1041N(1) but not that of D2.

57. Alternatively, it appears to follow on that reasoning that if there were an apportionable claim on which D1 and D2 were liable for apportioned amounts (eg, conduct in contravention of s 1041H resulting in a claim for the same loss or damage) and a separate "claim" against D2 for the same loss or damage (eg, based on conduct resulting in a liability in tort or contract), D2 would be separately liable for the full amount of the loss or damage.

58. With respect, the reasoning of White J is strained and unpersuasive:

58.1 it fails to have regard to the policy and purpose of the apportionment regime referred to at paragraph 20 above;

58.2 while it is correct to say that a cause of action is the set of facts which gives rise to the right to sue, it is not any random agglomeration of facts but only facts made legally relevant by some rule or rules circumscribing the facts and conferring the right to sue;

58.3 hence for the purposes of Division 2A, a cause of action in s 1041L(2) can refer to any set of facts identified as legally relevant by some norm or norms which together give rise to a right to sue for damages, and there is no basis on either a literal or purposive reading of the subsection to confine "cause of action" to a right of recovery under s 1041I;

58.4 in any event, the reasoning is internally inconsistent in that on the one hand it appears to be suggested that a cause of action is a set of facts disembodied from a legal norm or norms but on the other hand confines the permissibly material facts to those legally relevant for the purposes of an action under s 1041I framed around a contravention of s 1041H, that is one particular cause of action;

58.5 more generally, the reasoning of White J fails to give sufficient weight to the fact that s 1041L proceeds from the premise that if multiple assertions are made to recover the same loss or damage, either against the same wrongdoer or multiple wrongdoers, there is only one claim for the purposes of Division 2A.

59. White J also considered that the reference to "misleading or deceptive conduct" in the heading to Division 2A spoke against the apportionment regime applying to causes of action other than misleading or deceptive conduct[57]. However, it is submitted this gives too much weight to a necessarily brief and indicative description in the heading.

[57] FCJ [359].

60. Further, White J considered that the "incongruity" involved in a provision carved out from Division 2 by s 1041H(3) forming the basis of a cause of action underpinning a "single apportionable claim" within s 1041L(2) as a circumstance tending against apportionable claims extending beyond claims against any defendant based on other than a contravention of s 1041H. However, the carve-out does not deny that the excluded conduct may be misleading or deceptive conduct, merely that it is not misleading or deceptive conduct for the purposes of s 1041H. In any event, this is a very fragile basis on which to avoid the plain and natural meaning of s 1041L(2). The alternative construction which commended itself to White J encourages differential judgments for apportioned and unapportioned amounts in respect of the very same conduct and the very same loss or damage by pleading reliance on provisions of the Corporations Act other than s 1041I.

61. White J also held that s 1041N(3) would become "unworkable" on the respondents' construction[58]. White J posed the question:

> "But if a contravention of some other provision of the Corporations Act forms part of the single apportionable claim, what is the 'relevant law' which will require reduction of the damages to which the plaintiff would otherwise be entitled for losses caused by such contraventions?"[59]

62. The answer must be that a relevant law is one which attaches to a cause of action so as to provide a defence of contributory negligence notwithstanding that such cause of action is obliterated or disregarded in the first instance for the purposes of identifying a single apportionable claim. The effect of s 1041N(3) is implicitly to bring such a cause of action to account in assessing a deduction for contributory negligence (just as s 1041N does for the purpose of apportioning responsibility). Accordingly, such a relevant law may be a provision of the Corporations Act which attaches a defence of contributory negligence to a particular right of action arising under a provision of the Corporations Act or, in the case of a common law cause of action, a law attaching to the defence of that cause of action.

63. If White J were right in his principal reasoning that a single apportionable claim is confined to a claim based on one or more contraventions of s 1041H, then it becomes of particular significance that the recovery provision s 1041I has built into it its own contributory negligence defence provision (s 1041I(1B)). It is noteworthy that s 1041I(1B) was included in the Corporations Act as the same time as s 1041N(3). If an apportionable claim were confined to contraventions of s 1041H, there would be no need to refer to "any relevant law" and it would have sufficient to refer to s 1041I(1B). That is, if White J were correct, s 1041N(3) would doubtless simply have referred to s 1041I(1B). The phrase

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[58] FCJ [364].
[59] FCJ [365].

