

# Review of the Law of Negligence Report

August 2002

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30 August, 2002

Senator the Hon Helen Coonan  
Minister for Revenue & Assistant Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Minister

We have pleasure in submitting the first report of the Review into the Law of Negligence, in accordance with the terms of reference announced by the Government on 2 July 2002.

Yours sincerely

Handwritten signature of David Andrew Ipp in black ink.

The Hon David Andrew Ipp  
Chairman

Handwritten signature of Professor Peter Cane in black ink.

Professor Peter Cane  
Member

Handwritten signature of A/Prof. Dr Don Sheldon in black ink.

A/Prof. Dr Don Sheldon  
Member

Handwritten signature of Mr Ian Macintosh in black ink.

Mr Ian Macintosh  
Member



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## Terms of Reference: Principles based Review of the Law of Negligence

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

Accordingly, the Panel is requested to:

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

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

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

3 In conducting this inquiry, the Panel must:

- (a) address the principles applied in negligence to limit the liability of public authorities;
- (b) develop and evaluate proposals to allow self assumption of risk to override common law principles;
- (c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others;

- (d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;
- (e) develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss; and
- (f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations<sup>1</sup> from damages claims for death or personal injury (other than for intentional torts).

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

- (a) develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and
- (b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.

5 Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons. In developing options the panel must consider:

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

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<sup>1</sup> A not-for-profit organisation in this context may include charities, community service and sporting organisations.

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

**Report Date**

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



## Panel of Eminent Persons

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### Chairman

#### The Honourable David Ipp

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

### Members

#### Professor Peter Cane

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

#### Associate Professor Donald Sheldon

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

#### Mr Ian Macintosh

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



# List of Recommendations

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## Implementation of the Panel's Recommendations

### *A national response*

#### **Recommendation 1**

The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act')) to be enacted in each jurisdiction.

### *Overarching recommendation*

#### **Recommendation 2**

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

## Professional Negligence

### *Treatment by a medical practitioner — standard of care*

#### **Recommendation 3**

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

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

### ***Standard of care — professionals generally***

#### **Recommendation 4**

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

- (a) What could reasonably be expected of a person professing that skill.
- (b) The relevant circumstances at the date of the alleged negligence and not a later date.

### ***Duties to inform***

#### **Recommendation 5**

In the Proposed Act the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

#### **Recommendation 6**

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

#### **Recommendation 7**

The legislative statement referred to in Recommendation 5 should embody the following principles:

- (a) There are two types of duties to inform, a proactive duty and a reactive duty.
- (b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.
- (c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.
- (d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a

reasonable person in the position of the patient, unless giving the information is required by statute.

- (e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.
- (f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

### ***Procedural recommendations***

#### **Recommendation 8**

Consideration should be given to implementing trials of a system of court-appointed experts.

#### **Recommendation 9**

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

### **Not-for-Profit Organisations**

#### ***No exemption for NPOs***

#### **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 services generally***

#### **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.

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

**Recommendation 13**

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

***Warning and giving notice of obvious risks***

**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.
- (c) A risk may be obvious even though it is of low probability.

**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.

***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.

**Trade Practices**

***Part IVA***

**Recommendation 17**

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

**Recommendation 18**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

***Part V Div I***

**Recommendation 19**

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

**Recommendation 20**

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

## ***Part V Div IA, Part V Div 2A and Part VA***

### **Recommendation 21**

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

### **Recommendation 22**

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

## **Limitation of Actions**

### ***General provision***

#### **Recommendation 23**

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

### ***The limitation period and the long-stop period***

#### **Recommendation 24**

The Proposed Act should embody the following principles:

- (a) The limitation period commences on the date of discoverability.
- (b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:
  - (i) had occurred; and
  - (ii) was attributable to negligent conduct of the defendant; and
  - (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.
- (c) The limitation period is 3 years from the date of discoverability.

- (d) Subject to (e), claims become statute-barred on the expiry of the earlier of
  - (i) the limitation period; and
  - (ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').
- (e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.
- (f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:
  - (i) whether the passage of time has prejudiced a fair trial of the claim.
  - (ii) the nature and extent of the plaintiff's loss.
  - (iii) the nature of the defendant's conduct.

***Suspending the limitation period — minors and incapacitated persons***

**Recommendation 25**

The Proposed Act should embody the following principles:

- (a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.
- (b) 'Person under a disability' means:
  - (i) a minor who is not in the custody of a parent or guardian;
  - (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.
  - (iii) a minor whose custodial parent or guardian is a person under a disability.
- (c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.

- (d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.
- (e) A close relationship is a relationship such that:
  - (i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
  - (ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.
- (f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

### ***Survival of actions***

#### **Recommendation 26**

The Proposed Act should embody the following principles:

- (a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.
- (b) In such a case, the limitation period should begin at the earliest of the following times:
  - (i) When the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;
  - (ii) When the personal representative was appointed, if he or she had the necessary knowledge at that time;
  - (iii) When the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

***Contribution between tortfeasors***

**Recommendation 27**

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.



# 1. Introduction

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## The formation of the Panel and the Terms of Reference

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

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

1.3 Within this broad context, the Terms of Reference for the review stated that '[t]he award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death'.

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

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

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

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

## The general task of the Panel

1.7 The prime task of the Panel, as stated by the Terms of Reference, is 'to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death'.

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

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

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

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

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

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

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

## The scope of the review

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

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

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

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

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

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

1.19 Many of those who consulted with the Panel suggested that changes to the law relating to the payment of legal costs in personal injury actions would reduce the litigious culture that, they perceive, contributes to the problems that the Panel is required to address. This too, we believe, is outside our Terms of Reference.

