Submission No 14

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

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SUBMISSION

Executive Summary

The following submissions relate to the current inquiry into public liability insurance and tort law reform in NSW generally and are directed specifically at the horse industry.

The principles are based on legislation enacted in the United States of America that protects equine activity sponsors and professionals from excess liability arising from horse related activities. Similar legislation is enacted in most of the states protecting land owners from legal liability for accidents that may happen when someone is using their property for recreational activities. In both instances the only exceptions to the release from liability are for intentional harms and gross negligence.

Similar legislation enacted in Australia would effectively exempt or limit the liability of not-for-profit organisations and businesses involved in equine activities from damages claims for death or personal injury unless they had intentionally injured a participant or engaged in grossly negligent behaviour. The Equine Activity Liability legislation statutorily requires each participant who engages in an equine activity to assume the risk of and legal responsibility for injury whilst providing consumer protection.

Since making a similar submission in 2002 whilst discussions were in place prior to the adoption of the Civil Liability Act 2002 and the Civil Liability Amendment (Personal Responsibility) Act 2002 the Australian Capital Territory has adopted the Tennessee version of the Equine Activity Liability legislation, although the various states have all based their legislation on the original Colorado version.

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U.S.A. Equine Limitation of Liability legislation

45 of the 50 states in the United States of America have now enacted Equine Activity Limitation of Liability legislation. This legislation was passed because the legislature in those states realised how important the horse industry was to the economy and people of those states and decided that it warranted protecting.

The purpose of the legislation is to encourage equine activities by protecting equine activity sponsors from excess liability due to horse-related injuries. Although it is extremely difficult to obtain accurate figures, suggestions are that on average twenty people are killed participating in horse-related activities each year and approximately three thousand people are admitted to hospital with serious injuries as a result of participating in equine activities. This does not take into account the number of people treated at emergency rooms with less severe injuries.

By shifting the risk from equine activity sponsors or organisers to participants, equine professionals and not-for-profit groups are protected from liability in the course of an accident. It does not provide protection where reckless or intentionally negligent behaviour is engaged in by the sponsor or organiser.

An equine activity sponsor is defined as:

> "... an individual, group, club, partnership or corporation, whether or not the sponsor is operating for profit or non profit, that sponsors, organises or provides the facilities for an equine activity, including but not limited to pony

clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes, programs and activities, therapeutic riding programs and operators, instructors and promoters of equine facilities including but not limited to stables, club houses, pony ride strings, fairs and arenas at which the activity is held."

The common law principles applied in negligence are basically that the plaintiff owes the defendant a duty of care, the defendant intentionally or recklessly engages in conduct that results in an injury to the plaintiff and there is a foreseeable risk that such conduct would result in the injury. The standard of conduct required by the defendant is that of a "reasonable man" and the onus is on the defendant to establish contributory negligence on the part of the plaintiff in order to reduce their liability.

In the context of horse-related activities, this fails to take into account the propensity of a horse to behave in ways that may result in injury, harm or death to those around them and the unpredictability of a horse's reaction to sounds, sudden movement and unfamiliar things. Horses are a prey animal and, as such, have a highly developed flight instinct. The common law principles of negligence presuppose that equine activity sponsors or professionals have a duty of care to each participant and should be able to foresee any incidents that may occur. What it fails to do is acknowledge that the people involved in horse activities are, or should be, aware of the unpredictability and dangerous nature of horses and choose to participate in and be present at horse activities regardless.

Whilst, in theory, the amendments to the *Trade Practices Act 1974* (Cth) ("TPA") by the introduction of section 74 and the introduction of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) allows individuals engaging in risky recreational activities, including equine activities, to assume the risk of participating in such activities and waive their right to sue the provider of those activities should they suffer personal injury, it does not entitle the provider of those activities to require them to do so.

Whilst the practical effect of that may be the provider may stipulate the individual will not be permitted to engage in the equine activities unless they sign a waiver, this may potentially lead to allegations of duress and possibly unconscionable conduct on the part of the provider. Indeed a number of horse associations and societies are making renewal of membership conditional on the member signing a waiver as part of their membership application and there are questions being raised about whether that constitutes duress on the part of the association.

The TPA also applies to a narrower field than the Equine Activity Limitation of Liability legislation. For instance under the TPA, should a farrier be injured whilst shoeing a horse belonging to a trail ride operator for instance, the operator would not be covered by the legislation on the basis that the trail ride operator is not providing goods or services and the farrier is not engaging in recreational activities. Under the Equine Activity Limitation of Liability legislation "placing or replacing horseshoes on an equine" is considered to be an equine activity and the farrier therefore assumes the risk of and legal responsibility for any personal injury or property damage that they may suffer as a result of those activities.

The amendments to the TPA also fail to take into account that the risks associated with equine activities differ from the risks associated with other recreational activities because of the independent nature and unpredictable behaviour of horses as opposed to a recreational activity such as abseiling or white water rafting.

The Equine Activity Limitation of Liability legislation statutorily requires each participant who engages in an equine activity to assume the risk of and legal liability for injury, loss or damage to the participant or participant's property that results from engaging in an equine activity, except in the specific circumstances set out in the legislation, when the equine activity sponsor or professional may be held responsible.