"under any relevant law" must mean more than "under s 1041I(1B)".

64. It has not been demonstrated why s 1041N(3) is "unworkable" on the respondents' construction, and for the reasons submitted above, it is entirely consistent and conformable with that construction.

Reasons of trial judge

65. Similarly to White J, the learned trial judge found that s 1041L should only be interpreted to apply to s 1041H claims and no other types of claim[60]. The trial judge reasoned that:

65.1 the other sections for which s 1041I provides a statutory cause of action (s 1041E, s 1041F and s 1041G) have been "deliberately omitted in a consideration of s 1041I(1B)"[61];

65.2 as a result, if s 1041N(3) were interpreted to apply to all claims (and not merely s 1041H claims), s 1041N(3) would become unworkable[62]. Given s 1041N(3) requires that, in apportioning responsibility, the Court must exclude that proportion of the damage in relation to which the plaintiff is contributorily negligent and contributory negligence under s 1041I(1B) can only be taken into account in s 1041H claims (and not other claims), s 1041N(3) (and consequently s 1041L) must relate only to s 1041H claims;

65.3 interpreting s 1041L(1) to apply to all claims would have the result that it would apply to conduct deliberately excluded from the scope of s 1041H(1) by s 1041H(3) (being conduct contravening ss 670A and 728 or in relation to a disclosure document or statement within the meaning of s 953B(1) or s 1022B(1)); and

65.4 s 1041L(1) and s 1041L(4) speak only of conduct in contravention of s 1041H[63].

66. On the trial judge's construction, there is only a "single apportionable claim" if there are two or more claims, each of which is a claim (i) for a contravention of s 1041H, (ii) for the same loss or damage, and (iii) already apportionable under s 1041L(1).

67. The respondents' answers to the trial judge's reasoning appears sufficiently in the submissions put above. However, it is particularly to be observed, first, that the trial judge's construction gives s 1041L(2) no work to do at all and, secondly, s 1041I(1B) only has the narrow interpretation contended for if the expression "...conduct that was done in contravention of s 1041H" is treated as focussing on a right of action framed around that

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60 TJ [1097].
61 TJ [1045].
62 TJ [1096].
63 TJ [1099].

section and not merely conduct in contravention of that section.

Reasons of Full Court in ABN Amro[64]

68. The Full Court in *ABN Amro* decided that only claims made under s 1041I in respect of contraventions of s 1041H are apportionable under s 1041L. The Full Court reasoned:

68.1 when s 1041L(1) is read together with s 1041I(1), it is apparent from the absence of reference to s 1041E, 1041F and s 1041G in s 1041L(1) that claims for damages made for loss or damage caused by conduct in contravention of ss 1041E, 1041F and 1041G are, by implication, excluded[65];

68.2 s 1041I(1B) is similarly drawn: a distinction is drawn within s 1041I between s 1041H and ss 1041E, 1041F and 1041G. It is only a claim drawn in respect of conduct done in contravention of s 1041H which attracts the contributory negligence provision in s 1041I(1B). Section 1041(1B) had been deliberately drawn to apply only to s 1041H and not those other sections for which s 1041I provides a statutory cause of action[66]; and

68.3 there are evident policy reasons for so confining the proportionate liability provisions. Conduct in contravention of ss 1041E, 1041F and 1041G (as compared to conduct in contravention of s 1041H) constitutes an offence. These offence provisions have attendant mental elements of moral culpability[67].

69. The respondents submit that these reasons give insufficient attention to the issues of construction discussed above. The reasons do not address the essential roles which subss (2) and (3) of s 1041L play in the apportionment regime. Moreover, the significance of the fact that conduct in contravention of ss 1041E, 1041F and 1041G constitutes offence provisions with moral culpability is not clear in light of s 1041M.

