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**Public Liability  
- an update**

by

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## EXECUTIVE SUMMARY

This is an update to an earlier *Briefing Paper* on Public Liability published in May this year. The earlier paper dealt with the public liability ‘crisis’ or the increase in premiums and lack of availability of public liability insurance cover, the causes of such increases as well as proposed options for reform.

The ‘crisis’ led to various calls for reform from Members of Parliament, the media and various sections of the community, particularly adventure tourism operators, sporting groups, community organisations and others who were experiencing difficulty locating and/or affording insurance cover.

The response to the calls for reform included: two national ministerial meetings on the issue; the establishment of a Senate Inquiry; ACCC monitoring; a benchmarking study of Australian insurers’ claims management practices; the introduction of legislation to remove tax barriers to structured settlements; the introduction of legislation to amend the operation of the *Trade Practices Act 1974* (Cth); and the establishment of a Negligence Review Panel to investigate reforming negligence so as to limit claims.

Throughout all of the above activity the NSW Government has been proactive in announcing and implementing various reform proposals. Stage 1 was implemented in May/June this year and Stage 2 is due to be introduced in the spring session of parliament.

Both Stage 1 and Stage 2 of the NSW Government’s reform proposal have attracted considerable attention and debate. The tort law reform of negligence in general has attracted considerable commentary which is split between those who view such reform as being unnecessary – due to the belief that it will have a limited effect on insurance affordability or availability – and those who believe it is necessary in order to alleviate pressure on the number and cost of claims.

Amidst all of this have been calls for such reforms to proceed with caution and with proper and full consultation and investigation. This is because of the extensive nature of such reforms, and the scale of the proposals. The Premier himself has stated that there “...is no precedent for what we are doing...we are changing a body of law that has taken the courts 70 years to develop.”

To date the Negligence Review Panel is due to publish its report on 30 August 2002. The report was released on Monday 2 September 2002. The recommendations will form a platform for possible negligence reform in various jurisdictions.

Whilst there has been some indication as to what the Stage 2 reforms will include, it is yet to be seen what the proposal will fully encompass.

The background section of this paper provides a brief chronology of events. (pp 1-6)

Section 1 outlines in brief the Stage 1 reforms which were implemented earlier this year. (pp 6-9)

Section 2 contains background information to tort law reform and outlines some general comments by stakeholders with respect to such reform. (pp 10-14)

Section 3 outlines the Stage 2 reform proposals, based on the announcement of the Premier Bob Carr MP on 11 June 2002 – and will detail what the proposals encompass and what the stakeholder views are on such proposals. (pp 17-44)

Section 4 outlines other reform proposals considered nationally, such as uniform and consistent statute of limitation periods for personal injury actions throughout the states. (pp 45-57)

## 1 BACKGROUND

This is an update to the earlier briefing paper on *Public Liability*<sup>1</sup>. That paper discussed the background to the public liability ‘crisis’, concern with increase in premiums, causes of such increases, and possible reform. This paper outlines what has happened since that time including the announcement by the NSW Government of a range of reform measures aimed at reducing the number, size and cost of claims – what have been called the Stage 1 reforms and the Stage 2 reforms. The Stage 1 reforms have been implemented and the Stage 2 reforms are due to be introduced in Parliament in the spring session.

The trigger for such reforms was the increase in premiums as well as the lack of availability of public liability insurance. The reforms have been aimed at reducing the number, size and cost of claims and thereby halting the rise in public liability insurance premiums in the short term and possibly reducing premiums in the long term (targeted at the affordability of premiums); as well as increasing the availability of insurance cover.

Since the earlier briefing paper, a number of reform measures have been implemented, and further reform measures have been announced, by the NSW Government. The 1<sup>st</sup> stage of the NSW Government reforms were aimed both at the number of claims (which included for example a restriction of legal advertising, minimising the promotion of claims and a restriction on the amount recoverable for legal costs); as well as aimed at the cost of claims (which included capping damages, applying a higher discount rate to the final lump sum figure, and the abolition of punitive damages). The Stage 1 reforms have been implemented (apart from legal advertising<sup>2</sup>) through the passage of the *Civil Liability Act 2002* (NSW).

Stage 2 of the NSW Government reforms are wider and will include a range of broad-based tort reform measures, including a fundamental re-assessment of the law of negligence<sup>3</sup>. The NSW Premier, Bob Carr MP, has stated that “...it’s my view that this country is tying itself up in tape because of over litigation, a long-term trend to see us litigate for everything, to try to settle every problem in our lives...by getting a big cash payment from the courts.” He further added that “...a country as small as ours can’t afford to have the American-style

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<sup>1</sup> Note: due to the topicality of this issue, there is a large amount of material being generated daily. This briefing paper only refers to information available up to 28 August 2002.

<sup>2</sup> The exception is legal advertising which was changed via the Legal Profession Amendment (Advertising) Regulation 2000 which inserted a new Part in the Legal Profession Regulation 1994. Note also the NSW Government has halved the stamp duty levied on general insurance policies from 1 August 2002. The stamp duty was halved from 10% to 5%. As noted by *Compensation Week*, at this rate the insurance stamp duty in NSW is the lowest in Australia. By comparison, the CCH notes that the stamp duty in other jurisdictions is: 11% (SA); 10% (NT, VIC, ACT); 8.5% (QLD); 8% (WA, TAS) – CCH, “NSW stamp duty *Compensation Week*, Issue 41, 6/8/02, p 3.

<sup>3</sup> Carr B, MP, Premier, “Public Liability” (and attachment “Statement by Premier Bob Carr”), *Media Release*, 11/6/02.



culture of litigation”.<sup>4</sup> The Government hopes that both the Stage 1 and Stage 2 reforms will halt what is perceived to be an American-style culture of litigation that is beginning to emerge. The Premier has stated that “one of the central tenets of the Stage 2 reforms will be to bring back personal responsibility...The pendulum has swung too far in the direction that penalises the community generally for the lack of responsible judgement by certain individuals.” The Stage 2 reform proposals are not confined to those issues arising solely from public liability insurance increases. As they relate to the law of negligence in general, with respect to personal injury actions, they will have an impact on other areas such as medical indemnity insurance.<sup>5</sup> That is, their impact will be wider and encompass other areas such as medical indemnity insurance increases.

In an address to the Sydney Institute on 9 July 2002, the Premier, Bob Carr MP said:

...we need to restore personal responsibility and diminish the culture of blame.

That means a fundamental re-think of the law of negligence, a complex task of legislative drafting.

There is no precedent for what we are doing, either in health care or motor accident law, or in the legislation of other States and Territories.

We are changing a body of law that has taken the courts 70 years to develop.<sup>6</sup>

### **1.1 Chronology of recent events**

Coinciding with, and following, the publication of the earlier *Briefing Paper* on public liability many events have taken place in relation to this issue. These include the following:

#### ***NSW Government Stage 1 reforms***

The NSW Government introduced its Stage 1 reforms in May via the *Civil Liability Act 2002* (NSW). The Act commenced operation, retrospectively, on 20 March 2002<sup>7</sup>. The Act made various changes with respect to personal injury actions caused by negligence such as: capping general damages; capping damages for loss of earnings; introduction of a threshold to eliminate small claims; abolition of exemplary damages; and making lawyers liable for defendant’s costs in speculative claims. The 1<sup>st</sup> stage reforms will be outlined in more detail below.

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<sup>4</sup> B Carr MP, Premier, “Sunday – Interview: NSW Premier Bob Carr”, Interview with Laurie Oakes, *Sunday*, 14/7/02.

<sup>5</sup> Note: The NSW Government has also announced/ signalled its intention to reform defamation law by amending the *Defamation Act 1974* (NSW).

<sup>6</sup> Carr B, MP, Premier, “A new agenda for government”, *Address to the Sydney Institute*, 9/7/02, p 17.

<sup>7</sup> This is the date when the initial announcement was made to introduce reforms.

### ***Senate Inquiry***

As noted in the earlier briefing paper, the Commonwealth Senate referred an *Inquiry into the impact of public liability and professional indemnity insurance cost increases* to the Senate Economics Committee<sup>8</sup>. The Committee has, to date, received 146 submissions and held 5 hearings.<sup>9</sup> According to the terms of reference, the Committee was originally due to report by 27 August 2002. The Committee has since resolved to extend its reporting date to 24 September 2002<sup>10</sup>.

### ***Second ministerial meeting on public liability – 30 May 2002***

The first ministerial meeting on public liability was held in Canberra on 27 March 2002. It was held to investigate the accessibility and affordability of public liability insurance as well as canvassing options for reform.<sup>11</sup> The Ministers agreed to meet again in May. The second ministerial meeting was held in Melbourne on 30 May 2002. The *Joint Communique* from the second ministerial meeting is included at Appendix A.<sup>12</sup>

The outcome of the second ministerial meeting was that the Ministers had made progress towards developing a consistent national approach for implementing measures to address the problem of rising public liability premiums and lack of availability of cover in this area. The *Joint Communique* noted that various initiatives had already been undertaken or announced by various jurisdictions and it included, in an attachment, a break down of initiatives by jurisdiction.

The *Joint Communique* also noted that Ministers had met with the Insurance Council of Australia ('ICA') and chief executives of some insurers and "...made it clear that there is an expectation that the insurance industry will deliver affordable public liability products to the community on the basis of the reform package being implemented".

The Ministers agreed on a package of measures for consideration by the jurisdictions, to reduce and contain claims costs and increase the transparency of insurance industry practices which include:

- the introduction of legislation to protect volunteers and not-for-profit organisations;
- law reform which is aimed at reducing costs, and/or containing costs, and/or increasing certainty and predictability of the costs of claims, and/or managing the community's

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<sup>8</sup> CPD (Senate), 20/3/02, p 1111.

<sup>9</sup> The transcripts of the hearings and the public submissions are available at: [http://www.aph.gov.au/senate/committee/economics\\_ctte/publib\\_insur/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/economics_ctte/publib_insur/submissions/sublist.htm)

<sup>10</sup> Information obtained from the Secretariat of the Committee via telephone conversation on 28 August 2002.

<sup>11</sup> "Ministerial Meeting on Public Liability", *Joint Communique*, 27/3/02, Canberra.

<sup>12</sup> "Ministerial Meeting on Public Liability", *Joint Communique*, 30/5/02, Melbourne.

- expectation with respect to personal responsibility and assumption of risk;
- tort law reform which includes waivers for risky activities, the establishment of a panel to review the law of negligence, reviewing damages;
  - structured settlements - the removal of barriers to structured settlements;
  - legal system reforms which include procedural improvements so as to reduce costs, examining ways to improve claims procedures so as to encourage settlement/ claims resolution over litigation eg. compulsory conferencing, agreement that limits on advertising by legal practitioners would be considered on an individual jurisdictional basis;
  - data collection - the *Joint Communique* noted that “the lack of comprehensive data on claims costs was a significant constraint in the appropriate pricing of premiums by the insurance industry for not-for-profit, adventure tourism and sporting groups.” To this end the Commonwealth government has undertaken to require that all insurers in Australia submit claims data to APRA;
  - benchmarking study of claims processing;
  - risk management.
  - ACCC update of report on *Insurance Industry Market Pricing Review* – the *Joint Communique* notes that the Commonwealth has asked the ACCC to provide an update of its report on the insurance industry by 6 July 2002. The Commonwealth has also asked the ACCC to update this report on a six monthly basis over the next 2 years. The *Communique* notes that the monitoring role undertaken by the ACCC in this regard should ‘enable an assessment of whether the insurance industry is adjusting premiums to take account of cost savings’.<sup>13</sup>

### ***Second Trowbridge Consulting report 30 May 2002***

The Commonwealth Treasury commissioned a report by Trowbridge Consulting and Deloitte Touche Tohmatsu for the purpose of assisting the first national ministerial meeting<sup>14</sup>. Trowbridge Consulting was engaged a second time “to recommend practical measures to resolve the public liability crisis”. They released their second report entitled *Public Liability Insurance – Practical Proposals for Reform* on 30 May 2002<sup>15</sup>. The report is lengthy and outlines various reform proposals. The reform proposals are centered around the objectives of: stabilising and reducing claims costs; and dealing with the availability of cover.<sup>16</sup> The executive summary and recommendations are included at Appendix B.

<sup>13</sup> For reports of the ACCC see the ACCC website at <http://www.accc.gov.au>.

<sup>14</sup> Trowbridge Consulting, *Public Liability Insurance – Analysis for meeting of ministers 27 March 2002*, 26/3/02. It is available at: [http://www.deloitte.com.au/downloads/publicliability\\_apr02.pdf](http://www.deloitte.com.au/downloads/publicliability_apr02.pdf)

<sup>15</sup> Trowbridge Consulting, *Public Liability Insurance – Practical Proposals for Reform*, 30/5/02. The report is available at [www.trowbridge.com.au](http://www.trowbridge.com.au). (accessed August 2002)

<sup>16</sup> op cit n 15, p i.

***Negligence review panel established***

As noted above, at the second ministerial meeting on 30 May 2002, the Commonwealth and States and Territories agreed to establish an expert panel to inquire into and review the law of negligence as well as to develop options to limit liability and the quantum of awards for damages.<sup>17</sup> Following the ministerial meeting, the Negligence Review Panel was established to inquire and report on such changes. The panel is comprised of 4 members: the Honourable Justice David Andrew Ipp (Chairman); Professor Peter Crane; Dr Don Sheldon; and Mr Ian Macintosh. Submissions can be lodged with the panel. The panel is required to report in stages with its first report on terms 3(d), 3(f), 4 and 5 of its terms of reference due by 30 August 2002. These terms relate, respectively, to: developing and evaluating options “for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act”; developing and evaluating options for limiting the liability of not-for-profit organisations; reviewing the interaction of the *Trade Practices Act 1974* (as proposed to be amended) with common law principles applied in negligence; and developing and evaluating options for a statutory limitation period of 3 years. Further details on the panel membership as well as the terms of reference are included at Appendix C.<sup>18</sup> The recommendations of the Negligence Review Panel will form the basis of possible reform in all Australian jurisdictions.

The first report of the Negligence Review Panel was released on Monday 2 September 2002. The press release issued, and the list of the Panel’s recommendations is included at Appendix D.<sup>19</sup>

***Productivity Commission benchmarking study***

As noted in the *Joint Communique*, the Ministers at the meeting on 30 May 2002 agreed that the Productivity Commission would be asked to undertake a study into claims management and “to benchmark Australian insurers’ claims management practices against world standards and report by 31 December 2002”.<sup>20</sup> The terms of reference are included at Appendix E.

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<sup>17</sup> As noted in the *Joint Communique* from the ministerial meeting held on 30 May 2002.

<sup>18</sup> For more information on the Negligence Review Panel, as well as to view submissions to the panel, see: <http://revofneg.treasury.gov.au/submissions.asp>. As at 2/9/02 there are 64 submissions available for viewing by the public on the website.

<sup>19</sup> The full report is available at <http://revofneg.treasury.gov.au>

<sup>20</sup> For more information see the Productivity Commission website at <http://www.pc.gov.au/research/studies/insurance/index.html>

### ***NSW Government Stage 2 reforms***

The NSW Government announced its plans for tort law reform on 20 March 2002 and gave more detail of its Stage 2 reform proposal on 11 June 2002.<sup>21</sup> The NSW Government has stated that it will reassess the law of negligence in the following areas: addressing the concept of reasonable foreseeability in the law of negligence; protection of good samaritans who assist in emergencies; waivers for risky activities; statutory immunity for local government; public authorities which fail to exercise their powers will not breach any duty; changing the test for professional negligence to one of 'peer acceptance'; abolishing reliance by plaintiffs on their own intoxication; preventing people from making claims where they were injured in the course of committing a crime; provide a wider range of options for damages; creating a presumption in favour of structured settlements. The second stage reforms will be outlined in more detail further below

Whilst the discussion surrounding the Stage 2 reforms is centred on 'tort reform' (torts referring to the body of law that deals with civil wrongs as opposed to criminal wrongs) the area of tort law that is proposed for reform is the area of negligence. In particular, whilst there is no full detail to date on what the Stage reforms involve, it is assumed that these reforms will look at statutorily modifying or restricting the common law of negligence in certain areas such as by adding new defences or strengthening existing defences (eg exclusion clauses are a defence to an action in tort); and reforming the test for negligence in certain areas.

The Stage 2 reforms are due to be introduced in the Spring Session of Parliament, following a report of the Negligence Review Panel.

## **2 STAGE 1 REFORMS**

### **2.1 Restriction of legal advertising**

On 27 February 2002 the NSW Premier, Bob Carr, announced reform (effective from 1 April 2002) which would restrict legal practitioners advertising for personal injury cases:

...today I can announce that the Government is introducing restrictions on lawyers advertising for personal injury matters to take effect from 1 April...The rules that we propose will stop lawyers advertising personal injury services on television, on radio and in hospitals.<sup>22</sup>

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<sup>21</sup> op cit, n 3. Note: whilst there was an earlier announcement by the Premier on 20/3/02 (See the Ministerial Statement, *NSWPD (LA)*, 20/3/02, p 828) more detail about the Stage 2 proposals were given in the *Media Release* dated 11 June 2002.

<sup>22</sup> *NSWPD (LA)*, 27/2/02, p 7.

The NSW Government amended the *Legal Profession Regulation 1994* (NSW) to effect these changes.

The Legal Profession Amendment (Advertising) Regulation 2002 was gazetted on 1 March 2002.<sup>23</sup> The object of the regulation was to restrict the way in which barristers and solicitors (legal practitioners) advertise personal injury services.

The Regulation inserted a new Part 7B in the *Legal Profession Regulation 1994*. The new Part 7B<sup>24</sup> stipulates that a legal practitioner must not advertise personal injury services except by a statement which lists: the name and contact details of the legal practitioner and information about their area of practice or speciality.

A breach or contravention of the above sub clause can amount to professional misconduct.

The only mediums through which a legal practitioner can advertise are<sup>25</sup>:

- in a printed publication (such as a newspaper or magazine);
- on the internet via a website which contains an electronic version of a printed publication (the advertisement must be a reproduction of the advertisement which appears in the printed publication);
- on the internet via a directory or database that is published or maintained independently of the legal practitioner;
- via a public exhibition of the advertisement in, on, over or under any building, vehicle or place or in the air which is in view of persons on the street or in a public place;
- via pamphlets or leaflets sent to any persons or thrown or left on premises or vehicles;
- on receipts.

Legal practitioners are prohibited from advertising<sup>26</sup>:

- in hospitals,
- or via printed documents sent or delivered to a hospital.

The regulation prohibits personal injury advertising which may be reasonably be thought to encourage or induce a person to make a claim for compensation or damages.<sup>27</sup>

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<sup>23</sup> Published in Gazette No 54 of 1 March 2002, p 1244.

<sup>24</sup> cl 68B, sub cl (1).

<sup>25</sup> as per cl 68B, sub cl (4).

<sup>26</sup> as per cl 68B, sub cl (5).

<sup>27</sup> cl 68C.

## 2.2 Civil Liability Act 2002

The *Civil Liability Act 2002* ('the Act') was introduced in Parliament on 28 May 2002 and assented to on 18 June 2002.<sup>28</sup> It commenced operation (retrospectively) on 20 March 2002. The Act makes changes to the amount of compensation available under common law for personal injury damages claims which are caused by the negligence of another person, as well as limiting the amount of costs recoverable by legal practitioners with respect to such claims.

The following outlines the main areas that were changed by the Act.

### *Restriction of compensation available for personal injury claims*

The recently enacted *Civil Liability Act 2002* (NSW) has restricted the level of compensation available for personal injury negligence actions. It has done so by placing limits on general damages, and sets out maximum payouts for loss of earnings capacity. The following outlines, in summary form, the caps and restrictions put in place.

#### *Cap on damages – non-economic loss*

Under section 16(2) of the Act there is now a \$350,000 cap on damages for non-economic loss (what is commonly known as general damages or damages for pain and suffering). Under the Act, the maximum amount may only be awarded in "a most extreme case".

There is also a threshold test for the award of non-economic loss.

#### *Small claims threshold – 15% test*

'Small' claims are eliminated via the threshold test in the Act. Under section 16(1) of the Act no damages may be awarded in respect of non-economic loss unless the "severity of the non-economic loss is at least 15% of a most extreme case."

The amount available for economic loss has been limited under section 12(2) of the Act to 3 times average weekly earnings<sup>31</sup>.

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<sup>28</sup> The Civil Liability Bill 2002 was introduced, and had its second reading, in the Legislative Assembly on 28 May 2002 by the Premier, B Carr, MP. The Act commenced operation on 20 March 2002 (the Act was retrospective in its operation – which was one of the controversial aspects of the Bill).

<sup>29</sup> See: ABS, *Average Weekly Earnings*, February 2002, 6302.0, p 14. The average weekly earnings are for full-time adult ordinary time earnings.

<sup>30</sup> Submission No 80, p 4.

<sup>31</sup> Average weekly earnings is defined under section 12(3)(a) of the Act as being "the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by

*Increase of the discount rate to 5%*

Under the Act the discount rate was increased from 3% to 5%<sup>32</sup>. This has the effect of reducing the amount of damages available to a plaintiff for economic loss (the total sum is discounted by 5%).

*Damages awarded for family care reduced/abolished in some circumstances*

Under section 15 of the Act the amount of damages available for ‘gratuitous attendant care’, given by family members and others, is reduced or not available.

*Abolition of aggravate, exemplary and punitive damages*

Under section 21 of the Act, aggravate, exemplary or punitive damages are abolished.

*Legal costs*

Schedule 2 of the Act contains a range of amendments to existing acts. The *Legal Profession Act 1987* (NSW), is amended by schedule 2.2 with respect to legal costs.

*Legal costs obtainable*

Under Schedule 2, Division 5(b), where an award is less than \$100,000, the maximum amount of costs recoverable by a legal practitioner is 20% of the amount or \$10,000, whichever is greater.

*Prohibition on legal services where there are no reasonable prospects of success*

Under Schedule 2, Division 5C “A solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.” (198J(1)).<sup>33</sup>

*Consent orders and structured settlements*

Section 22 of the Act provides that a court may make a consent order for a structured settlement.

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the Australian Statistician and that is, at that date, available to the Court making the award." The latest average weekly earnings in NSW amount to \$910.00 gross per week. The total cap would currently be approximately \$910.00 x 3 = \$2730 gross per week – see See: ABS, *Average Weekly Earnings*, May 2002, 6302.0, p 14. The average weekly earnings are for full-time adult ordinary time earnings and the figure is taken from the ‘trend’ estimates. The ABS notes that it ‘...considers that trend estimates provide a more reliable guide to the underlying direction of the data, and are more suitable than either the seasonally adjusted or original estimates for most business decisions and policy advice’ (p 26).

<sup>32</sup> Section 14.

<sup>33</sup> For more information on the detail of changes effected by the *Civil Liability Act 2002* (NSW) in this regard, see: Goudkamp T & Goudkamp J, “An outline of the Civil Liability Act 2002”, *Law Society Journal*, August 2002, Vol 40 no 7, p 46; Crown Solicitor’s Office NSW, “Developments – Civil Liability Act 2002”, *Client Newsletter*, August 2002, p 3.



### 3 BACKGROUND TO TORT REFORMS

As noted by Adams, the proposed areas of reform that have emerged from the national ministerial meetings can be divided into two categories: reforms which deal with substantive law reform; and reforms which are targeted toward industry and claims practice.

The substantive law reform areas include for example: caps on damages (which have already been introduced in NSW); waivers for risky activities; and uniform limitation periods for the commencement of personal injury actions. With respect to substantive law reform, the Negligence Review Panel has been established to review the law of negligence and to make recommendations about reform in this area.

