Reform of liability insurance law in Australia

February 2004

ISBN 0 642 74209 X

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Printed by: Canprint Communications Pty Limited

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NOTES

In this report the term Commonwealth refers to the Commonwealth of Australia. The term is used when referring to the legal entity of the Commonwealth of Australia.

The term Australian Government is used when referring to the Government and the decisions and activities made by the Government on behalf of the Commonwealth of Australia.

The following notations are used in the report:

✓	Legislated, includes legislation currently before Parliament.
n/a	Jurisdiction has no responsibilities in this area.
a	Announced but not yet legislated.
--	Not agreed.

MINISTER FOR REVENUE AND ASSISTANT TREASURER
Senator the Hon Helen Coonan

PARLIAMENT HOUSE
CANBERRA ACT 2600

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February 2004

The major reforms detailed in this report have been a collaborative effort between the Commonwealth, State and Territory counterpart Ministers. From what was essentially a standing start, this Ministerial group has achieved truly commendable reforms for the Australian community. The path of reform is never an easy one and all Governments have faced difficult decisions in progressing this monumental reform agenda. It is only through the determination and cooperation of these Ministers that we have collectively achieved so much.

I would like to take this opportunity to thank this group of Ministers for their tireless efforts in implementing this reform agenda over the past two years and their commitment to continuing the process:

The Hon Michael Egan MLC
Treasurer, New South Wales

The Hon John Lenders MP
Minister for Finance, Victoria

The Hon Terry Mackenroth MP
Treasurer, Queensland

The Hon Nick Griffiths MLC
Minister for Government Enterprises, WA

The Hon Kevin Foley MP
Treasurer, South Australia

The Hon David Crean MHA
Treasurer, Tasmania

Mr Ted Quinlan MLA
Treasurer, Australian Capital Territory

The Hon Syd Stirling MLA
Treasurer, Northern Territory

Councillor Brad Matheson
Senior Vice President, Australian Local Government Association

Such extensive reform to the system of tort law and insurance is unprecedented in Australia. This report is a testament to the enormity of the task that we have faced and a credit to all involved.

Sincere thanks

HELEN COONAN

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PART A: INTRODUCTION AND SUMMARY

A1: BACKGROUND

Since early 2002, Governments across Australia have undertaken a program of unprecedented law reform and achieved a raft of changes unmatched in the common law world for their breadth and scope. These reforms were specifically designed to promote predictability to improve the cost and availability of liability classes of insurance and alleviate a crisis that had engulfed the Australian community.

In late 2001 and during 2002, a combination of international and domestic, cyclical and structural forces came together to produce a severe hardening of premium rates for liability classes of insurance in Australia. The collapse of major liability insurer HIH, increasing compensation payments for bodily injury during the 1990s, increasingly litigious community attitudes, and changes in the way courts were prepared to extend liability for negligence combined to impact heavily on the cost of insurance in Australia. This came at a time when the insurance market was hardening, insurers were recognising heavy underwriting losses from the previous decade and investments were producing very low or negative returns.

The stark lesson for Australian insurers arising out of the failure of HIH was that insufficient attention to pricing risk and the full and relative costs of capital can be catastrophic to the long term fortunes of an insurance company. This theme was reinforced by the Australian Government's introduction of new prudential requirements for general insurers, which came into effect on 1 July 2002. These new capital and liability valuation requirements provided a better focus for insurers in considering the capital consequences of writing different classes of insurance business.

For Australian consumers, this level of prudential certainty was essential. Insurance cover is of little value regardless of the price paid if the insurance company lacks sufficient resources to pay claims.

This more focused approach to underwriting, combined with the sharp hardening of international insurance markets, had dramatic flow-on effects for Australian consumers. Consumers were confronted with enormous premium increases in the previously underpriced lines of public liability and professional indemnity insurance. For some risks, liability insurance became unaffordable or completely unavailable.

A2: PUBLIC RESPONSE

A strict economic approach would suggest higher premiums were a necessary correction in the previously under priced insurance market. From a government perspective, however, when insurance is unaffordable or simply unavailable, the

insurance market is no longer performing its vital function of transferring risk across the economy.

During the initial stages of the insurance crisis, the Australian media regularly featured reports of sporting and recreational events cancelled as premiums were significantly higher than those paid in the past and, in some cases, accounted for the entire budget of the event. Anecdotes also appeared about volunteer and charity groups threatening to cease activities and businesses, including well known recreational and tourist attractions, either closing or, more problematically for consumers, continuing operations uninsured.

At the same time, a number of high profile court awards for negligence were resolved with multi-million dollar verdicts awarded to plaintiffs. In some circumstances verdicts were awarded where the community perceived that the plaintiff had largely contributed to his or her own injury. The public became increasingly concerned that court verdicts were unreasonable and were being financed by increasingly burdensome insurance premiums.

While most public attention was focused on increases in the cost of public liability insurance, and the subsequent impact on small businesses, community and sporting groups, the high and unpredictable cost of claims was also having a major impact on the cost of professional and medical indemnity insurance.

Factors affecting the price of insurance premiums are many and varied. Some are related to international conditions in insurance and reinsurance markets while other factors are domestic in nature. One obvious domestic factor which impacts on premiums and is generally within the control of governments is the cost of claims.

It is apparent that claims costs, and in particular the cost of personal injury claims, has escalated over recent years. The enormity of these increases can be demonstrated in fairly simple terms by comparing the increase in consumer prices with the increase in court awards over the same period. In the ten years to 2002, inflation in Australia averaged 2.5 per cent per annum. In contrast, a study commissioned by the Australian Government and state and territory governments found that awards for personal injury had increased at an average rate of 10 per cent per annum.

When looking at large claims, the comparison is even more startling. Between 1979 and 2001, the consumer price index (CPI) increased by 212 per cent. In contrast, over the same period the highest award for personal injury in Australia increased from $270,000 to $14.2 million, an increase of over 5,000 per cent.

The significant and very real impact these issues were having on the Australian community meant an urgent and effective response was needed.

A3: GOVERNMENT RESPONSE

Stabilising insurance premiums in such an environment required an urgent and comprehensive response. Policy changes from Australian governments were needed to address the issue quickly and effectively. But a lasting solution required governments to balance measures to reduce costs and premiums with the need for sound prudential regulation to provide for the ongoing financial viability of Australian insurance companies. It was also vital that reforms were based on a principled approach and balanced the needs of the community with the legitimate rights of injured persons to seek reasonable redress against others who are found to be responsible for their loss or damage.

Unfortunately, delivering solutions is seldom as easy as recognising and identifying the problem. Although it was clear that action was required to bring the system back into line with community expectations, this action was complicated by Australia's federal system of government.

In Australia there are six states and two territories each with its own independently elected government with powers and responsibilities within its own jurisdiction. Overlaying state and territory governments is the Commonwealth, with powers and responsibilities in respect of all Australian jurisdictions.

The respective jurisdictional powers of the states and territories and the Commonwealth are determined by the Constitution. In the case of insurance, powers and responsibilities are split between the states, territories and the Commonwealth.

The common law, including the law of negligence, falls within the jurisdiction of the states and territories. States and territories also have responsibility for administration of the court system for claims falling within their jurisdictions and for statutes relating to civil liability. The nature of Australia's division of powers is such that states and territories are also responsible for insurance which does not cross state boundaries. State and territory legislation also governs compulsory third party bodily injury motor vehicle or workers' compensation insurance.

The Commonwealth's responsibilities for insurance are reflected in a series of statutes which cover prudential regulation, contractual relationships between insurers and insureds, market conduct and the conduct of corporations. The Australian Government, through a number of agencies including the Australian Prudential Regulation Authority, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, uses its powers to protect consumers and ensure prudential standards are maintained.

Insurance claims can be brought in nine different jurisdictions in Australia and a cause of action may be found in tort, contract, under statute or a combination of all three. Comprehensive and effective reforms to address underlying issues in some cases required complementary reforms between Commonwealth, state and territory jurisdictions to prevent 'forum shopping' by plaintiffs.

A4: MINISTERIAL MEETINGS

To overcome the difficulties posed by the division of powers, the Australian Government's Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan, convened a series of ministerial meetings with Ministers from all jurisdictions and a representative of municipal government. The meetings are ongoing and will continue to focus on strengthening the stability of Australia's insurance system.

Through these meetings, a non-partisan accord was reached by all jurisdictions to implement major reforms to Australian law, in a consistent manner, to restore predictability to claims costs and improve the affordability and availability of liability insurance.

An important contribution to achieving this reform was a report commissioned by Ministers to review the law of negligence. An expert panel, chaired by Justice David Ipp of the New South Wales Court of Appeal, made 61 recommendations to governments on a principled approach to reforming the law (the report of the Review of the Law of Negligence is available at http://revofneg.treasury.gov.au).

At the fourth Ministerial Meeting in November 2002, Ministers made a significant breakthrough in the harmonisation of reforms, agreeing to a package of reforms to implement the key recommendations of the Review of the Law of Negligence. They agreed that recommendations that go to establishing liability should be implemented on a nationally consistent basis and each jurisdiction agreed to introduce the necessary legislation as a matter of priority. The Australian Government confirmed that within its own jurisdiction it would amend the *Trade Practices Act 1974* to underpin the changes being made by states and territories and avoid possible avenues for plaintiffs and their lawyers to circumvent reforms in other jurisdictions.

Ministers agreed to significant reforms because of the evidence before them that principled reforms would have a significant impact on the public liability crisis and would vastly improve the insurance climate in Australia, while restoring balance to a system in which the public had lost confidence.

During the course of the meetings Ministers also committed to a range of other measures to help resolve the crisis. Ministers agreed to and implemented changes to the tax system on a national level and liability laws at a state and territory level to encourage the use of structured, periodic payments to claimants rather than one-off lump sum settlements. Such structured settlements provide greater security for the injured party, who may otherwise be left without financial support if a lump sum is mismanaged, as well as greater certainty for insurers by aligning damages payouts more closely with an injured person's needs. Ministers also agreed to legislation that would facilitate people in some circumstances voluntarily waiving their right to sue and assuming their own risk. The Australian Competition and Consumer Commission was commissioned with monitoring premiums for liability classes of insurance, arrangements were put in place for better data collection by the Australian Prudential

Regulation Authority, and the Productivity Commission undertook a benchmarking study of claims processing in Australia. Ministers also agreed to legislate to protect certain volunteers from being sued.

A5: Reforms to the law

Jurisdictions have made exceptional progress in delivering the commitments made during the Ministerial meetings.

Changes implemented by all Australian jurisdictions can be broadly grouped into three types:

- Establishing liability — changes to the law governing decisions on liability, including contributory negligence and proportionate liability.
- Damages — changes to the amount of damages paid to an injured person for personal injury claims or for economic claims against a professional.
- Claims procedures — time limits and methods for making and resolving claims, including court procedures, legal conduct and legal costs.

Each of the groups of reforms has some elements aimed at:

- personal injury claims, thus impacting public liability and medical indemnity; and
- property and economic claims, thus mainly impacting professional indemnity.

The remainder of this summary outlines the changes in each of the three groups. Detailed descriptions are contained in Part C of this report.

A6: Reforms to establish liability

The changes being made to the way liability is established are among the most significant changes seen to the laws of negligence and are wide-reaching in their impact.

State and territory governments have implemented, or are in the process of implementing, legislation on a consistent basis to restate, clarify and in some cases reform the way courts decide issues such as duty of care, foreseeability, causation and remoteness of damage and the standards to which professionals should be held. The changes are based on recommendations from the Review of the Law of Negligence. The recommendations are designed so as to give courts statutory guidance when determining the liability of a defendant.

Major changes are also being made to the assumption of risk by various parties and the way liability is apportioned. One area of particular importance to recreational businesses and community groups is legislation to allow participants to sign effective waivers and voluntarily assume risk if they choose to take part in inherently risky activities. This has been implemented by most Australian jurisdictions, and was widely supported as a way of allowing people who choose to take part in such activities the right to bear some of the risk for their own safety.

Of particular interest to those seeking and providing professional indemnity insurance are changes across all jurisdictions to implement proportionate liability for economic loss, to counter the tendency for claimants to pursue those with high levels of insurance cover regardless of how responsible that party was for the loss.

Part C of this report describes each of the reforms in some detail and refers to the relevant pieces of legislation.

A7: DAMAGES REFORMS

Reforms being made to the laws relating to damages are two-fold, aimed at removing the smaller claims from the system while setting appropriate limits on particular heads of damage for very large claims. There was also significant concern among some Ministers about the proportion of pay-outs being consumed by legal costs, with a concerted effort to redirect larger proportions of claims towards the injured parties themselves.

Recently, jurisdictions have shifted their attention from public liability insurance to professional indemnity insurance and have also begun considering caps on professional liability as part of professional standards legislation.

A7.1: DEALING WITH GROWTH IN SMALLER CLAIMS

Evidence indicated that the growth in small and medium sized claims over the 1990s was driven mainly by general damages (also known as pain and suffering, or non-economic loss) and accompanying legal costs.[1]

A major component of the reforms around tort law in Australia has been a focus on reducing general damages and legal costs, particularly for small claims.

1 Trowbridge Deloitte, *Public Liability Insurance, Analysis for Meeting of Ministers*, 27 March 2002.

Most jurisdictions have now implemented thresholds or other barriers to filter the smallest claims out of the legal system, while a number have also acted to change the way claims are assessed and limit the impact of legal costs.

A7.2: THE SIZE OF CATASTROPHIC CLAIMS

As the focus on Australia's liability insurance crisis intensified, there was a great deal of concern among both governments and communities about the rapid and seemingly boundless growth in the size of the very largest claims. The most serious concern was not that the catastrophically injured may be treated too generously but rather the impact that such large claims would have on the risk profile of insurers operating in Australia.

There was particular concern about the potential economic damages awarded if a very high income earner were to be injured, and the impact such claims would have on the risk borne by insurers.

A package of measures has been designed to put boundaries around the size of the largest claims and potentially bring more predictability and stability in the future. All states and territories have placed caps on claims for loss of earnings, and the majority have also capped general damages claims. Discount rates for damages are being reformed in all states and territories and most have also placed limits on claims for gratuitous care.

Each of these changes is described in Part C, with reference to the relevant legislation.

A8: PROCEDURAL REFORMS

The third class of reforms being progressed by Australian jurisdictions to resolve the problems with insurance costs is procedural reform. With relation to personal injury claims, governments have committed to and have already implemented reforms relating to limitation periods, pre-litigation procedures, the ability of plaintiff lawyers to advertise for business and the proportion of awards consumed by legal fees.

A9: PROFESSIONAL INDEMNITY

Governments are also implementing changes that focus on professional indemnity insurance. During the course of 2003 it was clear that the High Court of Australia's interpretation of the *Insurance Contracts Act 1984* (the Act) was causing difficulties for

insurers providing long-tail classes of insurance.[2] In particular, section 54 of the Act, which operates to excuse the late notification of claims and the late notification of circumstances for 'claims made' and 'claims made and notified' policies, was clearly discouraging insurers from offering claims made professional indemnity policies. The Australian Government is currently examining amendments to the Act to ensure that claims made insurance continues to operate as intended.

Legislation that will replace the common law of joint and several liability with proportionate liability for economic loss has been agreed to by all levels of government, most of whom already have legislation in place. Proportionate liability is designed to remedy the 'deep pocket' syndrome experienced by professionals exacerbated by the operation of joint and several liability. 'Deep pocket' syndrome is where professionals are the target of litigation because they have insurance and, under the previous law of joint and several liability, were able to be held liable for the full amount of a plaintiff's loss even though their actions may only have made a small contribution to the loss.

All levels of government have also committed to professional standards legislation to assist delivering certainty to insurers, protection to consumers and affordable, available insurance to professionals. Professional standards legislation allows professionals to limit their liability in exchange for risk management, compulsory insurance and other consumer protection initiatives.

A10: MEDICAL INDEMNITY

Health care is an issue of foremost importance to the Australian community, and medical indemnity insurance is an issue of great consequence to health care professionals and consumers alike.

The problems experienced in the medical indemnity insurance market over recent years are similar to those found more broadly in the general insurance sector. However, with the near-collapse of Australia's largest medical defence organisation, UMP/AMIL, the problems of under-provisioning for long-tail claims were exacerbated and prices rose sharply at the same time as medical practitioners began to lose confidence in the system. Nationally, doctors threatened to cease work in hospitals in response to concern about the availability and affordability of medical indemnity insurance. In light of this situation it was clear that reform was absolutely essential to ensure that doctors had access to secure and affordable medical indemnity insurance into the future.

Tort law reform introduced to resolve the broader insurance crisis is also crucial to improving the medical indemnity environment. Of particular interest to health

2 *FAI General Insurance Company Ltd v Australia Hospital Care Pty Ltd* [2001] HCA 38 27 June 2001.

professionals and their insurers are reforms to limitation periods, changes to the standard of care required of medical practitioners in treating patients (often referred to as the 'modified *Bolam* principle') and caps and thresholds on damages.

The Australian Government has implemented a range of reforms to resolve the issues with medical indemnity insurance including legislation to bring medical indemnity providers within the general insurance industry prudential regulatory regime and premium support for doctors whose premiums are high relative to their income. A number of requirements around product standards and the operation of medical indemnity insurers were also introduced and the Australian Government provided guarantees that allowed UMP/AMIL to trade its way back into business.

A11: A WORK IN PROGRESS

Since 2002, remarkable progress has been made in reforming Australian tort law and legislation related to the cost of insurance. Much legislation is already enacted and effective. Such extensive law reform in a limited timeframe is unprecedented in the history of Australian insurance law and, taking into account the complexity of Australia's multiple jurisdictions, perhaps a first for the common law world.

Such complex and important issues cannot be fully resolved immediately and work to implement reforms already committed to by Australian governments continues. All governments and parliaments are continuing to consider these issues and consult with affected parties, to ensure that reforms are implemented in a way which restores balance to the system while giving due consideration to the rights of both the injured and the insured. The changes implemented in Australia broadly seek to impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves.

Although some aspects of reform remain a work in progress, the commitment of Australian governments to resolve this problem has been amply demonstrated by significant progress to date.

A12: CONCLUSION

In response to the damaging and wide-reaching impact of the liability insurance crisis, Australian governments acted swiftly and decisively.

The insurance climate in Australia has vastly improved as a result of these reforms and commitments are in place to ensure that progress in restoring balance to the Australian system will continue.

Capacity is already returning to liability insurance in Australia and the price increases of recent years have stabilised. Recent industry surveys show underwriters and

brokers generally expect capacity to increase further in 2004 and 2005 and that brokers are experiencing increasing interest from offshore underwriters enticed to the Australian market by attractively priced and profitable business.

Reforms undertaken to date have encouraged three insurers operating in Australia to form an alliance to provide public liability cover for small not-for-profit organisations. The activities of this alliance, the Community Care Underwriting Agency, have spread across jurisdictions as law reform was implemented, and at the end of 2003 the agency had already written policies for more than 1000 not-for-profit organisations.

Although some in the industry are taking a cautious approach in the early stages of reform, as the impact of tort reform on claims becomes clearer the return of capacity is likely to continue and strengthen.

Evidence indicates that conditions in the insurance market have begun to stabilise. Industry observers are reporting improved operating results, lower combined ratios and a favourable environment for insurers.

The comprehensive program of law reform has been a major contributor to this stabilisation and governments firmly believe that these reforms create a platform for a more stable and predictable insurance environment in the long term.

A13: Structure of the report

Part B of the report provides a convenient index to the reforms in four parts:

- a list of each reform described in Part C;
- an index showing each jurisdiction and how it has responded to each reform proposed;
- for professional indemnity, a special index of the most relevant reforms; and
- for medical negligence, a special index of the most relevant reforms.

Part C contains descriptions of each reform, including background and principles. It also outlines each jurisdiction's response.

Part D is ordered by jurisdiction. For each jurisdiction, it lists the relevant legislation with a brief description.

A14: Disclaimer

Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice.

Part B:

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PART B: INDEX TO THE REFORMS

This section contains an index of the reform initiatives, each of which is described in Part C. It also contains summary tables indicating which of the jurisdictions has specifically addressed each reform initiative.