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

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

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

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

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

## Considerations underlying the reports

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

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

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

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

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

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

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

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

## The review timetable

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

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

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

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

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

1.36 The Panel understands that:

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

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

## The absence of empirical evidence and its consequences

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

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

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

## The composition of the panel

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

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

## Consultations and submissions

1.43 The Panel has had the benefit of consultations with and has received submissions from a wide range of senior judges, leading barristers and academics, representatives of a wide range of interested bodies and persons from many walks of life, and from all around Australia. In the second report (due on 30 September 2002), the names of the persons and organisations who have participated in the consultation process, and who have made submissions, will be listed.

## The relationship between the Panel's reports

1.44 The Panel has been charged with reporting on certain issues by 30 August 2002 and on the remaining issues by 30 September 2002. However, some of the issues to which the 30 August Report relates cannot be properly considered in isolation from certain matters which will be dealt with in our second report. For this reason, the two reports of the Panel should be read as a single, integrated set of proposals for reform of personal injuries law. The Panel's second report, which is due to be submitted on 30 September, will incorporate the recommendations made in this report.



## 2. Implementation of the Panel's Recommendations

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2.1 The Panel has interpreted its task as being to suggest a package of legislative measures which will further the objectives expressed and implied in the Terms of Reference. That said, the Panel's recommendations are not so tightly integrated that they must stand or fall in their entirety. Within limits, it would be possible for some elements of the package to be accepted and others to be rejected without seriously undermining the value of the exercise. The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute that might be called the *Civil Liability (Personal Injuries and Death) Act*.

### Recommendation 1

**The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act')) to be enacted in each jurisdiction.**

### Overarching recommendation

2.2 For reasons explained earlier (see paragraphs 1.8-1.9) the Panel's aim in making recommendations has been to provide the basis for the drafting of model statutory provisions that could be adopted in any and every Australian jurisdiction (subject, of course, to any necessary consequential amendments of existing law in the particular jurisdiction). In some cases such provisions would achieve uniformity and in other cases consistency.

2.3 We would reiterate (see paragraph 1.28) that any statute incorporating any or all of our recommendations should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injuries or death resulting from negligence, regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action. Here, and throughout our reports, we use the term 'negligence' to mean 'failure to exercise reasonable care and skill'. We use the term 'personal injury' to include (a) any disease, (b) any impairment of a person's physical or mental condition, and (c) pre-natal injury.

**Recommendation 2**

**The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.**

## 3. Professional Negligence

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### *Term of Reference*

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

- (d)** *develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission.*

### Preliminary: the dichotomy between treatment and information

3.1 Issues about the standard of care in medical negligence cases may arise in relation to treatment (which includes diagnosis, the prescribing of medications and the carrying out of procedures) and to the giving of information about treatment. The Panel considers that the distinction between treatment, on the one hand, and the provision of information, on the other, is a very important one, and that the law should deal with these two activities in different ways. The standard of care therefore has to be discussed separately in regard to each.

### Treatment

#### The principal issue

3.2 The issue that principally causes controversy in regard to the standard of care applicable to the treatment of patients is whether the court should be the ultimate arbiter of the standard of care or whether it should defer to some designated body of opinion within the medical profession. Until *Rogers v Whitaker* (1992) 175 CLR 479, it was thought by many that the law on this question in Australia was embodied in the so-called '*Bolam* rule', although courts had expressed reservations about its application in Australia. 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:

a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... merely because there is a body of opinion that would take a contrary view.

3.3 There are several points that need to be made about this statement:

- (a) Although it refers specifically to medical practitioners, there are reasons to think that it may apply to other occupational groups.
- (b) The *Bolam* case involved treatment rather than the giving of information about treatment.
- (c) Under the rule the defendant will be held to have exercised reasonable care if what was done was in accordance with 'a responsible body of medical opinion'.

3.4 Our consultations suggest that there is a significant body of opinion, especially among the medical profession, in favour of reinstating the *Bolam* rule in its original form. However, the Panel has formed the view, for the reasons which follow, that it should not recommend the reintroduction of the *Bolam* rule in its original form but rather a modified version of that rule.

### Should the court defer to expert medical opinion?

3.5 Under the current law, courts are never required to defer to expert opinion as such. What the law says is that the court is entitled to accept a responsible body of expert opinion, unless there is a strong reason to reject it. The principle underlying this approach is that it is always for the court to decide what the test of reasonable care requires in particular cases, and it is always for the court to decide whether to defer to any particular body of expert opinion in the case before it. By contrast, the traditional *Bolam* rule requires courts to defer to responsible medical opinion, so that if the defendant acted in accordance with a responsible body of expert opinion, the court cannot decide that the defendant acted without reasonable care.

3.6 The choice between these two options may depend, in part at least, on how the body of professional opinion to which deference is accorded is defined. There are various options in this regard.

### The *Bolam* rule

3.7 As already noted, under the *Bolam* rule, deference is accorded to a 'responsible body' of medical opinion. A common objection to the *Bolam* rule is that it gives too much weight to opinions that may be extreme and held by only a very few experts, or by practitioners who (for instance) work in the same institution and so are unrepresentative of the views of the larger body of practitioners. The *Bolam* rule also gives added importance to the influence of so-called 'rogue experts'. The problems with the *Bolam* rule in its original form are well-illustrated by two instances.

3.8 The first is discussed in *Bolitho v City and Hackney Health Authority* [1998] AC 232 by Lord Browne-Wilkinson, referring to *Hucks v Cole* [1993] 4 Med. L.R. 393, 397 (a 1968 case), in which 'a doctor failed to treat with penicillin a patient who had septic spots on her skin even though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated [the patient] with penicillin'. Despite this body of supportive opinion, the Court of Appeal held the doctor to have been negligent because he had knowingly taken a risk of causing grave danger even though it could have been easily and inexpensively avoided.