The reforms aimed at industry and claims practice include: ACCC monitoring; a benchmarking study of claims-handling practices; data collection (the submission of claims data by insurers to APRA); legal system reform; restriction of legal advertising (already in place in NSW); and risk management.<sup>34</sup>

The NSW Government's Stage 2 reforms will be outlined further below.

#### 3.1 Stakeholder views on substantive law reform and negligence review panel inquiry

The key stakeholder views in relation to specific areas of the proposed Stage 2 reforms will be included below (when dealing with the specific areas). However, there have been views expressed on reforming the tort law of negligence in general – both opposition and support – as well as commentary about the Negligence Review Panel.

##### 3.1.1 Concerns about some areas of substantive tort law reform

Some stakeholders are of the view that the Negligence Review Panel has not been given sufficient time to adequately inquire and report on reforming negligence. Other commentators believe that tort law reform is not necessary or will not have an impact on reducing premiums, or that trends in recent judicial decision making have made it unnecessary to statutorily intervene. Some recent comments in this regard are:

##### *Australian Plaintiff Lawyers Association*

APLA President, Rob Davis, commenting on the outcome of the second ministerial meeting on public liability, whilst broadly supporting legislation which would allow adults to waive their right to sue when engaging in risky activities, stated that: “The review of the law of negligence is not a task that can be taken lightly. It should be referred to a properly resourced Law Reform Commission, and given a proper amount of time to consider the issues”.<sup>35</sup> <sup>36</sup> APLA further stated in their submission to the Negligence Review Panel:

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<sup>34</sup> Adams R, “Public Liability Reform”, *Australian Insurance Law Bulletin*, vol. 17 no 7, p 61.

<sup>35</sup> Davis R, President, Australian Plaintiff Lawyers Association, “APLA Cautious on Public Liability Reforms”, *Media Release*, 30/5/02.

<sup>36</sup> For other recent APLA comments see: “Lies, damned lies and statistics”, *Plaintiff*, Issue 52,

The law of tort is a critical component of a just democracy and a healthy economy. It is a regulator of behaviour, be it individual, corporate, or government. It provides an important mechanism for the resolution of civil wrongs....

Market failure in the provision of insurance cannot be solved by changes to tort law. Restrictions on the rights of claimants shifts costs from insurers and defendants to the claimants and the community, but do nothing to address the underlying market forces that drive premium increase.<sup>37</sup>

### ***Law Council of Australia***<sup>38</sup>

Tony Abbott, President of the Law Council of Australia has been reported as saying that he is concerned that the Negligence Review Panel has limited time to inquire and report. He said:

The Government have asked that the entire law of negligence developed over many decades be reviewed in two months under Terms of Reference which seems to pre-determine the conclusion irrespective of the facts.

...

He has also stated that:

The law currently balances the different interests of injured persons and defendants and the community. We think that the law has got the balance about right, and certainly there is no case for doctors or others to have a licence to cause injury through negligence without facing the responsibility for their actions.<sup>39</sup>

### ***Australian Competition and Consumer Commission***

The ACCC have stated in their submission to the Negligence Review Panel:

The Commission is most concerned that any legislative response to these problems...[availability and pricing of certain types of insurance]... be carefully considered. There is a real risk that some of the far-reaching changes to the law now being considered may

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August 2002, pp 4-5.

<sup>37</sup> APLA, *Submission to the Negligence Review Panel*, 2/8/02, p 3.

<sup>38</sup> Note the Law Council of Australia has appointed a group of lawyers and actuaries to prepare a submission to the Negligence Review Panel. The panel is comprised of: Hon LJ Priestly QC, retired Justice of the NSW Supreme Court; Dr Des Butler, Associate Professor of Law, Queensland University of Technology; Dr Peter Handford, Associate Professor of Law, University of Western Australia; Mr Nicholas Mullany, barrister at the Western Australian and NSW Bars, and adjunct Professor of Law at the University of NSW; Ms Prue Vines, Senior Lecturer in Law, University of NSW; Mr Ted Wright, Bell Wiese Professor of Legal Ethics at the University of Newcastle; and actuaries Cumpston Sarjeant.<sup>38</sup>

<sup>39</sup> CCH, "Lawyers criticise negligence exemptions", *compensation week*, Issue 41, 6/8/02, p 1.

be rushed through as quick-fix re-active measurers with inadequate attention being paid to their long term effects.

In the Commission's view law reform should be driven by policy which has the potential to promote the welfare of all Australians. In the case of negligence law reform, that policy should be focussed on reducing the number of accidents and the costs of the resulting injuries. As a general rule, potential liability is best placed on the person best able to avoid the accident most easily and cheaply in the first place. This is both sensible and fair.<sup>40</sup>

The ACCC further stated that "Many of the proposals being put before the Review for consideration will not promote the welfare of all Australians."

Some commentators have also pointed out that the trend in judicial decision making in recent years has been more restrictive, or less pro plaintiff. This trend has been claimed to obviate the need for statutory reform/ intervention in this area – particularly given that the reforms are targeted at reducing the number of negligence cases, or limiting the circumstances in which negligence cases can be successfully brought.

For example, Nicholas Mullany, adjunct Professor of Law at the University of New South Wales, has stated:

Contrary to popular myth, it is often a very hard task to succeed in a claim for negligence... On the contrary, there is no question that defendants have fared much better in recent times than plaintiffs in personal injury proceedings and with the more restrictive attitude to the scope of negligence of the High Court of Australia under the stewardship of Chief Justice Gleeson, the prospects of success have diminished further. The shift in judicial attitude is reflected in the stricter limits on liability imposed in a number of scenarios.<sup>41</sup>

In an article in the *Sydney Morning Herald*, Harold Luntz is reported as saying that it has become harder to successfully sue in personal injury cases. The article noted:

From 1987 until 1999 the High Court delivered 96 judgements in tort cases – 40 dealing with liability or damages for personal injury. Of these, 32, or 80 per cent, were decided in favour of the plaintiffs and eight, or 20 percent, in favour of the defendants.

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<sup>40</sup> ACCC, *Second Submission to the Negligence Review Panel*, August 2002, p 2. See also an article by Ross Gittins which discusses this aspect of the ACCC submission: "Insurance" *Sydney Morning Herald*, 12/8/02, p 11.

<sup>41</sup> Mullany N, "New tort reform agenda...Same old myths", *Law Society Journal*, July 2002, Vol 40, No 6, pp 52-53. Nicholas Mullany is a barrister at the Western Australian and NSW Bars and adjunct Professor of Law at the University of NSW. N Mullany was part of a panel of lawyers and actuaries gathered by the Law Council of Australia to prepare their submission to the Negligence Review Panel.

In 2000, a turnaround saw six of the nine personal injury cases ruled pro-defendant and two for the plaintiff.

With some exceptions, Professor Luntz said the trend had continued through 2001 and the first part of 2002. As a rule, the High Court was more stringently applying the notion of actual fault, was limiting the scope of duty of care provisions and was emphasising personal responsibility over community responsibility.<sup>42</sup>

### **3.1.2 Support for substantive tort law reform**

There has also been much support expressed for tort law reform. The following outline some of the views expressed:

#### ***Insurance Council of Australia***

The ICA has supported calls for tort reform, and has stated in its submission to the Negligence Review Panel:

There is a high expectation that the reform of tort law being considered by the Review Panel appointed by Senator Coonan will go a long way to resolving the insurance crisis and reducing the frequency and cost of claims. This is expected to bring greater capacity into the market and to stabilise or reduce premiums.

In the view of ICA, this reform will only assist in meeting the political expectations that surround it, if the reforms have a reasonable certainty of bringing about the result that they intend, and that the way in which the reform is structured enables insurers to price the future circumstances in which losses can be recovered and the amount of those losses.<sup>43</sup>

#### ***The Royal Australian College of General Practitioners***

The Royal Australian College of General Practitioners in its submission to the federal Senate *Inquiry into the Impact of Public Liability and Professional Indemnity Insurance Cost Increases* ('the Senate Inquiry') supported tort reform (amongst other measures):

The RACGP believes that a sustainable national approach to medical indemnity insurance requires reforms in tort law and its administration.<sup>44</sup>

The Victorian Employers' Chamber of Commerce and Industry (VECCI) has also "called for well targeted tort reform measures to improve insurer certainty by better defining the

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<sup>42</sup> "Negligence changes hit legal barrier", *Sydney Morning Herald*, 2/8/02.

<sup>43</sup> ICA, *Submission to the Negligence Review Panel*, July 2002, p 4.

<sup>44</sup> RACGP, *Submission to the Inquiry into the Impact of Public Liability and Professional Indemnity Insurance Cost Increases*, p 4. (Submission No 80)

risk parameters.”<sup>45</sup>

### ***Sporting organisations and adventure/sport tourism operators***

Other supporters of tort reform include sporting organisations. For example, Perisher Blue in their submission to the Negligence Review Panel said they disagree with the view that statutory intervention is not necessary because of recent trends in judicial decision making. They stated:

According to recent reports, the Law Council of Australia and other legal commentators have suggested that the judicial approach evident in recent years making it harder to successfully sue in personal injury claims renders any tort law reform by Legislatures unnecessary.

Perisher Blue disagrees with such a proposition. First, because the approach by the High Court in setting new precedents for subordinate jurisdictions does not mean that the community’s concern will be or should be fully addressed by the Courts. Second, because the change in judicial law making is determined by the constitution of the Bench at any one point in time. Future changes to the Bench could well again turn the decisions the other way. It is for this reason that the Legislatures must act. Third, because if the judicial approach is in fact considered correct and appropriate then codification into statute merely fixes the policy issues in a firm and unequivocal manner.<sup>46</sup>

## **3.2 General comments about tort reform**

The concept of tort reform is not new. Often it has centred around a discussion of common law/ tort based systems of compensation for bodily injury versus no fault schemes.<sup>47</sup>

<sup>45</sup> CCH, “Survey supports call for tort reform *compensation week*, Issue 40, 30/7/02, pp 3-4.

<sup>46</sup> Perisher Blue, *Submission to the Negligence Review Panel*, August 2002, p 8.

<sup>47</sup> Proponents of a common law based system of compensation argue that such a system is fairer in terms of the individual assessment of a person’s injuries versus a bureaucratic assessment, proponents for retaining the tort based system also point to its deterrence value in terms of minimising and preventing future injury. On the other hand, proponents of a no-fault system state that it is a fairer distribution of resources in society as well as minimising the ‘lottery’ effect (ie an award of damages being different, or non existent, depending on where the injury was sustained), of someone having to be ‘at fault’ in order to obtain compensation. There is much material available on the tort law of negligence, tort law compensation and surrounding issues. See for example: Aityah PS, *The Damages Lottery*, Oxford, Hart Publishing, 1997. The Honourable JJ Spigelman AC, Chief Justice of New South Wales, “Negligence: The Last Outpost of the Welfare State”, *Address to the Judicial Conference of Australia: Colloquium 2002, 27/4/02* (available at: [http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman\\_270402](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_270402) ); The Honourable Justice Michael Kirby AC CMG, “Tort System Reforms: Causes, Options, Outcomes”, *Journal of Law and Medicine*, Vol 8, May 2001, p 380 (in the context of medical malpractice litigation); Ergas H, “Public liability: An economist’s perspective”, *Bar News*, Winter 2002, p 3 (on the deterrence value of litigation and other issues); Howell B, Kavanagh J & Marriott L, “No-Fault Public Liability Insurance: Evidence from New Zealand”, *Agenda* Vol.

However, statutorily modifying negligence to the scale that has been proposed is a new concept in Australia.

On the issue of the reform of negligence in general, Bret Walker SC, President of the NSW Bar, noted that “It is therefore appropriate always to consider the possibility of further legislative adjustment, by way of trade-offs in the usual way of good government, in the field of rights to claim damages for bodily injury caused by other people’s carelessness”. He also commented on the value of the law of negligence:

A decent society does endorse standards of conduct between people in their relations with others. When the relations are not pre-agreed, are involuntary or are not governed by contract, those standards should require reasonable care by some in relation to others. Within the ambit of that duty, negligence should therefore always be a social wrong – unless the relationship (such as parent and child, or judge and litigant) is such as to defy any virtue in making shortcomings actionable. Generally, otherwise, the social wrong of negligence should be recognised and sanctioned – by the familiar device of shifting its cost from the victim to the wrongdoer.<sup>48</sup>

More recently, the Honourable JJ Spigelman AC, Chief Justice of NSW, in an address to the Judicial Conference of Australia on 27 April 2002, stated:

In the three major legislative schemes limiting common law actions – for motor vehicles, industrial accidents and medical negligence – the New South Wales Parliament has adopted a variety of different provisions as the basis upon which liability can be established and damages calculated. There is no discernible principle lying behind these differences. Persons who suffer injuries in the three different ways are subject to quite different caps and thresholds and different heads of damages can be recovered in different ways.

The primary reason for the creation of such differences is that all of the schemes – and presumably the public liability insurance scheme now in prospect – have been determined by the need to control or reduce insurance premiums in each of the different contexts. The primary source of the ideas about the changes has been insurance underwriters’ seeking to limit claims (and therefore premiums) or the equivalent perspective of a public instrumentality

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9 no. 2, 2002, pp 135-149 ; Compensation schemes: ‘no-fault’ versus negligence, “The *Radio National Transcripts*, 18/11/97. See <http://www.abc.net.au/rn/talks/8.30/lawrpt/1stories/lr971118.htm>

<sup>48</sup> Walker B, SC, President of the NSW Bar Association, “Personal injuries: Balancing individual and community obligations”, *Bar News*, Winter 2002, p 1.

responsible for a government-backed scheme. The reforms are underwriter driven.

In my opinion, in the long run, it is quite likely that the significant differences in compensation based on how an injury occurs, rather than the need for compensation, will create resentment in the community. Why should compensation be fundamentally different depending on whether injury occurred in a car or in a car park or at work or on the operating table or in a public swimming pool or at a supermarket? It will be very hard to retain a sense of fairness for a system as a whole. This is an inevitable result of underwriter-driven reform.<sup>49</sup>

The Chief Justice then suggested an alternative to such a process, what he describes as 'principle driven reform'. For an excerpt of the speech see Appendix F.<sup>50</sup>

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<sup>49</sup> The Honourable JJ Spigelman AC, Chief Justice of New South Wales, "Chief Justice suggests remedies for the tort of negligence – 'the last outpost of the welfare state'", *Law Society Journal*, June 2002, vol 40, no 5, pp 24-25. The article a summary of an address given to the Judicial Conference of Australia Colloquium 2002 in Launceston on 27 April 2002.

<sup>50</sup> The full text of the speech can be viewed at [http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman\\_270402](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_270402) (accessed August 2002)

## 4 STAGE 2 REFORMS

The following section outlines the NSW Government proposal for its Stage 2 reforms. The Stage 2 reforms are quite broad, and the information below has, where possible, tried to incorporate key stakeholder views on each proposal. For further information on the stakeholder views see the relevant websites.<sup>51</sup>

### 4.1 Address the concept of reasonable foreseeability in the law of negligence

The NSW Premier, Bob Carr MP has stated: “We propose to change the law to exclude claims that should never be brought and provide defences to ensure that people who have done the right thing are not made to pay just because they have access to insurance.”<sup>52</sup>

The Premier further stated:

Another area where Stage 2 will operate to push the pendulum back towards personal responsibility is the whole concept of what sorts of injuries might be “reasonably foreseeable”. The Chief Justice has criticised the development of tort law because it encompasses injuries that are only possible and theoretical. For example, on a completely deserted and isolated headland, it might be possible that somebody would come along in the middle of the night and fall off. That is not a contingency that a reasonable Local Government should have to guard against. On the other hand, if it is a well trodden tourist trek, where lots of people come and go, then a reasonable Council should have in place appropriate measures to guard public safety.<sup>53</sup>

To date, there is no further information as to the full extent of this proposal or how this reform will be implemented. There has also been little response, by way of public comment, on the above proposal.

### 4.2 Protection of good samaritans who assist in emergencies

The NSW Premier, Bob Carr MP has stated: “We want to protect good samaritans who help in emergencies. As a community, we should be reluctant to expose people who help others to the risk of being judged after the event to have not helped well enough.”<sup>54</sup>

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<sup>51</sup> For the Senate inquiry submissions see: [http://www.aph.gov.au/senate/committee/economics\\_ctte/publib\\_insur/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/economics_ctte/publib_insur/submissions/sublist.htm) For the Negligence Review Panel submissions see: <http://revofneg.treasury.gov.au/submissions.asp>

<sup>52</sup> op cit n 3.

<sup>53</sup> op cit n 3.

<sup>54</sup> op cit n 3. For further background information on this issue see Rachel Callinan’s *Background Paper* on “Medical Negligence and Professional Indemnity Insurance”, May



This does not appear to be a controversial aspect of the Stage 2 reforms. Many commentators have simply pointed to the fact that reform in this area may not be necessary.

### *Stakeholder views*

#### *Australian Plaintiff Lawyers Association*

APLA states:

The law in Australia already protects “good samaritans” by the imposition of a much lower standard of care than would otherwise apply. In this regard, the common law has the capacity to adopt a flexible approach to deal with the limitless range of circumstances that life can throw up. The use of statutes to codify existing principles leads to an inflexibility that must inevitably result in injustice.

APLA is prepared to consider the introduction of legislation to protect volunteers from personal liability provided:

- a) It does not exempt volunteers from liability for gross negligence or breach of statutory duty; and
- b) Does not exempt volunteers from duties of care for children, the disabled or others in positions of trust and dependence; and
- c) The liability for ordinary negligence is transferred from the individual volunteers to the organisations for whom they work.<sup>55</sup>

#### *The Law Council of Australia*

The Law Council of Australia, in their submission to the Negligence Review Panel noted that legislation protecting good samaritans in Queensland (Part 5 of the *Law Reform ACT 1995 (QLD)*) has ‘never been the subject of judicial comment’. Further that:

There is no evidence of any doctor or nurse in Australia being sued for first aid rendered at an accident scene.<sup>56</sup>

Also, as pointed out by the Law Council of Australia, section 27 of the *Health Care Liability Act 2001 (NSW)* provides an exemption from liability for medical practitioners when attending an emergency.<sup>57</sup>

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2001, p 45-50.

<sup>55</sup> APLA, *APLA Response to the New South Wales Premier, Bob Carr’s Public Liability Proposals*, 26/3/02, p 5.

<sup>56</sup> Law Council of Australia, *Submission to the Negligence Review Panel*, 2/8/02, p22.

<sup>57</sup> They do note that they will consider this ‘Good Samaritan’ legislation in more detail in their second submission to the Panel.

### 4.3 Waivers/ Exclusion clauses

As part of its second stage reforms, the NSW Government has also announced its intention to address the issue of waivers in the context of risky activities (or allowing for the self assumption of risk in the context of risky activities). The Premier, Bob Carr MP has stated: “We propose to ensure that a warning of risk is a good defence for risky entertainment or sporting activities. Such a defence could apply only where there is no breach of safety regulations.”<sup>58</sup>

In order to have full effect, it would also require Commonwealth government changes to the *Trade Practices Act 1974* (Cth). The Commonwealth government has already introduced legislation to amend the *Trade Practices Act 1974* (Cth)<sup>59</sup> in this regard.

#### **Background**

Under contract law, an exclusion clause is a clause in a contract that excludes liability of a party for the wrongful conduct specified in that clause. The legal effect of the clause is that it protects the guilty party from his/her own wrongful conduct. (In negligence actions it acts as a defence to the alleged wrongful conduct.)

A risk warning, as the name implies, refers to a written notice which warns the consumer of the risk involved in the particular activity. It is usually in the form of a notice on a sign, ticket or other such object and is usually at the point of sale. A risk warning can be accompanied by a disclaimer which is ‘a denial of liability by a potential defendant’. A ‘waiver is a contractual promise not to sue a potential defendant’ and a ‘disclaimer is a denial of liability by a potential defendant which may be included in a contract’.<sup>60</sup>

In order for an exclusion clause to be effective it must be part of a valid contract. Contract law will apply in determining this question. Also, courts have devised various rules and tests of construction in determining whether such clauses will be upheld as valid and these have at times been construed quite strictly against those relying on such clauses.<sup>61</sup>

The types of clauses relevant to this discussion are those which exclude ‘a right’ of the other party to sue for actions in negligence in relation to specific outcomes. It is possible to exclude or limit liability for negligence in a contract by way of an exclusion clause<sup>62</sup>.

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<sup>58</sup> op cit, n 3.

<sup>59</sup> Trade Practices Amendment (Liability for Recreational Services) Bill 2002.

<sup>60</sup> Law Council of Australia, *Submission to the Negligence Review Panel*, 2/8/02, p 33.

<sup>61</sup> For example the ‘fundamental breach rule’ where if there is a fundamental breach of the contract then the parties did not intend for the exclusion clause to cover that breach. Although note that an exclusion clause can prevent liability for a fundamental breach where the clause is clear and unambiguous and where the court determines that the intention of the parties was to agree to the exclusion clause covering the breach alleged. See: Carter J W & Harland D J, *Contract Law in Australia*, 4<sup>th</sup> ed., 2002, paras [750] – [766].

<sup>62</sup> See: *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642; See also *Canada SS*

However, the construction or wording of such a clause is important, as noted elsewhere, clauses which attempt to exclude “all liability” or “any loss” without reference to negligence have “generally been treated as *insufficient* to exclude liability for negligence”.<sup>63</sup>

As noted by Carter & Harland:

Whether an exclusion clause applies to protect a party from liability in negligence is, of course, a question of construction. However, because negligence frequently results in personal injury or property damage rather than mere economic loss, it is usually said that the intention to exclude liability for negligence must be clearly expressed. An express reference to negligence is sufficient. However, a clause does not expressly exclude negligence unless it actually uses that word or a synonym.<sup>64</sup>

#### *Interaction with statute*

The common law position with respect to exclusion clauses has been affected by statute. For example, section 68 of the *Trade Practices Act 1974* (Cth) states that a contract which excludes, restricts or modifies the operation of terms implied by the Act is void. One such provision in the Act, is section 74(1) which provides that in every contract for the supply by a corporation, in the course of business of services, to a consumer there is an implied warranty that such services will be rendered with due care and skill. Also, that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

The provisions contained in the *Trade Practices Act 1974* (Cth), referred to above, relate to businesses and are “restricted to contracts for the supply of goods or services to a  
<sup>65</sup>

This provision has clear implications for businesses which use exclusion clauses – particularly adventure tourism operators and others.

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*Lines Ltd v The King* [1952] AC 192 at 208 for the 3 rules of construction with respect to exclusion clauses which exclude, or limit, liability in negligence – ie 1) “an express exclusion of liability must be given effect and is sufficient to exclude liability”; 2) “where there is no express reference to negligence the court must consider whether the words used are wide enough” to exclude it 3) “if the words used are wide enough to cover liability it must be considered whether ‘the head of damage may be based on some other ground’” as per *Alderslade v Hendon Laundry Ltd* [1945] 1 KB 189; Carter JW & Harland DJ, op. cit., para [764]

<sup>63</sup> Carter JW & Harland DJ, op. cit., para [764]. See *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

<sup>64</sup> Carter JW & Harland DJ, op. cit., para [763]

<sup>65</sup> Carter JW & Harland DJ, op. cit., para [772].

Not only can the *Trade Practices Act* have an impact on the validity of an exclusion clause but another statute, the *Contracts Review Act 1980* (NSW), which is aimed at ‘unjust’ or ‘unfair’ contractual terms, can also have an impact.