B1: INDEX OF REFORMS

Table B1: Index of reforms

Group	Principal of reform	Ref to Part C
Establishing liability		
Broad based	Foreseeability	C1
	Causation and remoteness of damage	C2
	Standard of care for professionals ('modified *Bolam* test')	C3
	Non-delegable duties	C4
	Fair trading laws	C5
	Mental harm	C6
	Apologies	C7
Contribution	Contributory negligence and the assumption of risk	C8
	Proportionate liability for economic claims	C9
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	Caps on professional liability	C20
Procedural reforms	Limitation periods	C21
	Pre-litigation procedures	C22
	Legal advertising	C23
	Legal costs	C24
	Claims made policies	C25

B2: JURISDICTION INDEX — ESTABLISHING LIABILITY

Table B2: Jurisdiction index — establishing liability

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
	Establishing liability									
C1	**Foreseeability**									
	A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm	n/a	✓	✓	✓	✓	✓	✓	✓	---
	It cannot be negligent to fail to take precautions against a risk of harm unless that risk is 'not insignificant'	n/a	✓	✓	✓	✓	✓	✓	✓	---
	A person is not negligent for failing to take precautions against a not insignificant risk unless a reasonable person would have taken such precautions	n/a	✓	✓	✓	✓	✓	✓	✓	---
	Negligence calculus	n/a	✓	✓	✓	✓	✓	✓	✓	---
C2	**Causation and remoteness of damage**									
	Plaintiff bears the onus of proof in relation to issues associated with causation	n/a	✓	✓	✓	✓	✓	✓	✓	---
	Principles of the two elements of causation and guidance in application legislated	n/a	✓	✓	✓	✓	✓	✓	✓	---
	Principles for determining when the 'evidentiary gap' should be bridged in circumstances of material contribution by the defendant to risk or harm	n/a	✓	✓	✓	✓	✓	✓	✓	---
	Principles for determining what the plaintiff would have done had the negligent conduct not occurred	n/a	✓	✓	✓	✓	---	✓	---	---
C3	**Standard of care for professionals**									
	Modified *Bolam* rule	n/a	✓	✓	✓	a	✓	✓	---	---
	Legislative restatement of duty to inform for medical practitioners to give greater clarity and address hindsight bias	n/a	---	---	✓	✓	---	✓	---	---

B2: JURISDICTION INDEX — ESTABLISHING LIABILITY (CONTINUED)

Table B2: Jurisdiction index — establishing liability (continued)

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
C4	**Non-delegable duties**									
	Provides that the existence and extent of liability for breach of a non-delegable duty is determined on the basis of principles applicable to vicarious liability	n/a	✓	✓	---	---	---	---	---	a
	Provides that civil liability legislation applies to a non-delegable duty	n/a	---	---	✓	---	---	✓	---	---
C5	**Fair trading laws**									
	Action prohibited for personal injury and death under Division 1 of part V of the *Trade Practices Act 1974* and similar provisions under state and territory fair trading law	✓	✓	---	✓	---	---	✓	---	---
C6	**Mental harm**									
	Pure mental harm and economic loss for consequential mental harm must be a recognised psychiatric illness and harm must be forseeable to a person of normal fortitude	n/a	✓	✓	---	✓	✓	✓	✓	---
	Legislative restatement of factors relevant to assessing mental harm	n/a	✓	✓	---	✓	✓	✓	---	---
	Restrict the circumstances in which pure mental harm can be awarded as a result of another being imperiled, injured or killed to a specified list of family relationships.	n/a	✓	✓	---	✓	✓	✓	---	---
C7	**Apologies**									
	An apology cannot be taken as an admission of liability	n/a	✓	✓	✓	✓	✓	✓	✓	✓

B2: JURISDICTION INDEX — ESTABLISHING LIABILITY (CONTINUED)

Table B2: Jurisdiction index — establishing liability (continued)

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
C8	**Contributory negligence and the assumption of risk**									
	Legislative statement of the negligence calculus for contributory negligence	n/a	✓	✓	✓	✓	✓	✓	✓	---
	100 per cent reduction of available damages for contributory negligence	n/a	---	✓	✓	---	---	✓	✓	---
	Special provisions for contributory negligence of a plaintiff under the influence of drugs or alcohol and engaged in criminal activities	n/a	✓	✓	✓	✓	✓	✓	---	✓
	Reform of the defence of voluntary assumption of risk	n/a	✓	✓	✓	✓	✓	✓	---	---
C9	**Proportionate liability for economic claims**	✓	✓	✓	✓	✓	a	a	a	---
C10	**Recreational activities and waivers**									
	No liability for harm resulting from an obvious risk of a dangerous recreational activity	n/a	✓	✓	✓	✓	---	✓	---	✓
	Allows for providers of dangerous recreations to enter into contracts limiting their liability	✓	✓	✓	✓	✓	✓	✓	---	✓
C11	**'Good Samaritans'**									
	Provides that a 'good Samaritan' is not liable in any civil proceedings for any acts or omissions done in good faith	n/a	✓	✓	---	✓	✓	---	✓	✓
C12	**Volunteers**									
	Provides protection to volunteers doing work for community organisations from civil liability for acts or omissions in good faith	✓	✓	✓	✓	✓	✓	✓	✓	✓
C13	**Public authorities**									
	Policy defence in case an authority is sued for negligence in the exercise or non-exercise of a public function	n/a	✓	✓	✓	✓	---	✓	✓	---
	Restoration of highway immunity rule	n/a	---	---	✓	✓	✓	---	---	---

B3: JURISDICTION INDEX — DAMAGES

Table B3: Jurisdiction index — damages

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
	Damages									
C14	**General damages**									
	Threshold before general damages apply	a	✓	✓	---	✓	✓	✓	a*	✓
	Assessment procedure for general damages	n/a	---	---	✓	---	✓	---	---	✓
	Cap on general damages	a	✓	✓	✓	---	✓	---	---	✓
C15	**Earnings loss cap**	a	✓	✓	✓	✓	✓	a	✓	✓
C16	**Gratuitous care**									
	Threshold for damages to apply	a	✓	✓	✓	✓	---	n/a	---	✓
	Cap on rate of payment	a	✓	✓	---	✓	✓	n/a	---	✓
C17	**Discount rate**	a	✓	✓	✓	n/a	✓	n/a	---	n/a
C18	**Structured settlements**	✓	✓	✓	✓	✓	✓	✓	✓	✓
C19	**Punitive damages**	n/a	✓	---	✓	---	---	✓	✓	✓
C20	**Caps on professional liability**	✓	✓	✓	a	✓	a	a	a	a

* In relation to medical practitioners.

B4 : JURISDICTION INDEX — PROCEDURAL REFORMS

Table B4 : Jurisdiction index — procedural reforms

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
	Procedural reforms									
C21	**Limitation periods**									
	Commencement period defined as date of discovery	a	✓	✓	---	---	---	✓	✓	---
	Limitation period 3 years	a	✓	✓	---	a	✓	✓	✓	---
	12 year long stop	a	✓	✓	---	---	---	---	✓	---
	Court discretion to extend long stop	a	✓	✓	---	---	---	---	---	---
	Protection for persons under a disability and minors	a	✓	✓	✓	a	✓	✓	✓	---
C22	**Pre-litigation procedures**	---	✓	✓	✓	---	✓	---	✓	✓
C23	**Legal advertising**	---	✓	---	✓	✓	---	---	---	✓
C24	**Legal costs**	---	✓	---	✓	✓	---	---	✓	✓
C25	**Claims made policies**	a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

B5: PROFESSIONAL INDEMNITY INSURANCE INDEX

This table highlights the reforms most relevant to professional indemnity insurance (excluding medical).

Table B5: Professional indemnity insurance index

	Ref
Standard of care for professionals (modified *Bolam* test)	C3
Fair trading laws	C5
Proportionate liability for economic claims	C9
Caps on professional liability	C20
Claims made policies	C25

It should be noted that the focus of the reform process has moved to professional indemnity only during 2003, and so progress with these reforms is less advanced than for public liability.

Further substantial progress is expected during 2004.

B6: MEDICAL INDEMNITY INSURANCE INDEX

All jurisdictions have been concerned about the issue with medical indemnity insurance since the beginning of the reform process, and the terms of reference for the Review of the Law of Negligence report specifically included medical negligence.

The reforms of most relevance to medical indemnity are listed in the table below.

Table B6: Medical indemnity insurance index

	Ref
Standard of care for professionals (modified *Bolam* test)	C3
Apologies	C7
Good Samaritans	C11
Volunteers	C12
Damages	C14-C19
Limitation periods	C21
Pre-litigation procedures	C22
Legal costs	C24
Claims made policies	C25

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Detailed description of reforms

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PART C: DETAILED DESCRIPTION OF REFORMS

C1: FORESEEABILITY

SITUATION PRIOR TO THE REFORMS

In tort, a basic principle is that a person owes another person a duty of care if the first person could reasonably have foreseen that if they did not take care, the other would suffer either physical or economic injury or death.

Under Australian law, the concept of negligence has two components: foreseeability of the risk of harm and the so-called 'negligence calculus'. Foreseeability is a precondition of a finding of negligence; a person cannot be liable for failing to take precautions against an unforeseeable risk. In order for a risk to be foreseeable, it must not be so improbable that a reasonable person would ignore it.

Once foreseeability has been established, the negligence calculus provides a framework for deciding what precautions a reasonable person would have taken to avoid the harm that has occurred and what precautions the defendant could reasonably have been expected to have taken. The calculus has four components:

- the probability that the harm would occur if care was not taken;
- the likely seriousness of that harm;
- the burden of taking precautions to avoid the harm; and
- the social utility of the risk creating activity (that is, it is more worthwhile to take risks for some activities than for others — for example, if life is at stake).

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Case law in Australia had evolved so that events with a very low probability of occurring could still be held to be foreseeable. In *Wyong Shire Council v Shirt* (1980) 146 CLR 40, the court found that persons could be held liable for any foreseeable risks other than risks which were far-fetched or fanciful. This benchmark may have required a person to take precautions against a risk of very low probability simply because it was foreseeable.

Further, it is extremely important to note that the mere fact that a foreseeable risk was not far-fetched or fanciful says nothing of whether precautions to prevent the risk occurring ought reasonably have been undertaken. This issue can only be resolved by addressing all four elements of the calculus.

It was widely perceived that lower courts within Australia have ignored this point and that findings of negligence were sometimes based purely on whether a risk was not far-fetched or fanciful.

REFORMS

Reforms have been designed to replace the test of foreseeability as established by *Wyong Shire Council v Shirt* with a test that persons can only be held liable for risks that are 'not insignificant'.

In addition, reforms have been designed to clarify that foreseeability is a necessary but not sufficient condition for a finding of negligence. A person will not be liable merely by reason that a risk was foreseeable. Reforms set out the negligence calculus in legislation to prescribe what the court should take into account when determining negligence.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C1: Foreseeability — summary of reforms

Ref	Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
	Establishing liability									
C1	**Foreseeability**									
	A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm	n/a	✓	✓	✓	✓	✓	✓	✓	---
	It cannot be negligent to fail to take precautions against a risk of harm unless that risk is 'not insignificant'	n/a	✓	✓	✓	✓	✓	✓	✓	---
	A person is not negligent for failing to take precautions against a not insignificant risk unless a reasonable person would have taken such precautions	n/a	✓	✓	✓	✓	✓	✓	✓	---
	Negligence calculus	n/a	✓	✓	✓	✓	✓	✓	✓	---

NEW SOUTH WALES

Civil Liability Act 2002

Part 1A Division 2 of the Act contains certain general and other principles relating to liability in negligence resulting from a failure to take precautions against a risk of harm.

Under section 5B, a person will not be liable for harm unless the person knew or ought to have known of the risk, the risk was not insignificant and in the circumstances a reasonable person in that person's position would have taken precautions against the risk.

Section 5C sets out matters that the court is to consider when determining whether a reasonable person would have taken precautions against the risk — the negligence calculus.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Part 2 of the Act proposes to insert a new section 48 into the *Wrongs Act 1958*.

Subsection 48(1) will provide that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable, the risk was not insignificant and in the circumstances, a reasonable person in the person's position would have taken those precautions.

Subsection 48(2) will require that, in determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider a number of matters, among other relevant things. These matters accord with the negligence calculus.

QUEENSLAND

Civil Liability Act 2003

Subsection 9(1) sets out the general principles to be taken into account in assessing the appropriate standard of care to be taken by a person in precaution against a risk of harm eventuating to another person. Under subsection 9(1), a person will not be liable for harm unless the person knew or ought to have known of the risk, the risk was not insignificant and in the circumstances a reasonable person in that person's position would have taken precautions against the risk.

Subsection 9(2) requires consideration of certain factors, not exclusive to any other circumstance of a particular case, in assessing the precautions that would be taken by a reasonable person in that case — the negligence calculus.

Section 10 expands upon subsection 9(2) by requiring a court to take into account certain factors in applying the negligence calculus. These factors address the concern that a person would be found liable merely because a risk was avoidable in situations where the burden of avoiding the risk in a single instance was small, the risk could be avoided merely by doing something a different way, or taking subsequent corrective action indicated the ability to avoid a risk.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1A Division 2 codifies the present law governing the content of the duty of care. The codification is intended to set a standard of foreseeability higher than 'far-fetched or fanciful' but not so high as to limit foreseeability to 'significant' risks. These general principles will apply not only to personal injury claims but will extend to all common law negligence claims. It also sets out the general principles that must be taken into account by a court when determining whether a duty of care has been breached — the negligence calculus.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

Proposed subsection 32(1) provides that a person is not negligent in failing to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, it is a risk of which the person knew or should have known);
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

Proposed subsection 32(2) sets out the factors which the court is to consider in determining whether a reasonable person would have taken precautions against the risk of harm, that is, the negligence calculus.

TASMANIA

Civil Liability Act 2002

The Act provides that a person does not breach a duty of care unless the risk of harm was foreseeable and not insignificant and, in the circumstances, a reasonable person in the position of that person would have taken precautions.

In deciding whether a reasonable person would have taken precautions against the risk of harm, the court is to consider, among other relevant things, the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions and the potential net benefit of the activity that exposes others to the risk of harm.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Part 4.2 sets out the basic principles of negligence, including duty of care, standard of care for negligence, precautions against risk and causation.

Subsection 43(1) prescribes that a person does not fail to take appropriate precautions against a risk unless that risk was foreseeable, the risk was not insignificant and, in the circumstances, a reasonable person would have taken precautions.

Subsection 43(2) prescribes a negligence calculus for determining negligence.

NORTHERN TERRITORY

Intention to legislate announced.

C2: CAUSATION AND REMOTENESS OF DAMAGE

SITUATION PRIOR TO THE REFORMS

In tort, a person cannot be liable for damages for failure to take care to prevent injury or death unless negligent conduct on his or her part (whether by act or omission) caused the harm and unless that harm was not too remote from the negligent conduct.

In determining whether negligent conduct caused the harm in question, courts should have regard to two aspects.

The first aspect — the factual aspect — is concerned with whether the negligent conduct in question played a part in bringing about the harm that is the subject of the claim. The long-accepted basic test for answering this question is whether the conduct was a necessary condition of the harm, in the sense that the harm would not have occurred but for the conduct.

The second aspect — the normative aspect — is concerned with whether the defendant should be held liable to pay damages for harm caused.

Both aspects must be met in order for negligence to be established.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Uncertainty existed about the necessity of applying both tests in circumstances where the factual test was met. In circumstances where it is found that the negligent conduct was a necessary condition of the harm, there was a danger that negligence would be found without regard to the second, normative test. In these circumstances, it was perceived that liability would be imposed where the defendant's conduct was only remotely responsible for the loss.

In addition, in certain circumstances, the question of causation gave rise to 'evidentiary gaps'. There are two specific situations in which these gaps arise — where the defendant has materially contributed to the harm or where the defendant materially contributed to the risk which resulted in damage to the plaintiff. In these circumstances, a defendant may be liable for the total injury suffered by a plaintiff even though the defendant's conduct was only partially responsible for the harm or risk giving rise to the damage. In these situations even though it cannot be proved on the balance of probabilities that there was in fact a causal link between the conduct and the harm, it may be necessary to bridge the 'evidentiary gap' by allowing proof that negligent conduct materially contributed to harm or risk of harm. The major problem has been establishing in which cases the normal requirements of proof of causation should be relaxed.

A further issue is determining whether the harm would have occurred but for the conduct of the plaintiff without understanding what the plaintiff would have done if the defendant had not been negligent. For example, where a doctor fails to give appropriate warnings, the question would be whether or not the patient would still have proceeded with an operation had that disclosure been made. The major difficulty here is determining the state of mind of the plaintiff prior to harm occurring without being influenced by hindsight bias.

REFORMS

Reforms have been designed to improve the understanding of this area of the law, by providing legislative guidance to the principles underlying causation.

In addition, to address issues related to 'evidentiary gaps', reforms have made it clear that the onus of proof in relation to causation always rests with the plaintiff.

The reforms introduce measures to clarify the way in which a court should consider what the plaintiff would have done had the negligent conduct not occurred.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C2: Causation and remoteness of damage — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Causation and remoteness of damage									
Plaintiff bears the onus of proof in relation to issues associated with causation	n/a	✓	✓	✓	✓	✓	✓	✓	---
Principles of the two elements of causation and guidance in application legislated	n/a	✓	✓	✓	✓	✓	✓	✓	---
Principles for determining when the 'evidentiary gap' should be bridged in circumstances of material contribution by the defendant to risk or harm	n/a	✓	✓	✓	✓	✓	✓	✓	---
Principles for determining what the plaintiff would have done had the negligent conduct not occurred	n/a	✓	✓	✓	✓	---	✓	---	---

NEW SOUTH WALES

Civil Liability Act 2002

Division 3 requires that a determination that negligence caused particular harm comprises the following elements: that the negligence was a necessary condition of the occurrence of the harm (factual causation) and that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent,

the matter is to be determined subjectively in light of all relevant circumstances. Any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

For the purpose of determining the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

The division also provides that the plaintiff bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Section 51 sets out a number of general principles to be applied in determining whether the negligent conduct of one person has caused harm to another. Subsection 51(1) provides that a determination that negligence (on the part of the defendant) caused particular harm comprises two elements: factual causation and scope of liability. Factual causation is satisfied if the negligence was a necessary condition of the occurrence of the harm. Scope of liability is a consideration of whether it is appropriate, in all circumstances, for the harm to be considered to be within the scope of the negligent person's liability.

Subsection 51(2) provides that in an appropriate case, where negligence cannot be said to be a necessary condition of the harm, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party. An 'appropriate case' is one where the court considers it appropriate to 'bridge the evidentiary gap'.

Subsection 51(3) provides that in determining what the injured person would have done if the negligent person had not been negligent, the matter is to be determined subjectively, that is, what that injured person would have done, in the light of all relevant circumstances.

Section 52 provides that the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

QUEENSLAND

Civil Liability Act 2003

Section 11 sets out the elements and general principles to be taken into account in assessing whether the conduct of a person has caused harm to another person.

Whether a person has caused harm requires consideration of the facts of the case in two ways. First, whether the harm suffered would not have occurred but for the actions of the person claimed to be at fault, described as 'factual causation', and second, whether in all the circumstances of the particular case, it is appropriate that the liability of the person considered at fault should include the harm that eventuated, described as 'scope of liability'.

The section also provides for cases where the facts are so unusual or extraordinary that, while factual causation cannot be found, a breach of duty that was a material contribution to the harm still exists. In such circumstances, the section requires the court to apply the tests developed at common law to decide whether or not, subjectively, a person should be responsible for the harm suffered. As part of this, the court is to consider why in all the circumstances the person should be held responsible. The court is then still required to move to the objective test for the scope of liability.

In relation to determining factual causation under the provision, the section provides that in instances where the hypothetical conduct of the person who suffered harm in the absence of the negligent act is relevant, the conduct is to be developed and assessed subjectively, as opposed to that of a reasonable person. In relation to statements made by the person after they suffered harm, only a statement adverse to that person is admissible in the process. The section provides that, in assessing the scope of a person's responsibility, the court is to consider why, in all the circumstances, the person should be held responsible.

Section 12 provides that the onus of proof for negligence is always upon the plaintiff, and each fact relevant to causation must be proven on the balance of probabilities.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1A Division 3 provides a determination that a tortfeasor caused particular harm comprises two elements: factual causation and scope of liability.

In circumstances where fault cannot be established as a necessary condition to harm in determining factual causation (that is, where there is an 'evidentiary gap'), the court should consider whether and why responsibility for the harm should or should not be imposed on the tortfeasor.

In determining factual causation it is relevant to determine what the injured person would have done if the tortfeasor had not been at fault. The legislation requires that in making this determination, the evidence of the injured person is not admissible.

The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to causation.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

Proposed sections 34 and 35 deal with causation.

Proposed subsection 34(1) stipulates that a determination that negligence caused particular harm comprises the following elements:

- that the negligence was a necessary condition of the occurrence of the harm (factual causation); and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

Proposed subsection 34(2) provides that where a plaintiff has been negligently exposed to a similar risk of harm by a number of defendants, and it is not possible to assign responsibility for causing the harm to any one or more of them, the court may continue to apply the principle under which responsibility is assigned to defendants for causing the harm, but must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.

Proposed subsection 34(3) stipulates that, in determining the scope of liability, the court is to consider whether or not and why responsibility for the harm should be imposed on the negligent party.

Proposed section 35 provides that the plaintiff always bears the burden of proving any fact relevant to causation and that the standard of proof is the balance of probabilities.

TASMANIA

Civil Liability Act 2002

The Act provides that there are two prerequisites for a decision that a breach of duty caused particular harm. These are 'factual causation', based on a modified 'but for' test, and 'scope of liability' which requires the court to take into account whether or not and why responsibility for the harm should be imposed on the party who was in breach of duty.

In deciding in an exceptional case, in accordance with established principles, whether a breach of duty, being a breach of duty that is established but which cannot be established as satisfying factual causation (that is, there exists an 'evidentiary gap'), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the negligent conduct had not occurred, the matter is to be

decided subjectively in the light of all relevant circumstances, and any statement made by the plaintiff is inadmissible except to the extent (if any) that the statement is against his or her interest.

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, that any fact on which the plaintiff wishes to rely relevant to the issue of causation.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Part 4.3 sets out the principles of causation.

A decision that negligence caused particular harm comprises the following elements:

- that the negligence was a necessary condition of the occurrence of the harm ('factual causation'); and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

If a plaintiff has been negligently exposed to a similar risk of harm by a number of different people and it is not possible to assign responsibility for causing the harm to any one or more of them, the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.

In deciding liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

NORTHERN TERRITORY

Intention to legislate announced.

C3: STANDARD OF CARE FOR PROFESSIONALS

SITUATION PRIOR TO THE REFORMS

The standard of care required of professionals can be considered in two parts:

- negligent treatment; and

- negligence related to the duty to disclose relevant information prior to treatment being carried out.