3.9 The second instance concerns the events described in the *Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters* (1988). The report arose out of a research programme, conducted over the course of almost 20 years, at the National Women's Hospital (Auckland, New Zealand), to determine the natural history of carcinoma-in-situ of the female genital tract. The programme involved leaving untreated women who returned positive Pap smears. A positive Pap smear may be indicative of carcinoma-in-situ, which may develop into invasive cancer. This procedure involved deliberately omitting to treat women in accordance with standards accepted elsewhere, in order to determine whether they would later develop invasive cancer. The approach followed in the programme was accepted by many other practitioners, within and outside the hospital, and formed the basis for under-graduate and post-graduate teaching. According to the Report, several women died as a result of the failure to offer conventionally-accepted treatment. Under a strict application of the *Bolam* rule as originally formulated, the practitioners involved arguably were not negligent.

3.10 These examples demonstrate that the *Bolam* rule, when strictly applied, can give rise to results that would be unacceptable to the community. They show the main weakness of the *Bolam* rule to be that it allows 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. It is well-established that in many aspects of medical practice, different views will be held by bodies of practitioners of varying size and in different locations. This can result in the development of localised practices that are not regarded with approval widely throughout the profession. Thus, the *Bolam* rule is not a reliable guide to acceptable medical practice. The Panel therefore recommends that *Bolam* rule, in its original form, not be reinstated.

3.11 The question then is whether deference to a body of expert medical opinion would be acceptable if the relevant body of opinion were differently defined.

3.12 Term of Reference 3(d) suggests that deference should be paid to 'the generally accepted practice' of the medical profession. A problem with this formulation is that it does not allow for cases in which there is a genuine difference of opinion about whether generally accepted practice represents best practice, and it gives no scope for the properly regulated development of new techniques with a view to their future general adoption as best practice.

3.13 A third possibility, which would overcome the problems both of the *Bolam* test as originally formulated, and of the test suggested by Term of Reference 3(d), is a rule that a defendant could not be held liable where the court is satisfied that the conduct in question was in accordance with an opinion widely held by a significant number of respected practitioners in the relevant field.

3.14 In this formulation, the requirement that the opinion be 'widely held' is designed to prevent reliance being placed on localised practices that develop in isolation from the mainstream of professional activity. The requirement of 'a significant number' is designed to filter out idiosyncratic opinions. The requirement of 'respected practitioners' is designed to ensure that the opinion deserves to be treated as soundly based.

3.15 The Panel considers that the test set out in paragraph 3.13 is preferable both to the *Bolam* rule as originally formulated, and to the test suggested by Term of Reference 3(d). If it were thought right to require courts to defer to expert medical opinion relating to the standard of care applicable to medical treatment, the Panel's view is that the rule for determining the standard of care in all cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be as follows: 'A medical practitioner is not negligent if the court is satisfied that the treatment provided was in

accordance with an opinion widely held by a significant number of respected practitioners in the relevant field'.

3.16 As we have noted, however, under current law a court is never required to defer to medical opinion, although in the normal run of cases, it will. A serious problem with this approach is that it gives no guidance as to circumstances in which a court would be justified in not deferring to medical opinion.

3.17 This problem could be addressed by adding to the rule suggested in paragraph 3.15 the following proviso: 'unless the court considers that the opinion was 'irrational'. This proviso follows the law as laid down by the English House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232. In the opinion of the Panel, this formula gives doctors as much protection as is desirable in the public interest, because the chance that an opinion which was widely held by a significant number of respected practitioners in the relevant field would be held irrational is very small indeed. But, if the expert opinion in the defendant's favour were held to be irrational, it seems right (in the opinion of the Panel) that the defendant should not be allowed to rely on it. The Panel therefore recommends that this formula be adopted as the test of standard of care in relation to medical treatment administered by medical practitioners.

3.18 The proviso relating to 'irrational treatment' needs further elaboration. Under the recommended rule, it is for the court to decide whether treatment is irrational. It would be rare indeed to identify instances of treatment that is both irrational and in accordance with an opinion widely held by a significant number of respected practitioners in the field. Such a rare instance is the finding of the court in *Hucks v Cole* [1993] 4 Med. L.R. 393, referred to in paragraph 3.8.

3.19 Although some might think that this proviso is unnecessary, the Panel is of the opinion that there may be very exceptional cases (for example, *Hucks v Cole*) where such a situation may arise. In those circumstances, the court should have the power to intervene. As was argued in paragraph 3.17, if the court considers that the expert opinion on which the defendant relied is 'irrational', it seems right that the defendant should not be allowed to rely on it.

### **Recommendation 3**

**In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:**

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

#### Advantages of the Panel's recommendation in respect of provision of treatment

3.20 The recommended rule contains sufficient safeguards to satisfy the reasonable requirements of patients, medical practitioners and the wider community. It is hoped that the test will address the sense of confusion, and the perception of erratic decision-making, which (the Panel has been told) have contributed to the difficulty that medical practitioners face in obtaining reasonably priced indemnity cover and which have, in consequence, harmed the broader community.

3.21 The recommended rule recognises, first, that there might be more than one opinion widely held by a significant number of respected practitioners in the field. It provides a defence for any medical practitioner whose treatment is supported by any such an opinion, provided the court does not consider it irrational. It would not be for the court to adjudicate between the opinions.

3.22 Because there may be more than one opinion that meets the description in the recommended rule, it protects the practitioner who is at the cutting edge of medical practice provided that the procedure followed was in accordance with an opinion that meets that description.

3.23 The 'irrational treatment' proviso enables the community, through the court, to exercise control over the very exceptional cases where even the modified *Bolam* test does not provide adequate safeguards.

#### The scope of the rule about treatment: to which occupational groups should it apply?

3.24 If the rule contained in Recommendation 3 is adopted, the next issue to consider is to which occupational groups the rule should apply. Although the rule has been framed in terms of treatment of patients by medical practitioners, it could be applied more widely. Term of Reference 3(d) contemplates application to all professional groups. The Panel has identified four options in this regard.