### ***Proposed reform***

In light of this, the State Government has recently announced that the second stage reforms will include that the provision of a risk warning can operate as a good defence for risky entertainment or sporting activities. The Commonwealth government also announced that “The Commonwealth will legislate to allow self assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports, subject to preserving adequate protection for consumers in the Trade Practices Act.”<sup>66</sup>

The Trade Practices Amendment (Liability for Recreational Services) Bill 2002 has been introduced into the Commonwealth Parliament. The bill makes provision to insert a new section into the *Trade Practices Act 1974* (Cth) (section 68B) so that those who provide “recreational services” are able to “limit their liability for death or personal injury arising from the supply of those services”<sup>67</sup>. The new Section 68B states: “A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:

- (a) the application of section 74 to the supply of the recreational services under the contract; or
- (b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or
- (c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract.”<sup>68</sup>

Recreational services are defined under the bill to mean “a sporting activity or similar leisure time pursuit” or activity “that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreation enjoyment or leisure”. As noted in the explanatory memorandum, recreational services are “defined widely to cover the broad range of physical activities in which the community participates and which might result in the death of or personal injury to a participant”.

### ***Voluntary assumption of risk or duty of care - when does it arise with respect to risky***

<sup>66</sup> “Ministerial Meeting on Public Liability”, *Joint Communique*, Melbourne, 30 May 2002. See also: Egan M, MLC, Treasurer, “Public Liability Insurance”, *Media Release*, 27/3/02.

<sup>67</sup> Explanatory memorandum.

<sup>68</sup> The Bill can be viewed at <http://www.aph.gov.au> click on Bills.

**activity?**

There have been recent cases where a court has not found in favour of a plaintiff where they have engaged in conduct which contained inherent risks.

Two cases cited in the article “Negligence dilemma: balancing duty of care with individual <sup>69</sup> highlight the circumstances in which a court has declined to find that a duty of care existed towards a plaintiff where they were engaging in activity that involved certain risks: the first case with respect to gambling; and the second case with respect to football. As noted by the article, in both cases the court decided not to rely on the doctrine of voluntary assumption of risk, instead finding that there was no duty of care at all:

This unfashionable doctrine...[the voluntary assumption of risk]... assumes the existence of a duty of care, but exculpates a defendant on the ground that the plaintiff knew of and consented to the risk. Instead, the courts found no duty of care existed in the first place, because the plaintiff exercising an independent choice placed himself in a situation of risk where the common law would not intervene to restrain his autonomy. This is an important development: it is a wider approach than...[voluntary assumption of risk]...because it does not focus on the plaintiff’s cognisance of the risk at all. Instead, it pits against the prospective duty of care the plaintiff’s autonomy, the plaintiff’s willingness to partake in an activity which by its nature is risky.

The case with respect to gambling involved a plaintiff who was suffered economic loss as result of his gambling. The plaintiff was known as a chronic gambler by the hotel in question. Spigelman CJ noted: “the law should not recognise a duty of care to protect persons from economic loss, where the loss occurs following a deliberate and voluntary act on the part of the person to be protected.”<sup>70</sup>

In the second case (which involved football), the High Court stated that a duty of care does not necessarily extend to rule-making bodies who are responsible for making rules for sport:

Undertaking the function of participating in a process of making and altering the rules according to which adult people, for their own enjoyment, may choose to engage in a hazardous sporting contest, does not, of itself, carry with it potential legal liability for injury sustained in such a contest.<sup>71</sup>

Traves noted that:

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<sup>69</sup> Traves S, “Negligence dilemma: balancing duty or care with individual responsibility”, *The Queensland Lawyer*, vol. 22 December 2001, Part 3, pp 87-88.

<sup>70</sup> *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 (20 September 2001).

<sup>71</sup> *Agar v Hyde* [2000] HCA 41 (3 August 2000).

There is, perhaps, an increased rigour discernible in the attitude of the High Court to negligence claims generally. In the last year or so, *Jones v Bartlett* (2000) 75 ALJR 1; [2000] HCA 56, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164; [2000] HCA 61, *Derrick v Cheung* (2001) 181 ALR 301 and *Rosenberg v Percival* (2001) 75 ALJR 734; [2001] HCA 18 have all involved success for defendants.<sup>72</sup>

### *Stakeholder views*

#### *Australian Plaintiff Lawyers Association*

Commenting on the outcome of the second ministerial summit, APLA President, Rob Davis stated with respect to waivers for risky activities:

APLA broadly supports legislation which will allow adults to waive their right to sue if they engage in inherently risky activities, but care will need to be taken in the drafting, so that the rights of children and people with a mental disability are not effected.<sup>73</sup>

In their submission to the Negligence Review Panel, they affirmed this support:

APLA supports the exploration of the use of waivers or disclaimers to enable fully informed adults to voluntarily assume the risks inherent in certain activities. However, it is essential that these disclaimers are only available to those who can fully appreciate the nature and extent of the risks that they undertake. They should only apply to inherently risky activities and the risks involved should be fully articulated before the assumption of risk can be effective.<sup>74</sup>

#### *The Law Council of Australia*

The Law Council of Australia, in its submission to the Negligence Review Panel stated:

The Law Council is supportive of the general principle of utilising assumption of responsibility as a means by which the risk of liability created by participation in recreational activities may be addressed. However, the proposed response raises a number of concerns that must be addressed before it may be confidently concluded that this objective has been achieved in an acceptable way. These concerns are:

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<sup>72</sup> op. cit. n 69, p 88.

<sup>73</sup> Davis R, President, Australian Plaintiff Lawyers Association, "APLA Cautious on Public Liability Reform", *Media Release*, 30/5/02.

<sup>74</sup> op cit, n 37, p 3.

- (a) that an appropriate quid pro quo be provided by operators of recreational activities for the proposed trade-off;
- (b) matters affecting the effectiveness of waivers or disclaimers in general; and
- (c) the extent to which the proposed amendment of the *Trade Practices Act* achieves the objective of facilitating an effective exclusion of liability on the part of operators of recreational services in the context of the Act's protection of consumers.<sup>75</sup>

#### *Insurance Council of Australia*

The ICA stated:

We have already discussed the fact that in our view the principles of voluntary assumption of risk should be absorbed into the principles of contributory negligence and/or proportionate liability. However, on the wider issue as to whether or not persons involved in certain types of activities should be permitted or required to assume liability we would make the following comments:

- The proposed amendments to the Trade Practices Act...provide a contractual basis for assumption of liability in respect of defined recreational activities. There is a fundamental problem with this in that it relies on an effective contractual limitation of liability and does not adequately deal with minors who may be engaging in such activities and does not deal with situations where there may not be a contract arising between the party undertaking the activity and the provider of the service..<sup>76</sup>

#### *Australian Competition and Consumer Commission*

The ACCC have expressed considerable concern about the Trade Practices Amendment (Liability for Recreational Services) Bill 2002. They stated:

...the Commission is concerned that amending the Trade Practices Act ...either:

- (a) in the manner currently proposed by the...[bill]...; or
  - (b) to limit the operation of other consumer protection provisions of the Act, particularly section 52;
- will result in the risks of recreational and other activities being inappropriately allocated to consumers.<sup>77</sup>

With respect to the issue of allowing self-assumption of risk with respect to high-risk recreational activities, the Commission:

<sup>75</sup> Law Council of Australia, *Submission to the Negligence Review Panel*, 2/8/02, pp 29-31.

<sup>76</sup> ICA, op cit, n 43, p 19.

<sup>77</sup> ACCC, *Submission to the Negligence Review Panel*, August 2002, p 2.

...does not believe that consumers are as well-placed as suppliers of services (and goods) to:

- (a) gauge the extent of the risks to which they could be exposed;  
or
- (b) insure against the consequences of those risks.

In the Commission's view, allowing self-assumption of risk to over-ride statutory rights is likely to result both in an inefficient low level of care being adopted by suppliers and in too high costs being borne by consumers (both in the form of risk avoidance and in risk mitigation). This will be harmful to overall efficiency, and will improperly and unnecessarily disadvantage consumers.

The Commission believes that any contrary conclusion must be based on false assumptions which, once made explicit, will be seen to be false. Economic analysis suggests that if self-assumption of risk is to be efficient, it must be no more difficult for consumers than it is for suppliers to:

- (a) gauge the extent of the risks to which they may be exposed;  
and
- (b) insure (be it through third party insurance or by means of self-insurance) against those risks.

The Commission is unaware of any study that comes to the conclusion that these propositions are true for the Australian situation.

The Commission also notes that creating scope for greater self-assumption of risk, where that self-assumption of risk is likely to lead to increased costs of risk to consumers and to society, offends ordinary concepts of fairness.

If the Panel considers that particular reform options will benefit society, the Commission would expect there to be solid and quantified evidence that the benefits of recommended changes exceed the costs. The Commission would also expect that evidence to be subjected to full public scrutiny.<sup>78</sup>

### *Others*

Perisher Blue in their submission to the Negligence Review Panel agreed with allowing for self assumption of risk but argue that the proposed reforms need to go further:

The Bill needs to provide that posting of terms and conditions at points of sale and by way of exclusionary language on ticketing is a full discharge of the suppliers responsibility in bringing those terms to the attention of the participant consumer so as to render

<sup>78</sup>

ACCC, *Second Submission to the Negligence Review Panel*, August 2002, p 7.



the contract for the supply of the recreational services valid. The Colorado legislation provides a best practice illustration of the ways and means of doing so. In fact, the Australian industry already does this. However it needs the backing of the Parliament, through the Bill, to be able to effectively rely upon what is already equal with world's best practice, but which lacks recognition or force.

The gist of the Bill is that it permits an individual to contract out of the existing statutory warranties under the Act such as that under s. 74 to provide services with due care and skill.

This is likely to be satisfactory for small to medium sized recreational and tourism providers...

In ski resort operations...it is completely impractical. On a busy day during the ski season, there can be as many as 15,000 people attend Perisher Blue ski resort and require ticketing. To have each and every one of those participant consumers sign an individual waiver contract would be impossible in logistical and operational terms.<sup>79</sup>

#### 4.4 Statutory immunity for local government

The Premier Bob Carr MP has stated: "We will revisit the High Court's removal of the immunity from liability for highway authorities. While reinstating the immunity might not be the best approach, we want to protect public authorities from unrealistic standards imposed with hindsight by a court. What we expect of public authorities must take into account their obligations to the community generally and their resources to perform those obligations. Their actions or omissions should not be judged as though the particular case is the only case in which they are required to act."<sup>80</sup>

As noted in the earlier paper on Public Liability, local councils are faced with a great degree of exposure to negligence actions and public liability claims. This is because of the wide range of services and facilities provided by councils which the general public comes into contact with or uses on a daily basis.<sup>81</sup>

The facilities provided to the public also generally include a high proportion of recreational

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<sup>79</sup> Perisher Blue, *Submission to the Negligence Review Panel*, August 2002, p 9/

<sup>80</sup> op cit, n 3.

<sup>81</sup> For a detailed treatment on the issue of public liability and local councils see: Parliament of New South Wales, Report of the Public Bodies Review Committee *Public Liability Issues Facing Local Councils*, November 2000. See also the seminar papers in Legal and Accounting Management Seminars (LAAMS), *Liability of councils and statutory authorities*, 2001, especially: Hyde C, "Non Feasance – The High Court Overturns 50 Years of Settled Law"; Concannon T, "Ghantous – A Plaintiff's Perspective"; Jamieson R, "Impact of Recent Cases"; Connell D, "Risk Management for Local Authorities & Statutory Instrumentalities".

and sporting facilities, including: playgrounds, swimming centres, sporting grounds, child care facilities, community centres and libraries. As sporting activities contain more risks than other types of activities, these sporting facilities can carry a greater degree of exposure.

In addition to the above services and facilities, local councils are usually responsible for maintaining infrastructure which is continually used by the public, such as footpaths and roads. The responsibility for maintaining such infrastructure further increases councils' potential exposure, particularly in light of the recent High Court case of *Brodie v Singleton Shire Council* which abolished the immunity of highway authorities from legal action. Prior to this decision, highway authorities were not required to exercise statutory power to maintain roads, or associated, works.<sup>82</sup>

In the case of *Brodie v Singleton Shire Council* the High Court abolished the long established principle of immunity for highway authorities against negligence actions ("the highway rule") and replaced it with the ordinary principles of negligence. The High Court referred to the definition by Dixon J in the case of *Buckle v Gorringe* (1936) 57 CLR 259 at 281, in which:

The "highway rule" is said to be that, "by reason of any neglect on its part to construct, repair or maintain a road or other highway", a "road authority" incurs "no civil liability".

The majority noted that the principle has many exceptions and qualifications "which so favour plaintiffs as almost to engulf the primary operation of the 'immunity'", thus rendering it ineffective<sup>83</sup>. They also criticised the rule in that it had developed in such a way that gave rise to "illusory distinctions" such as, an authority could escape liability if it had never attempted to repair a road or structure in question ('non-feasance') but if it was repaired and the repair was problematic then they could be held liable ('misfeasance')<sup>84</sup>.

This distinction provided no incentive for authorities to take "positive action" to repair dangers.

#### *Other jurisdictions*

Local governments in some other jurisdictions have statutory immunity from being sued for negligence. The immunity conferred can be quite extensive or limited. For example, certain states within the United States such as Texas and California have statutory immunity schemes. As it implies, the immunity exempts the municipal councils within the jurisdiction from liability for either inherently dangerous recreational activities (eg water skiing and skateboarding) prescribed under the statute, or injuries that occur in natural environments which have not been modified by the councils (eg rivers, beaches).<sup>85</sup>

<sup>82</sup> See: *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232; and *Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001).

<sup>83</sup> para 67.

<sup>84</sup> para 86.

<sup>85</sup> For a detailed discussion on statutory immunity for local governments in overseas jurisdictions see: NSW Parliament, Legislative Assembly, Report of the Public Bodies

**Stakeholders views:**

Nicholas Mullany, adjunct Professor of law at the University of NSW<sup>86</sup>:

There is no reason to revisit the question whether highway authorities should be immune from liability in certain situations following the thorough review and decision of the High Court of Australia to remove the old protection. The case for its retention has just been advanced in detail, carefully considered and, rightly, rejected. It has been accepted that there is no compelling justification for affording special status to these types of defendants.

APLA have stated:

APLA would be interested in obtaining more information from the government regarding this proposal and how they envisage it being implemented.

A careful reading of *Brodie v Singleton Shire Council*...would suggest that the High Court has in fact made it more difficult for accident victims to win cases against road authorities because of the public policy focus adopted.<sup>87</sup>

In evidence to the Federal Senate Inquiry, David Clark, Legal Officer for the Local Government and Shires Association stated, stated with respect to this issue:

Our immediate concern about nonfeasance and the loss of the immunity is that most councils in New South Wales, certainly, and, I suspect, in the rest of Australia as well, have planned their risk management strategies around the availability of nonfeasance. Many of the claims that have been made against them in relation to road related incidents have been successfully contested on the basis that the only thing that the road authority was guilty of was nonfeasance, not misfeasance. Many of those claims, because they are not yet statute barred and have not actually been through the courts so they have not actually been subjected to the judicial process, are going to have to be revisited. Something like 60 per cent of the claims made over the last five years in New South Wales come into that category, and they are, notably, claims of a fairly low level. A classic example was one that came across my desk recently. A woman in a large country town in New South Wales claimed against the council because she backed into a tree

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Review Committee on *Public Liability Issues Facing Local Councils* (M Orkopoulos MP Chairman), November 2000, pp 28-30

<sup>86</sup> op cit, n 41.

<sup>87</sup> APLA, op cit, n 55, p 5.

guard. She had lived in the town all her life. The tree guards had been around the trees in the main street for at least 20 years. The evidence available to the council was that she had simply misjudged her approach to the parking space when she reversed into it, but she claimed that the tree guard was built in such a way that she was not aware of its presence and hit it as she backed in. The council is fighting that.<sup>88</sup>

#### **4.5 Public authorities which fail to exercise their powers will not breach any duty**

The Premier Bob Carr MP has stated: “We will provide that the existence of a power does not imply a duty to exercise that power. Unless Parliament explicitly imposes a duty on a public authority to consider exercising a power, it should not be liable for failing to exercise that power.”<sup>89</sup>

He further added:

Stage 2 will also deal with an area of the law where the taxpayer has been increasingly forced to pick up the bill for individuals who have been injured. This is the whole area of blaming the government for failing to act in circumstances where government had no duty to act. It might be possible for a government authority to build a dam to prevent flooding, but if a flood were to occur as the result of natural causes, why should the tax payers be held to be responsible for the damage?<sup>90</sup>

There does not appear to be any public comment on this issue.

#### **4.6 Peer review/ acceptance in the context of professional/medical negligence actions<sup>92</sup>**

The Premier Bob Carr MP has stated: “We will change the professional negligence test to one of peer acceptance. Conduct that is consistent with a respectable view within the profession should not be held to be negligent just because a court might, with hindsight, favour a different view within the profession. Professional negligence cases should not be about substituting a judge’s preferred view for a view that is legitimate within the

<sup>88</sup> Mr David Clark, Legal Officer, Local Government and Shires Association of New South Wales, *Evidence to the Federal Senate Inquiry*, 8/7/02, E 13 (proof).

<sup>89</sup> op cit, n 3.

<sup>90</sup> op cit, n 3.

<sup>91</sup> op cit, n 41.

<sup>92</sup> The following material on professional negligence was largely prepared by Rachel Callinan.

profession.”<sup>93</sup>

The Premier further stated:

In our reforms we want to say that doctors will have a good defence to an action for negligence if they act in accordance with a respectable body of opinion – even though there may not be consensus. This overturns a ruling by the courts that the court is entitled to conclude what is the most reasonable and reputable thing for a doctor to do. So far, so good. But what will be the criteria for the courts to determine whether or not a body of opinion is respectable? Deep Sleep Therapy was backed by a body of opinion –but we wouldn’t want that being accepted by the courts. We need to devise a test that is sufficiently robust to recognise that there is not necessarily consensus in the medical community, but at the same time exclude dangerous and misguided views.<sup>94</sup>

At the time of writing, no further information about the proposal has been released by the Government. It is assumed that the Government is of the view that by changing the test fewer cases will succeed against medical practitioners who follow practices supported by a reasonable body of medical opinion.

#### ***What the proposal means***

Although the reform proposals relate to all professionals, not just medical practitioners, as most of the discussion is centred around the example of medical practitioners, the following information will refer to that example.<sup>95</sup>

Under the tort of negligence, medical practitioners owe a duty to their patients to take reasonable care in all aspects of their dealings with them. A breach of the duty of care that causes an injury to the patient renders the practitioner liable for the injury caused. In order to establish that a medical practitioner was negligent, it is necessary to show all of the elements of negligence:

- (a) That the plaintiff owed the defendant a duty of care;
- (b) That the duty was breached; and
- (c) That there was ensuing damage or injury as a result of the breach.

After establishing that the doctor owes the patient a duty of care, the patient must then

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<sup>93</sup> op cit, n 3.

<sup>94</sup> Carr B, Premier, ‘Public Liability’, *Media Release*, 11/6/02, and accompanying statement: ‘Statement by Premier Bob Carr, p 5.

<sup>95</sup> As noted by APLA in their submission to the Negligence Review Panel at p 23, the terms of reference for the Review Panel (3(d)) infers that the Bolam test (which was used historically in the context of medical negligence cases) will apply to all professions.

prove that the doctor has breached that duty by failing to take reasonable care in the circumstances. Most negligence cases involving health care professionals turn on this question. When determining whether a doctor has failed to take reasonable care, the court applies an objective standard which is applied to all doctors. This is referred to as the *standard* of care that a doctor owes a patient. What must be determined is whether a reasonable doctor, exercising reasonable care and skill, could not, on the available material, have reached the conclusion or given the treatment that the defendant doctor did. This is an objective test and whether the conduct of a medical professional meets the standard of care in particular circumstances is to be determined by the court. Note that under this test, while a practitioner may follow ‘a practice accepted at the time as proper by a reasonable body of medical opinion’, if that opinion is unreasonable, the practitioner will be liable. Note also that this is the test that is applied in all negligence cases – expressed broadly therefore it is an objective test based on the class of person to which the defendant belongs, and a person must exercise reasonable care as a reasonable person of that class would, to avoid foreseeable risks. This approach follows the High Court’s decision in *Rogers v Whittaker*<sup>96</sup>, as subsequently applied to cases involving diagnosis and treatment in *Naxakis*.<sup>97</sup>

It is this standard of care that the NSW Government proposes to reform by replacing it with a ‘peer acceptance test’. Under the ‘peer acceptance test’, or rather the ‘*Bolam* test’ as it is known within the legal profession, the standard of care owed by a practitioner is met if the practitioner conformed with a ‘a practice accepted at the time as proper by a reasonable body of medical opinion’. The *Bolam* test derives from a 1957 English case<sup>98</sup> which was accepted in Australia until it was replaced, as explained, by the High Court of Australia in the case of *Rogers v Whitaker* in 1992.<sup>99</sup> In this regard the reforms involve a return to an earlier time. A return to the *Bolam* test will mean that a practitioner who acts in accordance with a practice accepted by a reasonable body of medical opinion may be saved from liability in negligence. No other jurisdiction in Australia uses the *Bolam* test.

For a case summary of *Rogers v Whitaker* (1992) 175 CLR 479 see Appendix G.

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<sup>96</sup> (1992) 175 CLR 479. The case of *Rogers v Whitaker* involved the issue of provision of information or failure to warn of specific risks. It did not involve the question of negligent treatment or diagnosis.

<sup>97</sup> *Naxakis v Western General Hospital* [1999] HCA 22 (13 May 1999)

<sup>98</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 at 587 per Mc Nair J.

<sup>99</sup> *Rogers v Whitaker* (1992) 175 CLR 479; 109 ALR 625 (HCA).

### *Views of stakeholders and others*

Some of the comments or public responses by stakeholders and others that have been made are set out below:

#### *The Honourable JJ Spigelman AC, Chief Justice of NSW*

Chief Justice Spigelman has advocated 're-introducing the test for professional standards, the effect of which was that it is not open for a court to find a standard medical practice to be negligent'<sup>100</sup>:

Until *Rogers v Whitaker* some Australian courts had followed the English *Bolam* test which, in substance, meant that it was not open to a court to find a standard medical practice to be negligent. That test applied not only to matters of diagnosis and treatment, but also to information and counselling. The reinstatement by legislation of the *Bolam* test was considered in New South Wales last year in the context of the Health Care Liability Act 2001. This was not done. No doubt it is a matter again under consideration. It represents a principle that could be adopted and which restricts findings of breach. It is difficult to see any other change which will restore balance in those cases that are particularly likely to engage the compassion of the judiciary eg obstetrics cases which always concern injured children, or the tragic side effects that may accompany neurosurgery. There does not seem to be any reason why the *Bolam* test, if adopted, should not extend to all areas of professional negligence.<sup>101</sup>

#### *Australian Plaintiff Lawyers Association*

APLA opposes this kind of professional negligence test and asserts that currently the law operates fairly to all parties:

The proposal will insulate doctors, lawyers, engineers and other professionals from the consequences of negligence. These groups are very highly trained and knowledgeable groups. The community is entitled to expect that they will exercise reasonable care in delivery of their professional services to ordinary consumers. Professionals should not be permitted to practice to a lower

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<sup>100</sup> The Honourable JJ Spigelman AC, Chief Justice of New South Wales, *Judicial Officers' Bulletin*, June 2002, Volume 14, Number 5, p 1-2.

<sup>101</sup> 'Negligence: The Last Outpost of the Welfare State', Address by the Honourable JJ Spigelman AC Chief Justice of New South Wales, The Judicial Conference of Australia: Colloquium 2002, Launceston 27 April 2002.

standard of care than that which regulates ordinary conduct between other citizens.

