

4. Not-for-Profit Organisations

Term of Reference

3. *In conducting this inquiry, the Panel must:*

- (f) *develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts). A not-for-profit organisation in this context may include charities, community service and sporting organisations.*

Exemption from or limitation of liability

4.1 A not-for-profit organisation (NPO) is an organisation that is prohibited under its governing rules or documents from distributing profits to its members, owners or manager. Upon the winding-up of an NPO, any surplus profits may be distributed only to another NPO. A commonly used shorthand description of NPOs is that they are organisations that are conducted neither for the profit nor the gain of their individual members. It is important to note that the term 'not-for-profit organisation' does not signify that the organisation cannot and does not make profits. It only indicates that there are restrictions on what the organisation can do with its profits. In fact, many NPOs are commercial operations and compete with for-profit commercial operations.

4.2 The class of NPOs is very broad. It includes all charities (implicit in the definition of a charity is that it is not conducted for the profit or gain of individual members), and a range of community service and sporting organisations.

4.3 On the basis of our research, consultations and deliberations, and after careful thought and consideration, our leading recommendation in relation to this Term of Reference is that there should be no provision exempting NPOs as such from damages claims for death and personal injury caused by negligence or limiting their liability for such damages.¹ Instead, the Panel will make recommendations, the effect of which will be to limit liability for the materialisation of obvious risks of recreational activities (Recommendation 11) and to exclude liability for failure to warn of obvious risks in any

1 For example, by providing that they will be liable only for 'gross negligence'.

circumstances (Recommendation 14). The Panel's view is that these recommendations will make a significant contribution to furthering the objective of this Term of Reference, and that they strike a better balance between the various interests at stake than would provisions to protect NPOs as such. Together with other recommendations that will be made in our second report (concerning assessment of damages, for instance), they should provide a principled basis on which the NPO sector can build with renewed confidence.

4.4 The Panel's main reasons for making this leading recommendation are:

- (a) There are very many NPOs, and in aggregate their activities present to members of the public considerable risks of suffering personal injury or death as a result of negligence. These risks are no different from those presented by similar activities of for-profit organisations.
- (b) As a group, NPOs engage in a very wide range of activities of different sorts, ranging from organisation of small-scale recreational events to large-scale provision of health and social services.
- (c) As a group, NPOs vary greatly in size, in the scale of their activities and in their financial turnover. As a result, their ability to bear or spread the costs of liability for personal injury and death also varies greatly. Our consultations suggest that the sorts of problems that have led to the appointment of the Panel are affecting smaller NPOs much more than larger NPOs.
- (d) Many of the activities in which NPOs engage and many of the services they provide involve the participation of young people and underprivileged and vulnerable members of society. Many of these activities create a potential for the infliction of serious harm — for instance, sexual and other abuse of young people in schools and like institutions.

4.5 For all these reasons, the considered opinion of the Panel is that it would not, on balance, be in the public interest to provide the NPO sector as such with general limitations of, or a general exemption from, liability for negligently-caused personal injury and death. The Panel also believes that offering special protection to NPOs would not be consistent with our task of developing principled options for reform of the law. No principle has been suggested to the Panel, nor has the Panel been able to discern any principle, that could support granting to NPOs a general exemption from, or general

limitations of, liability. On the contrary, all the arguments that support imposing liability (notably, the value of compensating injured persons, of providing incentives to take care, and of satisfying the demands of fairness as between injured persons and injurers) apply as strongly to NPOs as to for-profit organisations.

4.6 It has been suggested that at least some of the arguments for not treating NPOs differently that were outlined in paragraph 4.4 could be addressed by exempting from liability only a limited sub-class of NPOs defined, for example, in terms of annual turnover. One proposal was that NPOs with an annual turnover of less than \$250,000 might be given some form of protection from liability for negligently-caused personal injury and death.

4.7 In the view of the Panel, such proposals are undesirable for three main reasons. First, a financial threshold of this sort could easily be evaded in various ways that would be very difficult to control. For example, an NPO could hive off a section of its operations to ensure that its turnover, and also that of the remainder of its operations, was under the threshold. Secondly, because such a threshold is arbitrary, it would generate at least a perception of unfairness. An injured person might find it very difficult to understand why liability should depend on whether the turnover of the NPO responsible for his or her injuries was \$249,999 rather than \$250,001. Thirdly, there are strong reasons against protecting NPOs as a class that are not met by the proposal — such as those discussed in paragraph 4.4.

