

1. Introduction

The formation of the Panel and the Terms of Reference

1.1 On 30 May 2002, a Ministerial Meeting on Public Liability comprising Ministers from the Commonwealth, States and Territory governments jointly agreed to appoint a Panel of four persons to examine and review the law of negligence including its interaction with the *Trade Practices Act 1974*. The Terms of Reference, as jointly agreed to by the Ministers, were announced by the Commonwealth Government on 2 July 2002.

1.2 This was the second Ministerial Meeting held to discuss public concerns about the cost and availability of public liability insurance. In the Ministerial communiqué that followed, Ministers stated, 'unpredictability in the interpretation of the law of negligence is a factor driving up [insurance] premiums'.

1.3 Within this broad context, the Terms of Reference for the review stated that '[t]he 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'.

1.4 The Ministerial communiqué, the Terms of Reference, and the breadth and range of the responses the Panel received in submissions and consultations, indicate that there is a widely held view in the Australian community that there are problems with the law stemming from perceptions that:

- (a) The law of negligence as it is applied in the courts is unclear and unpredictable.
- (b) In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.
- (c) Damages awards in personal injuries cases are frequently too high.

1.5 Irrespective of whether these perceptions are correct, they are serious matters for the country because they may detract from the regard in which people hold the law, and, therefore, from the very rule of law itself.

1.6 The Panel's task is not to test the accuracy of these perceptions but to take as a starting point for conducting its inquiry the general belief in the Australian community that there is an urgent need to address these problems.

The general task of the Panel

1.7 The prime task of the Panel, as stated by the Terms of Reference, is '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'.

1.8 Having been appointed as a result of a jointly agreed decision of the Commonwealth, State and Territory governments, the Panel, as noted in the Ministerial communiqué, is to assist governments in 'developing consistent national approaches for implementing measures to tackle the problems of rising premiums and reduced availability of public liability insurance'.

1.9 Many of those with whom the Panel has consulted (representing many different interests) have stressed the desirability of enacting measures to bring the law in all the Australian jurisdictions as far as possible into conformity. The Panel unqualifiedly supports this aspiration and would urge upon those with the responsibility of deciding on measures to implement our recommendations to give it their serious consideration.

1.10 In developing a consistent national approach, the Panel has been asked to develop, evaluate and recommend options for reform of personal injury law (by which we mean the law governing liability and damages for personal injury and death resulting from negligence) that address the concerns set out above and that take due account of the interests of both plaintiffs and defendants.

1.11 Some have submitted that the phrase 'with the objective of limiting liability and quantum of damages' in the first paragraph of our Terms of Reference should be understood as instructing the Panel to restate the current law with a view to preventing the further expansion of liability and damages. Furthermore, it has been suggested to the Panel that its task does not include developing options for changing the law so as to reduce the incidence of

liability and the quantum of damages currently provided for. We have not interpreted our task in this way.

1.12 Nevertheless, it has become clear in the course of the Panel's investigations and consultations that in some respects the law is not well understood by many of those who are significantly affected by it. The Panel has reached the conclusion that in certain areas the best way of furthering the objectives of the review is merely to restate the law in an attempt to provide a greater degree of clarity and certainty, and we will make appropriate recommendations in this regard.

1.13 In the course of our deliberations we also formed the view that, in some areas, perceived problems are the result of the way courts apply legal rules and principles that are open to various interpretations. In such cases, we have recommended that the law be restated in such a way as to give courts more guidance about how to apply relevant rules and principles in individual cases.

The scope of the Review

1.14 In conformity with the Panel's Terms of Reference, our reports focus primarily on liability for negligently-caused personal injury and death. We have not considered the law governing liability for negligently-caused property damage and economic loss (although some of our broader proposals and recommendations have implications beyond personal injury law). Nor have we considered liability for intentionally or recklessly caused personal injury and death.

1.15 Throughout its consultations, the Panel was requested to consider issues which we believe extend beyond our Terms of Reference.

1.16 A number of these issues were concerned with the operation of liability insurance, in particular the interaction between the law of negligence and insurance (or between the law of negligence and what has been described in the media and other places as the 'insurance crisis'). Although the Ministerial communiqué (as earlier referred to in paragraphs 1.2) asserts that there is a relationship between the current law and recent rises in insurance premiums, the Panel has not investigated, and has formed no view about that relationship or the likely impact of our recommendations on the insurance market.