The proposal would mean that negligent professionals could escape liability if they were able to find somebody within their profession to support their actions. This would encourage publication or presentation of unreliable research within professions (something that is already a growing problem in some parts of the pharmaceutical industry), shopping for ‘junk science experts’ to bolster bogus defences, and generally bring about a serious decline in the quality and reliability of professional services.

This would reinstate the old system where injured people cannot find a professional to give evidence for them that conduct is less than the profession require.<sup>102</sup>

In their submission to the Negligence Review Panel, APLA stated:

Suffice it to say, the *Bolam* principle would be a disaster for the Australian consumer. To suggest, as do the terms of reference, that this test should then apply to auditors, accountants, engineers, lawyers and other professionals is a recipe for professional mediocrity in care and safety.<sup>103</sup>

*Nicholas Mullany*

An Adjunct Professor of Law at the University of New South Wales, Nicholas Murray is also critical of the Government’s proposal to introduce ‘peer review’:

Nor is there any justification whatsoever to redefine the negligence test in the context of suits for professional carelessness to one of ‘peer acceptance’ This is perhaps the most remarkable proposition mooted. Judges judge. They shape the common law. Not doctors. Not engineers. Not architects. Not accountants. The contention that the determination of the standards demanded by the common law should be deferred to the various professional bodies was, as one High Court Justice described it recently, ‘exploded’ in Court in 1992. Their Honours have refused steadfastly to retrace that step. And rightly so. The proposal is simply untenable.<sup>104</sup>

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<sup>102</sup> Australian Plaintiff Lawyers Association, *APLA Response to The New South Wales Premier, Bob Carr’s Public Liability Proposals*, 26 March 2002, pp 8-9.

<sup>103</sup> APLA, *op cit*, n 37.

<sup>104</sup> Mullany N, ‘New Tort reform agenda...Same old myths’, *Law Society Journal*, July 2002, pp 52-53.



*United Medical Protection*

United Medical Protection have stated that “...the single most important reform needed in respect of the law of negligence, is to connect “standard of care” to a responsible body of opinion accepted within the profession”.<sup>105</sup> (ie reinstate the *Bolam* test)

*The Insurance Council of Australia*

The Insurance Council of Australia supports the extension of the *Bolam* principle to all professionals.

The ICA agrees with the proposition that a principle based on the *Bolam* test...should be applied generally to professional negligence cases across all professions. The underlying principle should be that if a professional carries out a task or provides information to a client or patient in accordance with the norms of a reputable group in the profession, then that should not expose the professional to actions in negligence.<sup>106</sup>

*The Law Council of Australia*

The Law Council of Australia stated that the *Bolam* test, with respect to medical practice, should not be reintroduced:

The Law Council submits that the *Bolam* test, as originally formulated, is no longer suitable for the assessment of medical practice. It ignores the now well-accepted level of patient choice and autonomy which has become a fundamental tenet of medical practice. The *Bolam* test would allow medical practitioners to maintain practices which are flawed, or which may suit them as a profession, but be unjustifiable in relation to patients. The *Bolam* test encourages insularity and complacency in a profession. Returning to the *Bolam* test would run counter to the trend in the whole of the common law world. It would elevate the practices of a profession to a status greater than the independent judiciary in relation to this aspect of resolving a dispute.

The Law Council of Australia outline some possible alternative options:

2.34 One option would be to limit *Bolam* in the way the House of Lords has in *Bolitho*. That is, develop a test which says the standard of care for medical negligence is the standard which is established by a responsible body of medical practitioners practising in that field, unless there are cogent reasons to depart from it or it can be shown that the practice is unreasonable or illogical.

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<sup>105</sup> UMP, *Submission to the Negligence Review Panel*, p 1.

<sup>106</sup> ICA, *op cit*, n 43, p 23.

2.35 Another option would be to standardise what is required of professions by the use of published standards. The Law Council sees significant difficulties in this. To be legally valid such standards would either have to be legislated or be provided for in regulations. The danger of setting substantive professional standards by legislation is that the legislative process is slow and creates a relatively static standard which may not be able to take account of scientific or other developments. A further problem is that if standards were set in this way it would derogate from the right to sue. Should this approach be taken great care would have to be taken in deciding which professions should be entitled to have their practices protected in this privileged way. It would also have to be clear that this protection applied only within the exercise of their professional skill (so, for example, the building safety of a doctor's surgery would not be covered under the doctors' standards). The Law Council regards the published standards approach as one to be avoided.<sup>107</sup>

Other opponents include patient advocacy groups.<sup>108</sup>

#### **4.7 Strengthening defences for negligence with respect to plaintiffs who are intoxicated**

The Premier Bob Carr MP has stated: "We will abolish reliance by plaintiffs on their own intoxication. If someone carries out an activity for which they should be sober, but they do so when they are drunk or drugged, they should not get any special consideration. They should be judged by the same standards of responsibility as the rest of us would be judged – that is, as if they were sober."<sup>109</sup>

#### ***Stakeholder views***

##### *Insurance Council of Australia*

The ICA have stated:

In some areas, we believe that there is justification for directing the Courts that there be a finding of contributory negligence which recognises the continued responsibility of tort law and the law generally, to act as a deterrent. If the facts of the matter are that the plaintiff in proceedings for recovery was under the influence of

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<sup>107</sup> Law Council of Australia, *Submission to the Negligence Review Panel*, 2 August 2002.

<sup>108</sup> Patient Injury Support & Advocacy (Australia), *Submission to the Negligence Review Panel*.

<sup>109</sup> op cit, n 3.

alcohol or drugs and that fact contributed to the loss, then the Courts should be directed that a finding of contribution by the plaintiff of at least 25% should be made.<sup>110</sup>

Nicholas Mullany<sup>111</sup>:

The common law also deals adequately with the criminal and intoxicated plaintiff. Drunks are not discharged from the obligation to take care for their own well-being. Individual responsibility has been emphasised and not, as asserted, diluted by courts in recent times as part of the overall reduction of the scope of liability. However, the fact that a plaintiff was drunk does not, and should not, necessarily absolve a defendant from all legal responsibility to act with reasonable care in dealings with him or her. Judges usually identify the appropriate apportionment of accountability.

#### **4.8 Strengthening defences for negligence so that a person cannot sue if they were injured in the course of committing a crime**

The Premier Bob Carr MP has stated: “We will prevent people from making public liability claims where their injury arises in the course of committing a crime”<sup>112</sup>

This proposal is self explanatory.

##### *Stakeholder views*

The ICA have stated:

We believe that there is a strong reason in principle why a plaintiff should not be entitled to recover in respect of injuries received in the course of criminal activities. The only exception to this should be where the person is injured by some unjustified intentional act. The definition of the criminal acts to which this principle should apply should have regard to both felonies and misdemeanours of the type which are normally covered in state and territory crimes legislation.<sup>113</sup>

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<sup>110</sup> ICA, op cit, n 43, p 18.

<sup>111</sup> op cit, n 41.

<sup>112</sup> op cit, n 3.

<sup>113</sup> ICA, op cit, n 43, p 19.

APLA have stated:

It is assumed that this proposal involves a codification of the current legal position, whereby no duty of care is owed to somebody who is engaged in criminal activity...<sup>114</sup>

#### **4.9 Provide a wider range of options for damages awards, including provisional damages**

The Premier Bob Carr MP has stated: “ We will provide a wider range of options for damages awards, including provisional damages. This would help courts to have a full menu of damages options so that they do not have any reason to over-compensate a plaintiff.”

To date there has been no further detail on what this reform proposal would entail and there does not appear to be much in the way of public comment on it either.<sup>115</sup>

#### **4.10 Create a presumption in favour of structured settlements instead of lump sum damages awards**

The Premier Bob Carr MP has stated: “We will consider creating a presumption in favour of structured settlements rather than lump sum damages. A structured settlement replaces a “once and for all” lump sum award with regular payments...we are waiting for the Commonwealth to change its tax laws, which currently unfairly discourage structured settlements.”<sup>116</sup>

#### ***An overview of structured settlements***<sup>117</sup>

Common law claims for compensation for personal injury caused by negligence are assessed on a ‘once and for all’ basis and when compensation is paid, either through settlement or court judgment, the defendant’s liability is discharged.

Compensation is awarded by the courts in a single lump sum which is made up of a number of different components according to the heads of damages. This pattern is also generally followed in settlement agreements.

A structured settlement is an alternative to receiving compensation at settlement as a single lump sum and involves a small lump sum payment plus periodic payments for life. The periodic payments are funded by an annuity or annuities, purchased for the plaintiff by the defendant or its insurer for the plaintiff.

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<sup>114</sup> APLA, op cit, n 55, p 6.

<sup>115</sup> For more information on provisional damages see the NSW Law Reform Commission *Report No 78 (1996) – Provisional Damages*, available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R78TOC> (accessed August 2002).

<sup>116</sup> op cit, n 3.

<sup>117</sup> The following information on structured settlements was prepared by Rachel Callinan.

Structured settlements are said to provide a more financially secure way of receiving compensation than lump sums. It is argued that lump sums are difficult to manage and can easily be spent too quickly or invested badly, while structured settlements provide periodic payments that are arguably easier to manage, in addition to a smaller lump sum. The main advantages and disadvantages of structured settlements are set out below.

At present it is unclear whether the courts in NSW have the power to order a ‘structured’ judgment. As discussed in a later section, the courts have recently been given the power to make consent orders for structured settlements.

<b>Advantages</b>	<b>Disadvantages</b>
<ul style="list-style-type: none"> <li>• A plaintiff benefits from an increased after-tax award of compensation and a cash flow that can be guaranteed for life.</li> <li>• A structured settlement can be linked to inflation ensuring its adequacy over the years.</li> <li>• The compensation pay out is not susceptible to the fluctuating investment returns of an invested lump sum.</li> <li>• Structured settlements are flexible.</li> <li>• A defendant’s insurer will have to pay less money overall in compensation if it is paid in instalments rather than in a lump sum (estimates range between 10% to 15% lower cost than lump sum).</li> <li>• Plaintiffs who deplete their lump sums early often turn to the social security system, therefore the Federal Government will benefit from the use of structured settlements through reduced welfare payments (despite lower tax receipts).</li> <li>• Structured settlements shift the risk of living too long from the plaintiff to life insurance companies, which are better able to handle that risk.</li> </ul>	<ul style="list-style-type: none"> <li>• Currently, annuities that make up part of structured settlements incur tax whereas lump sum payments are non-taxable (although, as noted above, this is about to change).</li> <li>• Lump sums provide greater flexibility and choice in determining how a compensation payment is best spent than structured settlements.</li> <li>• A lump sum payment offers a plaintiff greater potential to change his or her lifestyles or career after an injury which is critical to recovery for many plaintiffs.</li> <li>• Lump sum payments provide certainty and finality to litigation.</li> <li>• There is said to be a psychological benefit for a plaintiff in receiving a lump sum pay-out, in terms of empowering a plaintiff to take control of his or her life.</li> <li>• There may be associated costs of administering structured settlements.</li> <li>• There is a risk that the provider of an annuity may go bankrupt.</li> </ul>

### ***The current structured settlements debate - amendments to Federal taxation law to facilitate structured settlements***

While parties to common law claims for personal injury due to negligence are free to negotiate settlements in the form of a structured settlement or a lump sum, currently there is a tax disadvantage to choosing a structured settlement. This is because, while lump sum payments are tax free, periodic payments in the form of annuities are not. Evidence suggests that structured settlements are not widely used for this reason.

A long campaign by the Structured Settlement Group (‘SSG’) to convince the Federal Government to change its taxation laws, has recently enjoyed success with the Federal

Government introducing amendment legislation this year to facilitate the use of structured settlements for personal injury claims at common law.<sup>118</sup> The SSG represents a broad range of organisations.<sup>119</sup> Information about the history of structured settlements in Australia and the SSG campaign is contained is available on their website.<sup>120</sup>

The *Taxation Laws Amendment (Structured Settlements) Bill 2002 (Cth)* was introduced into the House of Representatives on 6 June 2002 and read a second time. It is due to be debated in the next session of Parliament which commences on 19 August 2002.

The bill will amend the *Income Tax Assessment Act 1997 (Cth)* to encourage the use of structured settlements for personal injury compensation by providing an income tax exemption for annuities and deferred lump sums paid as compensation for seriously injured persons under structured settlements.

The exemption will be available if the necessary eligibility criteria are met. The eligibility criteria are designed to remove the disincentives in the tax system in relation to structured settlements and to ensure that the interests of the injured persons are protected, for instance, by providing for prudential regulation of the annuities and preventing the injured party from commuting an annuity. Note however that the changes will not apply to compensation that arises in relation to an action against employers.

The bill will also amend the *Life Insurance Act 1995 (Cth)* to provide that any commutation or assignment of a tax-exempt annuity or lump sum will be ineffective. This will ensure that settlements continue to benefit the person they are intended to benefit. A statutory review of the operation of the tax exemption is to be undertaken no later than five years after the date of commencement.<sup>121</sup>

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<sup>118</sup> For further information about the SSG, including the history of its reform campaign, see the SSG web site: [www.structuredsettlements.com.au](http://www.structuredsettlements.com.au).

<sup>119</sup> The members are: Australian Medical Association; Australian Plaintiff Lawyers Association; Injuries Australia; IAG (formerly NRMA Insurance Ltd); Insurance Council of Australia; Institute of Actuaries of Australia; Law Council of Australia; Motor Accidents Authority of NSW; Royal Australasian College of Surgeons; Royal Australian and New Zealand College of Obstetricians and Gynaecologists; Trustee Corporations Association; and United Medical Protection. The public liability debate has also revealed other organisations who support the use of structured settlements including: Law Society of NSW (Law Society of NSW, 'Accurate and reliable data needed on public liability insurance', *Media Release*, 27/3/02); the Australian Chamber of Commerce and Industry: (ACCI submission to the Senate Economics Reference Committee, p 9) and the Royal Australian College of General Practitioners (RACGP submission to the Senate Economics Reference Committee, p 4).

<sup>120</sup> <http://www.structuredsettlements.com.au>

<sup>121</sup> The text of the bill is available at <http://www.aph.gov.au> click on bills. An analysis of the features of the Federal Government's structured settlement model by the SSG is available on their website at: <http://www.structuredsettlements.com.au>.

***Structured settlement reform in the context of the public liability and medical professional indemnity insurance premiums debate***

As noted, the introduction of the *Taxation Laws Amendment (Structured Settlements) Act 2002* (Cth) is to be credited to the many years of lobbying efforts by the SSG. Its focus has been on encouraging the use of structured settlements as the best means of compensating personal injury.

The SSG's push for an amendment to the Federal taxation law to encourage the use of structured settlements has been adopted by the Federal Government, the NSW State Government and others as one 'solution' to the rise in medical professional indemnity and public liability indemnity insurance premiums. When announcing the introduction of the bill, Helen Coonan, the Minister for Revenue and Assistant Treasurer, stated:

[t]he proposed laws follows two successful Ministerial Meetings on Public Liability Insurance held in March and May 2002 where Commonwealth and State and Territory Ministers recognised that structured settlements give injured people greater security about their future income and their capacity to meet ongoing medical expenses. The Commonwealth has moved quickly to implement these changes. Structured Settlements is one of the areas in which the Federal Government can play a role in addressing the public liability problems facing the Australian community...[The Government recognises]...the importance of encouraging structured settlements, as one of a range of measures to address difficulties associated with the availability and affordability of public liability insurance'.<sup>122</sup>

The Government had already publicly announced its support for the reforms in the context of the medical professional indemnity insurance issue.<sup>123</sup> Prior to that, the SSG was having some success in lobbying the Federal Government. However, the momentum for reform was certainly bolstered by the Government's need to do something about the insurance

***Will an increased use of structured settlements have an impact on insurance premiums?***

In a press release welcoming the introduction of the *Taxation Laws Amendment (Structured Settlements) Bill 2002* (Cth) into Parliament the SSG stated that 'Introducing structured

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<sup>122</sup> Coonan H, Minister for Revenue and Assistant Treasurer, 'Government introduces structured settlements legislation', *Media Release*, 6/6/02. The Federal Government announced its intention to implement the reforms at the meeting in March: Joint Communique, Ministerial Meeting on Public Liability, 27/3/02, p 2. See also Coonan H, Minister for Revenue and Assistant Treasurer, 'Structured Settlements a Win-Win', *Media Release*, 28/3/02.

<sup>123</sup> Structured settlements in the context of the medical professional indemnity insurance debate is examined in: *Medical Negligence and Professional Indemnity Insurance*, NSW Parliamentary Library Research Service, Background Paper No 2/01, by Rachel Callinan.

settlements *won't have a big impact on reducing the cost of insurance premiums*, but it will have an enormous impact in terms of improving the lives of many seriously injured people...[emphasis added].<sup>124</sup>

The SSG also expressed its view to the Federal Parliament Economics References Committee Inquiry Into the Impact of Public Liability and Professional Indemnity Insurance Cost Increases, stating that structured settlements '*...will not...have any significant impact on the cost of claims and insurance premiums[emphasis added]*'.<sup>125</sup> Note however, that the SSG does identify some 'medium to long term positive impacts on claims costs'.

### ***Recent reforms to enable the courts to make consent orders for structured settlements in NSW***

Currently, court consent orders are required in relation to settlement agreements concerning plaintiffs who are minors or who are otherwise incapacitated.

As part of the NSW Government's first stage of public liability reforms, the recently introduced *Civil Liability Act 2002* enables a court to make consent orders for structured settlements.<sup>126</sup> This mirrors a provision in the *Health Care Liability Act 2001* which provides that a court may make a consent order for a structured settlement in relation to a health care claim.<sup>127</sup>

These reforms simply confer upon the court the necessary power to render a structured settlement an order of the court in the same way that lump sum settlement agreements constitute an order of the court.

### ***NSW Government's proposal to introduce a presumption in favour of structured settlements***

In March and again in June this year, the NSW Government announced that, as part of the second stage of its public liability reforms, it will create '*...a presumption in favour of structured settlements instead of lump sum damages*'.<sup>128</sup> To date no further details about this proposal have been released by the Government. It is unclear what form such a

<sup>124</sup> Structured Settlement Group, 'Tax free annuities bring compensation co  
*Media Release*, 7/6/02.

<sup>125</sup> Structured Settlement Group, Submission to the Economics References Committee inquiry into the impact of public liability and professional indemnity insurance cost increases, 13/5/02, section 5.

<sup>126</sup> *Civil Liability Bill 2002* (NSW), section 22. The Act defines 'structured settlement as 'an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means'. The Governor assented to the bill on 18 June 2002. As the legislation has retrospective effect to 20 March 2002, the bill will commence on assent, rather than proclamation in the Government Gazette.

<sup>127</sup> *Health Care Liability Act 2001* (NSW), section 18.

<sup>128</sup> NSWPD, 20/3/02, p 830. Carr B, Premier, 'Public Liability' and 'Statement by Premier Bob Carr, *Media Release*, 11/6/02.



presumption would take and how it would be implemented.

To date, few stakeholders have commented on the proposal. However, the SSG has indicated that it does not view a presumption as necessary because, in its opinion, the benefits of structured settlements in relation to lump sums already provide enough of an incentive to encourage the use of structured settlement.<sup>129</sup> The SSG supports the voluntary nature of SSG.

In its response to the Government's second stage of reforms, the Australian Plaintiff Lawyers Association ('APLA') addressed the issue of structured settlements. Without specifically addressing the issue of the presumption, APLA cautioned that structured settlements are not suitable in all situations:

- APLA continues to support the introduction of voluntary structured settlements.
- Structured settlements are not a panacea. They do not suit all people all the time. They best suit claimants with long term care needs. That said, they are only acceptable where the party providing the settlement annuity is so secure financially that they will not cease to exist before the entitlements to payments cease. Imagine, for example, if HIH had provided structured settlements to catastrophically injured victims of accidents.
- Structured settlements can work well in certain circumstances, by they must be closely regulated to ensure that claimants do not suffer at the hands of unscrupulous or financially insecure insurers.<sup>130</sup>

#### ***Mandated structured settlements above certain amounts in NSW?***

Currently, structured settlements are a completely voluntary settlement agreement between the parties. Structured settlements cannot be forced upon an accident victim, or the defendant or its insurer. Nor can Judges force a structured settlement on the parties at judgment. They must be agreed in an out-of-court context<sup>131</sup> (although, as noted above, where the case involves a minor or person with an intellectual incapacity court approval is required for a settlement, including a structured settlement).

It has been suggested that one way to ensure the effective use of structured settlements is to make them mandatory for compensation over certain amounts. While such a reform could be implemented by legislation it does not have the support of the SSG. The SSG advocates giving plaintiffs the *option* of negotiating a structured settlement and acknowledges that a structured settlement may not be the best way to go in all cases. In a

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<sup>129</sup> Personal communication with the Manager of the SSG, Jane Campbell, 28/6/02.

<sup>130</sup> Australian Plaintiff Lawyers Association, *APLA Response to The New South Wales Premier, Bob Carr's Public Liability Proposals*, 26/03/02, pp 8-9.

<sup>131</sup> This information is taken from the SSG web site: [www.structuredsettlements.com.au](http://www.structuredsettlements.com.au).

presentation to the Sydney Institute in February 2001, the manager of the SSG briefly addressed the issue of mandatory structured settlements as follows:

We suspect that there may be a concern that people won't take up structured settlements if they are optional rather than mandatory. Structured settlements are optional overseas and are used in about 1/3 of the serious cases. They don't need to be other than optional. They won't be appropriate in all cases and it should be up to the parties to a case as a form of out of court settlement agreement. They are not something to be ordered by judges or forced upon the parties. The voluntary system works overseas and would work here...<sup>132</sup>

The SSG has also stated that if courts were required to make structured, or 'periodic payment' orders, as part of their judgements this would actually be a more expensive option for defendants than a single lump sum in the current low interest environment where discount rates are high.<sup>133</sup> The SSG explains why this would be the case:

A periodic payment judgement (eg. for future care costs) is likely to cost more than a lump sum judgement in the current low interest rate environment.

In order to calculate the amount of a lump sum judgement, a judge decides upon the annual cost (eg. cost of care of \$36,000pa), and then multiplies that by the number of years of life expectancy (eg. 30 years). The judge then applies the statutory discount rate of 5%, which assumes that the accident victim will be able to invest the lump sum and earn a high rate of interest (5% above inflation). The judge thus "discounts" the total figure back to a smaller lump sum figure to take into account future interest earnings.

If interest rates are assumed to be high, eg. 5% above inflation, then a smaller lump sum is required to generate a fixed amount per year.

If a judge was going to make a periodic payment judgement based on the use of an annuity (and not a lump sum judgement) he or she would not apply the discount rate. Instead, the life insurance company offering the annuity would take into account real market interest rates. The judge would decide that the person needs \$36,000 pa for 30 years. In working out how much premium would be required for an annuity paying this sum, the life

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<sup>132</sup> *Structured Settlements*, Speech at the Sydney Institute, 14/02/01, Jane Ferguson, Manager, Structured Settlement Group.

<sup>133</sup> Personal communication with the Manager of the SSG, Jane Campbell, 28/6/02.

insurance company would form a judgement about what future interest rates they are likely to be able to achieve. They are likely to make a fairly conservative assumption about interest rates, eg. assume 2.5% returns above inflation. The cost of this annuity which assumes low future interest rates will be higher than the cost of a lump sum which has been calculated assuming high interest rates.

If interest rates are assumed to be low, eg. 2.5% above inflation, then a larger lump sum is required to generate a fixed amount per year.

Thus, in the current low interest rate environment, annuity providers are likely to produce quotes that are more expensive than the alternative lump sum calculated using the 5% discount rate.