Recommendation 10

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

Recreational activities and services: NPOs

4.8 Another suggestion that has been widely made is that NPOs might be given some form of protection from liability for negligently-caused personal injury and death only in relation to recreational activities. Our consultations suggest that this is an area in which NPOs (especially NPOs operating in rural and regional Australia) are facing particularly serious problems. We have been told that the activities of such NPOs play an important part in maintaining the social viability and the quality of life of small rural communities.

4.9 Many of the reasons that support Recommendation 10 also provide reasons against creating a sub-class of NPOs who provide recreational

services. In particular, we would draw attention again to three of those reasons.

- (a) NPOs that are involved in the provision of recreational services vary greatly in size — from the local scout troop to the large metropolitan football club. The Panel believes that it would not be in the public interest to provide exemption from, or limitation of, liability for all NPOs which conduct recreational activities or provide recreational services. Similarly, we do not believe that it would be practicable or desirable to provide such protection to a sub-class of NPOs defined in terms of annual turnover.
- (b) Many recreational activities are provided for the young whose health and safety especially need and deserve the law's protection.
- (c) An exemption from liability for personal injury and death resulting from negligence in the conduct of a recreational activity or the provision of a recreational service would remove one incentive that NPO providers of recreational services currently have for the development of improved risk-management procedures.

4.10 For all of these reasons, the considered view of the Panel is that neither NPOs as a group, nor any sub-class of NPOs, should be given protection from liability for negligently-caused personal injury and death associated with recreational activities. The Panel considers that such a change in the law could not be justified consistently with the instruction to develop principle-based options for reform of the law. The Panel understands that NPOs play a very important part in the life of many communities by organising recreational activities; and that if they do not do so, communities may be deprived entirely of such activities. Giving full weight to this consideration, our view nevertheless remains that on balance it would not be in the public interest to protect NPOs as such from liability in relation to recreational activities.

Recreational activities and services generally

4.11 The Panel is of the view, however, that a principled reason can be given for treating recreational activities and recreational services as a special category for the purposes of personal injury law, regardless of whether the provider of the service is an NPO or a for-profit organisation. The reason is that people who participate in such activities often do so voluntarily and wholly or predominantly for self-regarding reasons.

4.12 This is not always the case, of course. Members of schools and other institutions may be required to engage in sporting and other recreational activities. Also, people who participate in recreational activities in the course of their employment do not do so voluntarily in the relevant sense. The rationale for treating recreational services and activities as a special case does not apply to such persons. Therefore, any rule limiting liability in respect of recreational services should not apply to them.

4.13 On the basis of our consultations, the Panel has reached the conclusion that there is widespread and strong community support for the idea that people who voluntarily participate in certain recreational activities can reasonably be expected, as against the provider of the recreational service, to take personal responsibility for, and to bear risks of, the activity that would, in the circumstances, be obvious to the reasonable person in the participant's position. For this purpose, people who participate in recreational activities include not only 'players' but also, for instance, referees.

4.14 In reaching this conclusion, the Panel has not lost sight of the fact that many participants in recreational activities are children, whom most people would think need and deserve special protection from risks of personal injury and death. It is with this in mind that the phrases 'in the circumstances' and 'reasonable person in the position of the participant' have been used. These should give ample room for the law to develop flexibly to provide protection for people who are not in as good a position as a fully capable adult to take care for their own physical safety or to discern the risks of recreational activities in which they participate or which they observe.

4.15 The Panel considers that a distinction needs to be drawn between 'inherent' and 'obvious' risks. An inherent risk of a situation or activity is a risk that could not be removed or avoided by the exercise of reasonable care.² An inherent risk may be obvious, but equally it may not be. In *Rogers v Whitaker* (1992) 175 CLR 479, for example, the risk of sympathetic ophthalmia was inherent but far from obvious. This is one reason why it was so important for the doctor to tell the patient about it. Conversely, an obvious risk may be inherent, but equally it may not be. It may be a risk that could be avoided or removed by the exercise of reasonable care. This means that an obvious risk may be a risk that a person will be negligent.

4.16 The current law is that there can be no liability for negligence arising out of the materialisation of an inherent risk. This result actually follows logically

² *Rootes v Shelton* (1967) 116 CLR 383.

from the definition of 'inherent risk' as being a risk that could not be avoided by the exercise of reasonable care. On the other hand, under current law, failure to guard against an obvious risk may be negligent if the risk is not an inherent one. This makes it clear that the effect of Recommendation 11 may be to relieve a person of liability for failure to remove or avoid a risk that could have been removed or avoided by the exercise of reasonable care on their part. In other words, Recommendation 11 may require a person to accept a risk that another person will be negligent.

