

# Proportionate Liability

VGSO Seminar Series

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# This is about limiting a defendant's liability

1. Change your perspective on property damage & economic loss claims
2. Plaintiffs are at risk if one of the defendants can't pay
3. A defendant can **limit its liability** by joining others but can't seek contribution (or can it?)
4. Be careful when settling with the plaintiff alone
5. Interstate & transitional differences
6. Parties' risks are different & uncertain

# Commercial Transactions - Key Messages

1. The landscape for recovering damages for breach of contract has changed
2. Single line accountability – warranties/indemnities – *may* be undermined
3. A different approach to security over a transaction or project?
4. Which parties who could cause you loss? Do they have assets or insurance?
5. Contracting out is available in some States (not Vic)
6. Parties' risks are different & uncertain

# Summary

- A Joint & several vs proportionate liability
- B Sources
- C How PL works
- D Contractual issues
- E Relevance for Government
- F The Future

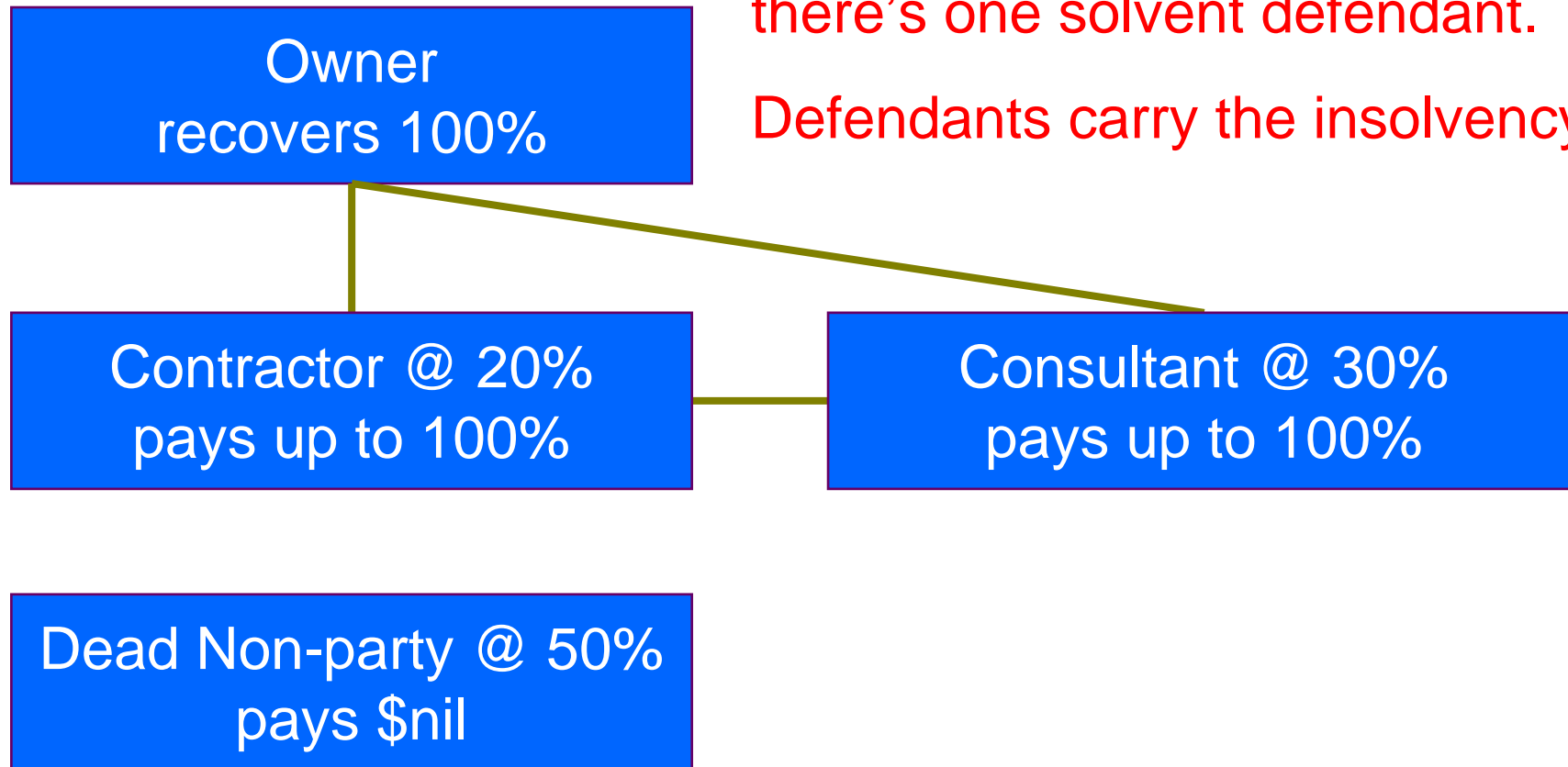
# A. Joint & Several v Proportionate Liability

