NAVIGATING THE MAZE OF PROPORTIONATE LIABILITY - post Selig v Wealthsure

[2015] HCA 18

SAMANTHA MARKS QC
Victorian Bar
CONFUSED? YOU ARE NOT ALONE…

(Mangling Winston Churchill…) 

……. Never

in the field of Australian litigation

Has so much confusion occurred

In so many cases

For so many people

Caused by so few clauses…. 
APPORTIONABLE CLAIM? - WRONGS ACT (VIC) & LEGISLATION OF OTHER STATES, CORPORATIONS ACT, ASIC ACT....
UNIFORMITY IN LEGISLATION?

- Still a dream
- Model provisions circulated – draft 7 in September 2011
- Proportionate Liability Impact Statement
- Wide industry consultation….
- Proposals were to be put to SCAG (after a couple of name changes) – still stalled
WHICH WRONGDOERS BEAR WHAT LIABILITY?
1. Decide which legislation can apply
   - State? (In Victoria, the Wrongs Act)
   - Commonwealth (Corporations Act, ASIC Act etc)

2. Decide which claims can be brought.
PLAINTIFF IDEAL (where there are multiple wrongdoers)

- BRING A CLAIM AGAINST A DEEP POCKET DEFENDANT where proportionate liability cannot be claimed as a defence.
- Eg – S1041E, s1041F, S1041G Corps Act, some statutory and contractual liabilities
- NOT s1041H
(1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:

- (a) the statement or information is false in a material particular or is materially misleading; and

- (b) the statement or information is likely:
  
  - (i) to induce persons in this jurisdiction to apply for financial products; or
  
  - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or

  - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and

- (c) when the person makes the statement, or disseminates the information:

  - (i) the person does not care whether the statement or information is true or false; or

  - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.
(1) A person must not, in this jurisdiction, induce another person to deal in financial products:

(a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or

(b) by a dishonest concealment of material facts; or

(c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:

(i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and

(ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.
• (1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

• (2) In this section:

• "dishonest " means:

• (a) dishonest according to the standards of ordinary people; and

• (b) known by the person to be dishonest according to the standards of ordinary people.
There is (arguably) a higher threshold to succeed under S1041H then under other clauses of the Corporations Act the plaintiff might otherwise rely on.

Need to weigh up risks and benefits.

Consider bringing both other Corps Act (or equivalent claims) and s1041H claim (due to lower threshold re proof) and then decide as trial proceeds what to continue with...?
(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.
(PRETTY OBVIOUSLY)

- Defend claims for which your client could be wholly liable strongly (raise insurance issues if applicable to see if such claims can be dropped)

- If there are also proportionate liability claims made against your client, make it easy for the Court just to find on those issues.
POLICY ISSUES

- There has always been a tension between the different policy reasons for
  - proportionate liability
  - Joint and several liability

- The tension remains
Which way for the future?