4.17 The term 'obvious risk' is designed to include risks that are patent or matters of common knowledge. In the opinion of the Panel, the mere fact that a risk is of low probability does not prevent it from being obvious. The Panel recommends a definitional provision embodying these points. Beyond this, the Panel considers that it would be undesirable and impractical to attempt to define obviousness, because whether or not a risk is obvious will be for the court to decide and must depend ultimately on the facts of each individual case.

Recommendation 11

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.**
- (b) Obvious risks include risks that are patent or matters of common knowledge.**
- (c) A risk may be obvious even though it is of low probability.**

4.18 The Panel is of the opinion that for the purposes of this provision, the definition of 'recreational services' contained in clause 2 of the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* does not provide a suitable model for a definition of 'recreational services' and of 'recreational activities'. This is because the provision we recommend is wider in its operation than clause 2. The effect of clause 2 is merely to remove the barrier erected by section 68 of the *Trade Practices Act 1974* against contractual exclusion of the warranties implied by section 74 of the Act into contracts for the provision of recreational (and other) services. By contrast, the provision we

are recommending excludes liability for the materialisation of obvious risks of recreational activities regardless of any agreement between the provider and the participant to this effect.

4.19 The Panel's view is that the definition of 'recreational services' in the Bill is too wide to be adopted in this context. The definition in the Bill could cover activities that do not involve any significant degree of physical risk. We think that a narrower definition that identifies activities that involve significant risks of physical harm would be more appropriate. This is because such activities are the sort that people often participate in partly for the enjoyment to be derived from risk-taking.

Recommendation 12

For the purposes of Recommendation 11:

- (a) 'Recreational service' means a service of**
 - (i) providing facilities for participation in a recreational activity; or**
 - (ii) training a person to participate in a recreational activity; or**
 - (iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.**

- (d) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.**

4.20 The effect of the provision in Recommendation 11 can be also be explained in terms of the defence of assumption of risk (which the Panel will deal with in more detail in its second report). Unlike the defence of contributory negligence (which involves apportionment of loss between plaintiff and defendant), the defence of voluntary assumption of risk provides a complete answer to a claim for personal injury or death. The basis of the defence of assumption of risk is that a person should not be able to recover damages in respect of a risk which they knew about and which they voluntarily took. The defence has, for all practical purposes, become defunct since the statutory introduction of apportionment for contributory negligence. This is because contributory negligence will be available as a defence in any case in which voluntary assumption of risk is available: a person who knowingly takes a risk that another person will be negligent can be said to have failed to take reasonable care for their own safety. Courts prefer

contributory negligence to assumption of risk because it enables them to apportion the loss between the parties and to give effect to more complex judgments of responsibility than the all-or-nothing approach of voluntary assumption of risk allows.

4.21 The effect of Recommendation 11 is to create a new defence of voluntary assumption of risk but limited in scope to voluntary taking of risks of participation in and observance of recreational activities. The Panel considers that this new defence is consistent with, and will further, the objectives underlying its Terms of Reference. Whereas the traditional defence of assumption of risk is available only in cases where the plaintiff subjectively knew of the relevant risk, Recommendation 11 applies the basic idea of voluntary assumption of risk to situations where the recreational activity in question carried risks that would be obvious to the reasonable person, regardless of whether the plaintiff was actually aware of those risks.

4.22 It has to be acknowledged that some will consider this to be a harsh rule. However, it must be borne in mind that:

- (a) it will apply only to claims by participants in recreational activities;
- (b) it will apply only to people who participate voluntarily;
- (c) it will apply only to claims against providers of recreational services;
- (d) it will apply only to a limited class of recreational activities of which it can be said that a significant element of physical risk is an integral part.

4.23 The Panel's investigations suggest that with these limitations, the recommended provision is likely to be widely accepted as a reasonable way of furthering the objectives of our Terms of Reference.

4.24 The Panel also recommends that risks of activities that are covered by a scheme of compulsory statutory liability insurance should be excluded from the operation of the provision contained in Recommendation 11. The main effect of this provision would be to exclude motor accident cases. This exclusion obviously derogates from the ethical principle of personal responsibility on which Recommendation 11 is based. However, the Panel is mindful that some people may consider the provision contained in this Recommendation to be a harsh one. Since the basic purpose of compulsory insurance provisions is to ensure that harm is compensated for, the Panel is of

the view that principle should not be pressed beyond the point of sound social policy by excluding obvious risks of recreational activities from the scope of relevant compulsory statutory insurance schemes.