It does however provide consumer protection on the basis that the equine activity sponsor or professional shall be held liable if they:

(a) provided the equipment or tack and knew or should have known that the equipment or tack was faulty, and the equipment or tack was faulty to the extent that it caused the injury;

(b) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and determine the ability of the participant to manage safely the particular equine based on the participant's representations of his or her ability;

(c) owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition that was known to the equine activity sponsor, equine professional or person and for which warning signs were not conspicuously posted;

(d) commits an act or omission that constitutes wilful or wanton disregard for the safety of the participant, and that act or omission caused the injury; and

(e) intentionally injures the participant.

Almost of the states in the United States of America also have recreational use statutes that were enacted to encourage land owners to make their properties available to the public for recreational uses, including horse riding. The statutes protect the land owner from legal liability for any accidents that may happen when the user is on their property for recreational purposes unless the land owner commits intentional harm or gross negligence. Similar legislation in Australia would effectively operate to protect land owners to a greater extent than the current tort of occupier's liability. If the land owner was also an equine activity sponsor or professional they would in any event be protected under the Equine Limitation of Liability legislation.

Whilst cases involving the Equine Limitation of Liability legislation still go before the courts, the number is relatively small, with only approximately forty (40) reported cases in the last ten (10) years over all of the jurisdictions that have introduced the legislation.

Waivers

Although the TPA and *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) seem to give credence to waivers and risk warnings, the general public is still very sceptical about the effectiveness of waivers and equine activity sponsors and organisers are extremely reluctant to use them. The required wording is extremely unclear and it appears to have been left to the lawyers to try and work out what the appropriate wording would be. Again, there is also a risk that requiring someone to sign a waiver may be seen as unconscionable or a form of duress.

By contrast, a great many of the American states that have adopted Equine Limitation of Liability legislation state quite clearly what wording is required to be included in a contract or on a risk warning sign to give the provider of equine activities protection under the legislation. For instance, the legislation in Alabama (adopted in 1993) defines an equine professional and an equine activity sponsor and requires the following wording to be inserted in all contracts and on risk warning signs:

> "Under Alabama law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to the Equine Activities Liability Protection Act."

The legislation also sets out what the inherent risks involved with equine activities are.

The Position in the A.C.T.

Section 42 of the *Civil Law (Wrongs) Amendment Act 2003 (No 2)* recently introduced in Canberra has inserted a new Schedule 3 in the *Civil Law (Wrongs) Act 2002* that reproduces the Tennessee legislation word for word.

In his presentation speech on 24 June 2003 Jon Stanhope MLA stated that:

> "To ensure that equine activities can continue and to encourage insurers back into this market the Bill clarifies the liability of people to who provide equine activities ... The legislation is based on model legislation operating in ... American states that provides a stable insurance environment and from that, should restore the insurance market for these activities. Further, the provisions fairly balance the rights of participants in equine activities with obligations on the providers of equine activities."

There was very little debate on the issue in parliament, which has been attributed to the fact that both sides of parliament recognised the efficacy of introducing such legislation to protect the horse industry.

The A.C.T. Attorney-General's Department has advised that the legislation was adopted because upon undertaking a review of the demographic in the A.C.T. and the amount of equestrian activity that took place in the territory it was considered necessary to take steps to protect the industry.

In the wake of the insurance crisis the Equestrian Federation of Australia in the A.C.T. was required to obtain public liability insurance from overseas, which is not regulated by APRA.

Non profit organisations that conducted equine activities were finding it extremely difficult to obtain insurance and despite periods of some twenty seven (27) years without a claim some were denied cover altogether. Almost 25% of the business in the equine industry was cut back by underwriters.

Before the legislation was introduced into parliament, A.C.T. Supreme Court judges were consulted, including the Chief Justice, and it was considered that the legislation codified the risk management practices, provided graded protection, allowed adequately for product liability, provided adequate protection from external failures such as equipment and tack and provided a balance of rights and skill levels.

Conclusion

The horse industry is the third largest industry in Australia and generates millions of dollars each year (not including the racing industry). More and more people each year are becoming interested in equine activities for recreational or sporting pursuits. The lack of adequate places to ride and the continuing number of trail ride operators and other providers of equine services who are required to close their businesses because they are unable to obtain public liability insurance or the costs of doing so are disproportionate to the rest of their operating expenses is making it extremely difficult for the industry to continue to grow. Horse riders are being continually shut out of National Parks and State reserves and are left with virtually no option but to ride on the roads (an extremely dangerous activity in itself).

Despite the introduction of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) insurance costs have not become reasonable for a number of businesses and charitable or not-for-profit organisations involved in the horse industry.

Both the law makers in the United States of America and the A.C.T. recognised the value of the horse industry to their jurisdictions and the numerous economic and personal benefits derived by its people as a result of equine activities. Equine Activity Limitation of Liability legislation was accordingly adopted, to promote and encourage the continuation and growth of the industry.

The horse industry is continuing to expand throughout the eastern states. As the A.C.T. has shown the foresight to protect the industry in that territory, I would hope and encourage New South Wales to become as forward thinking as most of the American states and the A.C.T.

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