1.17 Many of the people and organisations we consulted and who have made submissions to us stressed the importance of improving risk-management and enhancing regulation of potentially harmful activities.

These are important strategies for reducing the incidence of injury and death and, therefore, the amount of resources devoted to the compensation system. However, we consider that this topic is outside our Terms of Reference.

1.18 The costs of the personal injury liability system comprise the 'primary cost' of compensation and the 'secondary costs' of delivering compensation. Most notable of the secondary costs are legal fees and insurers' administrative costs. Secondary costs are relatively very high. Empirical evidence from research projects conducted over the last 30 years suggests that they make up as much as 40 per cent of total costs.¹ Measures to reduce secondary costs could make a significant contribution to furthering the wider objectives of this review, but we consider that they are outside our Terms of Reference.

1.19 Many of those who consulted with the Panel suggested that changes to the law relating to the payment of legal costs in personal injury actions would reduce the litigious culture that, they perceive, contributes to the problems that the Panel is required to address. We have taken the view that legal costs are generally outside our Terms of Reference. However, we make one recommendation on this issue in Chapter 13 (Recommendation 45).

1.20 If implemented, the recommendations made by the Panel will, to a degree, shift the cost of injuries from injurers to injured persons. As a result, some injured persons who, under the current law, would be entitled to compensation will no longer be so entitled; and other persons will be entitled to less compensation. How these issues are to be dealt with is a matter of policy for governments to determine and is not dealt with in our Report.

1.21 In this context it needs to be said that many of the people and organisations we consulted and who have made submissions to us argued that there is a strong case for a no-fault system of compensating injured persons. This is clearly not an issue within our Terms of Reference, and we make no comment on it save to draw attention to the fact that there is a significant body of opinion that supports the implementation of such a system.

1 The earliest major research on the secondary costs of the tort system was conducted for the UK Royal Commission on Civil Liability and Compensation for Personal Injury chaired by Lord Pearson (1978) discussed in P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (London, 1999), 337-9. There is a useful discussion of Australian data in the New South Wales Law Reform Commission's *Report on a Transport Accident Scheme for New South Wales* (LRC 43/1, 1983), paras 3.84-3.93. A recent estimate is that 'defence costs currently represent around 20-35 per cent of total payments made by MDOs.' (G. Harrex, K. Johnston and E. Pearson, *Medical Indemnity in Australia* (a paper presented to the Institute of Actuaries of Australia, XIII General Insurance Seminar, 25-28 November, 2001), 28.

1.22 Despite the fact that the issues discussed above are outside the Terms of Reference for this Review, the Panel nevertheless believes many of these issues deserve careful attention.

1.23 Some people have contended that any statutory reform of the law as contemplated by the Terms of Reference will deprive injured persons of their 'rights'. As long as any such reform is not retrospective, that proposition is incorrect. Parliament can change the law at any time, and parliamentary amendment of the law — including the common law — is, of course, a very common occurrence in Australia. It is part of our democratic system. It is true that the Commonwealth Constitution has been interpreted to prevent legislative removal of a 'vested' cause of action.² But a cause of action vests only when all the facts on which it is based have occurred. We do not recommend any interference with vested causes of action.

Considerations underlying the Report

1.24 The Panel's starting point is that personal injury law comprises a set of rules and principles of personal responsibility. The Panel sees its task as being to recommend changes that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves, consistently with the assumption inherent in the first paragraph of the Terms of Reference that the present state of the law imposes on people too great a burden to take care of others and not enough of a burden to take care of themselves.

1.25 Some of the submissions and representations made to us have stressed the importance of personal injury law as a source of compensation for injured persons, while others have stressed the interest of potential defendants in not being subjected to unduly burdensome legal liabilities. Within the constraints of our Terms of Reference, we have attempted to give due weight to both of these perspectives.

1.26 Some submissions have urged the Panel not to recommend changes to personal injury law that would reduce the level of protection provided to individual consumers of goods and services. The Panel has taken the view that the interests of individual consumers must be weighed against the interests of the community as a whole in reform of the law, and it has tried to strike a reasonable balance between these two sets of interests.