### Option 1

3.25 A first possibility is to limit the application of the rule to 'medical practitioners' within the meaning of s 3 of the *Health Insurance Act 1973* (Cwth).

### Option 2

3.26 A second possibility is to extend the application of the rule to all health-care professionals.

### Option 3

3.27 A third possibility is to extend the application of the rule to all 'professionals'.

### Option 4

3.28 A fourth possibility is to extend the rule to 'all professions and trades'. This formula was used by the majority in the leading decision of the High Court of Australia in *Rogers v Whitaker* (1992) 175 CLR 479.

## Assessment of the options

3.29 Which of these options ought to be adopted is ultimately a political question for governments to determine. In the Panel's view, there is no principled basis on which a decision between the various options could be made. Historically, the *Bolam* rule and variations on it have been discussed and applied chiefly in the context of medical negligence cases. The questions whether the rule applies to other occupational groups and, if so, to which ones, have not been authoritatively answered. Given the historical context, the Panel's view is that the recommended rule in Recommendation 3 should be stated to apply to medical practitioners, but in such terms as to leave it open to the courts to extend the rule to other occupational groups.

3.30 The discussion so far has been in terms of the provision of medical treatment to patients by medical practitioners. If Option 2, Option 3 or Option 4 were adopted, the recommended rules would need to be rephrased along the following lines: A service provider is not negligent if the service was provided in accordance with an opinion widely held by a significant number of respected service-providers in the relevant field, unless the court considers that the opinion was irrational. This formulation reflects the distinction between the provision of a service (which is analogous to the concept of

'treatment' in the medical context) and the giving of information about the service (see paragraph 3.1).

### **The need for restatement of the basic rule about the standard of care**

3.31 In the course of its consultations and investigations, the Panel has formed the view that there is a considerable amount of misunderstanding, especially amongst medical practitioners, about personal injury law. We believe that this is a source of a certain amount of unnecessary fear and anxiety on the part of medical practitioners (in particular) about the risk of being successfully sued, and a source of unrealistic expectations in society about the role of personal injury law in providing compensation for personal injury and death. For this reason, we believe that there are certain respects in which it would be worthwhile legislatively to restate the law to make it more widely known and understood, even if a decision is made not to change it.

3.32 One area in which we believe that such a legislative restatement would be helpful concerns the basic rule about the standard of care applicable to cases where defendants have held themselves out as possessing a particular skill. In such cases, 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. We recommend legislative restatement of this rule in order to make it clear that skilled persons are not required by the law to exercise skills that they have not held themselves out as having.

3.33 The wording of Term of Reference 3(d) also suggests that there may be some value in restating the basic rule that the standard of care should be determined by reference to the date when the service was provided, and specifying that changes of practice after that date are not relevant. This raises a larger question about the dangers of hindsight that arises in relation to certain other of the Panel's Terms of Reference. Even so, it is worth considering dealing with it specifically in this context. We recommend that this be done.

### **Recommendation 4**

**The Proposed Act should embody the following principles:**

**In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:**

**(a) What could reasonably be expected of a person professing that skill.**

- (b) The relevant circumstances at the date of the alleged negligence and not a later date.**

## The provision of information

### Basis for treating provision of information differently: the patient's right to decide

3.34 People have the right to decide for themselves whether or not they will undergo medical treatment. Originally, consent to medical treatment was seen as relevant only to the question of whether a medical practitioner administering the treatment could be sued for trespass to the person (battery), for interfering with the patient's bodily integrity. In this context, the law only required the medical practitioner to tell the patient, in general terms, about the nature of the proposed treatment.

3.35 Under current law, however, the giving of information by the medical practitioner, and the giving of consent by the patient, are seen as relevant to the issue of whether the medical practitioner has exercised reasonable care in relation to the patient. More importantly, it is now thought that medical practitioners must provide the patient with sufficient information to enable the patient to give 'informed consent' This obligation is commonly (although inaccurately) referred to as the 'duty to warn'.

3.36 An important implication of the patient's right to give or withhold consent is that the opinions of medical practitioners about what information ought to be given to patients should not set the standard of care in this regard. The giving of information on which to base consent is not a matter that is appropriately treated as being one of medical expertise. Rather, it involves wider issues about the relationship between medical practitioners and patients and the right of individuals to decide their own fate. The court is the ultimate arbiter of the standard of care in regard to the giving of information by medical practitioners.

### To whom the duty should apply: the relevant occupations

3.37 As stated, the obligation of medical practitioners to provide information derives originally from the law relating to trespass to the person.

3.38 In regard to professions and occupations other than the medical profession, the law does recognise duties on the part of service providers to give particular categories of information in particular circumstances. The historical source of these duties, and their nature and scope, differ from the duty of medical practitioners to inform their patients. Moreover, while duties to inform have from time to time been imposed, they have yet to be analysed and categorised into a principled set of rules. This is very much a developing area and in the view of the Panel it is desirable to make a legislative statement of certain aspects of duties to inform in the medical context only.

3.39 Accordingly, the Panel recommends that any legislative statement of duties to provide information should relate only to medical practitioners. When dealing with the duty to provide information, the Panel will confine the discussion accordingly.

#### **Recommendation 5**

**In the Proposed Act, the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.**

#### **When the duty arises and who owes it**

3.40 In all of the cases to which the Panel has been referred and which the Panel has considered in its own research, it has been assumed by the parties that it is the treating medical practitioner who owed the relevant duty to inform. While in most instances this will be the case, it is not necessarily so.

3.41 In many instances of modern medical practice, the treatment of a patient, while under the direction of what (in common practice) is known as the 'attending medical officer', is shared by several health care providers. For example, in the course of pre-operative treatment, the operation itself and post-operative treatment, the patient might be attended by the general practitioner, a physician, a radiologist, a principal surgeon and an assisting surgeon, a registrar, an intern, an anaesthetist, theatre nurses and ward nurses. Each one of these persons may administer treatment to the patient. It is unlikely that each will incur an obligation to inform the patient about the treatment administered, but it is quite possible that more than one of these persons will incur such an obligation.