Treatment

Until 1992, it was widely thought that the *Bolam* rule applied to cases of professional negligence in Australia. The *Bolam* rule requires that a professional is not guilty of negligence if he or she has acted in accordance with a practice considered proper by a body of professional practice skilled in that particular art. The rule derives from a famous statement by McNair J in the English case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

When strictly applied, the *Bolam* rule can result in outcomes which may be unacceptable by community standards. This is because it may allow small pockets of medical opinion to be arbiters of the requisite standard of medical treatment even in instances where a substantial majority of medical opinion would take a different view.

In 1992, the judgment in *Rogers v Whitaker* (1992) 175 CLR 479 overturned this principle such that a court was never required to defer to expert opinion. Instead, a court was entitled to consider the entirety of the expert evidence to determine whether, in its view, the professional had acted negligently.

Duty to inform

A medical practitioners' obligation to take reasonable care is an obligation to advise the patient contemplating treatment of the material risks inherent in that treatment and of risks about which the practitioner ought to have appreciated that the patient would wish to be aware. If a practitioner negligently fails to warn of a risk which eventuates in circumstances where the patient would not have undergone the treatment had he or she been advised of the relevant risk, the practitioner will be held liable in damages.

The law recognises duties on the part of other professions and occupations other than medical practitioners to give particular categories of information in particular circumstances. However, the law is still evolving in this area.

With respect to medical practitioners, the duty to inform can be divided into two parts, the proactive duty to inform and the reactive duty to inform.

The proactive duty to inform requires a medical practitioner to take reasonable care to give a patient such information as a 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 reactive duty to inform requires a medical practitioner to take reasonable care to give a patient such information as the medical practitioner knows or ought to know that the patient wants to be given before making the decision whether or not to undergo treatment.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Treatment

The application of the test for negligence established in *Rogers v Whitaker* led to circumstances where professionals perceived that they were being held negligent for an act which accorded with generally accepted practice at the time the procedure was carried out.

Notwithstanding that the basic rule for the standard of care is determined by reference to what could reasonably be expected of a person exercising the skill that the defendant professed to have, within the medical profession, in particular, there existed considerable fear and uncertainty about the risk of being sued.

Duty to inform

Given the relative immaturity of the state of the law as it relates to the duty to inform of professions more generally, reforms in this area have only been considered with respect to medical practitioners.

Some statements concerning the duty of medical practitioners to provide information make no reference to the obligation as being a duty of reasonable care. This means that consideration must be had to the circumstances of the medical practitioner. A practitioner only has a duty to exercise reasonable care in giving information and does not have a duty to give whatever information can be obtained.

In respect of the proactive and reactive obligations to inform, there is uncertainty amongst medical practitioners as to their duties. In addition, medical practitioners are concerned that hindsight bias increases the risks of their being found liable in damages.

REFORMS

Treatment

The reforms introduce a modified version of the *Bolam* rule to require, in most circumstances, a court to take into account practice at the time an event giving rise to a loss took place. The new test was modified to ensure that the practice had to be widely held to be proper, to avoid the drawbacks of the original test and, for very exceptional cases, to allow a court to intervene where widely held views are 'irrational'.

The reforms make a legislative restatement of the duty of care of professionals such that the standard would be determined by what could reasonably be expected of a person professing that skill and the relevant circumstances at the date of the alleged negligence.

Duty to inform

The reforms make it clear through legislative restatement that a medical practitioner's obligations to give information are only to take reasonable care. In addition, the reforms are designed to provide a legislative statement of the law to provide additional clarity and to make it clear that the assessment of whether there had been a breach of the duty to inform should be made at the time the decision to undergo treatment was made by the patient and not at some later time.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C3: Standard of care for professionals — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Standard of care for professionals									
Modified *Bolam* rule	n/a	✓	✓	✓	a	✓	✓	---	---
Legislative restatement of duty to inform for medical practitioners to give greater clarity and address hindsight bias	n/a	---	---	✓	✓	---	✓	---	---

NEW SOUTH WALES

Civil Liability (Personal Responsibility) Act 2002

Division 6 deals with the standard of care for professionals. A professional will not be liable in negligence if the professional acts in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice. The division does not apply to any duty to warn of the risk of personal injury or death associated with the provision of a professional service.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

The standard to be applied by a court in determining whether a professional acted with due care is to be determined by reference to what could reasonably be expected of a person professing that skill (and not a greater level of skill) and the relevant circumstances as at the date of the alleged negligence and not a later date.

Section 59 modifies the law regarding the standard of care that applies to professionals. In any case involving an allegation of negligence where a court is considering the conduct of a professional, the conduct will not amount to negligence if the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field, peer professional opinion, as competent professional practice, unless (in the circumstances of the case before it), the court determines that such peer professional opinion is unreasonable.

Section 60 clarifies that the new test for 'standard of care' in the case of professionals set out in section 69 does not apply to a liability arising in connection with the giving of (or the failure to give) a warning or other information in respect of a risk.

The common law will continue to apply to such cases, and courts may continue to have regard to expert evidence of accepted practice in relation to the giving of warnings or information, to the extent permitted under the common law.

QUEENSLAND

Civil Liability Act 2003

Section 21 provides that a doctor has a duty to advise their patient of information relevant to any risk of personal injury to that patient.

The information must be sufficient to enable the patient to make an informed decision about whether to undergo the treatment and must also include information of the type that the doctor knows or should know the patient wants to be given. It is immaterial whether or not the patient seeks or requests the information. The duty extends to providing information to a person responsible for making any decision on behalf of a patient.

Section 22 sets out the standard of care for professionals generally. The standard by which the conduct of a professional is to be assessed is conduct accepted by peer professional opinion as competent. The opinion is to be widely accepted geographically and also is to be accepted by a significant number of those peers. Acceptance by a significant number of peers does not necessarily mean that it must be the only opinion accepted as competent; neither does it mean that it must be the majority opinion that is accepted as competent. If a number of differing opinions are widely accepted by significant numbers of peers, then all of those opinions may be relied upon to establish the relevant appropriate conduct in any particular case. However, a court may discount the peer opinion if the court considers that opinion to be clearly outside the bounds of community expectations.

WESTERN AUSTRALIA

Intention to legislate announced.

Western Australia has approved the drafting of a bill to introduce a *Bolam*-type evidentiary rule in relation to medical treatment (as distinct from medical advice) given by health practitioners statutorily requiring registration. Under this test, a finding of negligent treatment would not be made against a health practitioner if the practitioner's conduct would be widely accepted in Australia by the health professional's peers opinion as competent professional practice.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

Proposed section 41, dealing with the standard of care for professionals, provides that a person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by members of the same profession as competent professional practice. Professional opinion does not have to be universally accepted to be considered widely accepted. These provisions do not apply to liability arising in connection with the giving of (or failure to give) a warning, advice or other information in respect of a risk of death or injury associated with the provision of a health care service.

TASMANIA

Civil Liability Act 2002

The Act provides that a professional does not breach a duty of care if the person acted in a manner that, at the time the professional service was provided, was widely accepted by peer professional opinion as competent professional practice, unless the court considers that peer opinion to be irrational. This section does not apply to any liability arising as a result of a breach of the professional's duty to warn of potential risks.

The Act provides that a registered medical practitioner has a duty to inform patients (whether or not the patient requests the information) about the risk associated with medical treatment that:

- a reasonable person in the position of the patient would require; and
- the medical practitioner ought reasonably to know the patient would want to be given before deciding to undergo the procedure.

The Act exempts from this provision cases in which:

- a medical practitioner must perform a medical procedure in order to avoid serious risk of harm to a patient;
- the patient is not able to hear or respond to a warning of the risk; and
- a person responsible for the patient cannot be contacted.

AUSTRALIAN CAPITAL TERRITORY

Not implemented.

NORTHERN TERRITORY

Intention to legislate announced.

C4: NON-DELEGABLE DUTIES

SITUATION PRIOR TO THE REFORMS

The concept of a non-delegable duty is used to justify the imposition of liability on one person for the negligence of another to whom the former has entrusted (or delegated) the performance of some task on their behalf.

This concept is related to that of vicarious liability in that it was developed in response to the inability of vicarious liability to apply in circumstances where independent contractors, as opposed to employees, were entrusted with the performance of the task. The general rule of vicarious liability is that an employer is vicariously liable for the negligence of an employee provided the employee was acting in the course of their employment. A corollary of the general rule is that an employer is not vicariously liable for the negligence of an independent contractor.

Vicarious liability has two essential characteristics. First, it is liability for the negligence (or other wrong) of another. Second, it is strict liability — that is, liability without proof of fault. A person can be vicariously liable for the negligence of another no matter how careful the person was in all relevant matters, such as choosing and supervising that person. In addition to the relationship of employer and employee, vicarious liability can also arise out of the relationship between principal and agent.

Various exceptions have been developed to the rule that an employer is not vicariously liable for the negligence of independent contractors. The concept of a non-delegable duty is, in effect, a technique for creating such exceptions.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The precise nature of a non-delegable duty is a matter of controversy and uncertainty. In recognition of this uncertainty, the Review of the Law of Negligence raised a concern that, if all recommendations in the Review of the Law of Negligence were adopted, it may have been possible for a party to avoid application of the tort law reform legislation by pleading that the incident was as a result of breach of a non-delegable duty. Accordingly, the Review of the Law of Negligence recommended that all tort law reform legislation should specifically state that, once a breach of non-delegable duty was found, the result of that breach should be treated as though it were a breach of vicarious liability, such actions already being caught by the recommendations.

In the recent decision of *New South Wales v Lepore* (2003) 195 ALR 412; [2003] HCA 4, the Full Court of the High Court of Australia provided guidance on the application of a number of principles related to non-delegable duty. However, the Court handed down the decision in six judgments with varying reasons on the position reached, ultimately not clarifying the content of a non-delegable duty of care.

Because of this, various points of view have developed on the appropriate application of the recommendation. Ultimately though, all states and territories agree that it is important that any breach of a non-delegable duty ought be dealt with so far as possible in the same fashion as any other breach of a duty, including and especially in relation to the statutory limitation of damages.

REFORMS

The reforms are designed to ensure that a breach of a non delegable duty is regulated within the tort law reforms so far as possible. This has been achieved in two ways — first, it is treated as equivalent in all respects to vicarious liability in line with the findings of the Review of the Law of Negligence, or second, it is merely included within the terms of application of the tort law reform legislation.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C4: Non-delegable duties — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Non-delegable duties									
Provides that the existence and extent of liability for breach of a non-delegable duty is determined on the basis of principles applicable to vicarious liability	n/a	✓	✓	---	---	---	---	---	a
Provides that civil liability legislation applies to a non-delegable duty	n/a	---	---	✓	---	---	✓	---	---

NEW SOUTH WALES

Civil Liability (Personal Responsibility) Act 2002

Division 7 provides that the existence and extent of liability in tort for breach of a non-delegable duty is to be determined on the basis of the principles applicable to vicarious liability.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Section 61 provides that the extent of liability in tort of a person (the defendant) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or entrusted to that person by the defendant, is to be determined as if the defendant were vicariously liable for the negligence of the other person in connection with the performance of the work or task.

QUEENSLAND

Civil Liability Act 2003

The definition of 'claim' in the Act ensures that the Act applies to actions involving a claim for breach of a non-delegable duty.

WESTERN AUSTRALIA

Not agreed.

SOUTH AUSTRALIA

Not agreed. Although a non-delegable duty is in one sense a strict liability, it is still only a liability that arises if someone has breached their duty of care. Therefore, South Australia believes that the legislation will be able to cover this situation without a special reference. It works just like vicarious liability.

TASMANIA

Civil Liability Act 2002

Section 3C provides that the Act applies to non-delegable duty.

AUSTRALIAN CAPITAL TERRITORY

Not agreed.

NORTHERN TERRITORY

Intention to legislate announced.

C5: FAIR TRADING LAWS — MISLEADING AND DECEPTIVE CONDUCT AND SIMILAR PROVISIONS

SITUATION PRIOR TO THE REFORMS

Division 1 of Part V of the Commonwealth *Trade Practices Act 1974* (TPA) and similar provisions under state and territory fair trading law, prohibit unfair practices in trade and commerce, including misleading and deceptive conduct.

To date, Division 1 of Part V of the TPA and similar provisions of state and territory fair trading acts have rarely been used to seek damages for personal injuries or death.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

There is significant potential for conduct in contravention of Division 1 of Part V of the TPA to be used as a basis for claims for negligently caused personal injury and death, thereby circumventing the reforms outlined elsewhere in this report.

This is the case notwithstanding the fact that the application of section 52 of the TPA (a key provision in Division 1 of Part V) is limited to conduct in the course of activities which are 'in trade or commerce'.

There are various areas of everyday life that are likely to give rise to claims for damages for personal injuries or death on the basis of Division 1 of Part V of the TPA. The most obvious are claims arising out of the provision of professional services and the occupation of land. For example, suppose a surgeon informs a patient that a certain operation would improve the patient's health. In the course of the operation, the surgeon decides — as a result of unforeseeable circumstances — that the operation was not, in effect, necessary and should not continue. The patient may be able to claim damages on the ground that the surgeon was guilty of misleading conduct in advising that the operation should occur.

To date, plaintiffs have rarely relied on the unfair practices in trade and commerce provisions of the TPA to form the basis of a claim for damages for personal injury or death. This, to a significant extent, is the result of the prevailing legal culture. There has been no need to rely on Division 1 of Part V of the TPA because the common law has been seen as an adequate source of compensation.

Once avenues for plaintiffs under the law of negligence are blocked or made less attractive by state and territory reforms (that is, the reform of rules on quantum of damages and other limitations of liability), this situation is likely to change. A shift of cases to Commonwealth law could effectively undermine state and territory civil liability reforms.

Further, while the TPA requires plaintiffs to demonstrate that they have suffered loss due to conduct that contravenes Division 1 of Part V, it does not require proof of intention, recklessness, negligence or dishonesty. In order for such common law claims to succeed it would be necessary for the plaintiff to show not only that the defendant made a false representation, but that he or she did so negligently or dishonestly.

REFORMS

The reforms will prevent actions for personal injury and death under Division 1 of Part V of the TPA and similar provisions of state and territory fair trading laws.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C5: Fair trading laws: misleading and deceptive conduct and similar provisions — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Fair trading laws									
Action prohibited for personal injury and death under Division 1 of Part V of the *Trade Practices Act 1974* and similar provisions under state and territory fair trading law	✓	✓	---	✓	---	---	✓	---	---

COMMONWEALTH OF AUSTRALIA

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

The measures contained in this bill will amend the TPA to prevent individuals, and the Australian Competition and Consumer Commission in a representative capacity, from bringing civil actions for damages for personal injuries or death resulting from contraventions of Division 1 of Part V of the TPA. As a consequence, these measures will ensure that plaintiffs continue to seek damages for personal injuries or death by pursuing a right of action under state and territory civil law rather than by relying on Division 1 of Part V of the TPA.

NEW SOUTH WALES

Civil Liability (Personal Responsibility) Act 2001

The *Fair Trading Act 1987* has been amended to prevent the recovery of damages under that Act for death or personal injury resulting from misleading and deceptive conduct.

VICTORIA

Not implemented.

QUEENSLAND

Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2003

The *Fair Trading Act 1989* has been amended to prevent recovery of damages under that Act for death or personal injury for all incidents resulting from beaches of the Act, other than unconscionable conduct, after 2 December 2003.

WESTERN AUSTRALIA

Not implemented.

SOUTH AUSTRALIA

Not implemented.

TASMANIA

Civil Liability Act 2002

The Act provides for amendments to the *Fair Trading Act 1990* to prevent actions for personal injury and death being brought under the misleading and deceptive conduct provisions of that Act.

AUSTRALIAN CAPITAL TERRITORY

Not implemented.

NORTHERN TERRITORY

Not implemented.

C6: MENTAL HARM

SITUATION PRIOR TO THE REFORMS

Personal injury may be either physical or mental. Mental harm may be consequential on physical injury (for instance where depression is suffered as a result of an injury to the body), or it may stand alone (for example, where a person suffers anxiety as a result of witnessing traumatic events).

For various reasons, the law has made it harder for people to recover damages for negligently caused pure mental harm than for negligently caused physical harm and consequential mental harm. Reasons for this include the difficulty of diagnosing pure mental harm objectively, proving pure mental harm for legal purposes and because the risk of causing pure mental harm may be more difficult to foresee.

Reasonable foreseeability of mental harm is the only precondition of the existence of a duty of care. However, a duty of care will only be owed if it was foreseeable that a person of normal fortitude might suffer mental harm in the circumstances of the case if care was not taken. That is, a plaintiff's abnormal vulnerability is not taken into account when determining the standard of care to be applied. The exception to this rule is where the defendant knew or ought to have known of this vulnerability.

The circumstances of the case include matters such as whether or not the mental harm was suffered as the result of a sudden shock, whether the plaintiff witnessed the event or the aftermath, what the relationship was between the plaintiff and defendant and the nature of the relationship between the plaintiff and anyone killed or injured.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

A very important difference existed between the law's treatment of consequential mental harm on the one hand, and pure mental harm on the other. Pure mental harm only attracted compensation if the plaintiff had suffered a 'recognised psychiatric illness'. This rule has the effect that expert evidence is normally required to establish whether damages are recoverable for pure mental harm. By contrast, consequential mental harm did not have to constitute a 'recognised psychiatric illness'.

REFORMS

The reforms apply the same evidentiary requirements to both pure mental harm and to economic loss associated with consequential mental harm. That is, in order to be compensated for pure mental harm and economic loss associated with consequential mental harm a plaintiff must have suffered a 'recognised psychiatric illness' and the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

In addition, the reforms provide a legislative restatement of the relevant factors in assessing mental harm.

The reforms also restrict the circumstances in which pure mental harm can be awarded as a result of another being imperilled, injured or killed to a specified list of family relationships.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C6: Mental harm — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Mental harm									
Pure mental harm and economic loss for consequential mental harm must be a recognised psychiatric illness and harm must be foreseeable to a person of normal fortitude	n/a	✓	✓	---	✓	✓	✓	✓	---
Legislative restatement of factors relevant to assessing mental harm	n/a	✓	✓	---	✓	✓	✓	---	---
Restrict the circumstances in which pure mental harm can be awarded as a result of another being imperiled, injured or killed to a specified list of family relationships	n/a	✓	✓	---	✓	✓	✓	---	---

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Part 3 deals with claims for damages for mental harm resulting from negligence and provides for the following:

- A plaintiff will not be able to recover for pure mental harm (that is, mental harm that is not a consequence of any other kind of harm) arising from another person being killed, injured or put in peril unless the plaintiff witnesses at the scene the victim being killed, injured or put in peril or the plaintiff is a close member of the family of the victim.
- There will be no liability for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

- There will be no duty of care to avoid causing mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness.
- A court will not be able to award damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Section 73 precludes recovery of damages for pure mental harm arising wholly or partly from mental or nervous shock unless the plaintiff witnessed at the scene a person being killed, injured or put in danger, or was in a close relationship with a person killed, injured or put in danger.

Section 74 provides that damages for consequential mental harm may only be recovered if the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstance of the case, suffer a recognised psychiatric illness if reasonable care were not taken or if the defendant knew, or ought to have known, that the plaintiff is a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken. In this section the circumstances of the case include the injury to the plaintiff out of which the mental harm arose.

Section 75 precludes recovery of damages for economic loss arising from mental harm unless the mental harm consists of a recognised psychiatric illness. Section 28LE of the *Wrongs Act 1958* already precludes recovery of damages for non-economic loss for psychiatric injury unless the injury is assessed at more than 10 per cent using established psychiatric guidelines.

QUEENSLAND

Agreed in principle but not yet implemented.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1B deals with claims for damages for mental harm resulting from negligence and provides for the following:

- There will be no duty of care to avoid causing mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness. It must be foreseeable that the plaintiff would suffer a psychiatric illness and not merely mental distress.
- The assessment of whether there is a duty of care relating to pure mental harm is to be made having regard to all the relevant circumstances including the suddenness of the incident, how closely the plaintiff was involved, and whether there was some relationship between the plaintiff and the victim.
- The test of foreseeability relating to consequential mental harm requires the court to take into account all the relevant circumstances including the physical injuries in fact suffered by the plaintiff.
- There are allowances for a court to have regard to a situation in which a person might owe a duty of care to someone who was abnormally vulnerable, even if no duty would be owed to a normally vulnerable victim, if the person knew that the other person was abnormally vulnerable.
- A court will not be able to award damages for economic loss for consequential mental harm resulting from the negligence of another unless the harm consists of a recognised psychiatric illness.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

The Bill provides the following.

- There will be no duty of care to avoid causing mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness. In respect of pure mental harm the circumstances which the court is to have regard include whether the mental harm was the result of a sudden shock, whether the plaintiff witnessed a person being killed, injured or put in peril, the nature of the relationship between the plaintiff and any person killed, injured or put in peril and any pre-existing relationship between the plaintiff and the defendant. In relation to consequential mental harm the circumstances of the case also include the nature of the bodily injury out of which the mental harm arose.
- A plaintiff will not be able to recover damages for mental harm unless they were physically injured in the accident or were present at the scene of the accident when it occurred, or they are a parent, spouse or child of a person killed, injured or endangered in the accident.