Recommendation 13

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

4.25 Although Recommendations 11 - 13 do not apply specifically to NPOs, they will operate for their benefit and will make a contribution to promoting the objectives of the Panel's Terms of Reference in relation to NPOs.

Warning and giving notice of obvious risks

4.26 Recommendations 11 and 12 provide relief from liability for failure to take care to eliminate obvious risks. But they do not deal with liability for failure to give notice or to warn of obvious risks.

4.27 Recommendation 7 contains a provision to the effect that a medical practitioner cannot be held to have breached a proactive duty to inform by reason only of having failed to give a patient information about a risk or other matter that would, in the circumstances, have been obvious to the reasonable person in the patient's position, unless required to do so by statute.

4.28 In the view of the Panel, the principle underlying this recommendation (ie that people should take more responsibility for their own safety) is of more general relevance. For instance, it is applicable to the liability of occupiers of land to visitors to the land. The obligation of the occupier is to take reasonable care for the visitor's safety. One way in which an occupier may be able to discharge this obligation is by giving notice or warning of dangers on the land. Even if the occupier was not negligent in failing to remove the danger, failure to warn or give notice of the danger could constitute actionable negligence. For instance, an occupier may be negligent in failing to give notice or warn of the danger of falling rocks in a particular location even though the occupier could not reasonably be expected to remove the danger.

4.29 In order to give wider effect to the rationale of Recommendation 7, the Panel recommends a provision to the effect that a person cannot be held to have breached a proactive duty to inform merely by reason of having failed to give notice or to warn of a risk of personal injury or death that would, in the

circumstances, have been obvious to the reasonable person in the position of the person injured or killed, unless required to do so by statute.

Recommendation 14

The Proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.**
- (b) Obvious risks include risks that are patent or matter of common knowledge.**

4.30 A risk may be obvious even though it is of low probability. The Panel considers that the provision in Recommendation 14 will make a significant contribution to furthering the objectives of its Terms of Reference. For instance, its effect would probably be to reverse the controversial decision in *Nagle v Rottneest Island Authority* (1993) 177 CLR 423 (in which it was held that a local council's failure to warn of the dangers of diving into shallow water was negligent).

4.31 It is important to note that Recommendation 14 applies only to the proactive duty to inform and not to the reactive duty to inform. If a person asks about a particular risk, he or she should be told about that risk even if, in the circumstances, it would have been obvious to a reasonable person in the position of that person.

4.32 Recommendation 14 is an important adjunct to Recommendation 11 (although the operation of Recommendation 14 is not limited to recreational activities). Exclusion of liability for the materialisation of obvious risks could be circumvented if it were open to a claimant to allege failure to give notice or to warn of the risk.

4.33 The Panel's recommendation is that there should never be liability for breach of a proactive duty to inform consisting of failure to give notice or warn of a risk that would, in the circumstances, have been obvious to the reasonable person in the position of the person injured or killed. But in the Panel's view, it is only as between voluntary participants in recreational activities and

providers of the corresponding recreational services that liability for failure to take care to eliminate an obvious risk can reasonably be excluded.

4.34 Although this recommendation does not specifically refer to NPOs, it will benefit them and will go some way toward meeting concerns that have been expressed to us and toward promoting the objectives underlying the Terms of Reference.

4.35 The Panel considers that the scope of the provision contained in Recommendation 14 should be limited in one significant respect. There has long been a principle of employers' liability law that a person who has control over the working environment is required take particular care for people in that environment. This obligation may extend to warning of obvious risks. It is not the Panel's intention to modify the law in this respect. We therefore recommend that the principles contained in Recommendation 14 should not apply to "work risks". The Panel recommends that 'work risks' be defined as 'risks associated with work done by one person for another'.

Recommendation 15

The principles contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person for another.

4.36 It should be noted that this recommendation says nothing about when work risks should be the subject of a warning, about who should give that warning or to whom it should be given. Its only effect is to exclude work risks from the operation of the rule that there can be no liability for failure to warn of obvious risks.

Emergency services

4.37 Some NPOs provide emergency services. The issue of the liability of providers of emergency services will be dealt with in our second report. The recommendations made there will apply to NPOs which provide emergency services, as well as to other providers of such services. We therefore recommend that no special provision be made regarding the liability of NPOs for personal injuries and death caused by negligence in the provision of emergency services.

Recommendation 16

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.