3.42 The law is undeveloped in regard to determining precisely when a duty to inform will arise and on whom it will be imposed. The Panel considers it inadvisable to attempt to lay down any rules or principles in this connection.

Often, the answer will lie in responsibilities assumed by the various practitioners, and orders given and accepted. The Panel considers that this aspect should be left for the development of the common law.

### **The nature of the duty: a duty to take reasonable care**

3.43 Some of the statements made concerning the duty to provide information make no reference, either expressly or impliedly, to the duty to inform being a duty of reasonable care. In these statements, the content and scope of the duty to inform are looked at solely from the point of view of the patient. In the Panel's view, however, this should not be the case. It should always be borne in mind that the duty to inform is part of the law of negligence, and accordingly is a duty to take reasonable care to inform. This means that consideration must be given to the situation of the practitioner.

3.44 It is by no means unknown, for example, for general practitioners in country areas to conduct surgery of a kind that elsewhere would be conducted by specialist surgeons. We are not here talking of instances where general practitioners profess skill that they do not have. The example we are giving is of general practitioners who hold themselves out as having only the skill of a general practitioner, but who are requested by their patients to carry out surgery that would elsewhere be carried out by specialist surgeons. Such general practitioners may not have the same knowledge as specialist surgeons would have of (for instance) risks of surgery. The law must accommodate this fairly, and will do so if it is recognised that the 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.

### **Recommendation 6**

**The medical practitioner's duties to inform should be expressed as duties to take reasonable care.**

3.45 An express statement that obligations to give information are obligations only to take reasonable care may help to reassure doctors that the law does not require of them unrealistic standards of behaviour, even though the law does not defer to medical opinion in this area to the extent that it does in relation to treatment. For instance, a doctor is not required to ensure that the patient fully comprehends the information given, but only to take reasonable care in this and other respects.

3.46 On the other hand, it is important to note that the information that the doctor must take reasonable care to provide is the information necessary to

enable the patient to give informed consent, not the information that the reasonable doctor would consider necessary for this purpose.

### Analysis of the categories of information to be provided

3.47 It is necessary to distinguish between two different kinds of obligation to provide information.

3.48 An obligation to give information about treatment might be imposed on the practitioner regardless of whether the practitioner knows or ought to know that the patient wants to be given the information. The Panel will call this the 'proactive duty to inform'. On the other hand, an obligation to give certain information might be imposed only when the practitioner knows or ought to know that the patient wants or expects to be given the information. The Panel will call this the 'reactive duty to inform'.

3.49 The proactive duty to inform relates to information that the practitioner must give a patient even when the particular patient does not ask for it or otherwise communicate a desire to be given it. The reactive duty to inform relates to information the practitioner must give when the particular patient asks for information, or otherwise communicates a desire to be given it.

### The proactive duty to inform

3.50 Under current Australian law, the proactive duty to inform requires the medical practitioner to put the patient in a position to make an informed decision about whether or not to undergo the treatment by telling the patient about material risks inherent in the provision of the treatment, and by providing other relevant information. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position would attach significance to it in deciding whether or not to undergo the treatment.

3.51 It seems clear that the proactive duty to inform is not confined to information about risks but extends to other types of information that may be needed to enable patients to make an informed decision about their health. What types of information are required to be given will depend on the circumstances of each case, and it is not possible or desirable to make general provision about this matter.

3.52 The test for determining what information the proactive duty to inform requires to be given should be objective, but should take account of the personal characteristics of the patient. In determining what information the

reasonable person would want, relevant factors might include the nature and effects of the treatment, the nature and probability of inherent risks of the treatment, and alternatives to the treatment.

3.53 Accordingly, we recommend that the proactive duty to inform should be formulated to the effect that the practitioner must exercise reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.

3.54 It is important that this formula be applied by reference to the time at which the decision whether or not to undergo the treatment was made and not with the benefit of hindsight. This is the current law. Research by psychologists suggests that it is very difficult to eliminate the effects of 'hindsight bias'. This problem may be thought particularly great where the question is what a person would have done if they had been given certain information that they were not given. So, in this context (at least), the Panel recommends providing explicitly that the question of what information the reasonable person in the patient's position would have wanted to be given is to be answered by reference to the time at which the relevant decision was made and not at a later time. This provision will, at least, require the issue of hindsight to be explicitly addressed.

#### *Giving the proactive duty to inform greater specificity*

3.55 On the basis of its consultations and investigations, the Panel has formed the view that the medical profession finds the current legal specification of the proactive duty to inform unsatisfactory because it gives insufficient guidance as to what information the medical practitioner has to give to the patient in order to avoid legal liability for negligence. There is anecdotal evidence that this may be having an adverse and distorting effect on medical practice. For example, it is sometimes said that medical practitioners may spend more time giving patients information than examining them. The Panel wishes to avoid further distortion of medical practice.

3.56 One way of addressing this concern might be to attempt to frame detailed, prescriptive legislative provisions specifying the matters about which information must be given to satisfy the proactive duty to inform. The Panel's considered view, however, is that this course of action would be impractical and undesirable. The precise content of the obligation has to depend on the facts and circumstances of individual cases, which are likely to be extremely diverse and incapable of being dealt with in such a way.

3.57 Another proposal that has been made in this regard is that the medical colleges (or the National Health and Medical Research Council) should develop guidelines, protocols or codes of practice concerning provision of information. We have not been able to investigate the feasibility of such developments. However, our view is that while compliance (or non-compliance) with such advisory regimes would (in accordance with current law) be relevant to the legal issue of reasonable care, it could never be treated as conclusive of the issue. For this reason, such proposals are not directly relevant to the Panel's Terms of Reference.