Joint & Several Liability	Proportionate Liability
2 or more wrongdoers cause the same loss	2 or more wrongdoers cause the same loss
each defendant is 100% liable to plaintiff	each defendant only liable to plaintiff to extent of its responsibility
	Court apportions loss between concurrent wrongdoers
defendant may seek contribution	defendant may <u>not</u> seek contribution
risk of uninsured or impecunious wrongdoers rests with <u>defendant(s)</u>	risk of uninsured or impecunious wrongdoers rests with <u>plaintiff</u>

## A. Joint & several liability

Plaintiff doesn't care as long as there's one solvent defendant.

Defendants carry the insolvency risk



# A. Proportionate liability

Even though the Contractor warranted the works (& charged for that risk), it can limit its liability to 20%.  
...Or can it?

Owner  
Recovers up to 50%

Contractor @ 20%  
pays up to 20%

Dead Non-party @ 50%  
pays \$nil

Consultant @ 30%  
pays up to 30%

No contribution claims

## A. Joint & several liability vs Proportionate liability

- plaintiff (and solicitors) can sit back
- plaintiff is at risk
- defendants join others, chase insurance, assets etc
- plaintiff chases insurance, assets etc
- plaintiff can sue on contractual indemnity
- can plaintiff recover solely on a contractual indemnity?
- contracting out in WA, NSW & Tas. And arbitration?

# THE BIG ISSUES

- 1 National uniformity/contracting out
  - pulling the rug from under PL, for the big end of town
- 2 Contractual indemnities & warranties
  - undermining contractual allocation of risk
- 3 Plaintiff settles with 1 defendant only  
*[Vollenbroich]*

## B. Sources: State legislation

VIC	Part IVAA Wrongs Act 1958	01/01/04
NSW	Part 4 Civil Liability Act 2002	01/12/04 & 26/7/04
WA	Part 1F Civil Liability Act 2002	01/12/04
QLD	Chap 2 Part 2 Civil Liability Act 2003	01/03/05
ACT	Chap 7A Civil Law (Wrongs) Act 2002	08/03/05
TAS	Part 9A Civil Liability Act 2002	12/04/05
NT	Proportionate Liability Act 2005	05/05/05
SA	Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001	08/09/05

**And they're all different!**

## **B. Sources: Federal legislation**

### ***Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004***

Imposes PL over misleading or deceptive conduct provisions:

- **Part VIA (ss 87CB – 87CI) *Trade Practices Act 1974***  
(s82 damages claims for conduct contravening s52)
- **Subdiv GA (ss 12GP – 12GW) *ASIC Act 2001***  
(s12GF damages claims for conduct contravening s12DA)
- **Div 2A (ss 1041L – 1041S) *Corporations Act 2001***  
(s1041I damages claims for conduct contravening s1041H)

## B. Sources: Cases & articles

*Ferdinand Nemeth v Prynew & Ors* [2005] NSWSC 1296

*Lawley v Terrace Designs* [2006] VCAT 1363

*Vollenbroich v Krongold Constructions* [2006] VCAT 1710

*CBA v Witherow* [2006] VSCA 45

*Bestcare Foods v Origin Energy* [2007] NSWSC 354

*Ucack v Avante Developments* [2007] NSWSC 367

*Chandra v Perpetual Trustees Victoria* [2007] NSWSC 694

*Dartberg v Wealthcare Financial Planning & Anor* [2007] FCA 1216

*Woods v De Gabrielle & Ors* [2007] VSC 177

*Shrimp v Landmark Operations* [2007] FCA 1468

*Atkins v Interprac and Crole* [2007] VSC 445

Justice David Byrne, *Proportionate liability in construction claims* (2007) 23 BCL 10