- There will be no liability for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.
- A court will not be able to award damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

TASMANIA

Civil Liability Act 2002

The Act provides that:

- damages may only be awarded for pure mental harm which is a recognised psychiatric illness;
- damages for economic loss may only be awarded for consequential mental harm that is a recognised psychiatric illness'
- damages may only be awarded to individuals suffering pure mental harm arising from the injury or death of another person if that person witnessed the death or injury, or its immediate aftermath, at the scene or the person was a close family member of the victim; and
- a person does not breach a duty to not cause mental harm to another unless it was reasonably foreseeable that a person of normal fortitude might, in the circumstances, have suffered mental harm.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Part 3.2 of the Act provides that damages are not available for mental harm unless the mental harm is a recognised psychiatric illness.

Implementation of this provision will avoid what appear to be early signs of the courts developing a new head of damages for 'mere sadness.'

NORTHERN TERRITORY

No action to date.

C7: APOLOGIES

SITUATION PRIOR TO THE REFORMS

In many cases, defendants are reluctant to communicate with injured persons in any sympathetic or co-operative way for fear any comments may be taken as an admission of liability.

This reluctance is reinforced by advice from insurance companies (including in policy wordings) and lawyers instructing policyholders against admissions of liability.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Research has shown that plaintiffs — particularly medical patients — are less likely to seek recovery of damages where the medical practitioner or potential defendant has explained the cause of loss or has apologised for the loss.

REFORMS

The reforms allow for certain apologies or expressions of regret without the action being construed as an admission of liability.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C7: Apologies — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Apologies									
An apology cannot be taken as an admission of liability	n/a	✓	✓	✓	✓	✓	✓	✓	✓

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Part 10 provides that an apology by or on behalf of a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

Section 14J provides that in the context of a civil proceeding for personal injury or death an apology does not constitute an admission of liability for the death or injury; or an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance.

QUEENSLAND

Civil Liability Act 2003

Sections 68 to 72 allow individuals involved in an incident to express regret about the incident without being concerned that their expression of regret may be used as an admission of liability.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1D provides that a mere expression of sorrow or regret by a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind.

SOUTH AUSTRALIA

Wrongs Act 1936

Division 14 of the Act provides that no admission of liability or fault is to be inferred from the fact that the defendant expressed regret for the incident out of which the cause of action arose.

TASMANIA

Civil Liability Act 2002

The Act clarifies that saying sorry for an action is not an admission of legal liability.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Part 2.3 of the Act provides that an apology does not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 13 provides that an expression of regret made before the commencement of a court proceeding in relation to the incident is not admissible in the court proceeding.

C8: CONTRIBUTORY NEGLIGENCE AND THE ASSUMPTION OF RISK

SITUATION PRIOR TO THE REFORMS

Contributory negligence is failure by a person (typically the plaintiff) to take reasonable care for his or her own safety, which contributes to the harm the person suffers.

Legislation in all Australian jurisdictions provides for the 'apportionment' of damages (that is, reduction of the damages to which the plaintiff is entitled) as a result of contributory negligence. The court has very wide discretion to reduce the plaintiff's damages to the extent the court considers just and equitable having regard to the plaintiff's share of responsibility of the harm suffered.

The basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. Contributory negligence is an objective concept that refers to the care that a reasonable person in the plaintiff's position would have taken for his or her own safety.

In theory, the standard of care that should be applied to the actions a person should take to protect themselves should be equivalent to the actions required of others to take care of that person.

For that reason, the negligence calculus as described in Part C1 provides a framework for deciding what precautions a plaintiff could reasonably be expected to have taken for his or her own safety.

The defence of voluntary assumption of risk is a complete defence in the sense that it provides the basis for denying the plaintiff any damages at all. A person will be held to have voluntarily assumed a risk only if they were actually aware of the precise risk in question and freely accepted that risk.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

In practice, the standard of care applied to contributory negligence has been lower than that applied to negligence. There is a perception that lower courts have on occasions accepted a lower standard of care from the plaintiff in contributory negligence and are more indulgent to plaintiffs than to defendants. In some cases, judges have expressly applied a lower standard of care.

The onus of proving that a plaintiff was guilty of contributory negligence has traditionally rested on the defendant. As circumstances differ from case to case and it cannot be presumed that certain types of behaviour will always, and in all circumstances, be contributorily negligent, this imposes a particular burden on the defendant.

The only guidance the apportionment legislation gives to courts is that the reduction of damages for contributory negligence should be 'just and equitable'. The High Court of Australia has held that a reduction of 100 per cent is not permissible on the basis that a finding of 100 per cent contributory negligence would be incompatible with the finding that the defendant was negligent.

Since the introduction of the defence of contributory negligence, the defence of the voluntary assumption of risk has become more or less defunct. This is because any conduct that could amount to voluntary assumption of risk would also amount to contributory negligence. Contributory negligence is preferred by the courts as it allows some recovery to the plaintiff even where the plaintiff bears a significant share of responsibility for the harm suffered.

There may be circumstances in which the plaintiff's relative responsibility for the injuries suffered is so great that it seems fair to deny the plaintiff any damages at all. While the cases would be rare, the ability to provide for 100 per cent contributory negligence would be appropriate. An example would be where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the part of the plaintiff.

REFORMS

To ensure that the standard of care applied to the determination of contributory negligence is the same as that applied to negligence, the reforms include a legislative statement setting out the approach to be followed in dealing with the issue of contributory negligence.

The reforms allow for the damages of a plaintiff to be reduced by 100 per cent where the court considers it just and equitable to do so.

The reforms make it easier to establish the defence of the assumption of risk by reversing the burden of proof on the issue of awareness of risk in relation to obvious risks. That is, it would be presumed that a person against whom the defence is pleaded was actually aware of an obvious risk unless that person could prove, on the balance of probabilities, that he or she was actually not aware of that risk. The test of whether a person was aware of a risk is whether he or she was aware of a risk of the type or kind of risk and not of its precise nature, extent or manner of occurrence.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C8: Contributory negligence and the assumption of risk — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Contributory negligence and the assumption of risk									
Legislative statement of the negligence calculus for contributory negligence	n/a	✓	✓	✓	✓	✓	✓	✓	---
100 per cent reduction of damages for contributory negligence	n/a	---	✓	✓	---	---	✓	✓	---
Special provisions for contributory negligence of a plaintiff under the influence of drugs or alcohol and engaged in criminal activities	n/a	✓	✓	✓	✓	✓	✓	---	✓
Reform of the defence of voluntary assumption of risk	n/a	✓	✓	✓	✓	✓	✓	---	---

NEW SOUTH WALES

Civil Liability (Personal Responsibility) Act 2002

Division 8 provides that the principles applicable to determining negligence also apply to contributory negligence, and that a court can determine a 100 per cent reduction in damages due to contributory negligence.

The Division also applies the contributory negligence principles to compensation for relatives' actions.

Part 6 and 7 contain special provisions relating to contributory negligence to be applied in circumstances where the plaintiff was intoxicated or engaged in criminal activities.

Division 4 deals with obvious risk (being a risk that in the circumstances would have been obvious to a reasonable person in the position of the person injured) and inherent risk. An injured person will be presumed to have been aware of an obvious risk unless the person can prove they were not aware of it.

There will be no duty of care to warn of an obvious risk (except where the injured person requested information about the risk, a risk warning is required by law or the risk is a risk of injury or death resulting from the provision of a professional service).

There will be no liability in negligence for harm suffered as a result of the materialisation of an inherent risk (a risk that cannot be avoided by the exercise of reasonable care and skill).

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Section 62 provides that the principles that govern determination of negligence also apply to contributory negligence on the part of the person who suffers harm for failing to take precautions against the risk of that harm.

Section 63 provides that contributory negligence can cover any proportion of the responsibility for the harm, up to and including 100 per cent, although a finding of 100 per cent contributory negligence will defeat the claim.

Section 14G provides that in determining whether a plaintiff has established a breach of the duty of care owed by the defendant, the court must consider, among other things:

- whether the plaintiff was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication; or
- whether the plaintiff was engaged in an illegal activity.

Section 54(1) amends the common law defence of voluntary assumption of risk (*volenti non fit injuria*) in a limited way. It provides that where the defence is raised and the risk of harm is an obvious one, the person is presumed to have been aware of the risk, unless the person proves on the, balance of probabilities, that he or she was not aware of the risk.

Section 54(2) provides that the amended defence does not apply in respect of:

- a proceeding on a claim for damages relating to the provision of a professional service; or health service; or
- a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

QUEENSLAND

Civil Liability Act 2003

Section 23 provides that the same principles that apply in deciding a matter to which this Act applies, also apply in deciding contributory negligence. The standard of care a person must take for the care of their own safety is to be the same standard a reasonable person would take if the reasonable person was aware of the same information that the person who actually suffered injury, loss or damage, knew or ought to have known.

Section 24 states that a claim of contributory negligence can defeat a claim for breach of a duty by way of a reduction of damages by 100 per cent.

Sections 45 to 49 contain provisions relating to the contributory negligence of plaintiffs who were intoxicated or engaged in criminal conduct.

Section 13 sets out the meaning of 'obvious risk'. An obvious risk does not include risks which manifest themselves because of some action which is not in itself an obvious risk. For example, while it may be an obvious risk of riding a horse that a rider may fall off the horse, it would not be an obvious risk that the rider may fall off due to the saddle not being securely fastened.

Section 14 establishes a presumption that a person who suffers harm is presumed to be aware of any obvious risk of harm. The presumption is rebuttable, but exists where the person has a general knowledge of the risk, not necessarily knowledge of the precise risk.

Section 15 provides that no proactive duty exists to warn of an obvious risk. A duty to warn of obvious risks exists in certain circumstances by way of exception to this general rule. These exceptions are where the person who suffers harm raises the risk with the person who, but for this section, had a duty to warn of the risk; where a person is required to inform of an obvious risk by legislation; and where a professional person, other than a doctor, may cause the death or personal injury of a person. Whilst a doctor is exempted by this section, the doctor's duty to warn of all risks is maintained by section 21.

Section 16 provides that no liability exists for personal injury suffered as a result of an inherent risk. An inherent risk is defined in this section. This is a restatement of the

position at common law. The section does not exclude liability in connection with a duty to warn of a risk.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1A Division 5 of the Act provides that the same principles that are applicable in determining primary liability in negligence also apply in determining contributory negligence. In addition, this Part provides that if an injured person was intoxicated at the time of the accident then contributory negligence will be presumed unless rebutted. The effect is to shift the onus of proof to the injured person in circumstances where that person is shown to have been intoxicated when injured.

The presumption will only apply where the claimant's intoxication was self-induced. There is no presumption of contributory negligence if the court is satisfied that the person's intoxication did not contribute in any way to cause the harm.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

Proposed Part 7 provides that the same rules should apply to determine whether the plaintiff was contributorily negligent as would apply to determining whether the defendant was negligent. This general provision however does not derogate from specific statutory provisions about contributory negligence, such as the provision that a person who is intoxicated automatically loses at least 25 per cent of their damages (as set out in the *Wrongs Limitation and Damages for Personal Injury Amendment Act 2002*).

Proposed Division 3 deals with the assumption of risk. Proposed new section 38 provides that, in general, there is no liability for failure to warn of obvious risks. However, an exception is made where the plaintiff has requested advice about the risk, the defendant is required by law to warn the plaintiff of the risk, or the risk is a risk of bodily injury from the provision of a health care service.

Proposed section 37 states that if a defence of voluntary assumption of risk is raised by the defendant and the risk is obvious (that is, obvious to a reasonable person in the position of that person), the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.

TASMANIA

Civil Liability Act 2002

The Act provides that the principles that are applicable in determining whether a person has been negligent also apply in determining whether the person has been contributorily negligent.

It also amends the *Wrongs Act 1954* so that a person may be found to be up to 100 per cent contributorily negligent. The Act restricts the level of damages that may be awarded in cases where the use of recreational drugs by the injured party has contributed to their injury, and prevents people from being able to claim damages if they are injured while they are engaging in serious criminal activity.

The Act provides that a plaintiff is assumed to be aware of an obvious risk unless it can be proved otherwise. This allows for the greater use of the defence of assumption of risk as the onus of proof is reversed.

The Act provides that there is not a duty of care to warn of an obvious risk, unless:

- the plaintiff has requested advice or information about the risk from the defendant;
- the defendant is required by law to warn the plaintiff of the risk; or
- the defendant is a professional, other than a medical practitioner, and the risk arises from the provision of a professional service by the defendant.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Bill 2002

Proposed Part 4.4 of the Bill provides a restatement of the common law regarding contributory negligence and provides that the court may reduce a plaintiff's damages by 100 per cent for contributory negligence.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 9 protects the owner/occupier from liability for injury to a person who enters the premises for the purpose of committing an offence punishable by imprisonment.

Section 10 excludes damages to a person injured in the course of committing an offence punishable by imprisonment and whose conduct contributes to the risk of that injury, unless there are exceptional circumstances.

Section 14 raises a rebuttable presumption of contributory negligence if the injured person was intoxicated (blood alcohol level >0.08) at the time of the incident.

Section 15 provides that there is a presumption of contributory negligence if the injured person relied on the care or skill of a person who is intoxicated by drugs or alcohol.

This presumption applies if the claimant is over 16 years of age and ought to have been aware that the other party was intoxicated by drugs or alcohol.

The presumptions for both sections can be rebutted if the claimant can establish that, at the time of the incident, intoxication did not contribute to the incident.

If contributory negligence is established, damages are reduced by 25 per cent or such greater percentage as determined by the court.

C9: PROPORTIONATE LIABILITY FOR ECONOMIC CLAIMS

SITUATION PRIOR TO THE REFORMS

The common law applying to all tort claims (both personal injury and economic losses) involves a system of joint and several liability.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Concern was expressed, especially by professionals such as accountants, with 'deep pockets' and adequate insurance, that they could be held liable for the full amount of losses even though their actions may have made only a small contribution to the loss.

Several previous Law Reform Commission and other studies had recommended proportionate liability for pure economic loss claims only, or for property damage and pure economic loss claims. Most studies, including the Review of the Law of Negligence, recommended a continuation of joint and several liability for personal injury and death claims.

REFORMS

Reforms are designed to apply proportionate liability to claims for economic loss.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C9: Proportionate liability for economic claims — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Proportionate liability for economic claims	✓	✓	✓	✓	✓	a	a	a	---

COMMONWEALTH OF AUSTRALIA

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

The Bill will amend the *Australian Securities and Investment Commission Act 2001*, the *Corporations Act 2001* and the *Trade Practices Act 1974* to ensure that proportionate liability applies to claims for damages for economic loss or property damage arising from misleading or deceptive conduct. The provision is not limited to the liability of auditors.

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

The following provisions of the Act have been enacted, but are awaiting proclamation.

Part 4 (see Schedule 1[5]) introduces proportionate liability for claims involving economic loss or property damage in non-personal injury matters or a contravention of section 42 (misleading or deceptive conduct) of the *Fair Trading Act 1987*, so that a person who is jointly responsible with some other person or persons will only be liable to the extent of their responsibility.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

Part IVAA introduces proportionate liability for claims involving economic loss or property damage in non-personal injury matters or a contravention of section 9 (misleading or deceptive conduct) of the *Fair Trading Act 1999*, so that a person who is

jointly responsible with some other person or persons will only be liable to the extent of their responsibility.

QUEENSLAND

Civil Liability Act 2003

The following provisions of the Act have been enacted, but are awaiting proclamation.

Section 28 sets out the application of this part. The part applies to claims for economic loss or damage to property where the damages exceed $500,000. It does not apply to claims that originate as a result of a personal injury. The Queensland Government has indicated it will amend this provision to remove the $500,000 threshold and replace it with an exclusion based upon the definition of a consumer transaction, relating to claims based upon goods and services acquired for personal, domestic or household use.

Section 30 provides that the liability of a person to which this part applies is restricted to the portion of loss that is assessed by a court as being the responsibility of the person. Further, the section directs that, should a court consider that liability is attributable to a party that is not joined in the proceedings, then for the purposes of apportioning damages the court can not take this factor into account. The provision does not prevent the court from making comment as to the parties' liability, but for the purposes of recovery, the court must apportion the damages between those parties who are joined to the action. The only exception to this requirement is where the party not joined is deceased, if a person, or wound up, if a corporation.

WESTERN AUSTRALIA

Civil Liability Act 2002

The following provision of the Act has been enacted, but is awaiting proclamation.

Part 1F replaces the concept of joint and several liability with proportionate liability as the basis for assessment of claims for damages for property damage and pure economic loss. Joint and several liability will remain the basis for assessment of damages for claims in respect of personal injury and death.

SOUTH AUSTRALIA

South Australia has announced its intention to introduce proportionate liability legislation in relation to economic loss and property damage claims.

TASMANIA

Tasmania has announced its intention to introduce proportionate liability legislation in relation to economic loss and property damage claims.

AUSTRALIAN CAPITAL TERRITORY

Not implemented.

NORTHERN TERRITORY

Agreed in principle but not yet implemented.

C10: RECREATIONAL ACTIVITIES AND WAIVERS

SITUATION PRIOR TO THE REFORMS

Section 74 of the *Trade Practices Act 1974 (*TPA) implies into certain contracts statutory warranties which cannot be waived. These statutory warranties include a requirement to provide services with due care and skill.

Similar provisions apply in state and territory fair trading acts.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Providers of recreational services, and in particular those with a high degree of inherent risk, argued that the existence of these statutory warranties prevented the effective use of waivers.

REFORMS

Reforms have been introduced to enable recreational service providers to enter into effective waivers overriding the statutory warranties of section 74 and similar provisions in state and territory law.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C10: Recreational activities and waivers — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Recreational activities and waivers									
No liability for harm resulting from an obvious risk of a dangerous recreational activity	n/a	✓	✓	✓	✓	---	✓	---	✓
Allows for providers of dangerous recreations to enter into contracts limiting their liability	✓	✓	✓	✓	✓	✓	✓	---	✓

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

Prior to the Australian Government's reforms, section 68 of the TPA did not allow providers of goods and services to contract out of statutory warranties established by the TPA, such as that under section 74 to provide services with 'due care and skill'.

The amendment made by the Government permits self assumption of risk by individuals who choose to participate in inherently risky activities, and allows them to waive their right under the TPA to sue the business providing the activity, should they suffer personal injury as a consequence of the service provider's failure to supply the services with due care and skill.

Section 68B now allows providers of 'recreational services' — as defined in subsection (2) — to limit their liability for death or personal injury arising from the supply of those services. 'Recreational services' has been 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.

NEW SOUTH WALES

Civil Liability Act 2002

Part 1 Division 5 of the Act makes special provision for limiting the liability of the providers of recreational activities.

A recreational activity is defined in section 5K as including:

- any sport (whether or not the sport is an organised activity); and
- any pursuit or activity engaged in for enjoyment, relaxation or leisure.

This is broadly similar to subsection 68B(2) of the TPA.

However the New South Wales legislation goes further to include any pursuit or activity engaged in a place (such as a beach, park or other public or open space) where people ordinarily engage in sport or in any other pursuit or activity for enjoyment, relaxation or leisure.

Part 5 sets out three separate circumstances in which a person does not owe the duty of care which would otherwise be placed upon that person by the materialisation of a (presumable) reasonably foreseeable risk. The three circumstances are:

- when the injured person has engaged in a dangerous recreational activity (section 5L);
- when the defendant has provided a risk warning (section 5M); and
- when the participant in and provider of the recreational services have entered into a contract in relation thereto (section 5N).

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

The protection provided to providers of recreational activities is limited to permitting them to exclude, restrict or modify the obligations which they were previously under, which were to provide such services with due care and skill.

The Victorian legislation is broadly similar to the federal provisions.

Prior to the recent legislation, sections 91 to 94 of the *Goods Act 1958* implied various terms into contracts for the sale of services, and sections 95 and 97 prohibited the provider of those services from excluding, restricting or modifying those terms.

A new section 97A of the Goods Act, inserted by section 16 of the Wrongs and Other Acts (Public Liability Insurance Reform) Act permits the exclusion or restriction of those statutory imposed obligations in relation to the provision of recreational services.

The definition of recreational services is precisely the same as that in subsection 68B(2) of the TPA.

Two further provisions in the new section 97A limit the provider of recreational services slightly more than does section 68B of the TPA;

- paragraph 97A(2)(e) requires the exculpatory term to have been signed by the participant in those services; and
- paragraph 97A(3)(b) prohibits the provider of recreational services from including a term which would exclude its liability for acting 'with reckless disregard, with or without consciousness, for the consequences of [the provider's] act or omission'.

QUEENSLAND

Civil Liability Act 2003

Section 17 sets out the application of the division which applies to liability for personal injury suffered during a dangerous recreational activity only.

Section 18 defines 'obvious risk' as having the same meaning as in Division 3 and 'dangerous recreational activity' as confined to those activities which, while primarily engaged in for enjoyment, relaxation or leisure, involve a significant degree of risk of physical harm.

Any consideration of a significant degree of risk of physical harm would necessarily require consideration of factors including, but not limited to, the type of activity, the probability of harm occurring, the severity of the injury and the characteristics of the person who suffered injury.

Section 19 provides that no liability exists for any personal injury suffered during a dangerous recreational activity if that injury occurred as a result of an obvious risk actually occurring.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1A Division 4 Section 5H provides that no liability exists for any harm suffered during a dangerous recreational activity if that injury resulted from the occurrence of an obvious risk (that is, what would have been obvious to a reasonable person in the position of the person suffering harm), whether or not the plaintiff actually knew of the risk. Liability may however be incurred in circumstances where the plaintiff has requested advice or information as to the risk from the defendant, or where a law requires the defendant to give a warning of the risk.

Part 1A Division 4 Section 5P provides that there will be no liability in negligence for harm suffered as a result of the materialisation of an inherent risk (defined as a risk that cannot be avoided by the exercise of reasonable care). If there is currently a common law duty to warn of risk then this section will not affect that duty.