3.58 A specific issue raised in the course of the Panel's consultations is whether the proactive duty to inform requires the practitioner to tell the prospective patient that the treatment is also available from other more skilled or experienced practitioners. This question cannot be answered in the abstract. Although, generally, such an obligation would not arise, there might be exceptional circumstances in which it would. It would be neither desirable nor practicable to attempt to spell these out in legislative form.

*Persons to whom the proactive duty to inform is owed, and the circumstances in which it does not arise*

3.59 There are cases in which the proactive duty to inform would be appropriately owed to someone other than the patient (who might be called 'the substitute decision-maker'): for instance, where the patient is an infant, or unconscious, or otherwise lacking in decision-making capacity. The identity of the appropriate substitute decision-maker would be determined in accordance with the law of the relevant jurisdiction dealing, for instance, with the rights and obligations of parents and guardians of minors. In such cases, the content of the proactive duty to inform would be to give the substitute decision-maker such information as, in the circumstances, a reasonable person in the substitute decision-maker's position would want to be given to enable him or her to make a decision in the best interests of the patient.

3.60 There are three main situations in which the proactive duty to inform would not arise:

- (a) Where its performance has been waived by the person to whom it is owed. This would be the case where the person to whom the duty to inform is owed has explicitly or impliedly told the person who owes the obligation that he or she does not want to be given information, or information of a particular kind, about proposed treatment.

- (b) Where the treatment is provided on an emergency basis. To constitute an emergency, three conditions must exist: first, a threat of death or serious physical or mental harm to the person to whom the duty to inform is owed; second, the person to whom the obligation is owed temporarily lacks decision-making capacity; third, there is no appropriate substitute decision-maker for that person. In such cases, the proactive duty to inform is suspended, but not cancelled.

When the person to whom the treatment is provided regains decision-making capacity, the practitioner is under a proactive duty to give that person such information as a reasonable person in the patient's position would, in the circumstances, want to be given about the treatment that was provided.

- (c) Where a medical practitioner reasonably believes that the very act of giving particular information to a patient would cause the patient serious physical or mental harm. This is the so-called therapeutic privilege. In this context, the phrase 'serious physical or mental harm' does not include harm likely to be suffered by reason only of a decision not to undergo the treatment in question. If it did, the patient's freedom to choose whether or not to undergo the treatment could be seriously compromised by a decision of the practitioner that the patient did not know what was in his or her own best interests.

3.61 The Panel considers that the development of these principles is best left to the common law.

#### **Obvious risks**

3.62 In the course of the Panel's consultations, the suggestion was repeatedly made that an obligation to give information should not entail an obligation to warn of obvious risks. Such a provision is consistent with the principle underlying the Terms of Reference that people should take more responsibility for their own safety. The Panel therefore recommends enactment of a legislative provision to the effect that a medical practitioner cannot be held to have breached the proactive duty to inform merely by reason of a failure to give the 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 giving the information was required by statute.

3.63 The term 'obvious risk' is intended to include risks that are patent or matters of common knowledge. In the Panel's view, the mere fact that a risk is of low probability does not prevent it being an obvious risk. Beyond this, however, the Panel considers that it would be undesirable and impractical to attempt to define obviousness of risk. Whether or not a risk is obvious must ultimately depend on the facts of individual cases and, in the end, will be a matter for the court to decide.

### The reactive duty to inform

3.64 Under current law, the reactive duty to inform is an obligation to take reasonable care to give to the particular patient information about risks inherent in the treatment (and other matters) to which the practitioner knows or ought to know the patient would attach significance in deciding whether or not to undergo the treatment. In other words, the reactive obligation relates to information that the patient has asked for or otherwise communicated a desire to be given.

3.65 As in the case of the proactive duty to inform, the reactive obligation is not limited to information about risks but may extend to other types of information about the treatment that the practitioner knows or ought to know the patient wants to be given before making the decision about whether or not to undergo the treatment.

3.66 So far as concerns the issue of to whom the reactive duty is owed (see paragraph 3.59) , it is the view of the Panel that, in cases where the proactive duty to inform would be owed to a substitute decision-maker, the reactive duty to inform would also be owed to that person.

3.67 Concerning the issue of the circumstances in which the reactive duty might not arise, waiver (described in paragraph 3.60(a)) is obviously not relevant in this context. In emergency situations, described in paragraph 3.60(b), the Panel's view is that the reactive duty to inform would be suspended in the same way and to the same extent as the proactive duty to inform. The application of the therapeutic privilege, described in paragraph 3.60(c), to the reactive duty to inform raises difficult questions of policy that the Panel has not had time to consider.

3.68 The application of these issues to the reactive duty to inform has yet to be settled. The Panel considers that this should be left to the common law to develop

3.69 So far as obvious risks are concerned, if a medical practitioner knows or ought to know that the patient wants to receive particular information before making the decision whether or not to undergo treatment, then the practitioner should be under an obligation to give that information, even if it concerns a risk or other matter that would, in the circumstances, have been obvious to the reasonable person in the patient's position.

#### **Recommendation 7**

**The legislative statement referred to in Recommendation 5 should embody the following principles:**

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

## Expert evidence

3.70 A matter that has arisen repeatedly in the course of our consultations, and that is relevant in the present context, is that of the procedures for the giving of expert evidence. Problems associated with expert evidence have been very recently summarised in a Discussion Paper, published by the Family Court of Australia, entitled *The Changing Face of the Expert Witness* (2002).

3.71 In most jurisdictions, there is deep dissatisfaction with expert evidence, although this is not uniform throughout Australia. From the Panel's investigations, it seems that in some States the issue is not a pressing one.