Note that in these examples we have used the annual amount as the fixed sum and the cost of the lump sum has varied. An alternative approach (which will be used in structured settlements in Australia) is that the amount of the lump sum will be fixed (as determined by applying the discount rate), and then life insurance companies will be asked to advise what annual payments will be possible. When calculated in this way, tax-free structured settlement annuity payments should provide a competitive return when compared with taxable lump sum investment returns. However, in a low interest rate environment neither the structured settlement nor the invested lump sum may generate the returns assumed using the 5% discount rate.<sup>134</sup>

### ***Structured settlements in overseas jurisdictions***

No overseas jurisdiction currently has mandatory structured settlements, although in Ontario, Canada, there is a statutory presumption in favour of periodical payments. A review of several overseas jurisdictions is contained in a recent paper published by the Lord Chancellor's Department in the UK.<sup>135</sup>

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<sup>134</sup> Correspondence from the Manager of the SSG, Jane Campbell, 1/7/02.

<sup>135</sup> For a review of the use of structured settlements in the United States and the United Kingdom see: Victoria, Parliament, n 3, Chapter 4. The NSW Parliament Standing Committee on Law and Justice conducted a study tour of the United States, Canada and the United Kingdom in 1997 to investigate the use of structured settlements, for the purposes of its Inquiry Into the Motor Accidents Scheme. See: NSW, Parliament, Legislative Council, Standing Committee on Law and Justice, (B Vaughan MLC) *Report on the Inquiry Into the Motor Accidents Scheme (Compulsory Third Party Insurance) – Second Interim Report*, NSW Parliament, 1997, p 9 for details.

In the UK the Lord Chancellor's Department is currently inquiring into the necessity of giving courts the power to order periodical payments for future loss and care costs in personal injury cases.<sup>136</sup> In February 2002, the Lord Chancellor's Department published a consultation paper on whether courts should have the *power* to order *periodical payments* instead of lump sums, when an injured person is awarded damages for future care costs and losses. The Department believes periodical payments are a fairer and simpler way to provide the right level of compensation in these cases.

## 5 OTHER REFORM PROPOSALS

There have been other reform proposals raised at the second ministerial meeting, and in other places, which do not necessarily relate to NSW because of the measures which already exist in NSW. One such reform proposal is to have a uniform statute of limitations in place across all jurisdictions for personal injury actions (of 3 years). NSW already has a statute of limitations of 3 years. Another reform proposed with respect to the statute of limitations is for it to apply to minors (to adopt a similar rule that exists in Tasmania with respect to minors). The following gives some background information on the statute of limitations.

### 5.1 Statute of limitations

An area of reform that has been raised is having a consistent statute of limitations in all jurisdictions— as noted in the *Joint Communique* from the ministerial meeting held on 30 May 2002. That is, having a consistent 3 year statute of limitations period for personal injury claims in all jurisdictions (with exceptions for minors, although, some have argued for removing such exceptions for minors)

There has been recent public discussion of limiting the time in which negligence actions can be commenced (particularly in the case of medical negligence actions).<sup>137</sup> Limiting the ability to apply for extensions of time, or to postpone the limitation period, has also been discussed.

This is because, some argue, allowing long periods of time to lapse prior to commencing court proceedings is a contributing factor towards the uncertainty surrounding the assessment and calculation of possible future claims and pricing insurance premiums accordingly. For example a recent article in *The Australian Financial Review* notes that Dr

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<sup>136</sup> The Lord Chancellor's Department, Consultation Paper, *Damages for Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases*, March 2002. This paper can be obtained from the Lord Chancellor's Department web site at: [www.lcd.gov.uk/consult/general/periodpay.htm](http://www.lcd.gov.uk/consult/general/periodpay.htm).

<sup>137</sup> See the submission by The Royal Australian College of General Practitioners, to the Senate *Inquiry into the impact of public liability and professional indemnity insurance cost insurances*, that supports tort law reform which includes a strict statute of limitations. (Submission No 80, p 4)

D Sheldon<sup>138</sup>, a member of the insurer United Medical Protection, favours reducing the statute of limitations. He is quoted as saying “The statute of limitations causes considerable stresses and makes it very difficult for the insurers to arrive at realistic premium levels when the claims may not emerge for 20 or more years”.<sup>139</sup>

As noted by the former NSW Attorney General, John Dowd, in 1989, when speaking on reforms which reduced the limitation period from 6 to 3 years for personal injury in NSW: “By limiting the time within which a plaintiff may make a claim, the defendant’s potential liability is made finite and can be predicted with certainty. This is an important element in obtaining insurance against damages for liability. It is desirable, if not essential, that insurers be made aware reasonably quickly of potential claims and that they be in a position to determine the possible size of claims.”<sup>140</sup>

### ***What is a limitation period?***

In general, a limitation period is a statutory time limit imposed on plaintiffs with respect to commencing civil proceedings. All states and territories within Australia have a *Limitation Act* which sets out the relevant time limits imposed for the commencement of a particular cause of action.

Once the limitation period has expired, in NSW, the right to bring the action is quashed/extinguished.<sup>141</sup> This is different to all other Australian jurisdictions where the effect of the end of the limitation period is to bar the remedy rather than the right.<sup>142</sup>

There can be different limitation periods for different types of civil action. Limitation periods can also differ from state to state.

### ***Limitation period for actions in tort and personal injury***

In general the limitation period for actions in tort, in each of the Australian jurisdictions except the Northern Territory, is 6 years. The limitation period for personal injury actions is 3 years in all Australian jurisdictions except the ACT, Victoria and Western Australia. The following outlines the limitation periods for personal injury actions for each jurisdiction in Australia<sup>143</sup>:

- **In NSW** the time limit for persons without a disability is 3 years. This limit however

<sup>138</sup> Dr Sheldon is also a member of the Negligence Review Panel.

<sup>139</sup> “Negligence payouts under review”, *The Australian Financial Review*, 3/7/02, p 8.

<sup>140</sup> *NSWPD (LA)*, 14/11/89, p 12247.

<sup>141</sup> s 63 & 64 of the *Limitation Act 1969 (NSW)*. *Cth v Dixon* (1988) 13 NSWLR 601.

<sup>142</sup> LBC, *The Laws of Australia*, Title 5.10 “Limitation of Actions”, para [18].

<sup>143</sup> For more detail on the current framework in all other jurisdictions see the Queensland Law Reform Commission’s Report No 53 on *Review of the Limitation of Actions Act 1974 (QLD)*, 1998.

does not apply to causes of action that are accrued before 1 September 1990.<sup>144</sup> Prior to 1 September 1990, the limitation period for personal injury actions was 6 years.<sup>145</sup>

The limitation period for minors in NSW does not begin to run until they are 18 and then it is 3 years. (which means minors may wait until they are 18 to bring an action and then the 3 year limitation period applies – in effect this gives them up to 18 + 3 years to bring an action)

- **In the ACT** the time limit is 6 years.<sup>146</sup>
- **In QLD** the time limit is 3 years.<sup>147</sup>
- **In SA** the time limit is 3 years.<sup>148</sup>
- **In TAS** the time limit is 3 years.<sup>149</sup>
- **In VIC** the time limit is 6 years.<sup>150</sup>
- **In WA** the time limit is 6 years.<sup>151</sup>
- **In the NT** the time limit is 3 years.<sup>152</sup>

The law in NSW will be discussed below, except where otherwise indicated.

#### ***Postponement/ deferral of limitation period – disabled, minors***

In certain circumstances<sup>153</sup> the commencement of the limitation period is deferred – ie doesn't begin to run until a later period. This is the case with people who are classed as being under a disability, including minors. The deferral of the commencement of the limitation period, in such instances, effectively means that certain plaintiffs have an extension of time.

<sup>144</sup> Section 18A of the *Limitation Act 1969* (NSW). Section 18A of the Act was inserted in 1990 (No 36, Sch 1(3)), so personal injury actions that accrued prior to this time were encompassed by the general provision relating to torts (section 14(1)(b)).

<sup>145</sup> Section 14 (1)(b)).

<sup>146</sup> Section 11 of the *Limitation Act 1985* (ACT).

<sup>147</sup> Section 11 of the *Limitation of Actions Act 1974* (QLD).

<sup>148</sup> Section 36(1) of the *Limitation of Actions Act 1936* (SA).

<sup>149</sup> Section 4 & 5(1) of the *Limitation Act 1974* (TAS).

<sup>150</sup> Section 5 of the *Limitation of Actions Act 1958* (VIC).

<sup>151</sup> Section 38 (1)(c)(vi) of the *Limitation Act 1935* (WA).

<sup>152</sup> Section 12 of the *Limitation Act* (NT).

<sup>153</sup> There are other circumstances which will warrant the postponement of the limitation period - such as fraud.

With respect to plaintiffs who are minors<sup>154</sup> the limitation period does not begin to run until they turn 18. This effectively means that an action, which involves a minor who has incurred a personal injury, can be brought up to 21 years after an injury has occurred (18 + 3 which is the standard limitation period for personal injury). Examples of where this can occur is in the event of adverse outcomes in the context of a birth (ie where a baby has been injured through the negligence of the attendant physician/obstetrician).

This is the same in all jurisdictions in Australia, except for Tasmania (which is dealt with below).

### *Extensions of time*

In NSW, notwithstanding the set time limit for commencing civil proceedings, a plaintiff can apply for an extension of time. There are three areas where an extension of time can be granted in the case of personal injury actions:

- for actions that accrue prior to 1 September 1990;
- for actions that accrue after 1 September 1990 – maximum 5 year extension;
- and in the case of where there is a latent injury – indefinite extension of the limitation period.

In NSW, for causes of action that accrue on or after 1 September 1990<sup>155</sup>, an extension of time (maximum of 5 years) can be granted for personal injury cases<sup>156</sup>. This is known as a secondary limitation period. An extension is granted if the court finds that it is ‘just and reasonable to do so’ taking into account all the circumstances of the case (section 60E).

Further, courts have the power to grant an additional discretionary extension of time<sup>157</sup> in the circumstance where the plaintiff “was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time”<sup>158</sup>: as per section 60F. A court may not make such a discretionary order under sections 60G or H unless it is satisfied that the plaintiff was not aware of such factors (listed in section 60I(1)(a)(i)-(iii)<sup>159</sup>) and the

<sup>154</sup> Under the *Limitation Act 1969* (NSW) a plaintiff is considered to be under a disability while a minor.

<sup>155</sup> The current section 18A was inserted in 1990. Prior to 1 September 1990, the limitation period for personal injury actions was 6 years (The limitation period for personal injury actions was encompassed by the original provision relating to torts – section 14 (1)(b)).

<sup>156</sup> Under sections 60A – 60E. Extensions of time are also available for causes of action that accrue prior to 1 September 1990 and these are provided for by Division 3, Subdivision 1 of the Act.

<sup>157</sup> Under Sections 60G and 60H.

<sup>158</sup> The relevant time being the initial limitation period.

<sup>159</sup> The factors are:

- (a) the plaintiff:
  - (i) did not know that personal injury had been suffered, or
  - (ii) was unaware of the nature or extent of personal injury suffered, or
  - (iii) was unaware of the connection between the personal injury and the

application was made within 3 years after the plaintiff became aware of such factors.

### ***How does a limitation period work?***

Time starts running “from the date on which the plaintiff’s ‘cause of action<sup>160</sup>, or ‘right of action’ accrues”. Generally speaking, that is from the time in which the fact or knowledge of the personal injury occurs (ie when the damage is suffered). So, in very general terms, in the case of personal injury actions a plaintiff will have up to 3 years from the time when the damage is suffered to commence an action against the defendant. The commencement of an action is defined as when an originating process is issued, such as lodging a statement of claim in the relevant court. The commencement of such proceedings will stop the running of time (the running of the limitation period).

### ***Earlier reform in NSW***

In NSW the original limitation period for personal injury actions was six years. The Act was amended in 1989 by the Limitation Amendment Bill<sup>161</sup> which reduced the limitation period to three years.

In his second reading speech on the Bill, the then Attorney General, John Dowd, stated:

The purpose of the bill is to amend the Limitation Act 1969 in relation to personal injury actions. Four main reforms are proposed. First, the primary limitation period for these actions will be reduced from six to three years. Second, provision is made for a secondary limitation period of up to five years if the plaintiff can show that it is just and reasonable for the court to allow the claim to be brought after the expiration of the primary limitation period. Third, there will be a further discretionary, but unlimited, extension if delay has been caused because the injury, disease or impairment concerned is latent.<sup>162</sup>

The Attorney General outlined, briefly, the history of limitations as well as the policy reasons for limiting the time frame (from 6 years to 3) in which plaintiffs can bring an action:

By limiting the time within which a plaintiff may make a claim, the defendant’s potential liability is made finite and can be predicted

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defendant’s act or omission,  
at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted...

<sup>160</sup> The LBC states that a cause of action is “simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”: *Letang v Cooper* [1965] 1 QB 232. LBC, op. cit. n 142, p 25.

<sup>161</sup> Schedule 1, Clause 3 of the Limitation Amendment Bill, 1989.

<sup>162</sup> NSWPD (LA), 14/11/89, p 12246.



with certainty. This is an important element in obtaining insurance against damages for liability.<sup>163</sup>

Notwithstanding the above, the Attorney General also outlined the public policy reasons for allowing an extension of the limitation period where necessary:

Limitation legislation thus aims at the prevention of avoidable delay. However, its operation may lead to particular instances of hardship where the plaintiff could not be said to have acted improperly or unreasonably in failing to commence action within the limitation period. This is particularly true in relation to latent injury or disease. Limitation statutes usually provide that the period within which an action must be commenced runs from the date on which the plaintiff's cause of action is said to accrue. Where the action is one for personal injury, this occurs when the plaintiff suffers damage or injury...Though reasonable in most circumstances, the limitation period severely disadvantages people who have sustained delayed onset or latent injuries. The physical effects of some diseases or injuries do not become apparent for some time. In other cases the diagnosis of a disease, using the currently available methods of diagnosis, may not be possible until many years after the date of the injury.<sup>164</sup>

### ***Provisions relating to minors***

Most jurisdictions within Australia maintain a similar provision with respect to time not running against a minor until they reach the age of 18.

#### *“Custody of a parent” rule*

The exception is Tasmania<sup>165</sup>. Section 26(6) of the *Limitation Act 1974* (TAS), is a provision which incorporates the “custody of a parent” rule. This provision states that the commencement of the limitation period for a minor is postponed only if the plaintiff is not in the custody of a parent. The onus is on the plaintiff to establish that they were not in the custody of a parent (should they wish the limitation period to be postponed). The effect of this provision is that parents are expected to bring an action on behalf of the minor within the relevant limitation period unless the minor can demonstrate that they were not in the custody of a parent.<sup>166</sup>

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<sup>163</sup> NSWPD (LA), 14/11/89, p 12247.

<sup>164</sup> NSWPD (LA), 14/11/89, p 12247.

<sup>165</sup> It should be noted that Victoria had a similar provision enacted (s23(1)(e) of the *Limitation of Actions Act 1958* (Vic)) which was subsequently abolished in 1983 by s 4 of the *Limitation of Actions (Personal Injury Claims) Act 1983*.

<sup>166</sup> Queensland Law Reform Commission, Report No 53, *Review of the Limitation of Actions Act 1974* (QLD), 1998, Chapter 12.

*Arguments against the “custody of a parent rule”*

The Law Reform Commissioner of Tasmania in 1992<sup>167</sup> noted that the provision relating to the “Custody of a Parent” rule is out-dated and “because of the possibility of it causing an injustice...recommended that it be repealed.” The Commissioner further stated:

The rationale behind the rule is that the child with a competent and conscientious parent in the background has no more need of special protection under the law of limitation than has an adult of full capacity. Accordingly, it was felt (when the rule was first introduced in 1938) that time should be permitted to run its normal limitation course if the parent or guardian was available to protect the Plaintiff’s interests. However, when applied in practice, the rule could cause an injustice in a situation where, for example, an infant Plaintiff’s parent/guardian, although available to safeguard the child’s interests, is not able through some cause to commence court proceedings within the limitation period.<sup>168</sup>

This rule was similarly criticised by the Law Commission in England (who identified the reasons for repealing a similar provision<sup>169</sup>) because:

- the rule could not operate properly when the parent was the tortfeasor;
- there was no legal duty on parents to bring proceedings on behalf of their children...[ie no positive duty to act]...
- there was a risk of injustice to those minors whose parents did not initiate proceedings on their behalf;
- a right of action against a parent for failing to commence proceedings would be a poor substitute for the child’s own claim for damages against the original tortfeasor.<sup>170</sup>

The Queensland Law Reform Commission cited the English Law Commission’s observation that: “The crucial policy question is whether it is fair to penalise any person under a disability for the inactivity of their representative”.<sup>171</sup>

<sup>167</sup> Law Reform Commissioner of Tasmania, Report No 69, *Limitation of Actions for Latent Personal Injuries*, 1992, p 41.

<sup>168</sup> op. cit., n 167, p 42.

<sup>169</sup> According to the Law Reform Commissioner of Tasmania’s Report No 69, the provision was abolished in the United Kingdom in 1975 by the *Limitation Act 1975* (UK) s 2.

<sup>170</sup> As outlined by the Queensland Law Reform Commission, op. cit. n 166.

<sup>171</sup> op. cit. n 166, citing: Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 298.

*The basis for provisions which postpone the limitation period for minors*

The Queensland Law Reform Commission outlined the basis for provisions which postpone/extend the limitation period for minors:

Although an action may be commenced by or on behalf of a person under the legal age of majority, there is a presumption that a minor is not competent to make reasoned judgments about decisions relating to the claim. In many jurisdictions limitation legislation makes provision for delaying the commencement of the limitation period until the plaintiff has attained the age of majority...[ie 18]...<sup>172</sup>

*Problems with provisions which postpone the limitation period for minors*

The Queensland Law Reform Commission Report did note the concerns expressed about such provisions, particularly in relation to the long time frame in which an action can be brought by plaintiff's who were babies or very young at the time the injury was sustained:

The effect of delaying the commencement of the limitation period until the plaintiff has attained his or her majority is that a potential defendant is at risk of being sued for a very long period. For example, in Queensland, an action alleging that the plaintiff's injuries were caused at birth by the negligence of a medical practitioner may be brought up to twenty-one years after the birth. There is likely to be further delay before the matter comes to trial. It is almost inevitable that in such a situation the quality of the available evidence will have deteriorated to some extent by the time the claim is heard. The policy of the Australian Medical Association is that practitioners should retain treatment records for a minimum of ten years after a patient who is a minor attains the age of majority. This would mean that a doctor who delivered a baby or treated a very young child would be obliged to keep records for almost thirty years. Apart from the administrative burden thus placed on practitioners, there is the problem for potential plaintiffs of accessing records of those practitioners who have moved or retired. Moreover, at a time when medical indemnity fees are escalating and there is concern that doctors will be unwilling to enter or remain in certain fields of practice, the length of time for which potential liability can continue is likely to add to the problem.<sup>173</sup>

Other concerns have been expressed about the cost of obstetric-related claims which, when coupled with the postponement of the limitation period for minors, places enormous pressure on insurance premiums in this area. The National Association of Specialist Obstetricians and Gynaecologists (NASOG) made the following observations about what

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<sup>172</sup> op. cit. n 166

<sup>173</sup> op. cit. n 166

they consider to be the main cost driver for obstetric claims:

NASOG believes that the single main cost driver for obstetric claims is the cost of long term care of severely neurologically impaired babies. Of 240,000 births per year approximately 500 infants are born with cerebral palsy, of which approximately 10% might be due to birth injury. The Harvard study found that approximately 30% of such birth injuries might be due to negligence, so it could be assumed that approximately 13 babies per year might at some stage in the future claim against the doctor or hospital.

Previously, such babies often did not survive and if they did were frequently institutionalised, and the costs of their care borne by the health system. More recently, parents of these children, who as a result of improved care do survive, have chosen to provide care at home, and their claims against defendant doctors and institutions have incorporated costs of 24 hours per day of specialised nursing care. Unsurprisingly, such costs are expensive, and increasing over recent years. In the recent *Simpson v Diamond* award in 2001, future attendant care costs amounted to \$6.5 million and past care costs were \$1.12 million. Together, the cost of care amounted to 59% of the damages awarded. The \$12.9 million award did not include legal costs estimated to be \$2 million. Once defence costs are added, one single case resulted in approximately \$16 million in damages.

Data from UMP, Australia's largest MDO, indicates that approximately 50% of costs for obstetricians and gynaecologists are generated by the 4% of claims for cerebral palsy and other brain damage. This area is and will remain the main cost driver for obstetric medical indemnity insurance unless changes are introduced which spread the cost of these claims to a larger group of contributors than the current number of 700 obstetricians in Australia.<sup>174</sup>

*Arguments in favour of retaining the postponement of the limitation period for minors*

Nonetheless, the Queensland Law Reform Commission, when examining whether or not to alter the provisions relating to minors, expressed reservations about the “custody of a recommended that “Neither the discovery limitation period nor the alternative limitation period should run against a plaintiff who is a minor” and that therefore the existing provision should be maintained. The reasons cited by them are as follows:

<sup>174</sup>

NASOG submission to the Federal Senate Economics Committee *Inquiry into the impact of public liability and professional indemnity insurance cost insurances.*

Birth related brain injuries are usually detected and their effects identified well before the child turns eighteen. In the view of the Commission, its proposals would not change the existing law in such a situation. The limitation period under the Commission's proposed scheme would be, as it is now, three years from the child's eighteenth birthday. If, as a result of the injury, the child would be regarded as a person under a disability when he or she attained majority, the limitation period under the Commission's proposed scheme would be, as it is now, postponed indefinitely for the duration of the disability.

...the Commission is mindful of the injustice which may be caused to a plaintiff if the limitation period is allowed to run during the plaintiff's minority. In the view of the Commission it would be dangerous to assume that all children have a responsible adult who is ready, willing and able to act on their behalf. Parents may not be aware that their child has a cause of action, or may not be able to afford to commence proceedings. In some cases there may be a conflict between the interests of the child and those of the parents. The Commission therefore considers that any possible prejudice to potential defendants which results from suspension of the limitation period is outweighed by the risk that a minor plaintiff might be deprived of the right to seek compensation because proceedings are not initiated on the minor's behalf within the limitation period.

Accordingly, the Commission is not in favour of adopting the "custody of a parent" rule.<sup>175</sup>

*Arguments for removing the postponement of the limitation period for minors*

The Western Australian Law Reform Commission recently recommended that time should start running in the ordinary way for minors – that is, time should not be suspended until they reach majority age.

The Commission recommended:

**A new approach to disability**

43. In the case of minors –
  - (1) if the plaintiff proves that he was not in the custody of a parent or guardian, neither the discovery period nor the ultimate period should commence until the minority ceases;
  - (2) in the absence of such proof, the limitation periods should apply in the ordinary way, except that for the

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<sup>175</sup>

op. cit. n 166.

- purposes of the discovery period it would be the knowledge of the parent or guardian, and not the minor, which would be relevant;
- (3) exceptional cases where the minor's interests are not adequately protected can be dealt with by the discretionary provision recommended by the Commission.
44. If, subsequent to the injury but before attaining adulthood, the minor ceases to be in the custody of a parent or guardian–
- (1) if the discovery period has already commenced, it should be suspended until the minor reaches adulthood;
  - (2) if the discovery period has not commenced, it should commence when the minor reaches adulthood;
  - (3) the ultimate period should be suspended, and should recommence when the minor reaches adulthood.

The reasons for the recommendation were as follows:

17.56 In the Commission's opinion the custody of a parent rule, in spite of its chequered career in other jurisdictions, has some value. Such a rule, in a revised and expanded form, may still be able to play a useful part in solving the problems raised by the law of disability.