Justice Robert McDougall, *Proportionate liability in construction litigation* (2006)

22(6) Building and Construction Law Journal 394

Owen Hayford, *Proportionate liability – its impact on risk allocation in construction contracts* (2006) 22 BCL 322

Stephenson, Andrew, 'Proportional Liability in Australia – The Death of Certainty in Risk Allocation in Contract' (2005) 22(1) *International Construction Law Review* 64

## C. Three questions:

1. Is this an apportionable claim against the Defendant?
  - if yes, then Def can limit its liability
  - if no, then Def is jointly & severally liable for 100% (and can seek contribution/indemnity from others)
2. Is the Defendant a concurrent wrongdoer?
  - if yes, then Def can limit its liability by reference to other concurrent wrongdoers
3. Does the legislation exclude the Defendant's entitlement?
  - eg, vicarious liability, fraud, agency, under some statutes

## C. What type of claims?

### An apportionable claim [24AF]

- a claim *[how it is characterised may be significant]*
- for economic loss or property damage
- not personal injury, and
- in an action for damages *[Witherow, Dartberg]*
- arising from a failure to take reasonable care  
or
- for misleading or deceptive conduct *[not Qld]*

## C. How does it work?

- the liability of a defendant [24AI]
- who is a concurrent wrongdoer [24AH] – ie:
  - one of 2 or more persons
  - whose acts or omissions
  - **caused the loss or damage** (indep. or jointly)  
*and is liable to the plaintiff for it* [Woods, Chandra, Dartberg, Shrimp]
- **IS LIMITED** [ie, a Def doesn't *claim* against another Def]
- to the amount reflecting the proportion of loss/damage
- which the Court considers **just** (Qld – 'just & equitable')
- having regard to the **extent of the defendant's responsibility for the loss/damage**

## C. How does it work? Two Models

In apportioning liability, Court can take into account:

1. **Nationally:** **all concurrent wrongdoers whether or not parties to the proceeding**
  - Defendant's duty to tell plaintiff who they are
  - No need to serve proceeding on other concurrent wrongdoers
  - Federal & all states, **except Vic**
2. **Victoria:** **only concurrent wrongdoers who are defendants**  
[24A1(3), including third parties/cross defendants]
  - Unless wrongdoer is dead or "*has been wound-up*"
  - Def must issue proceedings against concurrent wrongdoers
  - **Vic only.** Anomaly between Vic and TPA

## C. How does it work? Exceptions

- vicarious liability (principal and agent) [all]
- partners [all]
- agency [Vic, Qld, ACT]
- fraud [all]
- intentionally causing the loss [all except Vic]
- specified Acts (eg motor accidents, workers comp, discrimination legislation)
- other Acts imposing joint & several liability [not Qld]
- 'consumer transactions' [Qld and ACT]
- Fair Trading Act claims [Qld only]
- contracting out [NSW, WA, Tas]

## D. Contracting out

### NSW

Parties to a contract can make express provision for their rights, obligations & liabilities [s3A Civil Liability Act 2002]

### WA

Written, signed agreement may expressly exclude, modify or restrict PL [s4A Civil Liability Act 2002]

also Tas

### Can you contract out via arbitration? - unclear

*'Unless otherwise agreed by the parties to the arbitration agreement, arbitrator to determine questions according to law.'*

[s22(1) Commercial Arbitration Act 1984]

[See articles by Byrne and McDougall JJ]

Forum shopping?

## D. Contractual warranties etc

Do claims on contractual indemnities/warranties fall outside PL?

Is such a claim “*in an action for damages...arising from a failure to take reasonable care*” or no fault liability? Could be both!