3.72 The problems are of two kinds, one general and the other particular.

3.73 The general problem arises in many cases involving conflicting expert testimony. There is a widespread perception that, in many instances, expert witnesses consciously or sub-consciously slant their testimony to favour the party who retains them. There is also a widespread perception that, in many instances, the trial process does not afford a reliable means of adjudicating between groups of what might crudely be described as biased experts. Although this general problem has for many years been recognised and discussed throughout the common law world, it remains — to varying degrees — unresolved.

3.74 Generally, there has been growth in the expert evidence 'industry', with the result (so the Panel was told) that certain experts, including medical practitioners, devote their time substantially (and even in some cases entirely) to the giving of evidence. Many experts in this category become identified as plaintiffs' experts or defendants' experts.

3.75 The particular problem manifests itself in those States where case-management practices and the prevailing legal culture have resulted in expert evidence being given completely in writing, that is, where the evidence-in-chief is in writing and there is no cross-examination. This is the result of an understandable desire to reduce delays and ensure that cases are heard as cheaply and quickly as possible. But it may result in the judge having to choose between competing views contained in expert reports. Such decisions, taken in the absence of seeing and hearing the witnesses, may be thought to be in themselves contrary to accepted tenets of the adversarial system. They also may be thought to be inherently unreliable; and, as they usually turn on questions of fact, they are difficult to set aside on appeal.

3.76 From the submissions made to the Panel, we are satisfied that a significant body of the medical profession in particular has strong objections to the expert evidence system. On the other hand, there are some medical practitioners and lawyers who (so the Panel was told) oppose any change to this system. Some of this opposition is founded on an idealistic view of the adversarial system. In relation to the particular problem, objections that are so based are not persuasive as, in the situation in question, basic safeguards of the adversarial process have been lost. As regards the general problem, its long history suggests that it is questionable whether the adversarial system is adequately equipped to deal reliably and justly with conflicting expert evidence.

3.77 The Panel considers that careful attention needs to be given to these issues.

3.78 In the light of the differing conditions in various jurisdictions, the Panel does not recommend the introduction of national legislation. The Panel does recommend, however, in those jurisdictions where serious problems with expert evidence are recognised, that a system of court-appointed experts be implemented on a trial basis for 3 years and then evaluated.

3.79 The Panel is aware that O 34 r 2 of the *Federal Court Rules* provides for a 'court expert'. The system that the Panel recommends, however, is different in principle from that in O 34 r 2 in that it precludes the parties, of their own accord, from calling expert witnesses.

### **Recommendation 8**

**Consideration should be given to implementing trials of a system of court-appointed experts.**

#### **Suggested elements to underpin a system of court-appointed experts**

3.80 In the time available, the Panel has not been able to provide a detailed exposition of what such a system would entail. Broadly, however, it should be based on the following elements:

- (a) The judge would require a particular expert or experts to be called on particular issues.

- (b) The expert(s) so called would, in effect, be 'joint' as contemplated by Civil Procedure Rules (CPR) Pt 35<sup>1</sup> (the Rules of Court now operative in England).
- (c) No party would be entitled to call an expert witness on the party's own initiative. However, all parties would be entitled to cross-examine the court-appointed expert(s).
- (d) The system should cater for the possibility that in the disputed area more than one opinion exists — in which case more than one expert might be appointed. This issue should be resolved in pre-trial directions hearings, although it should be open to the judge at any time to call any other expert witness should that be required by the circumstances.
- (e) The decision as to which expert or experts should be called, and the issues on which the expert(s) should testify, should also be determined at pre-trial directions hearings.
- (f) Any expert appointed should be:
  - i) A person agreed by the parties; or
  - ii) If the parties cannot agree on the person, a person appointed by the judge from a list agreed by the parties; or
  - iii) If the parties cannot agree on a list, one or more persons appointed by the judge, after hearing submissions by the parties at a pre-trial directions hearing.
- (g) The Panel has not had sufficient time to investigate fully the mechanism that should be adopted in the event the parties cannot agree on a list. It may be that rules reflecting procedures developed in consultation with appropriate professional bodies would assist in this regard. Careful consideration should be given to adopting or adapting the system under CPR Pt 35.
- (h) The costs of the expert should initially be shared equally between the parties, but the court should have power at any time to order that the costs should be shared differently.

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<sup>1</sup> See *Peet v Mid-Kent Healthcare NHS Trust* [2002] 3 All ER 688.

## Another procedural issue

3.81 One other procedural issue has been raised with the Panel.

3.82 The Panel has been informed that the so-called '90 day rule' in South Australia has been very successful, particularly in resolving matters of professional negligence. This rule essentially provides that, at least 90 days before commencing an action, a plaintiff must give the defendant notice of the proposed claim. The notice must give sufficient detail of the claim to give the defendant a reasonable opportunity to settle the claim before it is commenced (see Rule 6A of the Supreme Court Rules of South Australia).

3.83 In the Panel's opinion this rule has considerable practical utility, and the Panel recommends that it be considered by all jurisdictions in which a significant number of professional negligence actions are brought.

### **Recommendation 9**

**Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.**

## Other relevant issues

3.84 There are three other issues that are of particular relevance to this Term of Reference, but which fall more squarely under other Terms of Reference about which the Panel is not required to report until 30 September. They concern the medical practitioner's obligations to give information about the provision of services, and are:

- (a) Whether an objective or a subjective test should be applied to determine whether the patient would have decided to undergo the treatment if the relevant duty to inform had been performed.
- (b) The proper basis for the assessment of damages in cases of breach of a duty to inform.
- (c) The standard of care applicable in circumstances where a medical practitioner or other health-care professional voluntarily renders aid to injured persons in an emergency.