17.57 The Commission considers that, in view of the problems that can arise when the running of the limitation period is delayed for many years as a result of the effect of the disability provisions...it is time for a new approach to the problem of disability. Hitherto, it has generally been automatically assumed that the only way to redress the imbalance between the parties created by the fact that the plaintiff is under disability is to extend the limitation period so that, following the thinking behind the original Limitation Act 1632, the plaintiff is given as long as to bring his action after the cessation of disability as a person not under disability would have had. This assumption should no longer be made. What is needed is a new approach which deals fairly with minors and other persons under disability without creating long limitation periods. The approach outlined by the Commission is based on the premise that most persons under disability are in the care of someone else who can take decisions on their behalf, including decisions as to whether it is necessary to start legal proceedings. If this is so, the need for limitation periods of longer than the normal length is greatly reduced.<sup>176</sup>

<sup>176</sup>

The Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No 36 Part II, January 1997, pp 398-399. (paras 17.56 & 17.57).

Notwithstanding the recommendations of the Western Australia Law Reform Commission, the Western Australian Government did not favour altering their relevant legislative provisions with respect to minors. The reasons given were as follows:

On balance, however, it is the Government's view that the lack of certainty associated with the Commission's recommendation and the fact that that uncertainty will mean among other things that records involving children would have to continue to be kept for lengthy periods in any event, outweigh the advantages of the Commission's scheme. Accordingly, the Government is currently of the view that limitation periods in civil proceedings should remain suspended during minority.<sup>177</sup>

The Medical Indemnity Protection Society, in their submission to the Federal Senate Inquiry into public liability, believed that there should be a finite statute of limitations which extended to minors as well:

It is said that the IBNRs...[incurred but not reported claims]... cannot be assessed with sufficient accuracy to give confidence of proper funding. MIPS believes that we could provide greater certainty of financial security if there was an absolute statute of limitations of five years or so, dating from the date of injury, not the date of awareness of the proximate cause of the injury, and absolute even for infants (ie, not starting from the age of acquiring legal maturity). The MDOs would then be able to rule off their books (say) five years after each membership year and know that no new claims can then be reported, and need funding.<sup>178</sup>

#### *General reform proposals for NSW*

The NSW State Government has not to date made any announcements with respect to reducing the limitation period (or removing the postponement period) for minors in NSW.

#### *Alternatives to reforming the limitation period for minors*

As noted above, a key concern expressed with respect to the extension of time available for minors is in the case of serious/catastrophic injury at the time of birth and the potential for a 21 year delay between the time of injury occurring and action being taken by the plaintiff. A submission by the National Association of Specialist Obstetricians and Gynaecologists (NASOG) to the Federal Senate Economics Committee *Inquiry into the impact of public liability and professional indemnity insurance cost increases* discusses the issue of adverse birth outcomes. It states that this area has the most disproportionate impact on the cost of obstetric claims.

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<sup>177</sup> WA Government, *Limitations Law Reform*, paper released 17 May 2002, p 22.

<sup>178</sup> MIPS submission to the Senate *Inquiry into the impact of public liability and professional indemnity insurance cost insurances*, 15/4/02, pp 4-5.

NASOG then canvass possible solutions which include “...the shifting of long term care costs for neurologically disabled babies to a nationally funded scheme separate to the indemnity subscription pool.”<sup>179</sup>

### *Stakeholder views*<sup>180</sup>

The Law Council of Australia supports a consistent statute of limitation period in all Australian jurisdictions:

The Law Council does not support the proposed limitation period of three years from an event. However, as discussed below, in the interests of uniformity, the Law Council suggests that the general limitation period for personal injury actions in all jurisdictions should be three years running from the date on which the cause of action accrues (in accordance with the present law in five out of the eight jurisdictions), together with appropriate extension provisions.<sup>181</sup>

The Law Council of Australia recommends:

5.81 As noted above, under the present law the basic limitation period in personal injury actions is three years in New South Wales, the Northern Territory, Queensland, South Australia and Tasmania, and six years in the Australian Capital Territory, Victoria and Western Australia. The Law Council suggests that, in the interests of uniformity, all jurisdictions should adopt a three year limitation period in personal injury actions, running from the date of accrual, provided that there is an adequate discretionary power in the courts to extend the period in proper cases.<sup>182</sup>

The Law Council of Australia recommends that the limitation period should run from 3 years from the date from when the damage is suffered. There should also be judicial

<sup>179</sup> NASOG Submission to the Federal Senate Economics Committee *Inquiry into the impact of public liability and professional indemnity insurance cost insurances*.

<sup>180</sup> Note: for an interesting article on the economic advantages/disadvantages of short and long limitation periods see: “Deterrence, litigation costs, and the statute of limitations for tort” *International Review of Law and Economics*, 20 (2000) 383-394. The article notes that: “Intuitively, the marginal benefit of lengthening the statute is higher under a negligence rule because, by increasing the length of time over which victims can file suit, deterrence is enhanced, which in turn reduces the likelihood that a given injurer will be found negligent. Thus, fewer victims file suits at each point in time because their chances of winning are reduced. As a result, litigation costs fall, which partially offsets the extra litigation costs when the statute is lengthened”. (p 383)

<sup>181</sup> Law Council of Australia, *Submission to the Negligence Review Panel*, 2/8/02, pp 69-71.

<sup>182</sup> op cit n 181, p 71.



discretion to extend the period where appropriate and that the limitation period for a minor should not begin to run until they reach majority age, ie 18.

The Insurance Council of Australia support a consistent limitation period which applies to minors as well (except where they are not in the custody of a parent or guardian).<sup>183</sup>

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<sup>183</sup>

ICA, *Submission to the Negligence Review Panel*, July 2002, p 5.



**APPENDIX A**  
***Joint Communique* from the second ministerial meeting on public liability**  
**30 May 2002**

© Senator The Hon Helen Coonan

**Minister For Revenue**  
and the Assistant Treasurer



## JOINT COMMUNIQUE

### MINISTERIAL MEETING ON PUBLIC LIABILITY

Melbourne

30 May 2002

Today Commonwealth, State and Territory Ministers and the President of the Australian Local Government Association (the Ministers) met again to continue work on addressing issues associated with the availability and affordability of public liability insurance. The meeting followed on from a highly successful meeting held in March.

Ministers noted that a number of jurisdictions had already undertaken a range of initiatives since Ministers last met in March - particularly in the areas of tort law reform, facilitating pooling and group insurance for not-for-profit organisations and the development of risk management guidelines. Some recently announced tort law reform and other measures are shown in Attachment A.

The Ministers made substantial progress on developing consistent national approaches for implementing measures to tackle the problems of rising premiums and reduced availability of public liability insurance.

Ministers met with the Insurance Council of Australia and chief executives of some major insurers and made it clear that there is an expectation that the insurance industry will deliver affordable public liability products to the community on the basis of the reform package being implemented.

Ministers agreed on a package of socially responsible measures aimed at reducing and containing claims costs and increasing the transparency of insurance industry practices through better data collection.

Given the substantive initiatives undertaken by Governments, Ministers called on insurers to respond to the difficulties in the public liability insurance market and participate in developing sustainable and affordable cover for the Australian community.

#### **Role of the ACCC**

Ministers agreed that the ACCC's role was crucial to monitoring progress in relation to public liability and general insurance premiums. The ACCC will monitor market developments and premium prices and the Commonwealth will review the ACCC's involvement (including more formal processes) if it becomes clear that cost savings are being made but not passed through to consumers.

The Commonwealth has asked the ACCC to update its 'Insurance Industry Market Pricing Review' report by July 2002. The Commonwealth will provide the ACCC with a standing brief to continue to update this report on a six monthly basis over the course of the next two years. This ongoing monitoring role will enable an assessment of whether the insurance industry is adjusting premiums to take account of cost savings, and provide the gauge for the effectiveness of measures taken on a national basis to stabilise and contain claims management costs as reflected in public liability premiums.

To ensure increased availability of public liability insurance cover, Ministers also called on the insurance industry to play a proactive role in facilitating group buying and pooling arrangements, especially for community groups.

#### **Volunteers and Not-For-Profit Organisations**

A number of jurisdictions, including the Commonwealth, will introduce legislation to protect volunteers from being sued by providing an indemnity from the organisation for which they work. The legislation will be analogous to that enacted in South Australia.

Ministers noted that the rising cost and limited availability of public liability issues is a particular problem for not-for-profit community organisations. Accordingly, they have agreed, as a matter of urgency, to examine the costs and benefits of exempting eligible not-for-profit organisations from common law damages claims for death or personal injury (other than for intentional torts) and develop options as appropriate.

### **Law Reform**

Notwithstanding substantial progress, Ministers agreed that further reform was necessary. Ministers agreed that reform proposals should satisfy one or more of the following objectives:

- Cost reduction;
- Cost containment;
- Increasing certainty and predicability of costs of claims for insurers which, based on evidence presented by the Insurance Council of Australia, is critical to containing premium increases in the short to medium term; and
- Managing community expectations about personal responsibility and assumption of risk.

### **Tort Law Reform**

Ministers are committed to achieving a range of targeted and broad based reforms designed to contain the costs of claims and to deliver predictability for the pricing of insurance products.

Ministers noted that, based on expert advice provided to the meeting, rising claims costs were a particular problem in New South Wales but that all jurisdictions had experienced increases in claims costs above growth in average weekly earnings.

Ministers noted that New South Wales and Queensland had recently announced their intention to introduce broad ranging tort law reforms. Western Australia has also announced in principle support for a range of measures as part of the national approach. Progress by States in these areas is set out in Attachment A.

### ***Waivers for Risky Activities***

The Commonwealth will legislate to allow self assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports, subject to preserving adequate protection for consumers in the Trade Practices Act.

The States committed to introducing mirror legislation where required.

### ***Review of law of negligence***

Unpredictability in the interpretation of the law of negligence is a factor driving up premiums.

The Commonwealth, States and Territories have agreed to jointly appoint an expert panel of three eminent persons to examine the law of negligence, including its interactions with the Trade Practices Act 1974. The review will also consider the liability of public authorities and joint and several liability. The panel will report by August 2002 after consultation with the Standing Committee of Attorneys-General. Terms of Reference for the Review and appointment of the panel will be announced shortly following agreement between governments.

### ***Compensation***

Ministers agreed that all States and Territories would examine the desirability of aligning damages under common law more closely with statutory third party insurance awards for other personal injury claims.

The range of measures to be considered in each jurisdiction, if not already done so, includes:

- Bringing general damages awards and economic loss into line with caps and thresholds available in each jurisdiction's statutory schemes;
- Pre-judgement interest on damages awards, where it exists, to be set at the 10 year Commonwealth bond rate;

- The discount rate for damages to be set by statute at 5%, unless a higher rate already applies;
- Limits to be placed on the circumstances and amount of damages for gratuitous attendant care;
- Set the statute of limitations period at 3 years for all personal injury claims with provisions to protect minors. Western Australia has commenced a separate and comprehensive review of its limitations legislation; and
- Prohibit the recovery of damages if the injured person was engaged in a criminal activity and providing that the taking of recreational drugs (including alcohol) is taken into account as contributory negligence.

### **Structured Settlements**

Ministers noted that Commonwealth legislation for structured settlements is scheduled to be introduced next week. Structured settlements allow compensation payments to more closely match the settlement against the claimant's ongoing needs. The State Ministers have agreed to sponsor legislation to remove the barriers to structured settlements as an alternative to lump sum payouts.

### **Legal System Reforms**

Ministers noted that although tort law reform is a key element in stabilising and reducing claims costs, improvements to the procedures by which the legal system assesses and determines claims would also deliver significant cost savings.

### ***Handling of Claims***

The Commonwealth, States and Territories have each, for their respective courts' jurisdictions, agreed to examine ways to improve procedures to encourage resolution of claims without resort to litigation including:

- Pre-litigation exchange of evidence whereby the notice of claim will be supported by experts' reports on liability, causation and quantum of damages;
- Compulsory conferencing prior to the commencement of proceedings, and parties possibly being required to exchange offers of settlement at or shortly after that conference;
- Changes to legal cost rules to encourage the above initiatives by the reintroduction of a scale of costs, which is set out by the court for the various activities involved in bringing a case to trial.

Ministers expect the legal profession and insurers to contribute to the development and implementation of these measures.

### ***Advertising by Legal Practitioners***

Ministers also noted a perception that advertising of personal injury legal services, including through 'no-win, no-fee' arrangements, could encourage inappropriate social expectations about assumption of risk and personal responsibility. Ministers agreed that limits on advertising and legal fees would be considered on an individual jurisdictional basis.

### **Data Collection**

Ministers agreed that the lack of comprehensive data on claims costs was a significant constraint in the appropriate pricing of premiums by the insurance industry for not-for-profit, adventure tourism and sporting groups. The paucity of data is also inhibiting the development of insurance products suitable for these sectors.

The Commonwealth has agreed to use the Financial Sector (Collection of Data) Act 2001 and require all authorised insurers operating in Australia to submit claims data to the Australian Prudential Regulation Authority (APRA) for analysis and publication. Consultations to develop a consistent methodology will begin shortly.

The States and Territories also agreed to contribute similar claims data from State insurers and local government insurance mutuals to assist in the understanding of public liability insurance.

Ministers also agreed on the need for a nationally consistent methodology for courts statistics and asked the

Standing Committee of Attorneys-General to consider this as a high priority.

### **Benchmarking Study of Claims Processing**

Ministers agreed that the Productivity Commission be asked to benchmark Australian insurers' claims management practices against world standards and report by December 2002.

### **Risk Management**

Recognising that better risk management would provide long term benefits through fewer injuries and hence, claims. Ministers endorsed proposals already underway to develop guidelines for not-for-profit community, sports and charity groups. The Commonwealth indicated that it was prepared to take a leadership role where required.

### **Role of Insurers**

Ministers' agreed that this package of reforms will over the long term deliver consistency and predictability. However, they will not address short term availability and affordability issues. Ministers therefore called on the insurance industry to respond promptly and constructively to the issues facing particular groups in obtaining public liability cover and rising premiums.

Ministers agreed to consult over coming months on particular issues affecting not-for-profit organisations, adventure tourism and sporting groups.

## **ATTACHMENT A**

### **New South Wales**

The NSW Government has introduced the Civil Liability Bill 2002 to implement stage one of the Government's law reform program. It has also announced details of stage two of the Government's tort law reform program, to be introduced in the Spring Session, commencing in September 2002.

Key features of Stage 1 include:

- Upper limits for non-economic loss (\$350,000) and lost earnings;
- Applications of a threshold of 15% in respect of general damages;
- New interest calculations and discount rates for damages awards;
- Limited legal costs claims in small claims;
- Penalties for making unmeritorious claims;
- Reforms to apply from 20 March 2002.

Key features to be addressed in Stage 2 of the reforms include:

- Waivers and voluntary assumption of risk;
- Establishing a realistic duty of care;
- Protection for volunteers under good Samaritan legislation;
- Defences against negligence claims for public authorities.
- Structured settlements;
- Drug and alcohol to be taken into account in assessing negligence.

### **Victoria**

The Victorian Government has acted on a sector by sector basis to assist groups most severely disadvantaged by the lack of availability and increased prices of insurance. This includes:

- The creation of a group insurance scheme for community organisations to operate from 1 June 2002, in conjunction with the Municipal Association of Victoria (MAV), Our Community Pty Ltd and Jardine Lloyd Thompson;
- Providing a grant of \$330,000 to MAV for the development of risk mitigation activities that are linked to the community group insurance scheme; and

- Providing a grant of \$100,000 to adventure tourism operators to assist them prepare risk management plans and audits.

In addition, Victoria has committed to finalise a legislative package for the Spring session of parliament that includes:

- Provision of waivers that will allow people to accept responsibility for their own participation in risky activities;
- Protection of volunteers and "Good Samaritans" from the risk of being sued;
- Proper risk management and accreditation frameworks for businesses and organisations;
- Enabling substantial amounts of damages to be paid in regular instalments ("structured settlements") instead of one lump sum;
- Improvement of legal procedures surrounding claims to enable quicker, cheaper and less stressful determination in civil liability disputes;
- Ensuring that saying "sorry" does not represent an admission of liability; and
- Removing the right to claim damages where the injury was suffered through criminal activity or while under the influence of drugs.

Victoria remains committed to working with all jurisdictions to implement a national approach to dealing with public liability insurance.

### **Queensland**

Queensland is well advanced in its group buying scheme for community based organisations with the scheme scheduled to commence on 1 September 2002.

The Queensland Government has approved the drafting of a Personal Injuries Proceedings Bill for introduction in mid-June that will, among other things, replicate the early reporting regime and early claim resolution processes adopted under the Queensland Compulsory Third Party Scheme.

Other provisions include:

- Limiting economic loss to three times average weekly earnings;
- Limiting legal costs for small claims; and
- Exclusion of jury trials.

Measures Queensland will be introducing as part of Stage Two include:

- Prohibiting the recovery of damages where the injured person was engaged in criminal activity at the time of injury (with appropriate boundaries);
- The proposal that the increase in risk caused by taking recreational drugs (including alcohol) should be taken into account as a factor in negligence and not lead to an increase in the duty of care owed by a third party;
- Waivers and self-assumption of risk (subject to suitable safeguards for minors), which would see people waiving their right to sue before undertaking certain high-risk activities; and
- The protection of volunteers from being sued except for gross negligence, by way of an indemnity from the organisation for which they work.

Other measures Queensland will consider as part of Stage 2 include:

- Caps on general damages;
- Changes to the statute of limitations but maintaining a level of protection for minors;
- A review of the law of negligence;
- Dispensing with the concept of joint and several liability.

### **Western Australia**

Western Australia recently announced in principle support for tort law reform, including:

- Limiting the cost of the general damages component of awards by bringing them into line with other personal injury compensation schemes in WA;



- Legislating to allow self assumption of risk by people who choose to engage in inherently risky activities such as tourism and sports;
- Applying a cap for the loss of earnings component of awards;
- Restricting advertising of personal injury legal services to limited factual matters;
- Ensuring the consequences of taking drugs were taken into account as contributory negligence; and
- Requiring insurers to contribute to a national data-set and to revise their strategic approach to claims management.

The Western Australian Government is drafting legislation to provide members of volunteer organisations with qualified immunity from personal liability.

### **South Australia**

South Australia has enacted legislation to protect volunteers to government and incorporated bodies from liability for claims and has provision under its Workers' Compensation legislation to provide cover to prescribed groups of volunteers.

It already has in place pre-litigation procedures which provide opportunities for settlement of claims in an economical way.

In the risk management area, it is conducting risk awareness raising and advisory sessions for tourism groups and will soon be providing similar services for volunteer and community groups.

Many community groups in South Australia have for a number of years purchased public liability insurance through arrangements managed by Local Government Risk Services. The South Australian government is working with the South Australian Local Government Association to broaden these arrangements to cover more community groups.

The South Australia Government will urgently consider a wide range of reforms as recommended, in particular a cap on payouts, self-assumption of risk ie: a waiver, no damages for those injured while engaged in a criminal activity or while under the influence of drugs (including alcohol). South Australia also supports a review of the law of negligence.

### **Tasmania**

Tasmania has already implemented a number of measures to address rising public liability insurance premiums. A series of seminars on risk management for not-for-profit community groups and small businesses has been held around the State.

In its 2002-03 State Budget, the Government announced that stamp duty on public liability insurance policies would be abolished effective from 1 July 2002.

Community organisations in the State will also benefit from the joint Tasmanian-Victorian 'Our Community' group buying scheme which is due to commence on 1 June 2002.

Tasmania already has in place some of the measures under consideration in other jurisdictions such as a discount rate of 7 per cent, no provision for pre-judgement interest, no damages in respect of gratuitous attendant care, and a three year statute of limitations for personal injury claims.

### **Northern Territory**

The Northern Territory Government has established a public liability insurance hotline to provide information and advice. It is developing risk management seminars for business and community groups, with the program likely to commence in June. It is also discussing with the Queensland Government the potential for Northern Territory not-for-profit community groups to join the Queensland group insurance scheme, and is amending the standard insurance requirements in Government contracts. The Northern Territory already has in place some of the measures under consideration (for example, a three year statute of limitation period and procedures to encourage resolution of claims without resort to trial).

### **Australian Capital Territory**

The ACT has recently conducted a survey of 2,200 ACT community, non profit, sporting and small businesses with respect to the various types of problems they have encountered in obtaining or renewing public liability insurance policies. The survey has produced overwhelming support across all groups for the

following two initiatives:

Group insurance for access to policies otherwise unaffordable or unavailable , and risk management/advisory facilities for those bodies that see the need to take closer notice of the way they conduct their activities with a view to being more risk aware.

Consequently, the ACT will be seeking agreement with our State and local government colleagues in New South Wales and Victoria to allow the ACT to participate in their group insurance schemes.

The ACT will also be setting up a risk advisory service directed at our community non profit sporting and small business sectors.

The ACT is contemplating the introduction of legislation, similar to that enacted in South Australia under which protection from public liability will be extended to volunteers and good Samaritans beyond those classes (EMS, Fire-fighters) already covered by our existing statutory framework.

#### **Australian Local Government Association**

Local Government has an important role in delivering support services that underpin the 'grass roots' effectiveness of legislative measures to be implemented by federal, state and territory governments. Local Government will examine options to facilitate group purchasing schemes for not-for-profit and community organisations. Local Government will also work collaboratively with state and territory governments to significantly improve risk management skills in the community, not-for-profit and small business sectors. Local Government will consider options for the provision of risk management accreditation services to relevant community organisations, not-for-profit groups and small business, in concert with other spheres of government.

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**APPENDIX B**

**Executive summary and recommendations from the Trowbridge Consulting report**  
*Public Liability Insurance – Practical Proposals for Reform, 30/5/02*



## Executive summary

Australian Governments at all levels have expressed a desire to deal with the current crisis in public liability insurance.

The communiqué from the 27 March 2002 meeting of Ministers, endorsed by the Council of Australian Governments (COAG) on 5 April 2002, requested Heads of Treasuries (HoTs) to develop practical measures for consideration by Governments. A further meeting of Ministers is to be held on 30 May 2002.

Trowbridge Consulting was engaged to assist the Insurance Issues Working Group of HoTs. This report presents the results of our work and our recommendations.

**We commend these proposals to the Commonwealth, State and Territory Governments of Australia as a range of practical measures to resolve the public liability crisis and re-establish a stable sustainable market for this crucial insurance service.**

We have developed these proposals against a framework of four desirable outcomes:

- Cost reduction
- Cost containment for the future
- Improving certainty and predictability in the insurance system
- Changing social and legal attitudes towards the assumption and liability for risk

The recommendations are presented in two groups:

- to stabilise and reduce claim costs (items A to D)
- to deal with availability of cover and other insurance issues (items E to H)

# Recommendations to stabilise and reduce claim costs

## A Targeted initiatives

### *Problem*

Certain segments of the community such as not-for-profit groups and adventure tourism have been especially hard-hit by the crisis, suffering insurance availability problems as well as severe price increases. Public agencies also have serious problems.

### *Proposals*

- A1 Legislate to allow self assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports
- A2 Protect volunteers from being sued except for gross negligence, by way of an indemnity from the organisation for which they work
- A3 Protect certain not-for-profit and community organisations from being sued except for gross negligence
- A4 Protect volunteers who work for not-for-profit organisations by giving them coverage under workers' compensation legislation
- A5 Codify the extent of liability of public agencies to deal with issues raised in recent High Court decisions including the standard of care and the boundaries of occupiers' liability

### *Comment*

These targeted proposals should materially assist the most severely impacted segments of the community.