1. Claim on a guarantee is not a claim ‘*arising from a failure to take reasonable care*’

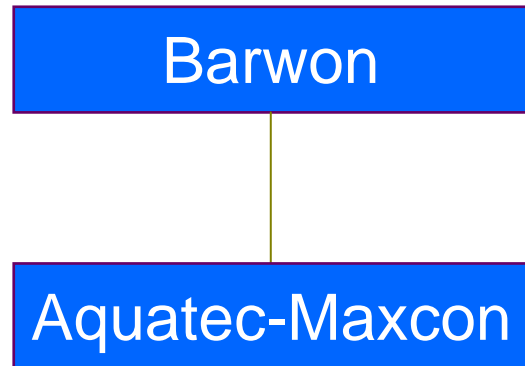
Recovery of a sum certain is not ‘*an action for damages*’  
[s24AF Wrongs Act, *CBA v Witherow* [10] to [11], but see *Dartberg* [17]]

2. Indemnities & warranties in a chain of contracts??

*[subject of Dept of Justice Discussion Paper, Dec 05]*

3. Possible solution (untested): contractor separately agrees to reimburse principal for loss apportioned against others

# Barwon v Aquatec [2006] VSC 117, Byrne J



PL under s131 *Building Act 1993* (Vic) (rep)

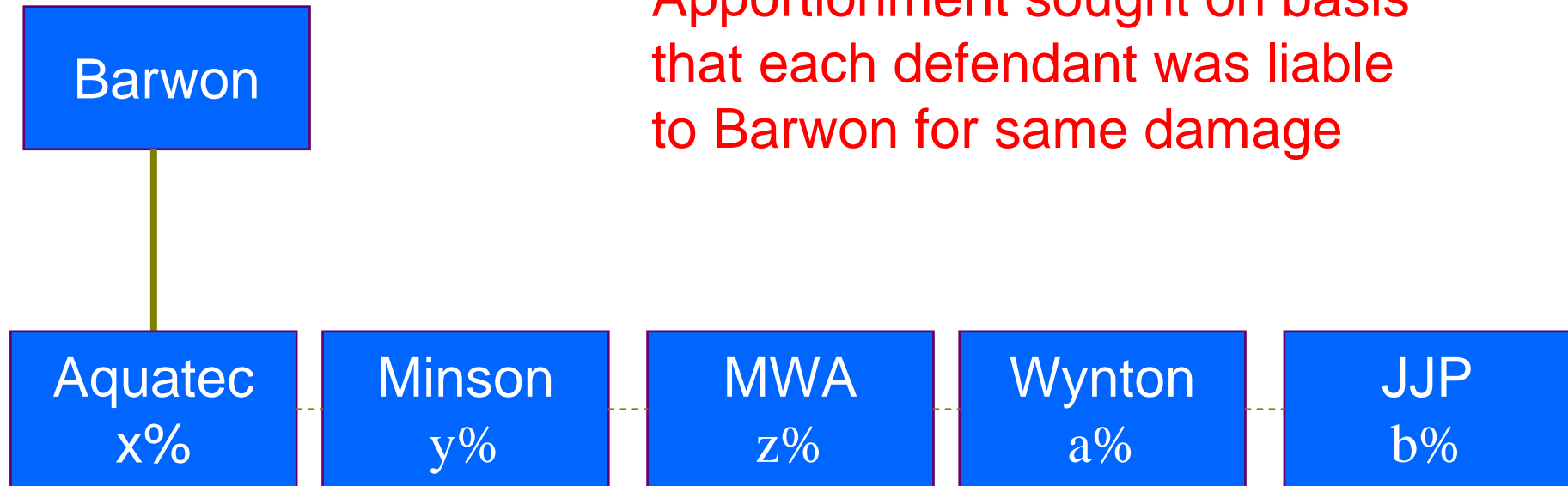
Claim for pure economic loss

Simplified version of the facts

Final orders yet to be made

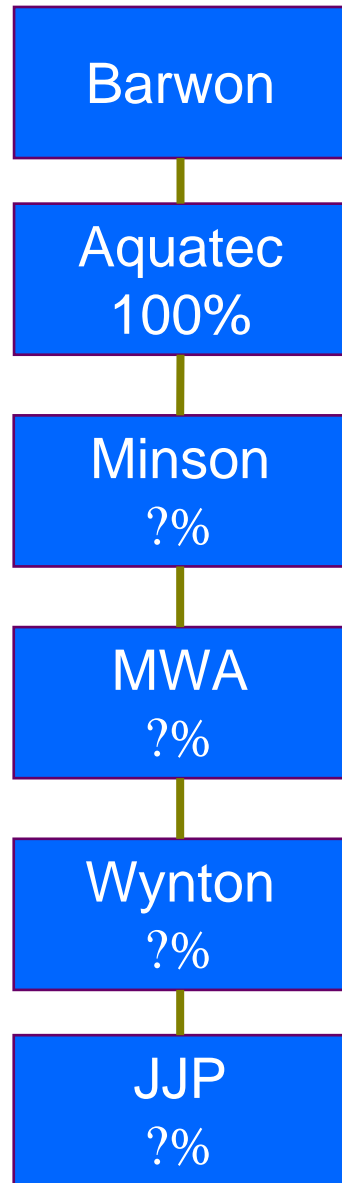
# Barwon v Aquatec <sup>[2]</sup>

Apportionment sought on basis that each defendant was liable to Barwon for same damage



Up to Barwon to sue the other defendants

## Barwon v Aquatec [3]



Byrne J (effectively) held:

No apportionment b/c Aquatec was the only defendant liable to Barwon

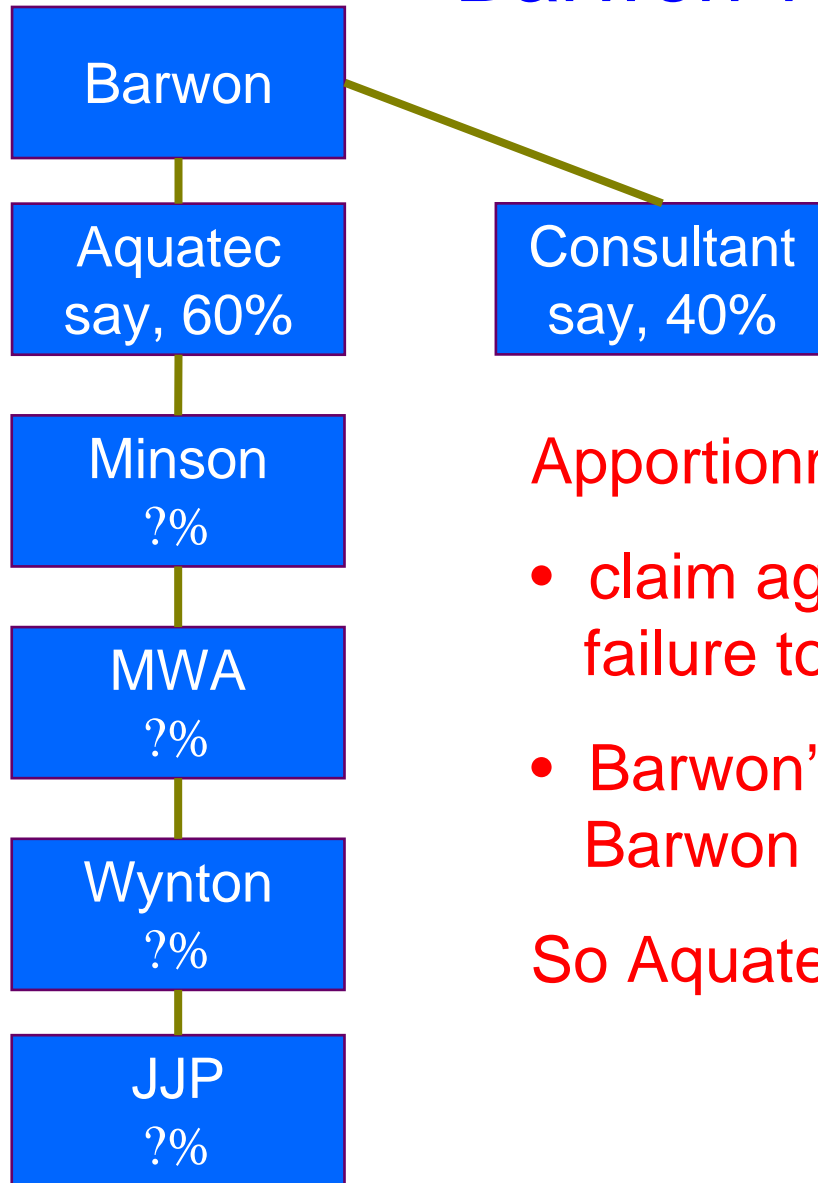
No duty of care owed by others to Barwon – in a claim purely for eco. loss