Part 1A Division 4 Section 5I provides that in relation to recreational activity there will be no liability for harm resulting from a risk of a recreational activity that was subject to a risk warning.

Warnings to parents and to other competent adults accompanying children aged 16 years or over will also be capable of extending to those children.

Risk warnings will not be applicable to younger children nor to disabled persons lacking the capacity to understand the warning, who need and deserve special protection from risks of harm.

SOUTH AUSTRALIA

Recreational Services (Limitation of liability) Act 2002

The Act allows providers of dangerous recreations to enter into contracts limiting their liability. It covers services that consist of participation in a sporting activity or similar leisure-time pursuit, or any other activity that involves a significant degree of physical exertion or risk and is undertaken for the purposes of recreation, enjoyment or leisure.

Section 6 of the Act states that a registered provider may enter into a contract with a consumer modifying the duty of care owed by the provider to the consumer so that the duty of care is governed by the registered code.

Any person or organisation can apply to the Minister to register a code governing a recreation. Codes are subject to public and Parliamentary scrutiny. Once a code is registered, any provider can register an undertaking to comply with a registered code.

Thereafter, the provider can contract with a consumer that the provider is not liable for any injury sustained in the course of the recreation unless the provider has breached the code.

The form of contract is prescribed by law and the code must be available for inspection.

Note however that the provider cannot limit liability towards children or mentally incapacitated persons.

TASMANIA

Civil Liability Act 2002

The Act provides that there is no liability arising from the materialisation of an obvious risk of a dangerous recreational activity. Dangerous recreational activity is defined in the Act.

AUSTRALIAN CAPITAL TERRITORY

Not agreed.

NORTHERN TERRITORY

Consumer Affairs and Fair Trading (Amendment) Act 2003

This Act amends the Consumer Affairs and Fair Trading Act to remove a statutory impediment to the self-assumption of risk by persons undertaking risky recreational activities.

Section 68A allows people who choose to participate in inherently risky recreational activities, such as adventure tourism and some sports, to share some of the legal risk.

Participants and suppliers of recreational services may agree to exclude, modify or restrict the warranty implied by the Act that the services will be rendered with due skill and care and that any materials supplied in connection with those services will be reasonably fit for their purpose.

The amendment only applies to agreements for recreational services entered into after the commencement of the Act.

C11: 'GOOD SAMARITANS'

SITUATION PRIOR TO THE REFORMS

In South Australia, the *Wrongs Act 1936* provides that a 'good Samaritan' is immune from civil liability for any act or omission done in good faith and without recklessness in assisting a person in apparent need of emergency assistance.

In other jurisdictions, no such exemptions from liability prevailed.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

'Good Samaritans' could incur personal civil liability actions against them in certain circumstances.

REFORMS

The reforms provide statutory protection where a 'good Samaritan' who comes to the assistance of a person in danger will be protected from all civil liability for acts or omissions done in good faith.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C11: 'Good Samaritans' — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
'Good Samaritans'									
Provides that a 'good Samaritan' is not liable in any civil proceedings for any acts or omissions done in good faith	n/a	✓	✓	---	✓	✓	---	✓	✓

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Part 8 provides that a 'good Samaritan' who comes to the assistance of a person in danger will be protected from all civil liability for acts or omissions done in good faith.

VICTORIA

Wrongs and Limitation of Action Acts (Insurance Reform) Act 2003

Section 31B provides that a 'good Samaritan' is not liable in any civil proceeding for anything done, or not done, by him or her in good faith in:

- in providing assistance, advice or care at the scene of the emergency or accident; or
- in providing advice by telephone or by another means of communication to a person at the scene of the emergency or accident.

QUEENSLAND

Law Reform Act 1995

Whilst Queensland does not have general 'good Samaritan' provisions, Part 6 of the Law Reform Act provides protection to medical practitioners and nurses assisting in emergency circumstances.

Civil Liability Act 2003

Sections 25 and 26 exempt emergency service agencies from liability when providing assistance in emergency circumstances.

WESTERN AUSTRALIA

Civil Liability Amendment Bill 2003

Proposed Part 1D provides for a qualified exemption from civil liability of 'good Samaritans'. A 'good Samaritan' who comes to the aid of a person in need of emergency assistance will be protected from civil liability for acts or omissions done in good faith and without recklessness. A 'good Samaritan' will not enjoy the protection where he or she was significantly intoxicated by alcohol or another drug which was taken voluntarily before coming to the person's aid.

SOUTH AUSTRALIA

Wrongs Act 1936

Division 13 of the Act provides that a 'good Samaritan' incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.

TASMANIA

Not agreed.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Chapter 2, Section 5 provides that a 'good Samaritan' who comes to the assistance of a person in danger will be protected from all civil liability for acts or omissions done in good faith.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 8 protects a 'good Samaritan' from personal civil liability for a personal injury caused by an act done in good faith and without recklessness while giving emergency assistance to a person.

C12: VOLUNTEERS

SITUATION PRIOR TO THE REFORMS

Volunteers may be sued for harm inflicted on others during the course of their volunteering activities.

In the case of emergency service providers, existing state Acts offer protection to personnel from civil liability arising out of incidents which arise in the course of performing a rescue in good faith.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

While the number of claims against volunteers is not significant, people may be discouraged from doing voluntary work by fear of incurring negligence liability.

REFORMS

Reforms are designed to protect volunteers doing work for community organisations from civil liability for acts or omissions done in good faith.

The reforms exclude the volunteer from liability in most circumstances, and make the organisation for which they are providing services liable for any negligence of that volunteer.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C12: Volunteers — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Volunteers									
Provides protection to volunteers doing work for community organisations from civil liability for acts or omissions in good faith	✓	✓	✓	✓	✓	✓	✓	✓	✓

COMMONWEALTH OF AUSTRALIA

Commonwealth Volunteers Protection Act 2002

The Act protects volunteers from civil liability for acts that the volunteer has done in good faith in doing work for the Commonwealth or a Commonwealth authority.

The Commonwealth or a Commonwealth authority incurs the civil liability that, except for this legislation, the volunteer would incur.

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Part 9 confers protection on volunteers doing work for community organisations from civil liability for acts or omissions done in good faith.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

Part 9 confers protection on volunteers doing work for community organisations from civil liability for acts or omissions done in good faith.

QUEENSLAND

Civil Liability Act 2003

Section 39 provides an indemnity to individual volunteers, either engaged in community work for community organisations or as an office holder of such an organisation, from liability in negligence for their own actions. The conduct of the volunteer must be in good faith, and without reckless disregard for the safety of any other person.

Section 40 provides that the indemnity does not extend to situations where the volunteer is engaged in a criminal act.

Section 41 provides the volunteer must not be intoxicated, as defined under the Act, and fail to exercise due care and skill at the time of doing the work.

Section 42 provides that that indemnity is not provided if the volunteer is acting outside the activities of the organisation. In addition, if the volunteer ignores instructions given by the organisation, the indemnity does not extend to their actions.

Section 43 states that, if a policy of insurance is required to be held by law in relation to the volunteer work, the indemnity does not apply.

Section 44 states that, if a policy of compulsory third-party motor vehicle insurance applies to cover the liability, the indemnity does not apply.

WESTERN AUSTRALIA

Volunteers (Protection from Liability) Act 2002

The Act provides volunteers with qualified immunity from civil liability when doing community work for not-for-profit incorporated associations.

SOUTH AUSTRALIA

Volunteers Protection Act 2001

The Act provides that a volunteer for an incorporated community organisation is not personally liable for civil wrongs committed in good faith and without recklessness in the course of volunteer work for the organisation. Instead, civil liability falls on the organisation itself.

TASMANIA

Civil Liability Act 2002

Volunteers are exempted from civil liability for their actions if they are acting in good faith when undertaking work for a community organisation. The organisation for which the volunteer undertakes the work is liable for any harm arising from a breach of duty by the volunteer. This removes any disincentive to a volunteer from taking part in community activities but still provides an avenue of redress for a plaintiff if negligence can be established.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Chapter 2 section 6 confers protection on volunteers doing work for community organisations from civil liability for acts or omissions done in good faith.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 7 provides that volunteers have no personal liability for actions done in good faith and without recklessness while doing community work for a community organisation.

C13: PUBLIC AUTHORITIES

SITUATION PRIOR TO THE REFORMS

In 2001, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, the High Court of Australia abolished the rule that a highway authority is not liable for injury or damage resulting from 'non-feasance' in the performance of its functions as a highway authority. This abolition affected the liability of all public authorities.

The High Court of Australia found that where the state of a highway poses a foreseeable risk of harm to road users, the public authority with power to remove the danger is obliged to take reasonable steps to do so. The duty to take care arises not only when the authority knows of the danger but also when, if it had taken reasonable care to inspect the highway, it would have known of the danger.

In determining whether the public authority took reasonable steps to remove the risk, regard must be had to 'competing or conflicting responsibilities or commitments of the authority'.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The result of this decision was that increasing amounts of time were spent in the course of a trial considering whether the authority's conduct in relation to a risk was reasonable given the other demands on the resources available to the authority.

REFORMS

In recognition that public authorities have a variety of responsibilities which may limit their resources, reforms are designed to provide public authorities with a 'policy defence'. The highway immunity, or non-feasance, rule has also been re-introduced in some jurisdictions.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 13: Public authorities — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Establishing liability									
Public authorities									
Policy defence in case an authority is sued for negligence in the exercise or non-exercise of a public function	n/a	✓	✓	✓	✓	---	✓	✓	---
Restoration of highway immunity rule	n/a	---	---	✓	✓	✓	---	---	---

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Part 5 (Schedule 1[5]) deals with civil liability in tort of a public or other authority as follows:

- General principles are established for determining liability, including a requirement to consider the financial and other resources that are reasonably available to an authority, consideration of the broad range of an authority's activities, and evidence of compliance with general procedures and

applicable standards. Resource allocation decisions by an authority are not open to challenge.

- A public or other authority will not be liable for breach of statutory duty (but without affecting liability in negligence) unless it has acted in a way that no reasonable public authority would act.
- A public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function in proceedings instituted by the claimant.
- A roads authority will not be liable to the extent that a claim is based on the failure of the authority to carry out or consider carrying out road work (including inspection) unless the authority had actual knowledge of the particular risk at the time of the alleged failure.
- The fact that a public or other authority exercises or decides to exercise a function will not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

VICTORIA

Wrongs and Other Acts (Law of Negligence) Act 2003

Section 79 defines various terms used in the new Part XII of the *Wrongs Act 1958* relating to the liability of public authorities.

The definition of 'public authority' includes the Crown, bodies established by or under an Act for a public purpose, and municipal councils. It also includes other public bodies and enables the regulations to include persons or bodies in the definition either wholly or in relation to particular functions.

Section 80 provides that this new Part (except section 84) applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

This Part operates subject to any Act that contains an express provision to the contrary.

Section 81 excludes certain claims from the operation of the Part and allows the regulations to exclude certain public authorities or classes of public authorities from the operation of the Part.

Section 82 provides that this Part is not intended to affect the common law, except as provided in sections 83, 84 and 85.

Section 83 sets out principles that apply to determine whether a public authority has a duty of care, or has breached a duty of care. These principles apply in addition to the new provisions regarding negligence in clause 3.

Section 84 applies to a proceeding for damages for an alleged breach of statutory duty in connection with the exercise of or failure to exercise a function of a public authority. The effect of the provision is that in such proceedings a public authority is not liable for breach of statutory duty:

- in cases where the function of the authority is conferred on it specifically in its capacity as a public authority, and where the relevant provision does not impose an absolute duty on the authority to do or not do a particular thing, unless the act or omission in question was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions; or
- in all cases, unless the provisions or policy of the relevant enactment are compatible with the existence of that liability.

Section 85 provides that the fact that a public authority exercises or decides to exercise a function does not itself indicate that the authority is under a duty to exercise the function, or that the function should be exercised in particular circumstances or in a particular way.

QUEENSLAND

Civil Liability Act 2003

Section 34 provides that 'public or other authority' means the Crown (within the meaning of the *Crown Proceedings Act 1980*) or a local government or any public authority constituted under an Act.

Section 35 specifies certain principles that are to apply when assessing whether a public authority has breached a duty of care. These principles are peculiar to public and similar authorities, and relate to the decision making power required to allocate resources in circumstances where the authority has certain functions. It is to be accepted that the functions of a public authority are necessarily limited by the financial and other resources available to that authority. Accordingly, the allocation of those resources generally is not open to challenge. Further, in assessing the duty of care of a public authority, the fact that the authority has more than one function to which the proceedings relate is to be taken into consideration, along with the content of those functions. The Section provides that a public authority may rely upon evidence of appropriate general actions when exercising its functions as evidence of the proper exercise of those functions in a specific instance.

Section 36 provides that the mere fact that a public or other authority undertakes a certain activity under a statutory power, or does not undertake a certain activity despite holding a statutory power to do so, of itself does not mean the authority must act in the same way in each circumstance. However, if the actions of the public authority are manifestly unreasonable in the circumstances, those actions may constitute a wrongful act or a failure to act. The standard by which the actions of the public authority are to be considered is that of a reasonable public authority.

Section 37 reinstates the defence of non-feasance for road authorities except in circumstances where the authority has knowledge of the specific risk prior to the incident. The effect will be that a highway authority will be able to make use of the protections and immunities that it was considered to have at law before the judgments of the High Court of Australia in *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512. However, in circumstances where the authority had knowledge, the section will not apply and the authority will be subject to the law as otherwise modified by the Act. The authority is not automatically liable for any damages as a result of the section not applying.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 1C Section 5W spells out the principles that apply in determining if a public body or officer breaches a duty of care.

A policy defence is introduced in Section 5X, so that when a public or other authority is sued for alleged negligence in the exercise or non-exercise of a public function, it can defend the claim by showing that the exercise or non-exercise of its powers was based on a policy decision made on economic, social or like policy grounds. If a decision can be so characterised, the authority cannot be liable unless its decision was so unreasonable that no reasonable body or officer could have made it. The defence will be capable of applying not only to a public authority but also to a contractor engaged by an authority to perform a public function.

Section 5Y provides that a public body or officer cannot be liable for breach of a statutory duty unless the provisions and policy behind the statutory duty allegedly breached are compatible with the existence of that liability.

Part 1C Section 5Z effects the reintroduction of the non-feasance rule for road authorities. A roads authority is not liable for any harm caused to the extent that a claim is based on the failure of the authority to carry out or consider carrying out road work (including inspection) unless the authority had actual knowledge of the particular risk at the time of the alleged failure. A road authority is defined as a public authority and will include a state or local government authority that is responsible for roads.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

Proposed section 42 restores the 'highway immunity rule'. A road authority is not liable in negligence for a failure to maintain, repair or renew a road, or take other action to avoid or reduce the risk of harm that results from a failure to maintain, repair or renew a road.

The common law was that a public authority responsible for a highway (for instance, a council) was not liable in tort for harm that came to a road-user because the authority had failed to exercise statutory powers to maintain or repair the road (that is, the authority could have prevented the harm but did not). This had always been the law in South Australia until the High Court of Australia's decision in 2001 in the case of *Brodie v Singleton Shire Council* that established the rule was no longer good law and the principles of negligence applied instead. The Bill provides for a restoration of the former common law position.

TASMANIA

Civil Liability Act 2002

The Act includes principles that apply in determining whether a public or other authority has breached a duty. Courts are to consider the limited resources of the public authority and the broad range of functions of the authority.

Public authorities are exempt from liability arising from the materialisation of a risk associated with a recreational activity for which a risk warning has been given. There is protection in the Act for incapable persons who are not able to understand risk warnings, but not if they are in the care of someone who is able to understand the warning.

The Act provides special protection for public and other authorities that have responsibility for roads. An authority is not liable for harm arising from its failure to carry out roadwork, unless it was aware of the actual risk that gave rise to the harm.

If the authority carries out inadequate roadwork, it is not protected from liability.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Chapter 8 of the Act deals with civil liability in tort of a public or other authority as follows:

- a policy decision should not be able to be used to support a finding that a public authority was negligent unless the decision was so unreasonable that no reasonable public authority could have made it; and
- a public authority should only be liable for personal injury damages for breach of a statutory duty where the provisions and policy of the relevant statute are compatible with the existence of such liability.

NORTHERN TERRITORY

Intention to legislate announced.

C14: GENERAL DAMAGES

SITUATION PRIOR TO THE REFORMS

General damages are damages for non-economic loss, including pain, suffering, loss of amenities, and loss of expectation of life. Underlying the award of damages for non-economic loss is the idea that money can provide the plaintiff with some consolation for having been injured.

Pain and suffering is a matter of subjective experience. Loss of amenities refers to the inability of an injured person to enjoy life as they did before the injury. This may relate to the ability to work, play sport, engage in hobbies, marry, have children, realise ambition or achieve sexual satisfaction. Loss of expectation of life is awarded for loss of prospective happiness resulting from reduction of an injured person's life expectancy.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

For claims in the size range of $20,000 to $100,000, the statistical evidence shows that 45 per cent of the cost is in general damages. Imposing a threshold on general damages is an effective and appropriate way of significantly reducing the number and cost of smaller claims.

The subjective nature of general damages leads to uncertainty for insurers in premium setting and reserving.

REFORMS

The reforms impose a threshold on general damages.

Reforms also include caps on general damages. These caps are not, in themselves, cost reduction measures but are designed to improve greater stability and enable consistent calculation of general damages amounts below the cap (by way of the points/severity scales in Queensland, South Australia and the Northern Territory, and the proportionality rules in New South Wales).

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C14: General damages — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
General damages									
Threshold before general damages apply	a	✓	✓	---	✓	✓	✓	a*	✓
Assessment procedure for general damages	n/a	---	---	✓	---	✓	---	---	✓
Cap on general damages	a	✓	✓	✓	---	✓	---	---	✓

* With respect to medical practitioners.

COMMONWEALTH OF AUSTRALIA

Intention to legislate announced.

NEW SOUTH WALES

Civil Liability Act 2002

The amount of damages for non-economic loss (general damages) that may be awarded will be fixed at the same indexed maximum as applies under the *Health Care Liability Act 2001* which is currently $384,500.

There will be a 15 per cent threshold for non-economic loss damages so that no damages will be able to be awarded unless the severity of the non-economic loss is at least 15 per cent of a most extreme case and claims above 15 per cent will be determined according to a sliding scale as currently set out in the Health Care Liability Act and the *Motor Accidents Act 1988*.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

The maximum amount of damages that may be awarded to a claimant for non-economic loss is $371,380. This amount is to be indexed, in respect of the financial year beginning on 1 July 2003 and each subsequent financial year

The threshold for eligibility for awarding of general damages essentially provides that a court may not award general damages in respect of a claim for injury based on negligence unless the injuries suffered have resulted in a more than 5 per cent permanent impairment as assessed using the American Medical Association's Guide to the Evaluation of Permanent Impairment (4th Edition). Separate provisions are specified for assessing eligibility for general damages where the injuries relate to loss of hearing, psychiatric or psychological injury, or other specific conditions (such as loss of a foetus or loss of a breast). A qualified medical practitioner is to assess the degree of impairment, with an independent medical panel able to re-assess the damage on referral to them. The panel's decision is final and must be accepted by the court (provided the panel has followed proper procedures).

QUEENSLAND

Civil Liability Act 2003

Section 61 provides a new method for the assessment of general damages for personal injury. The method involves a 100-point scale upon which the court must assess the degree of injury. In order to assess where an injury lies on the injury scale, the court is to consider the injury scale values prescribed under a regulation and the injury scale values attributed to similar injuries in prior proceedings.

Section 62 provides the formula for the calculation of general damages subsequent to assessment of the injury scale value by the court. The section does not apply a threshold, but provides that injuries at the lower end of the scale are provided with an exponentially lower calculation of general damages than those at the higher end of the scale. That is, each point of the 100 point scale is not worth the same.

Further, under the Civil Liability Regulation 2003, a guide to assessment of the injury scale value (ISV) is provided. This guide provides particular ranges of ISV for 162 different types of injuries along with rules on applying those ranges.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 2 Division 2 of the Act imposes a deductible threshold for the determination of damages for non-pecuniary loss (that is, pain and suffering, loss of amenities of life, loss of enjoyment of life; curtailment of expectation of life, and disfigurement or mental harm). The deductible threshold is $12,500 indexed to a statutory formula. There is no cap on general damages.

The threshold model follows that in the *Motor Vehicle (Third Party Insurance) Act 1943* except that there is no cap on general damages as there is under this Act.

In summary, if:

- general damages are assessed as ≤ $12,500 (indexed), no award is made;
- damages are assessed as >$12,500 but ≤ $38,000 (indexed), the award is the amount by which the damages assessed exceed $12,500; and
- damages are assessed as >$38,000 but < $50,500 (indexed), the award is the amount by which the damages assessed exceed [$12,500 — (damages assessed — $36,500)].

SOUTH AUSTRALIA

Wrongs (Limitation and Damages for Personal Injury) Amendment Act 2002

Section 24B provides that damages may only be awarded for non-economic loss if the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days; or medical expenses of at least the prescribed minimum have been reasonably incurred in connection with the injury.

If damages are to be awarded, they must be assessed as follows:

- The injured person's total non-economic loss is to be assigned a numerical value on a scale running from 0 to 60 (the scale reflecting 60 equal gradations of non-economic loss, from a case in which the loss is not severe enough to justify any award of damages to a case in which the injured person suffers non-economic loss of the gravest possible kind). The numerical value corresponds to a dollar figure fixed by reference to an indexed sliding scale. The scale is skewed so that damages for minor injuries are much less than damages for serious injuries.
- The maximum amount payable as general damages for the worst possible injury is $241,500 for claims arising from an accident that occurred in 2003.