Appellants' contentions

70. The appellants essentially rely on the reasoning of *ABN Amro* and White J. In addition, they submit that there was a general legislative intention to provide an exception to proportionate liability for consumer claims. This submission is directly contradicted by the Explanatory Memorandum for the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) (which introduced Division 2A). The option of implementing proportionate liabililty with a carve-out for consumer claims was

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64 *ABN Amro v Bathurst Regional Council* (2014) 309 ALR 445; [2014] FCAFC 65 (***ABN Amro***).
65 *ABN Amro* [1561].
66 *ABN Amro* [1563], [1587].
67 *ABN Amro* [1565]-[1574].

specifically considered and rejected[68].

71. Accordingly, it is submitted that the appellants' construction of Division 2A should be rejected and the appeal accordingly dismissed.

Part VII: Argument concerning any Notice of Contention or cross-appeal

72. Not applicable.

Part VIII: Respondents' estimate of time for oral argument

73. The respondents estimate two hours for the presentation of their oral argument.

10 Dated: 30 January 2015

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[68] Explanatory Memorandum for the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth), [4.109], [4.123], [4.137]. The relevant option (option 5) was whether there should be proportionate liability with some form of consumer carve-out to protect small consumer plaintiffs. The Commonwealth, and several of the States, including New South Wales, opposed the option because it could undermine the benefits of proportionate liability in terms of insurance claims, would make it more difficult for insurers to price premiums, and could have an adverse impact on small business defendants. The Commonwealth believed that the option did not achieve the stated objectives of the reforms and might in fact undermine the desired effect of proportionate liability for economic loss.

Appendix A: Submissions in support of First and Second Respondents' Summons

1. The respondents contend that, in accordance with the respondents' Summons filed 23 December 2014, supported by the affidavit of Daniel Patrick Moloney sworn and filed the same day, the appeal should be dismissed as moot on the ground that, following delivery of the Full Court's judgment, the appellants sought the enforcement of the Full Court judgment and it has been fully satisfied.

2. In the circumstances, the respondents submit:

2.1 to the extent that the first and second respondents and the other respondents were concurrent wrongdoers in respect of the claims for economic loss suffered by the appellants caused by conduct in contravention of s 1041H:

2.1.1 those claims fell to be treated as apportionable claims and to be determined in accordance with the provisions of Division 2A; and

2.1.2 the appellants were entitled to several judgments involving apportionment, as provided for in s 1041N(1);;

2.2 to the extent that the various respondents were each found liable for the same economic loss caused by their conduct in contravention of s 1041E (or in contravention of the other statutory provisions apart from s 1041H or in breach of their duties in tort and contract), then on the hypothesis of error in the Full Court:

2.2.1 these were not apportionable claims within Division 2A and would have fallen to be determined in accordance with the legal rules that, apart from Division 2A, would have been relevant; and

2.2.2 the appellants would have been entitled to joint and several judgments against each respondent at least for the entirety of the appellants' loss in respect of the conduct done in contravention of s 1041E and the other statutory provisions (subject possibly in those latter cases to the application of s 79 of the Judiciary Act);

2.3 judgments involving apportionment in respect of the conduct done in contravention of s 1041H and (for the same economic loss) not involving apportionment in respect of the conduct done in contravention of s 1041E (or some other statutory or other right of action) would have been mutually inconsistent[1];

[1] *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [1523], [1610].

2.4 given, however, that one liability (a judgment involving apportionment) has been obtained and fully satisfied following the demands of the appellants, any other liability for the same economic loss (such as a liability not involving apportionment in respect of the conduct done in contravention of, for example, s 1041E) has thereby been discharged: *O'Connor v SP Bray Limited* (1936) 36 SR (NSW) 248 at 258, 263-264 per Jordan CJ[2].

3. That is to say, full payment of the judgment debt discharged the obligation to pay the judgment debt. Any other liability for the same economic loss has thereby been discharged. The purported qualification in the appellants' letter of demand by reference to an application for special leave to appeal to the High Court can be of no effect in the face of the demand for payment in that letter of the judgment entered by the Full Court. As a consequence, the appeal is moot.

Dated: 30 January 2015

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[2] The High Court stated in *Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603 at 617 that "the general subject of election is discussed in a very full and informative manner" by Jordan CJ.