² *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

1.27 Our Terms of Reference require us to undertake a 'principles-based' review. This is an approach suggested by Spigelman CJ in his article 'Negligence: the Last Outpost of the Welfare State' (2002) 76 ALJ 432. The Chief Justice contrasted principles-based law reform with 'underwriter-driven proposals' for special rules to govern particular types of cases or particular categories of potential defendants. The Panel understands principles-based reform as favouring general rules governing as many types of cases and as many categories of potential defendants as is reasonably possible. Principles-based reform favours consistency and uniformity and requires special provisions for particular categories of cases to be positively argued-for and justified. This is the approach to reform that the Panel has adopted in conducting the review and making its proposals and recommendations.

1.28 Our view is that in order to be 'principled' and effective, reforms of personal injury law must deal with such liability regardless of the legal category (tort, contract, equity, under statute or otherwise) under which it arises. If they do not, it may be possible for a claimant to evade limitations on liability for personal injury and death that attach to one cause of action by framing the claim in another cause of action. For example, if a limitation on liability or damages were applied only to the tort of negligence, injured persons would be encouraged to explore the possibility of framing their claim in contract or for breach of a statutory provision.

1.29 Another important consideration underlying our deliberations is that only a small proportion of the sick, injured and disabled recover compensation through the legal liability system, and only a very small proportion of deaths result in the payment of compensation. As a result, only a very small proportion of the total personal and social costs of personal injury and death are met by the imposition of legal liability to pay compensation. The vast majority of those who are injured or suffer disease or lose a breadwinner have to rely on their own resources and on other sources of assistance, notably social security.

1.30 We are also mindful of the fact that the levels of compensation available through personal injury law are generally much higher than those available under the social security system. Relatively speaking, personal injury law provides very generous compensation to a very small proportion of injured people. The Panel has taken the view that the relationship between personal injury law and other systems for meeting the needs of injured people is relevant to its Terms of Reference, especially to that part concerned with assessment of damages.

The Review timetable

1.31 Some submissions criticised the shortness of the period within which the Panel is required to produce options for reform. Some have even urged the Panel to seek an extension of its reporting dates.

1.32 The Panel accepts that the period available for the Review is indeed extremely brief given the complexity and difficulties of the task it has been asked to perform. But that is not the entire picture. The position requires some elaboration.

1.33 The law concerned with liability for personal injury and death has been developed by courts and parliaments over hundreds of years. It is comprised of countless principles and rules, many of which are inter-dependent. Together they form a system of great complexity and subtlety. It is often extremely difficult — and sometimes impossible — to ascertain how changes in one area will affect others. In addition, none of the issues raised by our broad and encompassing Terms of Reference admits of one obvious solution, and all require a balancing of legitimate and competing interests. Some of the issues have been the subject of lengthy and comprehensive reviews by Law Reform Commissions in Australia and other countries. In the time allotted to it, the Panel cannot carry out such a review. (We have, of course, relied heavily on such valuable work in formulating our own recommendations.) These matters are mentioned to make it plain that the Panel is properly cognisant of the nature of the task set for us in our Terms of Reference.

1.34 On the other hand, evidence has been provided to the Panel that throughout the country absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life. Results have included the cancellation of community festivals, carnivals, art shows, agricultural shows, sporting events of all kinds, country fetes, music concerts, Christmas carols, street parades, theatre performances, community halls, and every manner of outdoor event. The Panel has been informed that some schools and kindergartens are not able to offer the facilities they would wish and some have had to close. Hospitals have experienced difficulties and the problems faced by members of the medical and other professions are well-attested. These are merely some examples of the way in which the fabric of everyday life has been harmed.

1.35 These problems have been experienced in the cities of Australia but their effect is most strongly felt in the country. There is evidence that the smaller the town, the more noticeable the impact.

1.36 The Panel understands that:

- (a) There is a widely held view that personal injury law has contributed to this state of affairs, and that reducing liability and damages would make a significant contribution to resolving the crisis.
- (b) At present an opportunity exists for legislation to be passed throughout the country that will reform personal injury law, and that this will be a considerable help in making things better.
- (c) If the Panel does not produce its reports on the scheduled dates, the opportunity may be lost.