## *B Broad-based initiatives*

### *Problem*

The continued upward trend in claim costs is an underlying factor contributing to the insurance problems. These measures are designed to stabilise, and in some cases reduce, the cost of claims and improve predictability of outcomes for insurers.

### *Proposals*

- B1 Stabilise and limit the cost of general damages awards, aiming for consistency with other personal injury schemes
- B2 Pre-judgement interest on damages awards to be at a benchmark rate based on Government Bonds, with no interest on non-economic loss
- B3 A cap to be applied to loss of earning capacity claims, with a benchmark of \$2,000 per week net of tax proposed
- B4 The discount rate for calculating damages to be set by statute at 5%, unless a higher rate already applies to public liability claims in a jurisdiction
- B5 Limits to be placed on the circumstances and amount of damages for gratuitous attendant care (Griffiths v Kirkemeyer damages)
- B6 Punitive, exemplary and aggravated damages to be abolished, or at the least, excluded by legislation from insurance cover
- B7 Structured settlements tax legislation to be passed by the Commonwealth. All jurisdictions to pass legislation encouraging the use of structured settlements (though not compulsory) and allowing consent orders
- B8 Set the statute of limitations period at three years for all personal injury claims, with limited judicial discretion to extend in special circumstances and to protect minors
- B9 Prohibit recovery of damages if the injured person was engaged in a criminal activity and thereby contributes to the risk of injury
- B10 Legislate to ensure that the consequences of taking recreational drugs (including alcohol) are taken into account as contributory negligence and do not lead to an increase in the duty of care owed by a third party
- B11 Proportionate liability to apply to personal injury and property damage claims
- B12 Be ready to adopt for public liability any proposals that emerge from the medical indemnity debate, especially regarding long term care

*Comment*

This package of measures, broadly consistent with recent reforms in other personal injury classes, aims to stabilise claim costs and remove some areas of uncertainty.

It should be noted that the impact on claims cost, and in due course on premiums, will not be uniform across risk types. For example a general damages threshold will have a greater impact on risk types with a high volume of “slip and fall” claims.

## *C Review of the Law of Negligence*

The law of negligence is complex and technical - it has evolved over many decades of judicial interpretation.

We are satisfied that the evidence indicates a gradual “drift” or “stretching” of the interpretation of negligence over several decades so that there are cases succeeding today that would not have succeeded at times in the past. We note there is some dispute over this conclusion, and there is also evidence that recent High Court decisions may have stopped or reversed this trend.

This issue - and what could be done about it - is beyond both our expertise and the time available for this project. It is, however, a fundamental one. We recommend that Governments engage a specific expert panel to consider it. A first draft terms of reference has been prepared to help understand this proposal.

## *D The legal system - assessing and determining claims*

*Problem*

The environment in which claims are currently resolved is overly adversarial. This unnecessarily delays claim resolution and increases the costs incurred in achieving the result. We propose a system designed to encourage early resolution and discourage undesirable behaviour.

*Proposals*

- D1 Procedures to be introduced to encourage resolution of claims without resort to litigation where possible - including:
- pre-litigation exchange of evidence
  - compulsory conferencing
  - legal costs rules structured to support the initiatives

- D2 Advertising of personal injury legal services to be restricted to limited factual matters and selected media
- D3 Impose a maximum “uplift” factor for legal fees in “no win no fee” arrangements

*Comment*

The package of proposals should encourage good practice. It is based on principles of fairness, disclosure and co-operation. It should improve the speed with which claims are resolved and reduce the transaction costs in achieving that resolution. This contributes both to lower claim costs and greater certainty for claimants and insurers.

## Recommendations to deal with availability of cover and other insurance issues

### *E Risk management*

*Problem*

While large organisations have developed extensive skills and competence in risk management, this has not yet spread widely to smaller businesses and community groups.

*Proposal*

- E1 Risk management guidelines to be made available to all organisations, and especially targeted to not-for-profit, community, sports and charity groups
- E2 Acceptance of these guidelines to be a condition for entry to any public liability group buying scheme created for NFP organisations
- E3 Acceptance of these guidelines to be a pre-condition for benefiting from legal protection as per proposals A1 and A3

*Comment*

The long term benefits of this proposal lie in the reduction of injuries and consequential claims. These benefits will take time to achieve, and will not immediately affect premium rates.



Implementation of these recommendations requires a modest commitment from Governments, mainly to leverage the skills already available in industry and umbrella groups in the private sector.

Risk management guidelines are already available from some organisations (eg NSW Dept of Sport and Recreation, Victorian "Our Community" organisation). We believe that the most effective way to widen their use is for the appropriate industry or group of organisations to develop appropriate plans and make them publicly accessible.

## **F Group buying**

### *Problem*

While "Group Buying" has been suggested as a way to resolve the current "availability" problems in public liability insurance, especially in the community sector, few opportunities have yet been developed for the worst affected groups.

### *Proposals*

- F1 Create a public liability insurance group buying scheme for community organisations, preferably available nationally, with limited exclusions
- F2 Refer community organisations excluded from the group buying scheme to their own umbrella body which can facilitate further groupings and risk management with a view to creating specialist schemes
- F3 Refer to their own industry body those commercial and semi-commercial entities that find cover is unavailable, with a view to negotiating a suitable industry scheme
- F4 Pooling of risk without insurance backing is not recommended for most organisations due to prudential concerns over security of claims and the difficulties of governance

### *Comment*

Regarding the first proposal, there are preparations already being made in some States (VIC, TAS, QLD) to create state-based schemes for community organisations.

Some insurers have indicated a willingness to support a scheme on a national basis, although it is not clear at the date of this report whether terms suitable to all parties can be devised.

In our view it is highly desirable to have a scheme available nationally, and we recommend continuing efforts be made in that direction. If a suitable scheme cannot be devised, State based schemes should still be supported.

For those outside such a scheme (and if such schemes cannot be implemented) the other proposals are relevant.

For Group Buying to succeed, there must be at least:

- some similarity between the risks being covered
- coherent data available on the nature and extent of the risks covered
- a high takeup by the members of the group (to reduce selection) and
- a common attitude to risk reduction and risk management (to ensure equity between scheme members)

Schemes combining say NFPs with small businesses are unlikely to meet these requirements.

## **G** *Role of insurers*

### *Problem*

The contribution expected of insurers in resolving the public liability crisis needs to be articulated and agreed.

### *Proposals*

- G1 Create an information line or other reference group for organisations having trouble finding cover so they can be directed to what cover does exist (already actioned)
- G2 Insurers to support a group buying scheme for community organisations (see proposal F1)
- G3 Insurers to be compelled to contribute to a national data set
- G4 Insurers to revise their strategic approach to claims management
- G5 Insurers to accept overall accountability for realising, tracking, and demonstrating the benefits to Australian society arising out of the total reform package implemented

### *Comment*

These proposals contain short-, medium- and long-term actions to solve the availability problem in public liability insurance. The proposal to contribute to a national data set is, in addition, a safeguard to ensure that the benefit of reduced claims costs is in fact passed back to society and customers in the form of reduced premiums.

The revision to claims management strategies is required to obtain the benefit of the revised legal systems in Section D. In addition, following any reform of tort law, insurers will have to build test cases and support them through the courts, rather than taking the “safe” option of settling out of court. There is also a need to benchmark current Australian practices against global best practice.

There is a need to track and demonstrate the benefits to society from the reforms. Insurers have a central role to play in this.

## *H Taxation*

### *Problem*

GST (Federal) and Stamp Duty (State) add about 20% to the cost of public liability insurance premiums. Should these taxes be changed to reduce the cost of premiums?

### *Proposals*

- H1 There is no case for a change to the GST regime, as most purchasers of public liability insurance are businesses that receive input credits for the GST paid
- H2 Revision to Stamp Duty is a matter for States, in the context of State finances

### *Comment*

It is open to any State to reduce stamp duty as a concession for the NFP or any other sector, and we note that the ACT has announced their intention to do this.

Any reduction should apply to all covers bought by the affected organisations, not just the public liability component.

In addition it should be noted that any selective reduction introduces new compliance costs and it is preferable if all insurance stamp duty can be dealt with consistently.

## National consistency

There is a strong desire among all stakeholders for national consistency. Complete national uniformity, however, is not practical or desirable in all circumstances.

To the extent that we already have differences among jurisdictions, our recommendation is that each jurisdiction first aim for consistency within its own borders.

For each of our proposals we have recommended the extent of national consistency we believe to be appropriate in order to achieve the required effect:

- Uniform** - To be implemented in a uniform way in all jurisdictions, eg by way of uniform state legislation
- Consistent** - To achieve the same objective in each jurisdiction, but by different specific means, reflecting:
- Existing differences in State legislation
  - Different needs by jurisdiction
- Optional** - Non critical that the recommendation be adopted by each jurisdiction

A summary of these national consistency recommendations appears below:

Proposal		Proposal	
A1 - Self assumption of risk	Uniform	C - Review Law of Negligence	N/A
A2 - Protect volunteers with an indemnity	Uniform	D1 - Encourage Early Resolution	Consistent
A3 - Protect not-for-profit organisations	Uniform	D2 - Prohibit certain legal advertising	Optional
A4 - Coverage for volunteer workers	Consistent	D3 - Reform "no win-no fee" arrangements and "uplift" fees	Consistent
A5 - Liability of public agencies	Uniform	E1 - Risk Management: guidelines available	Consistent
B1 - General damages (pain and suffering)	Consistent	E2 - Risk Management: for entry to NFP scheme	Uniform
B2 - Interest	Uniform	E3 - Risk Management: for legal protection	Consistent
B3 - Caps on loss of earning capacity	Consistent	F1 - National community scheme	Uniform
B4 - Discount rates	Consistent	F2 - National community scheme: excluded bodies	Consistent
B5 - Gratuitous attendant care	Uniform	F3 - Group buying - commercial	Uniform
B6 - Punitive damages	Consistent	F4 - Non-insured mutual pools	Optional
B7 - Structured settlements	Consistent	G1 - Insurers information line	Uniform
B8 - Statute of limitations	Uniform	G2 - Insurer support for community scheme	Uniform
B9 - Criminal Activity	Uniform	G3 - Insurer contribution to data set	Uniform
B10 - Consequences of recreational drugs	Consistent	G4 - Strategic claims management	Consistent
B11 - Proportionate liability	Uniform	G5 - Accountability for benefit realisation and tracking	Uniform
B12 - Long term care	Uniform	H - Insurance taxes	Uniform/Optional

## Proposals as a package

Public liability insurance represents a complex problem requiring multiple solutions. Many of the proposed solutions are not interchangeable - e.g. placing restrictions on the amount of compensation is a complement for the reform of "negligence", not a substitute.

The recommendations in this report have been constructed to complement and support each other. In general, the benefits emerging from implementation of the total package will produce an overall benefit well in excess of the individual components.

When implementation decisions are made it is important that "packaging" be considered, e.g. general damages thresholds and legal costs measures need to be consistent to support each other.

All the legislative reform applicable to claims must be applied to claims for personal injury or death, whether in negligence, contract or statute. In this way conflict of laws and potential future forum shopping is minimised.

## Additional evidence available

Since our March report, we have been working to identify additional evidence about the nature of the problems in public liability insurance and to guide the development of reform proposals.

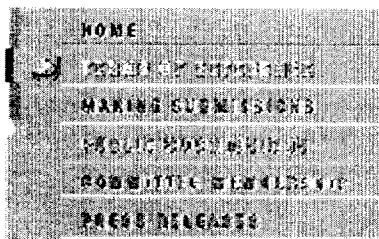
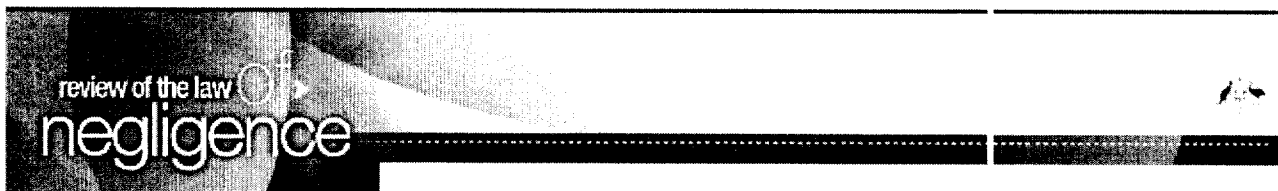
One of the research projects has involved gathering relevant international experience. Our findings have been summarised in this report.

Some progress has been made with Court statistics. Despite continuing limitations over accuracy, these statistics appear to support a view that there has been a steady increase in public liability bodily injury claims over the last five to ten years.

Of greatest value is that five major insurers have "opened their books" by providing detailed actuarial data from their systems. This data indicates that:

- all jurisdictions have experienced an increase in the size of bodily injury claims in excess of normal inflation
- the rate of increase appears to be higher since the mid 1990s
- NSW (and ACT) have a higher average size for bodily injury claims than other jurisdictions.

**APPENDIX C**  
**Terms of Reference -**  
**Principled Based Review of the Law of Negligence by a Panel of Eminent Persons**



## **Terms of Reference**

### **Principles Based Review of the Law of Negligence by a Panel of Eminent Persons**

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

Accordingly, the Panel is requested to:

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death, including:

- (a) the formulation of duties and standards of care;
- (b) causation;
- (c) the foreseeability of harm;
- (d) the remoteness of risk;
- (e) contributory negligence; and
- (f) allowing individuals to assume risk.

2. Develop and evaluate principled options to limit liability and quantum of awards for damages.

3. In conducting this inquiry, the Panel must:

- (a) address the principles applied in negligence to limit the liability of public authorities;
- (b) develop and evaluate proposals to allow self assumption of risk to override common law principles;
- (c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others;
- (d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;
- (e) develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss; and
- (f) develop and evaluate options for exempting or limiting the

liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts).

4. Review the interaction of the *Trade Practices Act 1974* (as proposed to be amended by the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002*) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk).

In conducting this inquiry, the Panel must:

(a) develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and

(b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.

5. Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons.

In developing options the panel must consider:

(a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and

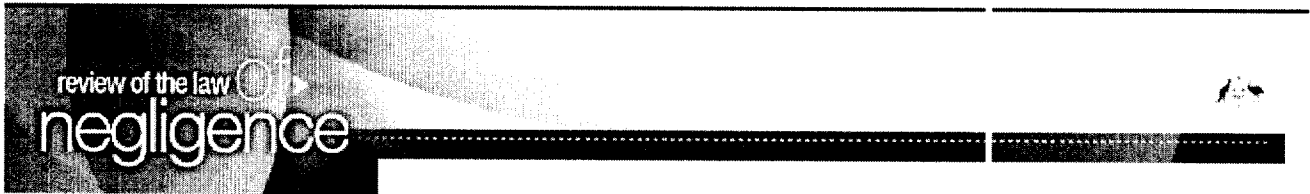
(b) establishing the appropriate date when the limitation period commences.

#### Report Date

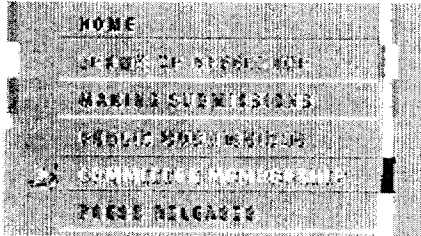
The Panel is required to report to Ministers on terms 3(d), 3(f), 4 and 5 by 30 August 2002 and on the remainder of terms by 30 September 2002.

\* A not-for-profit organisation in this context may include charities, community service and sporting organisations.





## Review Panel Membership



### Chairman

#### The Honourable Justice David Andrew Ipp

Justice Ipp has been an Acting Judge of Appeal, Court of Appeal, Supreme Court of New South Wales, since 2001 and Justice, Supreme Court of Western Australia, since 1989. He was admitted to the Western Australian Bar in 1984 and appointed as a Queen's Counsel in 1985.

### Members

#### Professor Peter Cane

Professor Cane has been a Professor of Law in the Research School of Social Sciences at the Australian National University since 1997. For 20 years before that he taught at Corpus Christi College, Oxford, being successively a lecturer, reader and professor. His main research interests lie in the law of obligations (especially tort law), and in public law (especially administrative law).

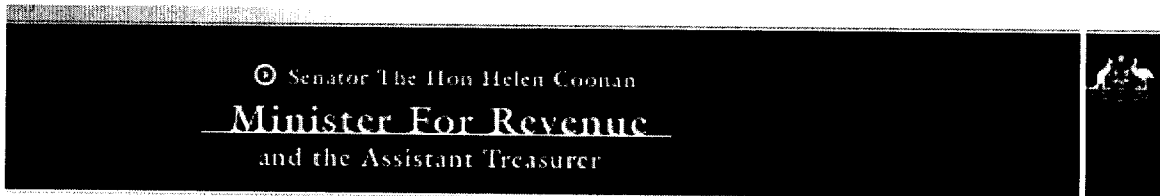
#### Dr Don Sheldon MBBS, FRACS, FRC

Dr Sheldon has been the Chairman of the Council of Procedural Specialists since 1993. His particular interests are in Upper GI Surgery.

#### Mr Ian Macintosh

Mr Macintosh has been the Mayor of Bathurst City Council in New South Wales since 1995. He also has been the Chairman of the NSW Country Mayors Association since 2000.

**APPENDIX D**  
**Press release and recommendations from the**  
***Review of the Law of Negligence Report, August 2002***



C91/02

2 September 2002

## MINISTER WELCOMES FIRST NEGLIGENCE REVIEW REPORT

Assistant Treasurer Senator Helen Coonan today released the first report of the Review of the Law of Negligence.

The Review, chaired by the Honourable Justice David Ipp, was established as one of the measures agreed by the second Ministerial Meeting on Public Liability Insurance in May.

The panel, comprising Justice Ipp, Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh, was asked to inquire into the law of negligence and to develop a series of proposals which provide a principled approach to reforming the law of negligence.

"The cost and availability of public liability, medical and professional indemnity insurance is having a significant impact on many aspects of Australian life," Senator Coonan said.

"The Commonwealth, and all States and Territories, are grappling with ways of implementing responsible reform which will take the pressure off insurance premiums while providing adequate protection for consumers.

"There is strong community support for actions by Governments at all levels to ensure our system of compensating injuries is balanced and does not contribute to a culture of blame.

"Australians are clearly saying to their leaders that some of the payouts coming from the courts just don't seem to make sense and they want some balance restored to the system.

"The report which I am releasing today contains a number of very significant proposals to address these issues.

"The Commonwealth will carefully consider the changes being proposed and I would urge my counterparts in State and Territory Governments to do the same."

The report recommends a range of measures including:

- A national response embodied in a single statute;
- Changes to negligence law to protect doctors who provide treatment that accords with the widely held views of a significant number of respected practitioners in the relevant medical field; and
- Individuals taking part in recreational activities be more responsible for their own actions and be unable to sue for obvious risks.

This report is the first of two to be produced by the Review. In its second report, due on September 30, the panel will develop principled options for limiting liability and the quantum of awards for damages as well as evaluating proposals to allow self-assumption of risk to override the common law.

Senator Coonan said the panel had been guided by the principle that individuals should take more responsibility for their own actions.

"The changes being proposed are not about taking away people's rights or reducing consumer protection," Senator Coonan said.

"They are about reforming a system which has become unaffordable and meeting the expectations of the community while balancing the interests of those who are injured with those of the community at large.

"The goal should be a system that imposes a reasonable burden of responsibility on individuals to take care of others and to take care of themselves.

"As the panel has pointed out, only a small proportion of the sick, injured and disabled are in a position to be compensated through the courts and under the current system. Those who are able to frame a legal action arising from their misfortune are often able to receive compensation which is very much higher than others who have suffered the same fate."

Senator Coonan said the recommendations of the report have the potential to greatly impact on the areas of medical negligence, public liability and professional indemnity insurance.

She said the panel had also pointed to areas outside the scope of their review that require attention, such as legal and administrative costs which can make up as much as 40 per cent of total compensation costs.

"I would like to thank Justice Ipp, Professor Cane, Professor Sheldon and Mr Macintosh for their hard work on this important report," Senator Coonan said.

Senator Coonan said the Government would carefully consider the panel's recommendations and she expected them to be discussed with State and Territory Governments at the next Ministerial Meeting on September 27, 2002, in Sydney.

The full report is available at <http://revofneg.treasury.gov.au>

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### **First Report of the Principles Based Review of Negligence**

There is a widely held view in the Australian community that insurance has become unaffordable and unobtainable that this is due in large part to the operation of the legal system in which:

- the law of negligence, as applied by the courts, is unclear and unpredictable;
- it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants;
- damages awards in personal injuries cases are frequently too high.

In its first report to Governments, the Panel was asked to report on matters relating to:

- i. professional negligence;
- ii. options for limiting the liability of not for profit organisations;
- iii. the interaction of the *Trade Practices Act 1974* with common law principles; and
- iv. the statute of limitations.

The Panel will report on a range of other areas of the law in its second report to Governments due on 30 September 2002. The two reports of the Panel will be a single integrated set of proposals for reform.

### **General Principles**

The Panel sees its task as being to recommend changes to the law that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves.

The Panel has sought to strike a balance between the interests of injured people and those of injurers that seems to be fair and likely to be widely accepted in the community at large.

### **Injured Persons' Rights**

It is the view of the Panel that, unless it is retrospective, statutory reform of the law does not deprive injured persons of their rights.

Relatively speaking, personal injury law provides very generous compensation to a very small proportion of the population at considerable expense to the rest of the community. Only very small proportions of deaths or injury result in the payment of compensation. The vast majority of those who are injured have to rely on their own resources and on other sources of assistance, notably social security.

This is a theme that will be further explored in the Panel's second report.

### **Effective Law Reform**

The Panel's view is that in order for law reform to be effective, reforms to personal injury law must provide a uniform scheme regardless of the legal category (tort, contract, equity, under statute or otherwise) under which a claim is brought.

The Panel unqualifiedly supports the desirability of enacting measures that would bring the law in all Australian jurisdictions as far as possible into conformity.

A summary of the Panel's recommendations is as follows:

#### **I. National Response**

- That there be a national response to be incorporated in a single statute. The law would need to be incorporated in each jurisdiction - the Commonwealth (where relevant) and each State and Territory.

#### **II. Overarching Reach**

- That the legislative scheme should apply (unless expressly provided to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the cause is brought in tort, contract, equity, under statute (such as the Trade Practices Act 1974, or State and Territory Fair Trading Acts) or any other cause of action.

#### **III. Professional Negligence**

- The Panel has particularly focused for the purposes of this report on the liability of medical practitioners, however the suggested rule developed by the panel could be applied more widely to all professional groups (see Options Paragraphs 3.24 - 3.30).

#### Medical Negligence

- The issue is what standard of care should be applied when assessing whether or not a medical practitioner has been negligent.
- The panel notes that an important difference exists between the standard applied in providing or failing to provide treatment on the one hand and the provision of information on the other.

#### Standard of Care for Treatment

- The test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

*A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless a court considers that the opinion was irrational.*

- This provides a modified version of the Bolam Rule which will require a court to defer to widely held medical opinion unless in an exceptional case, the expert opinion were both widely held and irrational.
- This formulation will give doctors as much protection as is desirable in the public interest. It will protect medical practitioners in cases of medical misadventure, but will leave open cases where a medical practitioner has acted negligently and those actions are not supported by a wide body of medical opinion.