In subsequent years, the maximum amount payable will be indexed to the consumer price index (CPI).

The amendment of the *Wrongs Act 1936* (Part 2A — Damages for personal injury, Division 2 — Assessment of damages) prescribes certain restrictions on damages for personal injury.

TASMANIA

Civil Liability Act 2002

The Act provides for a threshold level of damages for non-economic loss of $4,000, which acts as a deductible that reduces to zero when awards reach $20,000, with both amounts indexed to movements in the consumer price index. This means that, for example, if damages are assessed by a court at $3,000, such as for a soft tissue injury, no award is to be paid. If damages are assessed at $10,000, the person would receive $7,500 and for any damages above $20,000 the full amount is awarded.

AUSTRALIAN CAPITAL TERRITORY

Civil Laws (Wrongs and Thresholds) Amendment Bill 2002

The Bill imposes a deductible threshold for the determination of damages for non-pecuniary loss (that is, pain and suffering, loss of amenities of life, loss of enjoyment of life; curtailment of expectation of life, and disfigurement or mental harm). The deductible threshold is graded between $12,000 and $20,000 indexed to a statutory formula. There is no cap on general damages.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 24 abolishes common law principles relating to the assessment and awarding of damages for pain and suffering, loss of amenities of life, loss of expectation of life or disfigurement; and provides for the assessment and awarding of damages other than for pecuniary loss on the basis of the degree of permanent impairment suffered by the injured person. The American Medical Association guide to permanent impairment is to be used.

Section 27 provides that the maximum amount of damages a court may award for non-pecuniary loss is $350,000.

A court must not award damages for non-pecuniary loss if it determines the degree of permanent impairment to be less than 5 per cent of the whole person. A sliding scale is adopted up to a degree of permanent impairment of 15 per cent of the whole person so that a 20 per cent impairment of the whole person would result in damages for non-pecuniary loss of $70,000.

C15: EARNINGS LOSS CAP

SITUATION PRIOR TO THE REFORMS

Damages for loss of earning capacity could, in theory, be for any amount limited only by the earning potential of the injured person.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

While cases involving very high income earners would be rare, the uncertainty in the risk profile for insurers is difficult to manage.

It may also be inappropriate for insurance premiums to fund income protection for very high earners who are able to, and arguably should arrange, their own insurance protection.

REFORMS

The reforms limit the earnings amount that may be compensated by way of loss of earnings or loss of earning capacity to a (relatively high) maximum. The maximum award for future earnings is determined by reference to a multiple of average weekly earnings (AWE) for the expected duration of the plaintiff's loss. The exception to this calculation is in South Australia where the cap is expressed as a dollar amount.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C15a: Earnings loss cap — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Earnings loss cap	a	✓	✓	✓	✓	✓	a	✓	✓

Table C15b: Earnings loss cap variables

State	AWE	Multiplier
New South Wales	$782.00	3.00
Victoria	$752.50	3.00
Queensland	$863.30	3.00
Western Australia	$720.90	3.00
South Australia	n/a	$2.2m limit
Tasmania	$926.60	4.25
Australian Capital Territory	$983.80	3.00
Northern Territory	$905.80	3.00

* As at 13 November 2003.

C16: GRATUITOUS CARE

SITUATION PRIOR TO THE REFORMS

In *Griffiths v Kerkemeyer* (1977) 139 CLR 161 in 1977 the High Court of Australia decided that compensation could be awarded in respect of the injured person's need for care and assistance even if that need was met gratuitously by relatives or friends at no cost to the plaintiff. The quantum of damages under this head is the value of the services required to meet the need, and this is measured by the market value of the services.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The rule in *Griffiths v Kerkemeyer* is often criticised on the basis that it allows plaintiffs to be compensated when they have suffered, and will suffer, no actual financial loss because the relevant care is provided free-of-charge. In principle, this criticism misses the mark because compensation under this head is for loss of the capacity to care for oneself and the consequent need to be cared for by others. This loss of capacity and consequent need exists regardless of whether the person who meets the need does so gratuitously. On the other hand, it is important to acknowledge that a plaintiff may recover very substantial damages under this head even though the services they relate to may never be paid for, and even if none of the damages awarded are paid over to the carer.

Another criticism of the *Griffiths v Kerkemeyer* rule is that claims by plaintiffs about the nature and extent of their need for gratuitous services are easy to make and difficult to refute. The needs of a plaintiff are partly subjective, and often dependent not only on

the level of injury but on the plaintiff's age, general state of health, personality and state of mind.

REFORMS

The reforms are designed to limit gratuitous care claims to circumstances where the plaintiff will require these services of a significant period of time and where the amount of gratuitous care provided is significant.

The reforms also put in place guidance for the calculation of gratuitous care.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C16: Gratuitous care — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Gratuitous care									
Threshold for damages to apply	a	✓	✓	✓	✓	---	n/a	---	✓
Cap on rate of payment	a	✓	✓	---	✓	✓	n/a	---	✓

COMMONWEALTH OF AUSTRALIA

Intention to legislate announced.

NEW SOUTH WALES

Civil Liability Act 2002

The Act provides that no damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:

- there is a reasonable need for the services to be provided;
- the need has arisen solely because of the injury to which the damages relate; and
- the services would not be provided to the claimant but for the injury.

Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided for less than 6 hours per week, and for less than 6 months.

If the services are provided or are to be provided for at least 40 hours per week, the amount of damages that may be awarded for gratuitous attendant care services must not exceed the average weekly total earnings of all employees in New South Wales.

If the services are to be provided for less than 40 hours per week, the amount of those damages must not exceed at an hourly rate of one-fortieth of the amount determined above.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

The Act provides that no damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:

- there is a reasonable need for the services to be provided;
- the need has arisen solely because of the injury to which the damages relate; and
- the services would not be provided to the claimant but for the injury.

Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided for less than 6 hours per week, and for less than 6 months.

If the services are provided or are to be provided for at least 40 hours per week, the amount of damages that may be awarded for gratuitous attendant care services must not exceed the average weekly total earnings of all employees in Victoria.

If the services are to be provided for less than 40 hours per week, the amount of those damages must not exceed at an hourly rate of one-fortieth of the amount determined above.

QUEENSLAND

Civil Liability Act 2003

Section 59 provides that damages for gratuitous services are not to be awarded unless the services are necessary; and the need for the services arises solely out of the injury in relation to which damages are awarded; and the services are provided for at least 6 hours per week and for at least 6 months.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 2 Division 3 of the Act restricts the damages that may be awarded for home care services (such as domestic help or nursing) that are provided on a gratuitous basis. This involves a $5,000 threshold and a restriction on the calculation of damages that can be awarded for these services to average weekly earnings both in total and pro rata. In addition, such services as would have been provided in any event will not be eligible for compensation.

SOUTH AUSTRALIA

Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002

In section 24H, damages are not to be awarded for gratuitous services except services of a parent, spouse or child of the injured person. Damages awarded for the recompense of gratuitous services of a parent, spouse or child are not to exceed an amount equivalent to 4 times the state average weekly earnings.

The court may make an award in excess of the prescribed limit if it is satisfied that:

- gratuitous services are reasonably required to the injured person; and
- it would be necessary, if the services were not provided gratuitously by a parent, spouse or child of the injured person, to engage another person to provide services for remuneration. In this case, the damages awarded are not to reflect a rate of remuneration for the person providing the services in excess of State average weekly earnings.

TASMANIA

Common Law (Miscellaneous Actions) Act 1986

Tasmania abolished the awarding of damages for gratuitous attendant care under the Act.

AUSTRALIAN CAPITAL TERRITORY

Not agreed.

Personal Injuries (Liabilities and Damages) Act 2003

Section 23 provides that damages for gratuitous care may only be awarded if the services are provided or are to be provided for 6 hours or more per week and for 6 months or more.

C17: DISCOUNT RATE

SITUATION PRIOR TO THE REFORMS

When a court awards a lump sum for future economic loss or future expenses that will be suffered or incurred periodically, it assumes that the plaintiff will invest the lump sum and receive a stream of income from the investment. As a result, to ensure that the plaintiff does not receive too much, the sum of the expected total future losses and expenses needs to be reduced by using a 'discount rate' in order to calculate its present value.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

In 1981 the High Court of Australia set the discount rate for personal injury and death claims at 3 per cent ('the default rate'). The default rate still applies today (in the absence of any statutory provision to the contrary), but in a number of jurisdictions discount rates higher than the default rate are established by statute.

Considerable inconsistencies existed across jurisdictions.

REFORMS

Most jurisdictions have aligned the discount rate used in civil liability matters with those in their respective compulsory third party motor vehicle and workers' compensation statutory schemes. The common discount rate is 5 per cent, except for two jurisdictions that already had a higher rate specified in legislation.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C17a: Discount rate — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Discount rate	a	✓	✓	✓	n/a	✓	n/a	---	n/a

Table C17b: Before and after discount rates

	Before	Now
New South Wales	3	5
Victoria	3	5
Queensland	3	5
Western Australia	6	6
South Australia	3	5
Tasmania	7	7
Australian Capital Territory	3	3
Northern Territory	5	5

C18: STRUCTURED SETTLEMENTS

SITUATION PRIOR TO THE REFORMS

Typically a court in Australia awards a lump sum for future economic loss or future expenses that will be suffered or incurred periodically, and assumes that the plaintiff would invest the lump sum and receive a stream of income from the investment.

This has been the situation for two reasons. Under previous legislation lump sum compensation was more tax advantageous than income streams. In addition, courts have been prevented from making structured settlement awards.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Whilst a lump sum has many benefits, a number of less positive scenarios could emerge: a plaintiff may not know how to manage a large sum of money and it may dissipate within their lifetime.

REFORMS

Reforms are designed to remove the tax impediment to structured settlements and to facilitate court ordered structured settlements.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table C18: Structured settlements — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Structured settlements	✓	✓	✓	✓	✓	✓	✓	✓	✓

COMMONWEALTH OF AUSTRALIA

Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002

The Act amends the *Income Tax Assessment Act 1997* to provide an income tax exemption for annuities and certain deferred lump sums paid under structured settlements to seriously injured persons. The exemption will only be available where certain eligibility criteria are met. Further, the Act is designed to ensure that life companies are exempt from income tax on income derived from assets that support structured settlement annuities and lump sums.

NEW SOUTH WALES

Civil Liability Amendment (Personal Responsibility) Act 2002

Division 7 of Part 2 (Schedule 1[4]) contains provisions to encourage and facilitate structured settlements in personal injury damages cases, including provisions for the court to notify the parties of the terms of any proposed award so as to give the parties a reasonable opportunity to negotiate a structured settlement.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

The Act contains provisions to encourage the use of structured settlements through agreement between the parties.

QUEENSLAND

Civil Liability Act 2003

Part 4 facilitates the making of consent orders for structured settlements.

Section 64 requires a court, prior to making any award of damages for future economic loss, future medical expenses or future general expenses that exceed a total of $100,000, to advise the parties to the action of the intended award. The court is required to list the amount of each head of damage proposed.

Section 65 provides the court with power to make an order that details the terms of an agreed structured settlement. The result of such an order is that it will be enforceable under the rules of court.

Section 66 places an obligation upon lawyers to advise their clients of the ability to negotiate a structured settlement in circumstances where their client is the plaintiff of a personal injuries action. Further, the advice must extend to the desirability of obtaining independent financial advice about structured settlement, as opposed to lump sum settlement, of a claim.

Section 67 provides that an offer of a structured settlement will be considered by the court in relation to any costs orders upon final hearing of a claim. The court is to consider whether, in accordance with the *Uniform Civil Procedure Rules 1999*, any judgment was not more favorable than the structured offer to settle, having regard to any cost to the defendant in making the offer.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 2 Division 4 enables courts to make an order approving a structured settlement, in circumstances where the parties to the action agree to settle a personal injuries claim by making a structured settlement, whether or not the payment of damages is in the form of a lump sum award of damages. This will be a voluntary option that the parties agree to.

SOUTH AUSTRALIA

Statutes Amendment (Structured Settlements) Act 2002

The Act provides that, in an action for damages for personal injury, the court may, with the consent of the parties, make an order for damages to be paid wholly or in part in the form of periodic payments, by way of an annuity or otherwise, instead of in a lump sum.

TASMANIA

Civil Liability Act 2002

The Act gives the court the power to order structured settlements as an alternative to lump sum payouts for future.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

Part 7.4 of the Act contains provisions to encourage and facilitate structured settlements in personal injury damages cases.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

Section 32 provides that the court may, with the consent of parties to a proceeding, make an order for a structured settlement.

Personal Injuries (Civil Claims) Act 2003

Section 12 allows the court to make an order for a structured settlement agreed to in a resolution conference.

C19: PUNITIVE DAMAGES

SITUATION PRIOR TO THE REFORMS

Punitive damages include both exemplary and aggravated damages.

Exemplary damages are damages awarded over and above the amount of damages necessary to compensate the plaintiff. Their purpose is to punish the defendant, to act as a deterrent to the defendant and others who might behave in a similar way, and to demonstrate the court's disapproval of the defendant's conduct.

Aggravated damages are damages awarded to compensate the plaintiff for increased mental suffering caused by the manner in which the defendant behaved in committing the tort.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Various arguments have been used to support abolition of exemplary damages:

- exemplary damages confuse the punishment function of the criminal law with the compensation function of the civil law;
- exemplary damages constitute an undeserved windfall for the plaintiff;
- awards of exemplary damages are unpredictable, especially in jury trials; and
- awards for exemplary damages are often too high.

The main argument for abolishing aggravated damages is that if they are truly compensatory, they are unnecessary because compensation for mental distress can be given under other heads.

The status of insurance coverage for punitive damages has been unclear, with insurers sometimes using exclusion clauses and insureds expressing concern about unprotected exposures.

REFORMS

Reforms are designed to specifically abolish punitive damages in personal injury cases.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 19: Punitive Damages — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Punitive damages	n/a	✓	---	✓	---	---	✓	✓	✓

C20: CAPS ON PROFESSIONAL LIABILITY

SITUATION PRIOR TO THE REFORMS

Professional standards laws seek to minimise economic loss and property damage claims against professionals through improved professional standards — by requiring risk management strategies, compulsory insurance cover, professional education and appropriate complaints and disciplinary mechanisms — in return for caps on the liability of professionals who are covered by schemes which have been gazetted under the relevant state or territory professional standards law. Liability for personal injury is not able to be capped under existing legislative provisions.

Ultimately professional standards benefit professionals and consumers alike, as professional standards laws ensure that professionals hold adequate insurance, and this will serve to protect the interests of the community at large. There is also an unequivocal benefit to consumers flowing from the risk management strategies, professional education and disciplinary procedures embodied in professional standards schemes.

New South Wales and Western Australia have had professional standards law in place for several years, however, only New South Wales has had schemes gazetted under the law.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The *Trade Practices Act 1974* (TPA) and other Commonwealth legislation limited the effectiveness of professional standards legislation by providing an alternative, unlimited, cause of action against professionals.

REFORMS

The Australian Government has agreed to amend the TPA and other Commonwealth law to support professional standards legislation. All states and territories have agreed to implement professional standards legislation on a national basis.

This agreement was reached in August 2003 and progress by states and territories towards this goal is limited at this time.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 20: Caps on professional liability – summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Damages									
Caps on professional liability	✓	✓	✓	a	✓	a	a	a	a

COMMONWEALTH OF AUSTRALIA

Treasury Legislation Amendment (Professional Standards) Bill 2003

The purpose of the Bill is to amend the TPA and other relevant Commonwealth legislation to support professional standards laws which are currently in force in New South Wales and Western Australia, and which other jurisdictions are expected to adopt in due course.

The amendments made by the Bill will establish a structure under which the Commonwealth, by prescribing schemes under state or territory professional standards legislation, can support those laws by allowing liability under the relevant Commonwealth legislative provisions to be capped.

This Bill amends three Commonwealth acts: the TPA, the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

NEW SOUTH WALES

Professional Standards Act 1994

Professional standards legislation provides greater certainty for professionals in determining their maximum level of liability exposure and consumers in knowing that a professional covered by a scheme will have sufficient resources to meet most potential claims.

Five professions are currently covered by professional standards schemes in NSW:

- accountants (maximum cap of $20 million);
- solicitors (maximum cap of $50 million);
- surveyors (maximum cap of $5 million);
- valuers (maximum cap of $5 million); and
- engineers (maximum cap of $3 million).

VICTORIA

Professional Standards Act 2003

The Act is designed to:

- provide for the limitation of liability of members of occupational associations in five certain circumstances; and
- facilitate improvement in the standards of services provided by those members.

QUEENSLAND

Queensland has commenced preparation of a professional standards bill for consultation purposes.

WESTERN AUSTRALIA

Professional Standards Act 1997

Western Australia has enacted professional standards legislation in the Act. The Government has recently approved the drafting of a bill to amend this Act to maintain consistency with the *Professional Standards Act 1994* (NSW).

SOUTH AUSTRALIA

Professional Standards Bill 2003

The Bill would enable an occupational or trade group (not limited to a profession in the strict sense) to apply to register a professional standards scheme. A registered scheme would apply to all the members of the professional association, or to particular classes of members specified in the scheme. A scheme would require those to whom it applies to adopt specified risk management practices and adhere to a complaints and disciplinary regime, so as to improve professional standards and reduce the likelihood of claims. In return, the scheme would cap the professional liability of the practitioners covered at a figure not less than the minimum cap fixed by law of $500,000. The scheme would then require practitioners who want the benefit of the cap to maintain insurance cover or business assets, or a combination of these, sufficient to meet claims up to the cap.

Schemes can be approved for any profession, occupation or trade for liability for breach of a duty of care resulting in economic loss. The Bill would not, however, allow the limitation of liability for injury (even if the injury caused economic loss).

The Bill is consistent with, though not identical to, the New South Wales and Western Australian legislation, and the Bill is currently before the South Australian Parliament.

TASMANIA

Agreed in principle but not yet implemented.

AUSTRALIAN CAPITAL TERRITORY

The Australian Capital Territory has announced it will introduce a professional standards bill into Parliament in 2004.

NORTHERN TERRITORY

Agreed in principle but not yet implemented.

C21: LIMITATION PERIODS

SITUATION PRIOR TO THE REFORMS

Limitation periods serve to limit the time in which a potential plaintiff may bring an action to court.

Limitation periods are generally defined in terms of:

- the date of commencement;
- the length of the limitation period;
- whether there should be an ultimate bar to commencing proceedings (the 'long-stop');
- whether the court should have discretion to extend the limitation period, and if so, on what basis; and
- whether the limitation period should be suspended, particularly for minors and incapacitated persons.

Prior to reform, the rules applying to these criteria varied immensely between states and territories and also by claim type. The most common limitation period, however, was 6 years, although courts generally were readily able to extend this period on a case-by-case basis and in most cases, the limitation period did not commence for minors until the age of 18.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The previous, more generous nature of limitation periods meant that defendants were subject to long periods of uncertainty regarding whether a claim was to be brought and were likely to be disadvantaged and less well prepared for defence due to long time lapse. In the case of an obstetrician, a claim could be brought against him or her up to 25 years after the date of the date of an injury sustained by a child during birth.

The passage of time has the ability to prejudice a fair trial of a claim, as evidence is likely to diminish, be lost or be affected by additional influences over time. The accuracy of information regarding nature of the loss itself as well as the conduct of the defendant also becomes more difficult to verify as time progresses.

It is generally considered to be in the public interest to settle claims within a short period of time (with the exception of certain special circumstances), as it is generally likely to reduce the costs associated with the claim and court proceedings, increase the quality and accuracy of evidence and information presented, and provide certainty for both plaintiffs and defendants.

REFORMS

In general the reforms:

- Define the commencement of the limitation period as the 'date of discoverability'.
- Set the limitation period as 3 years from the date of commencement.
- Insert a twelve year 'long-stop' period which prevents an action from being taken more than 12 years after the events on which the claim is based took place.
- Provide the court with discretion to extend the long-stop period to the expiry of three years from the date of discoverability.
- Provide guidance to the court on matters it must have regard to before extending the long-stop provision.
- Provide special protection to persons operating under a disability.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 21: Limitation periods — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Procedural changes									
Limitation periods									
Commencement period defined as date of discovery	a	✓	✓	---	---	---	✓	✓	---
Limitation period 3 years	a	✓	✓	---	a	✓	✓	✓	---
12 year long stop	a	✓	✓	---	---	---	---	✓	---
Court discretion to extend long stop	a	✓	✓	---	---	---	---	---	---
Protection for persons under a disability and minors	a	✓	✓	✓	a	✓	✓	✓	---

COMMONWEALTH OF AUSTRALIA

Intention to legislate announced.

NEW SOUTH WALES

Civil Liability (Personal Responsibility) Act 2002

The Act amends the *Limitation Act 1969* to make the following changes to limitation provisions applying to negligence actions involving personal injury or death:

- The new limitation period will be 3 years starting from when the cause of action is discoverable (that is, when the plaintiff first knew or ought to have known that there is a cause of action against the defendant) or 12 years starting from the occurrence that gives rise to the claim, whichever expires first.
- The 12 year period will be able to be extended at the discretion of the court but not beyond 3 years after the cause of action is discoverable.
- The suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian.