1.37 In these circumstances, public interest requires the Panel to do the best it can in the time allotted to it and to provide recommendations within the required dates. In doing so the Panel considers that it is able to propose some principled and soundly-based options for reform.

The absence of empirical evidence and its consequences

1.38 Many different changes could be made to the current law of negligence to further the objectives stated in the first paragraph of the Terms of Reference. Many bodies and individuals with differing interests and objectives have made submissions to the Panel as to the changes that should be made. Such changes were often recommended on the basis of assertions about their likely effects; but typically they were not supported by reliable and convincing empirical evidence. The vast majority of the assertions were based merely on anecdotal evidence, the reliability of which has not been tested.

1.39 A consequence of the dearth of hard evidence in the areas in which decisions are called for, is that the Panel's recommendations are based primarily on the collective sense of fairness of its members, informed by their knowledge and experience, by their own researches and those of the Panel's Secretariat, and by the advice and submissions of those who have appeared before the Panel and who have made written representations to it.

1.40 Consistently with our understanding of the objectives motivating our Terms of Reference (see paragraphs 1.4-1.12), the Panel has sought to strike a balance between the interests of injured people and those of injurers that seems to it to be fair and, on the basis of what we have been told, likely to be widely acceptable in the community at large.

The composition of the Panel

1.41 Certain submissions criticised the make-up of the Panel. In particular, they criticised the fact that the Panel is not comprised solely of legally trained persons. We have interpreted the mixed membership of the Panel as indicating that its task is to draw upon the personal knowledge and experience of all its members and on their perceptions of the attitudes and wishes of the Australian community as a whole (and not solely lawyers, medical practitioners, members of local government councils and others who are closely and frequently involved in the application of the law of negligence).

1.42 This approach is consistent with the observation of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 that the law of negligence should be based on a general public sentiment of moral wrongdoing — a statement said by the Judicial Committee of the Privy Council in *The Wagon Mound*, to be the 'sovereign principle' of negligence ([1961] AC 388, 426).

Consultations and submissions

1.43 The Panel has had the benefit of consultations with, and has received submissions from, a wide range of senior judges, leading barristers and academics, representatives of a wide range of interested bodies and persons from many walks of life, and from all around Australia. The names of the persons and organisations who have participated in the consultation process, and who have made submissions, are listed at the end of this Report.

The structure of the Report

1.44 The Panel was required to report on certain issues (Terms of Reference 3(d), 3(f), 4 and 5) by 30 August 2002 and on the remaining issues by 30 September 2002. As a result, this Report was written in two parts. Chapters 3-6 (which were submitted on 30 August 2002) deal with the former set of issues, and Chapters 7-13 deal with the latter set of issues. As we make clear in Chapter 2, however, this Report should be read as making a single, integrated set of proposals for reform of personal injury law on a national basis. Chapter 2 contains two pivotal recommendations dealing with the implementation of the Panel's proposals that are of equal relevance to all the recommendations made in both phases of our work.

1.45 Each of Chapters 3-6 deals with one of the four Terms of Reference on which we were required to report by 30 August 2002. In dealing with the remaining Terms of Reference, it has not been possible to relate Chapters to Terms of Reference in this one-to-one fashion. This is because various of the Terms of Reference, and the issues they raise, inter-relate with others in complex ways. Our aim in Chapters 7-13 has been to deal in a clear and logical way with the various issues we have identified as deserving attention.

1.46 The Terms of Reference on which we were required to report by 30 September 2002 raise very many difficult and complex issues. In the time available we have not been able to deal with them all. Consistently with the Terms of Reference, we have focused on aspects of the law in relation to which we consider that useful and effective changes might be made for the purpose of 'limiting liability and quantum of damages arising from personal injury and death'. Our basic concern in Chapters 7-13 is with changes that will promote the objectives underlying the Terms of Reference. It should not be concluded from our silence about any topic that we believe that reforms of that area of the law would be neither possible nor desirable. Nevertheless, the Report discusses each of the issues that the Panel was expressly asked to consider, whether or not we have made recommendations for reform of the law in that respect.

Acknowledgments

1.47 The Panel would like to praise and thank the members of the Secretariat for their professional and dedicated contribution to the Review. Without their many skills, unfailing enthusiasm and hard work, this Report could not have been produced on time.