#### Standard of Care for the Provision of Information by Medical Practitioners

- The medical practitioner's duties to inform should be expressed as duties to take reasonable care.
- Principles underpinning the duty to take reasonable care should embody the following.
  - The proactive duty to inform. Which requires a medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.
  - The proactive duty to inform should be determined by reference to the time at which the relevant decision was made by the patient and not at a later time.
  - A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless warning of the risk is required by statute.
  - Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.
  - The reactive duty to inform. Which requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

#### Procedural Issues

##### (a) Court Experts

- That further consideration be given to the use of Court appointed experts (along the lines now operative in the United Kingdom) on a three year trial period.

##### (b) Notice of Claims

- That Government's consider the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.
- This would be based on the '90 day rule', applying in South Australia. This rule requires a plaintiff to give at least 90 days notice to a defendant of a proposed action. The notice must provide sufficient detail of the claim to enable the defendant an opportunity to settle the claim before proceedings commence.

#### Other Professionals

- In cases involving the allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:
  - What could reasonably be expected of a person professing that skill.
  - The relevant circumstances at the date of the alleged negligence and not a later date.

#### **IV. Not for Profit Organisations**

- Rather than adopt a general exemption for not for profits, the Panel has preferred to address the need to strike a better balance between the various interests at stake by a series of recommendations to be found in its two reports.
- In essence the Panel has found that not for profits vary considerably in size and scope whilst the risks associated with not for profits are no different to those presented by similar activities conducted on a commercial basis eg. riding schools and other activities.
- However, recommended changes that will assist not for profit and community activities as well as activities more broadly include:

#### Recreational Services

- The provider of a recreational service should not be liable for personal injury or death suffered from a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.
  - An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.
  - Obvious risks include risks that are patent or matters of common knowledge.
  - A risk may be obvious even though it is of low probability.
- The rationale for this approach is that people who participate in such activities often do so

voluntarily and wholly or predominantly for their own enjoyment.

### Warnings of Risk

- In line with the basic principle that people should take responsibility for their own safety, the Panel has recommended that the law be amended so that a person cannot be held liable for a failure to warn of obvious risks.
- A person should not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.
  - An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.
  - Obvious risks include risks that are patent or matter of common knowledge.
  - A risk might be obvious even though it is of low probability.
- The Panel's recommendation would apply broadly and would have particular applicability to the liability of occupiers of land. Currently, the failure of a land occupier to provide warnings of dangers may constitute negligence, even though the occupier could not reasonably be expected to remove the danger.
- The effect of the Panel's recommendation would be to reverse the decision in *Nagel v Rottneest Island Authority*, in which it was held that a local council's failure to warn of the dangers of diving into shallow water was negligent.

### **V. Trade Practices Act**

- The Panel recommends that the Trade Practices Act should be amended to provide that the rules relating to limitation of actions recommended by the Panel apply to any claim for negligently caused personal injury or death that is brought under:
  - Part IVA - unconscionable conduct;
  - Part V Div 1A - product safety and product information;
  - Part V Div 2A - liability of manufacturers and importers of goods.
- As it becomes more difficult for plaintiffs to succeed in claims based on negligence, lawyers will inevitably search for an alternative cause of action. The Trade Practices Act and equivalent provisions in State and Territory law provide potential sources for claims for personal injury and death. Steps should be taken to ensure that actions taken under the Trade Practices Act are not more attractive or available than actions under the general law of negligence.
- The Panel also recommends that the Trade Practices Act be amended to:
  - prevent individuals bringing claims for personal injury or death under Part V, Div 1 - misleading and deceptive conduct (particularly sections 52 and 53); and
  - prevent the ACCC from bringing representative actions for personal injury and death resulting from contraventions of Part V, Div 1.
- It is open to serious question whether Part V, Div 1 of the Trade Practices Act was ever intended to be used in a cause of action for injury or death. To date, plaintiffs have rarely relied on these provisions to bring claims for personal injury or death, however, if personal injury law is amended as recommended by the Panel, this situation is likely to change.
- A plaintiff can succeed in an action under section 52 merely by proving that a statement was misleading or deceptive. Unlike at common law, there is no need to prove that the statement was made negligently or dishonestly.
- While actions under section 52 are restricted to conduct 'in trade or commerce', it is the Panel's view that there remains considerable opportunity for claims for personal injury or death to be brought under this section.
- It is the Panel's view that the possibility of making claims under section 52 and similar legislation could have an adverse effect on the reforms recommended in its reports.
- It is the Panel's view that these recommendations do not unacceptably reduce the legal protection of consumers under the Trade Practices Act. The main effect of these recommendations is to remove a basis of strict liability damages for personal injury or death resulting from misleading or deceptive conduct.
- To the extent that legislative changes are made to limit the potential use of the Trade Practices Act for claims for personal injury and death, similar changes should be made to State and Territory legislation containing similar provisions.

### **VI. The Trade Practices Amendment (Liability for Recreational Services) Bill 2002**

- The Federal Government has introduced a Bill into the Parliament to amend the Trade Practices Act to allow consumers to 'waive' implied warranties under the Act in a contract for the supply of a recreational service.

- The purpose of the Bill is to prevent section 68 of the Trade Practices Act rendering void a provision in a contract for recreational services that purports to exclude, restrict or modify the 'statutory warranties' contained in section 74 of that Act.
- Section 74 of the Trade Practices Act requires that a supply of services must be rendered with due care and skill and that the services are reasonably fit for their intended purpose. Section 68 provides that any term of a contract that purports to exclude or restrict the warranties implied by section 74 is void.
- The Panel has concluded that the Bill does not significantly reduce consumer protection. This is because the Bill only removes the obstacle of section 68 to waivers, it does not exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents significant obstacles to achieving this.
- Notwithstanding this, the Panel considers that the amendments contained in the Bill are necessary to enable waivers to be effective.
- The Bill compliments the recommendations of the Panel with respect to recreational services and warnings. The Panel has recommended that the definition of personal injury and recreational services contained in the Bill be amended.

## VII. Limitation of Actions

**The Panel has recommended that the limitation period be three years from the date of discoverability.**

- The Panel has recommended that a system of limitations should embody the following principles.
  - The limitation period commences on the date of discoverability.
  - The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:
    - : has occurred; and
    - : was attributable to negligence conduct of the defendant; and
    - : in the case of personal injury, was sufficiently significant to warrant bringing proceedings.
  - Claims become statute barred in most cases on the expiry of the earlier of:
    - : the limitation period; or
    - : a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').
  - The court has a discretion at any time to extend the long-stop period to the expiry of a period of three years from the date of discoverability.
  - In exercising its discretion, the court must have regard to the justice of the case, and in particular:
    - : whether the passage of time has prejudiced a fair trial of the claim;
    - : the nature and extent of the plaintiffs loss;
    - : the nature of the defendant's conduct.
- A workable limitation system needs to provide fairness to both plaintiffs and defendants. The system must be sufficiently flexible to cope fairly with both damage suffered immediately or shortly after the occurrence of a wrongful act and with latent damage that can only be detected years afterward.
- The array of different limitation regimes in Australia leads to confusion, litigious disputes and materially influence the nature of the cause of action relied upon, occasionally leading to forum shopping.

### Minors and People under a Disability

- The Panel makes recommendations with respect to the treatment of minors, persons under a disability and the deceased. Except in very limited cases (for example, when a minor is not under the care of a parent or guardian or in the case of a person under a disability, where an administrator has not been appointed), the standard limitation period would apply.
- The limitation periods as proposed should apply in all jurisdictions.

## VIII. Copies of the Report

Copies of the Panel's report can be obtained from the Panel's web-site at <http://revofneg.treasury.gov.au>



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**APPENDIX E**  
**Productivity Commission**  
**Terms of reference for research study into Australian Insurers' claims**  
**management practices**



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## Public Liability Claims Management Terms of Reference

### PRODUCTIVITY COMMISSION ACT 1998

The Productivity Commission is requested to undertake a research study into Australian Insurers' claims management practices in the public liability class of insurance and benchmark them against world's best practice.

In undertaking this study, the Commission is to:

1. Benchmark Australian insurers' claims management practices against world standards, having regard to:
  - a. differences in legal processes between States and Territories in Australia;
  - b. the impact of litigation on claims costs;
  - c. the proportion of claims settled out of court and the factors determining which claims are settled out of court, and the size of these claims;
  - d. whether insurers collate claims history and what criteria for collation are used;
  - e. the time taken to finalise claims and factors determining this time;
  - f. the incidence of claims as a proportion of policies written and changes in the average size of claims over time;
  - g. the cost of claims management relative to the size of payouts, and the factors influencing this; and
  - h. any connection between claims management practices and the affordability, and the availability of public liability insurance.
2. Take account of recent substantive studies relevant to the study, including those by Trowbridge Consulting.
3. Consult with key interest groups, including insurance companies, as well as any other relevant parties.

The Commission is to report by 31 December 2002 and the report is to be published.

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# Current Projects

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## Public Liability Claims Management Commissioned Study

### Commencement of Study

The Productivity Commission has commenced a study into Public Liability Claims Management.

### About the Study

On 26 July 2002, the Parliamentary Secretary to the Treasurer asked the Productivity Commission to undertake a research study into Australian Insurers' claims management practices in the public liability class of insurance and benchmark them against world's best practice. Further details are available in the [terms of reference](#).

### Further Information

If you would like further information about the research study, or consider that you may wish to participate in the research study, please contact the research study team at the Commission as follows:

Administrative Matters	Jill Irvine	(02) 6240 3223
Other Matters	John Williams	(02) 6240 3215
Fax		(02) 6240 3311
Email	Public Liability Claims Management Study	
Mail	Public Liability Claims Management Study Productivity Commission PO Box 80 Belconnen ACT 2616	

### Project Information

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**APPENDIX F**

**“Chief Justice suggests remedies for the tort of negligence – ‘the last outpost of the welfare state’, published in the *Law Society Journal*, June 2002, pp 24-25.**

Premier Bob Carr has told Parliament that problems with the law of negligence outlined by the Chief Justice will be addressed in stage two of the Government's reform package.

## Chief Justice suggests remedies for the

*The following is the summary of an address by The Honourable J. J. Spigelman AC, Chief Justice of New South Wales, to the Judicial Conference of Australia Colloquium 2002 in Launceston on Saturday 27 April 2002. The full text of the address is available on the NSW Supreme Court website [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).*

**I**N MANY RESPECTS THE LAW of negligence is the last outpost of the welfare state. Notwithstanding that the system is based on a finding of fault, the practical operation of the law of negligence suggests that an element of welfare state paternalism, driven by compassion, may well exist. Furthermore, on some occasions there may have been inadequate weight given to the principle that an individual should take responsibility for his or her own actions.

From the 1960s to the 1990s, a long-term trend of judicial decision-making can be discerned by which liability and damages expanded. However, that trend has, in recent years, been decisively stopped and reversed. There is now a significant body of recent High Court decisions, and an even larger body of intermediate court of appeal decisions, which find in favour of defendants, when the opposite decision would have been made if the long-term trend had continued.

Over the years there have been a large number of comments by judges criticising the previous trend and advocating its reversal.

For many years, the judiciary was regarded as too conservative and pro-defendant. Various statutes extended liability to situations that would



**Chief Justice Spigelman has proposed a 'principle-driven' model for legislative intervention in tort reform.** PHOTO: PATRICK BYRNE

be denied at common law. Commencing about twenty years ago, the process appears to have been reversed. Judges came to be regarded as too pro-plaintiff. Throughout Australia, statutes restricted the scope of liability at common law in major areas of conduct including motor vehicle accidents

It is sometimes said that legislatures should not interfere with common law rights. That does not always recognise the degree to which, as a matter of practical significance, past amendments of the common law by statute have expanded the range of liability. What many regard as 'common law rights' are, in fact, statutory rights which abolished common law restrictions.

In the three major legislative schemes limiting common law actions – for motor vehicles, industrial accidents and medical negligence – the New South Wales Parliament has adopted a variety of

different provisions as the basis upon which liability can be established and damages calculated. There is no discernible principle lying behind these differences. Persons who

**“... in the long run, it is quite likely that the significant differences in compensation based on how an injury occurs, rather than the need for compensation, will create resentment in the community.”**

and industrial accidents and, in New South Wales last year, in medical negligence cases. Similar change is now in prospect with respect to public liability insurance.

# tort of negligence – ‘the last outpost of the welfare state’

suffer injuries in the three different ways are subject to quite different caps and thresholds and different heads of damages can be recovered in different ways.

The primary reason for the creation of such differences is that all of the schemes – and presumably the public liability insurance scheme now in prospect – have been determined by the need to control or reduce insurance premiums in each of the different contexts.

The primary source of the ideas about the changes has been insurance underwriters’ seeking to limit claims (and therefore premiums) or the equivalent perspective of a public instrumentality responsible for a government-backed scheme. The reforms are underwriter driven.

In my opinion, in the long run, it is quite likely that the significant differences in compensation based on how an injury occurs, rather than the need for compensation, will create resentment in the community. Why should compensation be fundamentally different depending on whether injury occurred in a car or in a car park or at work or on the operating table or in a public swimming pool or at a supermarket? It will be very hard to retain a sense of fairness for the system as a whole. This is an inevitable result of underwriter-driven reform.

There is an alternative model for legislative intervention, which I call ‘principle-driven reform’, and which is equally capable of restricting liability and damages in accordance with the application of universally applicable principles. Changes to the present law have been articulated by judges, members of the legal profession and legal academics. Judgments that have been overruled and, dissenting judgments often contain useful insights. These sources identify a wide range of changes which could, cumula-

tively, achieve the apparent objective of reducing the total amount of resources that the community is required to make available for purposes of compensation.

Changes based on principle could include the following:

□ Change the test of foreseeability of risk so that it excludes a broader area than risks that are “far fetched or fanciful”.

□ Establish that the remoteness of a risk is always pertinent when determining whether a duty has been breached.

□ Restrict the circumstances in which one person must guard against the failure of another to take care for their own safety.

□ Adopt the test for professional standards, the effect of which is that it is not open for a court to find a standard medical practice to be negligent.

□ Consider the introduction of a form of proportionate liability for property damage or pure economic loss, so that a defendant who is only partially responsible for the damage does not have to bear the whole of the loss when some other person is insolvent.

□ Reconsider the circumstances in which offsetting benefits, such as the returns from private insurance or superannuation entitlements based on employer contributions, are taken into account by way of reducing damages otherwise payable.

□ Reduce death benefits for relatives, in the same way as damages would be reduced for a plaintiff who had survived, when the deceased has been guilty of contributory negligence.

□ Limit the amount recoverable for economic loss so that higher earners are required to take out their own insurance for loss of income above this level.

□ Reconsider the basis on which damages are payable for gratuitous services, to which

interest is attached, perhaps by exempting from such damages services which would have been provided even if there had been no accident.

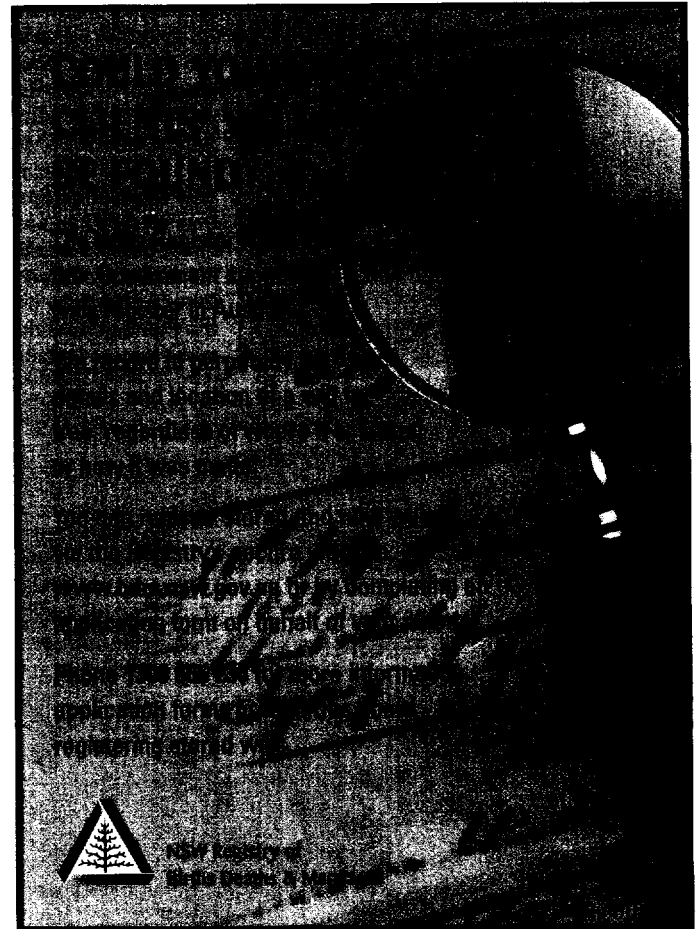
□ Reduce the interest payable on damages in those States where, in recent times, they have been between four and six percentage points above that of other States.

□ Increase the discount rate used to determine the present value of future losses above the rate determined by the High Court in 1981.

The cumulative effect of some or all of such changes would be to achieve the objective, now apparently widely held, of reducing the total amount that the community must make available for the purposes of compensation by insurance premiums, insurance

company returns and taxes.

Such changes can probably not be adopted on the urgent time-scale which appears to be driving the current decision making process. However, changes of the character I have identified may make it possible to alter some aspects of the special regimes adopted for motor vehicles, industrial accidents, medical negligence and, in prospect, public liability, so that the kinds of differences and anomalies that have arisen through an underwriter driven reform process are eventually removed. Such an approach would, in my opinion, achieve the result now sought to be achieved in a manner more likely to be regarded in the long term as fair and therefore to receive broad community acceptance. □



**APPENDIX G**  
**Case summary – *Rogers v Whitaker* (1992) 175 CLR 479**



## ***Rogers v Whitaker* (1992) 175 CLR 479 – case summary**

This is the High Court case which applied a different standard of care from that expounded in Bolam's case. The full text of the case is available at <http://www.austlii.edu.au><sup>1</sup>.

### *Facts*

This case involved a plaintiff respondent who was left totally blind in the left eye following surgery to the right eye. The surgery to the right eye was to improve scarring in the right eye and restore vision (the plaintiff respondent had very limited vision in the right eye due to an earlier injury). Following the surgery, the plaintiff respondent developed a condition called "sympathetic ophthalmia" which resulted in the plaintiff losing sight in her left eye. In addition, the vision in her right eye did not improve and the plaintiff respondent was rendered almost totally blind following the procedure. The appellant defendant (ophthalmologist) did not warn the patient of the risk of contracting "sympathetic ophthalmia" of which there was a 1 in 14,000 chance of acquiring the condition.

### *Legal question to be determined – breach of duty*

The legal question to be determined in this case involved whether or not the standard of care encompassed a duty to warn of the specific risk in question (a risk which the patient had a 1 in 14,000 chance of acquiring the particular condition following the ophthalmological surgery), and therefore whether the failure to warn of the specific risk resulted in a breach of the doctor's duty of care towards the patient.

### *Evidence*

The primary judge had competing evidence from reputable medical practitioners. One body of medical practitioners stated that it would not have warned of the risk in question. Another body of medical practitioners stated that it would have warned of the risk in question.

### *The standard of care and breach*

The High Court outlined the standard of care to be applied in the case at hand:

The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill ((4) *Bolam v. Friern Hospital Management Committee* (1957) 1 WLR 582, at p 586; see also *Whitehouse v. Jordan* (1981) 1 WLR 246, per Lord Edmund-Davies at p 258 and *Maynard v. West Midlands R.H.A* (1984) 1 WLR 634, per Lord Scarman at p 638), in this case the skill of an ophthalmic surgeon specializing in corneal and anterior segment surgery. As we have stated, the

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<sup>1</sup>

Go to: [http://www.austlii.edu.au/au/cases/cth/high\\_ct/175clr479.html](http://www.austlii.edu.au/au/cases/cth/high_ct/175clr479.html)

Or alternatively, click on Commonwealth cases and legislation, click on High Court decisions, click on alphabetical list, click on R and scroll down to *Rogers v Whittaker*.

failure of the appellant to observe this standard, which the respondent successfully alleged before the primary judge, consisted of the appellant's failure to acquaint the respondent with the danger of sympathetic ophthalmia as a possible result of the surgical procedure to be carried out. The appellant's evidence was that "sympathetic ophthalmia was not something that came to my mind to mention to her".<sup>2</sup>

*The Bolam principle and its application to the facts of Roger v Whitaker*

The High Court discussed the Bolam principle and its application to the case at hand:

The Bolam principle has invariably been applied in English courts... At its basis lies the recognition that, in matters involving medical expertise, there is ample scope for genuine difference of opinion and that a practitioner is not negligent merely because his or her conclusion or procedure differs from that of other practitioners...a finding of negligence requires a finding that the defendant failed to exercise the ordinary skill of a doctor practising in the relevant field.<sup>3</sup>

After referring to an English decision<sup>4</sup>, in which the majority of the House of Lords applied the *Bolam* principle in determining whether or not the question of an omission to warn a patient of inherent risks of a procedure constituted a breach of duty of care, the High Court rejected the application of the Bolam principle in this particular case. The High Court distinguished between cases involving diagnosis and treatment on the one hand, and the provision of information on the other hand. With respect to the provision of information the High Court stated that the Bolam principle could not adequately be applied to such cases. They noted that a patient's consent to a procedure rests on being informed of the risks involved. Further, they stated that the question of whether or not a patient has been given sufficient information to consent to a procedure is not a question which relies on medical standards or practice and therefore is not one to which the Bolam principle is relevant. That is, it is a question for the court to determine, not for the medical profession to determine:

...the factors according to which a court determines whether a medical practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice; the different cases raise varying difficulties which require consideration of different factors ((32) *F v. R.* (1983) 33 SASR, at p 191). Examination of the nature of a doctor-patient relationship compels

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<sup>2</sup> para 6.

<sup>3</sup> para 8.

<sup>4</sup> *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871.

this conclusion. There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient. In diagnosis and treatment, the patient's contribution is limited to the narration of symptoms and relevant history; the medical practitioner provides diagnosis and treatment according to his or her level of skill. However, except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it. **In legal terms, the patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended ((33) *Chatterton v. Gerson* [1981] QB 432, at p 443). But the choice is, in reality, meaningless unless it is made on the basis of relevant information and advice. Because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the patient, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession. Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices.** Except in those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment ((34) See Fleming, *The Law of Torts*, 7th ed. (1987), p 110). Rather, the skill is in communicating the relevant information to the patient in terms which are reasonably adequate for that purpose having regard to the patient's apprehended capacity to understand that information. ...[emphasis added]...<sup>5</sup>

The High Court affirmed the approach taken earlier, on this issue, by the Supreme Court of Canada in the case of *Reibl v Hughes*<sup>6</sup>:

To allow expert medical evidence to determine what risks are material and, hence, should be disclosed, and correlatively, what

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<sup>5</sup> para 14.

<sup>6</sup> (1980) 114 DLR (3d), at p 13.

risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of duty. Expert medical evidence is, of course, relevant to findings as to the risks that reside in or are a result of recommended surgery or other treatment. It will also have a bearing on their materiality but this is not a question that is to be concluded on the basis of the expert medical evidence alone. The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment.

The approach had already been applied in several Australian cases with respect to this issue.<sup>7</sup>

The High Court rejected the appellant defendant's argument with respect to breach of duty, dismissed the appeal and upheld the findings of the primary judge that the appellant defendant had in fact breached its duty of care by failing to warn the respondent plaintiff.

The High Court held that "...a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it."<sup>8</sup>

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<sup>7</sup> *Gover v South Australia* (1985) 39 SASR, at pp 551-552; *Ellis v Wallsend District Hospital* (Unreported; Supreme Court of New South Wales; 16 September 1988); *E v Australian Red Cross* (1991) 27 FCR, at pp359-360.

<sup>8</sup> para 16.