- A court will be able to extend a limitation period by up to 1 year if satisfied that the failure to bring an action on behalf of a minor was due to an irrational decision by a parent or guardian of the minor. For actions by minors injured by a parent or guardian or a close associate of their parent or guardian, the applicable limitation period will not start running until the person turns 25 years of age.
- The new provisions do not apply to motor accident claims (the limitation period for which is provided for by the *Motor Accidents Compensation Act 1999*).

VICTORIA

Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003

The Act amends the *Limitation Act 1958* to implement the following changes to the limitation provisions applicable to actions for the recovery of damages for personal injury or death caused by the fault of a person:

- The new limitation period will be 3 years starting from when the cause of action is discoverable (that is, when the plaintiff first knew or ought to have known that there is an actionable cause of action against the defendant) or 12 years starting from the occurrence that gives rise to the claim, whichever expires first.
- The 12 year period will be able to be extended at the discretion of the court but not beyond 3 years after the cause of action is discoverable.
- The suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian.
- A court will be able to extend a limitation period by up to 1 year if satisfied that the failure to bring an action on behalf of a minor was due to an irrational decision by a parent or guardian of the minor. For actions by minors injured by a parent or guardian or a close associate of their parent or guardian, the applicable limitation period will not start running until the person turns 25 years of age.

QUEENSLAND

Personal Injuries Proceedings Act 2002

Queensland legislation regarding limitation periods has taken initial steps to limit the ability of claims to be brought against defendants after a reasonable period of time elapses.

While subject to several exceptions, Queensland reform to date requires that:

- notice of claim is to be given to the defendant within nine months of the incident; and
- notice of claim is to be given within one month of seeking legal counsel.

This serves to ensure that once a claimant is aware of their legal position and ability to bring claim, the defendant is not to be disadvantaged by any delay in notification.

If notice is not provided within the time provided, it is open for a court to strike out any claim of action despite the action otherwise being within the period required under the *Limitation of Actions Act 1974*.

WESTERN AUSTRALIA

A Bill is being prepared to reform Western Australia's limitations law regime, by modernising the *Limitations Act 1935* and other associated legislation. The reforms will include:

- in the case of latent injury, the cause of action will accrue from when the injury first manifested itself;
- the initial limitation period from the commencement of proceedings is to be 3 years;
- courts will be given the power to extend time beyond the initial 3 year period in circumstances where the victim was unaware of the cause of injury or the identity of the person responsible, or where there was fraud or improper conduct by the defendant;
- in the case of children, the ordinary limitation provisions will apply where the child is in custody of a parent or guardian, except for where the child is under 15, a 6 year limitation period will apply. Courts will also have discretion to extend time where the parents' or guardians' failure to commence proceedings was in the circumstances unreasonable. Time will also be extended where the proposed defendant was in a close relationship with the child;

- a regime analogous to that applying to children will apply to claims by people with a mental disability; and
- the new limitation regime will not, except for in the case of latent injury, be retrospective.

SOUTH AUSTRALIA

Law Reform (Ipp Recommendations) Bill 2003

South Australia has retained its previous limitation rules which provide for a 3 year limitation period from the date the cause of action arises (often but not always the date of injury). For children time does not start to run until they reach 18 years of age.

The reforms contained in the Bill propose to amend section 48 of the *Limitation of Actions Act 1936* so that:

- time extensions are only available if the plaintiff can show that the new fact relied on forms an essential element of the plaintiff's claim, or would have major significance on an assessment of the plaintiff's loss;
- the parent or guardian of a child under 15 years of age is to give notice of the claim to the prospective defendant within 6 years of the accident. If a parent fails to give notice however, the child does not lose the right to sue — this endures until the child turns 21. However, in that case, medical and legal costs incurred by the parents and any gratuitous services rendered by them prior to the commencement of proceedings are not claimable by the defendant, unless the court finds there is good reason excusing the non-compliance with the notice requirement; and
- once the prospective defendant is served with a notice, he or she is entitled to access the child's medical and other relevant records, and to have the child medically examined at reasonable intervals at the defendant's expense. Further, the defendant can serve a notice requiring the parent or guardian to commence legal action for a declaratory judgment, although the assessment of the child's damages will be adjourned until he or she matures. After 6 years, it should be possible to deal with the issue of liability, even though final assessment of damages may need to await the child's maturity.

TASMANIA

Limitations Act 1974

Tasmania has historically been subject to the shortest limitation periods of all states and territories.

The Act provides that:

- an action for damages for negligence in respect of personal injuries shall not be brought after the expiration of a period of three years from the date on which the cause of the action accrued;
- there is discretion for a judge to extend the limitation period by a further 3 years based on the circumstances of the case; and
- an extension to the limitation period in the case of disability can be permitted. If, on the date when any right of action accrued, the person was under a disability, the action may be brought at any time before the expiration of 6 years from the date when the person ceased to be under a disability or died (section 26).

Under the Act, a person is deemed to be under a disability while an infant or incapable, by reason of mental disorder, of managing their property or affairs.

Additional legislation has not yet been introduced to address long-stop periods but additional reform in line with the national approach is expected in the future.

AUSTRALIAN CAPITAL TERRITORY

Limitation Act 1985

The statute of limitations for the ACT comprises the following elements:

- The limitations period for adults is 3 years from the date of occurrence of their injury or discovery of the injury.
- Parents or guardians of children under 15 years of age must give notice of a claim to the prospective defendant within 6 years of the accident or discovery of the injury. If a parent fails to give notice, the child does not lose the right to sue — this still endures until the 'child' turns 21. In that case however the cost of medical treatment, legal work and gratuitous services incurred by the parents before the commencement of the proceedings are not claimable from the defendant, unless the court finds that there was a good reason excusing the non-compliance with the notice requirement.
- A defendant who has been served with a notice can require the child's parent/guardian to apply for a declaratory judgment on liability.
- With regard to cases involving medical malpractice and health services, there are more restrictive provisions relating to children. The statute provides for a base limitation of six years from the date of occurrence with a further 6 year long-stop. Suits are statute barred after 12 years unless a medical panel establishes a basis for cause and effect during the 12-year period.

NORTHERN TERRITORY

No action to date.

C22: PRE-LITIGATION PROCEDURES

SITUATION PRIOR TO THE REFORMS

Court procedures for liability claims are governed by the laws, regulations and court rules in each jurisdiction dealing with civil actions. Only in a couple of jurisdictions are there any rules aimed at liability claims.

By contrast, most jurisdictions have found the need to modify the normal court procedures for claims in the statutory schemes — motor accidents and workers' compensation. A wide variety of such provisions exist, involving a variety of pre-litigation procedures.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

In a few jurisdictions, insurers believe they have been disadvantaged by the court procedures including:

- tactical delays in notifying claims;
- sometimes not notifying the insurer of the claim before commencing proceedings; and
- reluctance to reveal details of the claim and evidence until court, thus reducing settlement opportunities and increasing costs.

REFORMS

The reforms are designed to improve pre-litigation procedures.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 22: Pre-litigation procedures — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Procedural changes									
Pre-litigation procedures	---	✓	✓	✓	---	✓	---	✓	✓

NEW SOUTH WALES

Civil Liability Act 2002

The *Legal Profession Act 1987* is amended to enact the following provisions with respect to the responsibilities of solicitors and barristers in connection with all claims for damages (not just personal injury damages) where there are no reasonable grounds for believing a claim or defence has reasonable prospects of success:

- A solicitor or barrister must not provide a legal service on a claim or defence unless the solicitor or barrister has reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success (with a contravention of this prohibition capable of being unsatisfactory professional conduct or professional misconduct).
- If a solicitor or barrister provides legal services in contravention of that prohibition, the solicitor or barrister can be ordered to repay costs that the client has been ordered to pay to another party and can be ordered to indemnify another party against costs payable by that other party.
- If a court finds that the facts established by the evidence on a claim do not support a reasonable belief that the claim or defence has reasonable prospects of success, there is to be a presumption (rebuttable by the solicitor or barrister concerned) that legal services provided on the claim or defence were provided without reasonable prospects of success.

The Legal Profession Act is further amended to extend to costs in civil damages matters an existing provision that authorises the making of regulations fixing the costs payable for legal services.

VICTORIA

Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003

Wrongs and Other Acts (Law of Negligence) Act 2003

Both Acts prescribe pre-litigation procedures that enable claimants and respondents to determine the claimant's eligibility for access to general damages (that is, whether or not the claimants meet the medical threshold).

QUEENSLAND

Personal Injuries Proceedings Act 2002

Section 73 provides that a proceeding in a court based on a claim must be heard and determined by a court sitting without a jury

Sections 9, 9A, 10, 11, 18 specify the correct way in which notice is to be given to claimants and respondents of the intention to bring a claim.

Section 19 protects the position of the claimant during minority or a period of legal incapacity.

Section 20 sets out the requirements of a respondent to attempt to resolve a claim.

Section 22, 23, 27 establishes the duty of claimants and respondents to provide documents and to cooperate with each other.

Section 32 sets out the consequences of a party's failure to comply with provisions requiring the giving of information.

Section 36 provides that before proceedings in a court can be started about a claim there must be a compulsory conference.

Section 39 provides that if the conference cannot settle the claim parties must exchange mandatory final offers.

Section 40 sets out provisions about mandatory final offers. If a claim proceeds to court, the mandatory final offers of the claimant and respondent must be filed at the court in sealed envelopes. The court must not read the mandatory final offers until is has decided the claim. The court must take these offers into account in making a decision about costs.

WESTERN AUSTRALIA

Not implemented.

SOUTH AUSTRALIA

South Australia has long had in place provisions requiring a plaintiff to give a defendant written notice of claim at least 90 days before commencing legal action. The notice must contain enough information about the claim to enable the defendant to make an offer to settle, and must include copies of any experts' reports. The defendant is required to respond within 60 days, advising whether liability is admitted or denied and including copies of experts' reports. The court can penalize the parties in costs for

failure to comply with these requirements. The court process also includes a settlement conference at an early stage to explore the possibility of a negotiated resolution of the claim. The rules of court also permit either party to a case to file an offer of settlement at any time. If a party chooses not to accept a filed offer, then he or she runs a cost risk at trial. If the offer is not bettered, cost penalties will normally apply.

Court rules are made under the relevant court Acts, that is, for civil matters, the *Supreme Court Act 1935*, the *District Court Act 1991* and *the Magistrates Court Act 1983*. These Acts contain sections that give extensive powers to make rules regulating the practice of the court. The rules are made by the judges and published in the Government *Gazette*.

TASMANIA

Not implemented.

AUSTRALIAN CAPITAL TERRITORY

Civil Laws (Wrongs) Act 2002

Chapter 6 of the Act establishes a new regime for expert witnesses. Under the new regime, parties will be given the opportunity to nominate and agree on one medical expert witness to provide evidence to the court. If agreement is reached, the court appoints the expert and the parties pay equally. If the parties cannot agree, the court will appoint an expert and the parties will share the cost.

Part 14.2 of the Act requires legal practitioners to certify that cases have a reasonable chance of success. This will ensure that parties do not incur costs for claims or defence that have no reasonable prospects of success. The Act provides that the court can allow claims to continue where the interests of justice so dictate (for example, to allow the court to consider a desirable advance within the common law).

Part 15.1 of the Act allows the courts to order that parties attend mediation. Mediation will not assist in all cases, rather it can be ordered by a court where a case is identified as suitable for mediation. The cases that are generally suitable for mediation are simple cases where the compensation sought is small. Other suitable cases are those where one party is seeking non-legal remedies such as apologies and explanations; claims where parties wanted greater involvement in case management; claims where speedier resolution was required; and those where the parties have a long term relationship.

NORTHERN TERRITORY

Personal Injuries (Civil Claims) Act 2003

This Act commenced in part on 1 July 2003 with the substantial changes awaiting the drafting of court rules to give effect to the Act.

The Act is designed to encourage the economical and early resolution of personal injuries damages claims without the need for a court to determine liability or damages.

Sections 7 to 9 require the claimant to give written notice of the claim within 12 months of the injury occurring, and providing all relevant documents in support, and the respondent to also identify other relevant parties and to also provide all relevant papers.

Section 15 does not allow legal privilege over medical reports to prevent doctor shopping by either party and to ensure compliance with the requirement for full disclosure.

Section 11 provides that all parties must make a final offer and participate in a resolution conference with all of the papers on the table.

If the conference fails, the parties must file the final offers with the court, and only then are allowed to commence formal proceedings.

C23: LEGAL ADVERTISING

SITUATION PRIOR TO THE REFORMS

Activities of the legal profession are regulated by the states and territories in conjunction with the relevant professional bodies.

Through the influences of pro-competitive *Trade Practices Act 1974* and national competition policy, the general trend has been towards deregulation of legal professional activities, although not in a uniform way.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Some commentators argued that aggressive advertising by law firms was contributing to a more litigious culture and an increase in claims.

REFORMS

Some jurisdictions introduced restrictions on advertising and touting by law firms. These were mainly jurisdictions that had previously introduced similar rules for motor accidents or workers' compensation claims.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 23: Legal advertising — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Procedural changes									
Legal advertising	---	✓	---	✓	✓	---	---	---	✓

NEW SOUTH WALES

Legal Profession Act 1987

Amendments to the Act give the power to restrict advertising and related activities. The Legal Profession Amendment (Advertising) Regulation 2002 contains the specific rules.

VICTORIA

Not implemented.

QUEENSLAND

Personal Injuries Proceedings Act 2002

The advertising restrictions contained in sections 62 to 69 apply to personal injury, not only under this Act, but also, for example, for personal injury to which the *Motor Accident Insurance Act 1994* applies and damages and compensation to which the *WorkCover Queensland Act 1996* applies.

The provisions prohibit a lawyer from advertising personal injury services except by means of a statement that includes only the lawyer's name and contact details, together with information as to any area of practice or speciality of the lawyer that is published by an 'allowable publication method'.

An example of advertising that is restricted is advertising personal injury services on a 'no win, no fee' or other speculative basis.

Section 67 provides that a prohibited person must not solicit or induce a person to make a claim at the scene of an incident or at a hospital. A person cannot provide to a potential claimant the name, address or telephone number of a particular lawyer or firm of lawyers.

Section 68 provides that a person must not pay or seek payment of a fee for soliciting or inducing a potential claimant to make a claim.

WESTERN AUSTRALIA

Civil Liability Act 2002

Part 3 of the Act prohibits legal practitioners, or persons on their behalf, from advertising or publishing statements encouraging persons to make claims for personal injury compensation or damages. Certain factual advertisements limited to identity of the firm and areas of expertise are permitted in print media. It also prohibits advertising or touting at the scene of accidents or subsequently in the course of the injured person receiving treatment or administrative or other support.

SOUTH AUSTRALIA

Not implemented.

TASMANIA

Not implemented.

AUSTRALIAN CAPITAL TERRITORY

Not implemented.

NORTHERN TERRITORY

Personal Injuries (Civil Claims) Act 2003

This Act commenced in part on 1 July 2003 with the substantial changes awaiting the drafting of court rules to give effect to the Act.

Sections 18 and 20 preclude legal costs being payable where the amount to be paid to the claimant is less than the prescribed amount, and for legal costs to be strictly limited at levels far below those previously payable.

Legal Practitioners Amendment (Costs and Advertising) Act 2003

The Act commenced in part on 1 July 2003 with the changes of substance awaiting regulations and changes by the Law Society of the Northern Territory to the Professional Conduct Rules in relation to advertising.

Section 10 sets out the circumstances in which conditional costs can be made and imposes limits on any premium payable. The conditional costs agreement must be in writing, specifying the premium payable and the reasons why it is required. Additionally, the lawyer must provide an advice concerning liability for other costs payable in varying circumstances, a written estimate of the likely costs if the claim is successful, together with the right of review of the agreement.

The section also requires for every costs agreement that the lawyer provide a written statement of how fees are calculated, proposed billing intervals, for litigation matters details of the costs variables, and full details of the minimum amount a person would receive on a proposed settlement, together with details of the costs review process.

C24: LEGAL COSTS

SITUATION PRIOR TO THE REFORMS

Australia has experienced a substantial increase in the number of small to medium sized claims. A major component of the cost of smaller personal injury claims relates to legal expenses.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

Resources devoted to compensation for negligently-caused personal injury and death should be allocated in such a way as to provide support and assistance where it is most needed, that is, in cases of catastrophic or serious injury.

Reducing the number and the cost of resolving smaller claims could make a significant contribution to reducing the overall cost of the system without disadvantaging those most in need of support and assistance.

REFORMS

The reforms are designed to make legal action less attractive for smaller claims. In particular, the reforms limit the amount of legal costs that can be awarded by a court for small claims.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 24: Legal costs — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Procedural changes									
Legal costs	---	✓	---	✓	✓	---	---	✓	✓

NEW SOUTH WALES

Legal Profession Act 1987

If the amount recovered on a claim for personal injury damages is less than $100,000, the maximum costs recoverable for legal services provided to the plaintiff is 20 per cent of the amount recovered or $10,000, whichever is greater. The maximum costs recoverable for legal services provided to the defendant is 20 per cent of the amount claimed or $10,000, whichever is greater. These amounts and percentages may be varied by regulation. There are certain exceptions provided for under the Act.

A solicitor or barrister must not provide a legal service on a claim or defence unless the solicitor or barrister has reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success. A contravention of this prohibition may result in a finding of unsatisfactory professional conduct or professional misconduct; an order for the legal practitioner to repay costs that the client has been ordered to pay to another party and can be ordered to indemnify another party against costs payable by that other party.

If a court finds that the facts established by the evidence on a claim do not support a reasonable belief that the claim or defence has reasonable prospects of success, there is to be a presumption (rebuttable by the solicitor or barrister concerned) that legal services provided on the claim or defence were provided without reasonable prospects of success.

VICTORIA

Not implemented.

QUEENSLAND

Personal Injuries Proceedings Act 2002

Section 56 provides limits on costs that can be awarded for smaller claims. Where damages are $30,000 or less, no legal costs are recoverable. If damages are more than $30,000 but not more than $50,000, the claimant has a maximum entitlement under the claim for legal fees of $2,500. However, if the matter proceeds to trial, costs subsequent to the issue of proceedings are recoverable in situations where judgments are more favourable than the mandatory final offers made at the compulsory conference or before the proceedings are commenced.

WESTERN AUSTRALIA

Legal Practitioners Act 1893

Maximum legal fees chargeable by lawyers are set by the Legal Costs Committee under the Act. In addition lawyers's bills may be also subject to 'taxation' (that is, vetting) in the Supreme Court.

SOUTH AUSTRALIA

Not implemented.

TASMANIA

Not implemented.

AUSTRALIAN CAPITAL TERRITORY

Civil Laws (Wrongs) Act 2002

Part 14.1 limits the maximum costs for legal services in personal injury cases. The maximum costs for the legal services are linked to the amount of personal injury damages received by the plaintiff in the matter.

This Part also provides that if the amount recovered on a claim for personal injury damages does not exceed $50,000, the maximum costs recoverable for legal services provided to the plaintiff or defendant is 20 per cent of the amount recovered or claimed or $10,000, whichever is greater (with provision for the regulations to vary these amounts and percentage). The costs that are capped do not include disbursements. Provision is made for higher costs where the complexity of a case or the behaviour of a party so requires.

Part 14.2 of the Act requires legal practitioners to certify that cases have a reasonable chance of success. This will ensure that parties do not incur costs for claims or defences that have no reasonable prospects of success. The Act provides that the court can allow claims to continue where the interests of justice so dictate (for example, to allow the court to consider a desirable advance within the common law).

NORTHERN TERRITORY

Personal Injuries (Civil Claims) Act 2003

This Act commenced in part on 1 July 2003 with the substantial changes awaiting the drafting of court rules to give effect to the Act.

Sections 18 and 20 preclude legal costs being payable where the amount to be paid to the claimant is less than the prescribed amount, and for legal costs to be strictly limited at levels far below those previously payable.

Legal Practitioners Amendment (Costs and Advertising) Act 2003

The Act commenced in part on 1 July 2003 with the changes of substance awaiting regulations and changes by the Law Society of the Northern Territory to the Professional Conduct Rules in relation to advertising.

Section 10 sets out the circumstances in which conditional costs can be made and imposes limits on any premium payable. The conditional costs agreement must be in writing, specifying the premium payable and the reasons why it is required. Additionally, the lawyer must provide an advice concerning liability for other costs payable in varying circumstances, a written estimate of the likely costs if the claim is successful, together with the right of review of the agreement.

The section also requires for every costs agreement that the lawyer provide a written statement of how fees are calculated, proposed billing intervals, for litigation matters details of the costs variables, and full details of the minimum amount a person would receive on a proposed settlement, together with details of the costs review process.

C25: CLAIMS MADE POLICIES

CURRENT SITUATION

Section 54 of the *Insurance Contracts Act 1984* (Cth) operates to excuse the late notification of claims and the late notification of circumstance for 'claims made' and 'claims made and notified' insurance policies.

ISSUES IDENTIFIED WITH THE PREVIOUS LAW

The interpretation of the section has caused difficulties for the insurance industry in how it deals with long tail insurance. It is a major contributing factor in discouraging insurers from offering 'claims made' insurance in Australia, and is increasing the costs of, and reducing the breadth of coverage of, 'claims made' insurance.

The complexity in 'claims made' insurance has increased as insurers attempt to address the perceived problem with the application of section 54 to late notification of circumstances, by omitting deeming provisions from their policies. Such a result still allows circumstances notified to insurers to be covered, due to the operation of subsection 40(3). However, section 54 will not apply to this statutory right, to excuse the late notification of circumstances. The result is that insureds are required to be aware of and understand the effect of the Act in conjunction with their insurance contract, to understand properly their rights regarding the notification of circumstances to an insurer.