So contractual liabilities prevail down the contractual chain

Will this also apply under the *Wrongs Act*?

What if the claim is for property damage?

## Barwon v Aquatec (hypothetically) [4]



Apportionment if:

- claim against Aquatec arose from a failure to take reasonable care, and
- Barwon's consultant was also liable to Barwon for the same loss

So Aquatec avoids 100% liability.

**PROPORTIONATE LIABILITY**

**STILL A LOT OF UNCERTAINTY**

**SLICING UP THE LIABILITY CAKE**

**IS**

**GOOD NEWS FOR DEFENDANTS**

**BAD NEWS FOR PLAINTIFFS**

**SWINGS & ROUNDABOUTS FOR THE**

**STATE**

# Potentially all State agreements are affected (not confined to construction projects)

- Construction, civil engineering & infrastructure
- Contracts to supply goods or services
- Contracts to manufacture goods
- Software supply/IT agreements
- Transport contracts
- Advertising/multimedia agreements
- Maintenance contracts/ FM agreements
- Social infrastructure project agreements
- Security systems... etc

# **But the claim must arise from 'a failure to take reasonable care'**

- A breach of a duty of care
- A breach of implied contractual terms to take reasonable care
- A breach of an express contractual terms to take reasonable care
- A breach of statutory duties to take reasonable care (s. 8 DBC Act)
- The civil obligation of directors and other officers to act with the degree of care and diligence of a reasonable person (s. 180 Corps Act)
- Implied warranties to render services with due care and skill