REFORMS

In November 2003 the Australian Government established an independent review panel to review and make recommendations on section 54.

The review panel has recommended an amendment to section 54 to clarify its operation in relation to professional indemnity and similar policies.

JURISDICTION BY JURISDICTION SUMMARY OF REFORMS

Table 25: Claims made policies — summary of reforms

Principle of reform	Aus Gov	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Procedural changes									
Claims made policies	a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Part D:

Overview of legislative and regulatory instruments

PART D: OVERVIEW OF LEGISLATIVE AND REGULATORY INSTRUMENTS

The following legislative and regulatory instruments form the basis of reforms to liability insurance law undertaken by Australian governments.

COMMONWEALTH OF AUSTRALIA

Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002

The Act removes tax barriers to structured settlements. It was enacted on 19 December 2002.

Trade Practices Amendment (Liability for Recreational Services) Act 2002

The Act amends the *Trade Practices Act 1974* (the TPA) to allow people to sign waivers and assume the risk of participating in inherently risky recreational activities. It was enacted on 19 December 2002.

Commonwealth Volunteers Protection Act 2003

The Act protects volunteers from civil liability for acts that the volunteer has done in good faith in doing work for the Commonwealth or a Commonwealth authority. The Commonwealth or a Commonwealth authority incurs the civil liability that, except for this legislation, a volunteer would incur. It was enacted on 24 February 2003.

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

The Bill prevents individuals, and the Australian Competition and Consumer Commission in a representative capacity, from bringing actions for damages for personal injuries or death resulting from contraventions of Division 1 of Part V of the TPA. The Bill was introduced into the Parliament on 27 March 2003.

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

The Bill provides for proportionate liability for economic loss for specific actions brought under the TPA, *Corporations Act 2001* and the *Australian Investment and Securities Commission Act 2001*. It was introduced into the Parliament on 4 December 2003.

Treasury Legislation Amendment (Professional Standards) Bill 2003

The purpose of this Bill is to amend the TPA and other relevant Commonwealth legislation to support professional standards laws which are currently in force in New

South Wales and Western Australia, and which other jurisdictions are expected to adopt in due course. It was introduced into the Parliament on 4 December 2003.

NEW SOUTH WALES

Civil Liability Act 2002

New South Wales enacted the Civil Liability Act in June 2002. The Act commenced retrospectively on 20 March 2002.

The Act applies to civil liability arising before the commencement of the Act but not to proceedings already begun. The Act provides:

- upper limits for non-economic loss ($350,000) and lost future earnings (three times New South Wales' average weekly earnings);
- the application of a threshold of 15 per cent impairment in respect of general damages;
- new interest calculations (10 year bond rate or as determined by regulation) and discount rates (5 per cent unless prescribed by regulation) for damages awards;
- the abolition of punitive, exemplary and aggravated damages;
- limits on recovery for gratuitous attendant care;
- legal costs claims limited to the greater of 20 per cent of damages or $10,000 in small claims;
- penalties for making unmeritorious claims; and
- costs can be awarded on an indemnity basis for costs incurred after the failure to accept an offer of compromise.

Civil Liability Amendment (Personal Responsibility) Act 2002

The Civil Liability Amendment (Personal Responsibility) Act was enacted in November 2002. Part 7 (self-defence and recovery by criminals) and section 30 (limitation on recovery for pure mental harm arising from shock) apply to proceedings commenced on or after 3 September 2002. The Act:

- allows waivers and voluntary assumption of risk;
- establishes a peer acceptance defence for professionals;
- establishes a realistic duty of care;
- limits the scope of reasonable foreseeability;

- provides protection for volunteers and 'good Samaritans';
- allows structured settlements;
- limits liability in tort of a public or other authority;
- ensures that saying 'sorry' does not represent an admission of guilt;
- limits claims for nervous shock;
- allows drugs and alcohol to be taken into account in assessing negligence;
- provides proportionate liability for economic loss;
- prohibits the recovery of damages if injured person engaged in criminal activity; and
- provides new limitation periods for personal injury cases.

Civil Liability Amendment Act 2003

The Civil Liability Amendment Act was enacted on 10 December 2003. The Act:

- precludes a person recovering damages if the loss results from conduct that would have constituted a serious offence if the person had not been suffering from a mental illness at the time;
- excludes damages for the cost of rearing a child in proceedings where there is a civil liability for the birth of a child;
- further limits the circumstances in which a public or other authority or public official is liable for damages in respect of the exercise of public functions;
- provides for self-defence against the conduct of another person that would have been unlawful if the person had not been suffering from a mental illness at the time;
- confirms that limitations of the Act in respect of a tort also apply to the vicarious liability of another person for that tort;
- amends the *Mental Health Act 1990* to exclude police and health care professionals from personal liability for functions exercised under the Act;
- amends to allow for proportionate liability for economic loss.

Professional Standards Act 1994

The Act was introduced at a time of expanding fields of liability for professional negligence accompanied by increasingly large awards of damages for economic loss caused by professionals. An increase in the number of claims against professions resulted in an increase in insurance premiums. In some cases, professionals could not obtain insurance at any cost.

The Act was unique to New South Wales at the time of its introduction. The focus of the Act is on minimising claims against professionals by improving professional standards, requiring risk management strategies, compulsory insurance cover, professional education and appropriate complaints and disciplinary mechanisms, in return for limited liability.

The Act includes provision for members of occupational associations to limit their civil liability as long as they have business assets and/or insurance cover of no less than the amount specified in the cap. The Act applies to claims for damages for economic loss worth at least $500,000 and liability may be capped at an amount determined by the Professional Standards Council.

VICTORIA

Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002

The provisions commenced on 22 October 2002 and apply to all proceedings commenced after this date regardless of date of injury.

The Act provides:

- caps on general damages of $371,000;
- a cap on the loss of earnings of three times average weekly earnings;
- an increase of the discount rate to five per cent;
- provision of waivers to allow people to accept risk;
- protection of volunteers and 'good Samaritans';
- that the right to claim damages is removed where the injury was suffered through criminal activity or while under the influence of drugs; and
- that saying 'sorry' does not represent an admission of liability.

Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003

The provisions generally apply to all proceedings commenced after 21 May 2003 in relation to injuries occurring on or after that date, but does not apply to proceedings commenced before 1 October 2003 in respect of injuries occurring before 21 May 2003.

The Act:

- implements a threshold of greater than 5 per cent whole person impairment for access to general damages;
- implements proportionate liability for purely economic loss (that is, excluding death or personal injury) (This provision is yet to be proclaimed);
- implements a limitation period of 3 years from date of discoverability, but with this period to be 3 years in the case of minors, reducing to 3 years when they reach 18; and
- specifies maximum recoverable damages for gratuitous attendant care services.

Wrongs and Other Acts (Law of Negligence) Act 2003

The provisions generally commenced after 2 December 2003. The Act:

- establishes in statute provisions based on the recommendations of the Review of the Law of Negligence in respect of negligence, duty of care, causation, awareness of risk, negligence of professionals and non-delegable duties;
- sets out principles applicable in cases of contributory negligence and introduces legal presumptions of contributory negligence when intoxicated;
- limits recovery in pure mental harm cases;
- limits liability in tort of a public or other authority;
- specifies maximum recoverable damages for loss of care provided to dependants and loss of capacity to provide such care;
- allows counsel and parties to draw to a court's attention damages awarded in other cases; and
- revises and extends procedures applying to determination of whether a claimant's injury satisfies the threshold requirements for eligibility (should negligence be proved) for awarding of general damages.

Professional Standards Act 2003

The Act was assented to on 2 December 2003, however, will commence upon proclamation. The Act:

- provides for the limitation of liability of members of occupational associations in certain circumstances; and
- facilitates improvement in the standards of services provided by those members.

QUEENSLAND

Civil Liability Act 2003

The Act applies to all claims for damages for harm. Harm is defined to include all possible types of loss, including personal injury, damage to property and pure economic loss other than those excluded. Through the definition of 'claim', the Act applies to all breaches of a duty of care in tort, those duties in contract that, whether express or implied, can be considered of the same effect as a duty to take reasonable care at the same time as would be found in tort, and any other duty, whether expressed under statute or otherwise, that likewise can be considered of the same effect as a duty to take reasonable care.

Excluded from the application of the Act are matters involving 'injuries' as defined under the *WorkCover Queensland Act 1996*, except those injuries which are identified in sections 36(c) and 37 of that Act. This exclusion will result in liability for those injuries in which employment is likely to be a significant factor being decided in accordance with the law as current before commencement of the Act. An example is provided of the multitude of claims from one incident that may be excluded from application of the Act. The exception of those injuries identified by sections 36(c) and 37 from the exclusion will result in liability for those injuries in which employment is less likely to be a significant factor being decided in accordance with the law as modified by the Act.

The provision does not affect any pre-claim procedure under any of the *Personal Injuries Proceedings Act 2002*, the WorkCover Queensland Act or the *Motor Accident Insurance Act 1994*. Further, the provision will not affect an employee's right to obtain statutory benefits through the WorkCover Queensland Act.

Also excluded from the Act's application are injuries which result from smoking, or the use of or exposure to tobacco products, and also dust-related diseases.

Personal Injuries Proceedings Act 2002

The Act:

- outlines pre-court procedures as well as some court procedures for all remaining personal injury actions;
- contains special provisions for notification of claims in relation to injuries to children arising out of medical treatment;
- places restrictions on advertising and prohibits touting; and
- details disclosure requirements and compulsory conferences.

The Act facilitates the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury. This is achieved by:

- providing a procedure for the speedy resolution of claims for damages for personal injury to which the Act applies;
- promoting settlement of claims at an early stage wherever possible;
- ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial;
- minimising the costs of claims; and
- regulating inappropriate advertising and touting.

The Act applies in relation to all personal injury arising out of an incident whether happening before, on or after 18 June 2002.

The Act does not apply to:

- personal injury as defined under the *Motor Accident Insurance Act 1994* and in relation to which that Act applies; or
- injury as defined under the *Workers' Compensation and Rehabilitation Act 2003*, but only to the extent that an entitlement to seek damages, as defined under that Act, for the injury is regulated by chapter 5 of that Act;
- personal injury in relation to which a proceeding was started in a court, including in a court outside Queensland or Australia, before 18 June 2002; or
- personal injury that is a dust-related condition.

Sections 40(2) (in relation to mandatory final offers) and 56 (in relation to costs involving awards of more than $50,000) do not apply to personal injury if the act causing the personal injury is an unlawful intentional act done with intent to cause personal injury or is unlawful sexual assault or other unlawful sexual misconduct.

Furthermore, this Act does not affect the seeking, the recovery or award of damages in relation to personal injury under any of the following:

- the *Anti-Discrimination Act 1991*, section 209(1)(b);
- the *Civil Aviation (Carriers' Liability) Act 1964*, including the applied provisions as defined under that Act;
- the *Criminal Offence Victims Act 1995*; and
- the Criminal Code, repealed section 663D.

WESTERN AUSTRALIA

Civil Liability Act 2002

The Act came into effect on proclamation on 1 January 2003.

The personal injury damages provisions (Part 2) take effect only in relation to incidents occurring after the date of proclamation. The Act does not have retrospective operation.

Part 2 applies to awards for personal injuries damages whether the action is founded in tort, breach of contract or another legal basis. It however does not apply to tortious claims generally, for example it would not apply to torts causing solely economic loss such as claims for negligent misrepresentation.

Circumstances excluded from the operation of Part 2 are:

- unlawful intentional acts and sexual misconduct;
- damages awards to which the *Motor Vehicle (Third Party Insurance) Act 1943* applies;
- employment related injuries awards the subject of the *Workers' Compensation and Rehabilitation Act 1981*;
- awards to which the *Civil Aviation (Carriers' Liability) Act 1961* applies; and
- awards relating to death or injury caused by asbestos inhalation.

Civil Liability Amendment Act 2003

The Act was proclaimed to commence on 1 December 2003, and excludes Part 2's application to injury associated with smoking or other use of tobacco products. The Act also:

- partially codifies the law of negligence;
- sets out principles applicable in cases of contributory negligence and introduces legal presumptions of contributory negligence when intoxicated;
- protects good Samaritans;
- removes liability for inherent risks and revises the law relating to voluntary assumption of risk, including providing for waivers and risk warnings;
- allows for apologies to be made without fear of legal liability;
- provides for new public policy defence for providers of public services;
- reinstates the 'non-feasance' rule for road authorities; and
- introduces proportionate liability for economic loss claims (not yet commenced).

SOUTH AUSTRALIA

Statutes Amendment (Structured Settlements) Act 2002

The Act permits a court, with the consent of parties, to award damages wholly or partly in the form of a periodical payment. Prior to the Commonwealth legislating to remove tax disadvantages, parties were deterred from entering into such settlements. This legislation applies to settlements and judgments on or after the date of commencement.

The Act came into effect on 1 December 2002.

Wrongs (Limitation and Damages for Personal Injury) Amendment Act 2002

The Act extends the system of thresholds and caps applying under the motor vehicle accident system to all bodily injury damages claims. It includes special provisions such as a presumption of contributory negligence where an injured person is intoxicated and an exclusion of liability where the person was injured in the course of committing a serious crime.

The Act applies only to incidents of injury that occur on or after 1 December, 2002.

Recreational Services (Limitation of Liability) Act 2002

The Act provides for a system of safety codes and waivers to deal with the risk associated with certain types of recreational activity. A registered provider may enter into a contract with a consumer modifying the duty of care owed by the provider to the consumer so that the duty of care is governed by the registered code. The provider is then only liable for a breach of the code and not for any injury or damage that occurs without a breach.

Law Reform (Ipp Recommendations) Bill 2003

The Bill addresses the key liability recommendations of the Review of the Law of Negligence and some other matters, including:

- providing a defence to a negligence action for doctors and other professionals if they have acted in accordance with a practice widely held by respected practitioners to be a proper practice;
- removing liability for failure to warn of obvious risks, and providing that, for the purpose of a defence of voluntary assumption of risk, plaintiffs are deemed to be aware of obvious risks unless they can prove otherwise;
- in relation to limitation periods, making it more difficult to obtain extensions of time beyond the statutory periods and providing for an early notification regime for children's claims;
- codifying and clarifying the common law in relation to the causation, foreseeability and scope of liability principles of negligence; standard of care for professionals, and contributory negligence;
- restoration of the highway immunity for road authorities;
- capping of economic loss in loss of dependency claims; and
- removing any entitlement to damages to cover the ordinary costs of raising a child.

The Bill is currently being debated in Parliament.

Professional Standards Bill 2003

If enacted, the Bill will enable an occupational or trade group to apply to register a professional standards scheme. A registered scheme would apply to all the members of the professional association, or to particular classes of members specified in the scheme. A scheme would require those to whom it applies to adopt specified risk management practices and adhere to a complaints and disciplinary regime, so as to improve professional standards and reduce the likelihood of claims. In return, the scheme would cap the professional liability of the practitioners covered at a figure not less than the minimum cap fixed by law of $500,000. The scheme would then require

practitioners who wanted the benefit of the cap to maintain insurance cover or business assets, or a combination of these, sufficient to meet claims up to the cap.

Schemes can be approved for any profession, occupation or trade for liability for breach of a duty of care resulting in economic loss. The Bill would not, however, allow the limitation of liability for injury (even if the injury caused economic loss). The Bill is consistent with, though not identical to, the New South Wales and Western Australian legislation.

The Bill was introduced to Parliament on 12 November 2003.

TASMANIA

Civil Liability Act 2002

Provisions of the Act that commenced on 19 December 2002:

- restrict the level of damages that may be awarded in cases where the use of recreational drugs by the injured party has contributed to their injury;
- prevent people from being able to claim damages if they are injured while they are engaging in serious criminal activity;
- give the court the power to order structured settlements as an alternative to lump sum payouts for future; and
- clarify that saying sorry for an action is not an admission of legal liability.

The Act was subsequently amended to prevent a plaintiff using a different basis of claim to circumvent the application of the Act. It applies to all actions for personal injury or death or property damage whether brought under tort, contract or statute or under an action for breach of a non-delegable duty.

The Act exempts:

- civil liability for personal injury or death arising from intentional physical or sexual assault or resulting from smoking, which are exempt from all sections of the Act;
- liability for statutory compensation under the *Workers Rehabilitation and Compensation Act 1988*, *Criminal Injuries Compensation Act 1976*, *Anti-Discrimination Act 1998* or a scheduled benefit under the *Motor Accidents (Liabilities and Compensation) Act 1973*; and
- civil liability relating to an injury to which Division 2 of Part X of the Workers Rehabilitation and Compensation Act applies;

Only selective parts of the Act apply to an injury to which Part III of the Motor Accidents (Liabilities and Compensation) Act applies.

The Act does not prevent parties to a contract from making express provision for their rights, obligations and liabilities under the contract in relation to any matter to which the Act applies, except assessment of damages for personal injury or death.

AUSTRALIAN CAPITAL TERRITORY

Civil Law (Wrongs) Act 2002

The Act provides for:

- statutory personal injury negligence (negligence) exemptions for volunteers and 'good Samaritans';
- a bar on negligence claims by persons engaged in criminal acts;
- restrictions on recovery for those engaged in activity where impairment to their physical condition was self-induced;
- apologies to be made without fear of legal liability;
- broadening of the ability of liable parties to claim contribution from one another;
- limits on recovery in pure mental harm cases;
- the codification of the elements of negligence;
- the broadening of the court's ability to award 100 per cent contributory negligence and it gives the court wider discretion in cases of fraudulent claims and provides direct remedies to aggrieved parties, such as insurers;
- open and full disclosure;

- limits on expert testimony to a single court sanctioned or appointed witness in any case where medical testimony is required;
- structured settlements;
- limitations on legal costs;
- sanctions in case of frivolous pleadings or claims;
- neutral evaluation;
- protection of insurers in relation to the attachment of insurance money;
- the abolition of a number of formerly actionable common law torts;
- significant restrictions with respect to limitation of actions;
- an absolute bar to recovery in most types of equine activities;
- added restrictions on claims against medical practitioners;
- abolition of the rule in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; and
- the introduction of restrictions on claims against public authorities.

NORTHERN TERRITORY

Personal Injuries (Liabilities and Damages) Act 2003

The Act commenced on 1 May 2003. The Act:

- provides for the entitlement to damages for personal injuries;
- clarifies principles of contributory negligence;
- fixes reasonable limits on certain awards of damages for personal injuries; and
- provides for periodic payments of damages for personal injuries.

The Act applies to all civil claims for damages for personal injuries from the commencement date except for those related to:

- motor accidents;
- workers compensation;
- dust-related conditions;
- assistance certificates under the *Crimes (Victims Assistance) Act 2003*;
- certain provisions of the *Consumer Affairs and Fair Trading Act 2002*; and
- certain provisions of the Commonwealth's TPA.

Consumer Affairs and Fair Trading (Amendment) Act 2003

This Act amends the Consumer Affairs and Fair Trading Act to remove a statutory impediment to the self-assumption of risk by persons undertaking risky recreational activities. The Act complements Commonwealth changes to the TPA. The amendments commenced on 1 May 2003.

Personal Injuries (Civil Claims) Act 2003

The Act is designed to encourage the economical and early resolution of personal injuries damages claims without the need for a court to determine liability or damages.

The Act commenced in part on 1 July 2003 with the substantial changes awaiting the drafting of court rules to give effect to the Act.

Legal Practitioners Amendment (Costs and Advertising) Act 2003

This Act amends the *Legal Practitioners Act 2002* to provide for appropriate advertising by legal practitioners and to clarify the law regarding cost agreements. The Act commenced in part on 1 July 2003 with the changes of substance awaiting regulations and changes by the Law Society of the Northern Territory to the Professional Conduct Rules in relation to advertising.

Civil Liability Bill 2003

A Bill relating to the balance of the Review of the Law of Negligence recommendations is expected to be released for discussion in mid-2004. The Bill will seek to reform the law in relation to civil liability for negligent acts or omissions and deals specifically with liability for harm generally (breach of duty generally, breach of duty by professionals, causation, assumption of risk, dangerous recreational activities, non-delegable duties, vicarious liability and contributory negligence), liability of public authorities and liability for mental harm.

Additionally, it is proposed that there be a discussion draft Limitation Amendment Bill dealing with limitations issues raised by the Review of the Law of Negligence.

Legislation including Acts, Bills and Explanatory Notes can be accessed from the following web sites:

Commonwealth:	http://www.scaleplus.law.gov.au/browse.htm
New South Wales	http://www.legislation.nsw.gov.au/maintop/search/inforce
Victoria:	http://www.dms.dpc.vic.gov.au
Queensland:	http://www.legislation.qld.gov.au/Legislation.htm
Western Australia:	http://www.slp.wa.gov.au/statutes/swans.nsf
South Australia:	http://www.parliament.sa.gov.au/dbsearch/legsearch.htm
Tasmania:	http://www.thelaw.tas.gov.au/search
Australian Capital Territory:	http://www.legislation.act.gov.au
Northern Territory:	http://www.nt.gov.au/dcm/cabinet/register.shtml

Relevant Documents

Review of the Law of Negligence:
http://revofneg.treasury.gov.au.

Trowbridge Deloitte, Public Liability Insurance, Analysis for Meeting of Ministers 27 March 2002:
http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=269

Trowbridge Deloitte, Public Liability Insurance, Practical Proposals for Reform, 30 May 2002:
http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=314

Australian Competition and Consumer Commission Price Monitoring Reports:
http://www.accc.gov.au

Actuarial Analysis of the Review of the Law of Negligence Recommendations:
http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115.asp