**Also misleading and deceptive conduct**

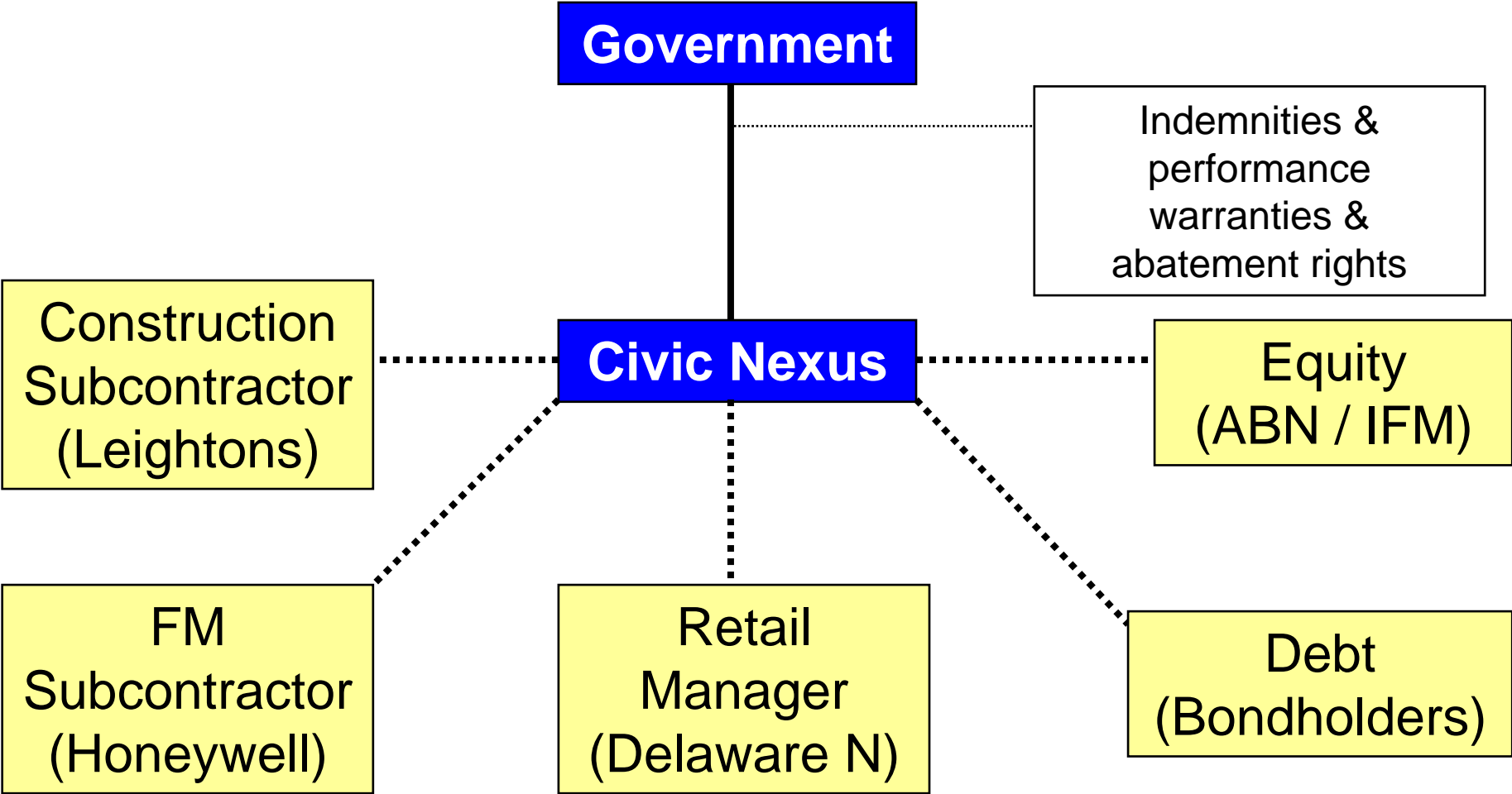
# The State as (Deep Pocket) Defendant

- Plaintiff- Pentridge Village Pty Ltd
- Sole defendant – State of Victoria
- Pre- Part IVAA
- State join URS (Geotech adviser)
- URS's primary PI insurer was HIH (insolvency risk with Defendant)
- State potentially 100 % liable under joint & several liability
- With Part IVAA - insolvency risk with plaintiff *not* the State

# The Project

- The Southern Cross Station Redevelopment is being delivered as a Partnerships Victoria project by the Civic Nexus consortium.
- The project included two components:
  - **The transport interchange redevelopment**, together with associated rail modifications and signalling work; and
  - **Commercial development** that may include a retail precinct, car parking and offices (these are commercial developments which involve no payment by the government).

# When the State is a plaintiff (& defendant)



# The dispute as relevant to Part IVAA

- Part IVAA applied (if proceedings filed post 1/1/2004)
- Potential State claim against Civic Nexus for LDs/ losses associated with construction delays
- Leightons threatened claim against State for delay costs/lost profit (media)- but no contractual relationship with State
- Principal would typically rely upon a contractual indemnity with the SPV to recover its loss
- Risk that single line accountability between State and Civic Nexus undermined under Part IVAA

## F. The future?

Cascading joinder of parties by defendants (especially in Vic)

Each successive joinder – pleadings, discovery, delay, \$\$\$...and further joinder

Cross-vesting issues (choice of law)

Major technical challenges to pleadings '*tactical manoeuvring between litigants for procedural advantage*' [Byrne J]

Difficulties in settling when J&S vs PL is a knife edge issue (is D1 exposed to 10% or 100%?)

Courts have a lot of work to do!

## F. The future?

Dec 2005 Dept of Justice Discussion Paper

– *“Review of Contractual Allocation of Risk and Part IVAA of the Wrongs Act 1958”*.

Will there be:

- cosmetic surgery or open heart surgery to remedy current ambiguities?
- further national discussion to explore opportunities for greater uniformity?