3.85 These issues will be addressed in detail in the Panel's second report.



## 4. Not-for-Profit Organisations

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### *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.<sup>1</sup> 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

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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.<sup>2</sup> 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

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<sup>2</sup> *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.**

## 5. Trade Practices

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### *Term of Reference*

4. ***Review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2000 ('the Bill')) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk).***

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

- (a) ***develop and evaluate options for amendments to the Trade Practices Act 1974 to prevent individuals commencing actions in reliance on the Act including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and***
- (b) ***evaluate whether there are appropriate consumer protection measures in place (under the Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Act.***

5.1 The Panel understands Term of Reference 4 as instructing it:

- (a) To review the interaction of the *Trade Practices Act 1974* (Cwth) ('the TPA'), generally, with common law principles of negligence in so far as they apply to claims for personal injury and death;
- (b) To develop and evaluate options for amending the TPA so as to restrict claims for personal injury and death that may be based thereon;
- (c) To comment generally on the Bill and in this respect have regard to the common law principles relating to waivers and voluntary assumption of risk;
- (d) In carrying out (b), to have regard to the need for appropriate consumer protection consistently with the overall intent of the TPA and, particularly, the Bill.

## The Interaction between the Trade Practices Act and the law of negligence

5.2 In considering the interaction between the TPA and common law principles of negligence relating to claims for personal injury and death, it is first necessary to identify the potential bases for such claims under the TPA. It is also necessary to bear in mind that each State and Territory has legislation that is equivalent to or mirrors some of the relevant provisions of the TPA (most importantly, the 'Fair Trading Acts').

5.3 The TPA applies generally to the business and commercial activities of:

- (a) most corporations;
- (b) sole traders or partnerships whose activities:
  - i) cross State boundaries; or
  - ii) take place within a Territory; or
  - iii) are conducted by telephone or post, or use radio or television (Parts IVA and V only).

It also applies to commercial activities of the Commonwealth.

5.4 The Fair Trading Acts apply generally to business and commercial activities of any person.

5.5 Under the TPA the potential bases of claims for personal injury and death are:

- (a) Part IVA (which concerns unconscionable conduct) particularly ss 51AA, 51AB and 51AC;
- (b) Part V Div 1 (which concerns misleading or deceptive conduct) particularly ss 52 and 53;
- (c) Part V Div 1A (which concerns product safety and product information) particularly ss 65C and 65D;
- (d) Part V Div 2A (which concerns liability of manufacturers and importers of goods) particularly ss 74B, 74C and 74D; and

- (e) Part VA (which concerns liability for defective products) particularly ss 75AD and 75AE.

5.6 Under the Fair Trading Acts, potential bases for claims for personal injury and death are found in unconscionable and misleading or deceptive conduct provisions that are equivalent to or mirror provisions of the TPA. There are other Commonwealth statutes that contain similar provisions relating to unconscionable and misleading or deceptive conduct. These include the *Australian Securities and Investment Commission Act 2001 (Cwth)* and the *Corporations Act 2001 (Cwth)*. There are also certain State and Territory Acts that contain provisions that are equivalent to or mirror certain provisions of Part V Div 1A and Part V Div 2A of the TPA.

5.7 For the sake of clarity and simplicity, the discussion and recommendations in this Chapter generally will refer only to relevant provisions of the TPA. However, references to provisions of the TPA should be read (subject to any necessary adjustments) as incorporating references to State and Territory provisions that are equivalent to or mirror what seem to the Panel to be the most relevant provisions of the TPA. The appendix to this chapter contains tables of such equivalent or mirror provisions. References in this Chapter to the Australian Competition and Consumer Commission (ACCC) should be read as incorporating a reference to enforcement authorities in the States and Territories to the extent that they perform similar functions under the relevant local legislation. The appendix to this Chapter contains a list of such authorities.

5.8 Plainly, if it is thought necessary that legislative changes be made to limit potential use of these various bases for claims (as the Panel recommends), the changes should be made nationally in a uniform and consistent way. All jurisdictions will need to act co-operatively to ensure that this occurs.

5.9 Parliament intended the provisions that relate to product safety and product information, claims against manufacturers and importers of goods, and product liability (that is the relevant provisions in Part V Div IA, Part V Div 2A and Part VA) to provide causes of action to individuals who suffer personal injury and death.

5.10 On the other hand, it is open to serious question whether Parliament intended those provisions that relate to unconscionable and misleading or deceptive conduct (ie the relevant provisions in Part IVA and Part V Div I) to provide causes of action to individuals who suffer personal injury and death. We deal with this more fully below.

5.11 Until now plaintiffs have rarely relied on the unconscionable and misleading or deceptive conduct provisions in order to bring claims for personal injury and death. This state of affairs is to a significant extent a product of the prevailing legal culture. There has been no need to rely on those provisions because the common law of negligence has been seen as an adequate source of compensation. However, if personal injury law is changed in ways that the Panel recommends by limiting liability and damages, this situation is also likely to change.

5.12 If reforms that we are proposing in this Report, and will propose in our Second Report, are adopted, it will become more difficult for plaintiffs to succeed in claims based on negligence. Some may not succeed at all and others may only succeed to a lesser extent. Lawyers will inevitably search for different causes of action on which to base the same claims. Provisions of the TPA will provide an obvious target for this search. What has so far been a rarity may become commonplace, unless steps are taken to prevent this from occurring.

5.13 We will discuss each of the bases of claims for personal injury and death that have been identified in the TPA, and we will point out how each could attract claims for damages for personal injury and death if reforms to the law of negligence are adopted and implemented.

## Part IVA

5.14 Part IVA is based on principles of equity. This gives a key to its underlying intent. Equity is primarily concerned with commercial and financial transactions. In Australian law, equitable principles have not been used to provide a basis for liability for personal injuries and death.

5.15 The paramount object of the unconscionable conduct provisions of the TPA was to extend certain rules of equity to afford protection to consumers. The Panel accepts that the intent of the legislature was to extend the scope of Part IVA beyond the common law doctrine of unconscionability. But, in the Panel's view, the unconscionability provisions of Part IVA were originally intended to apply only to commercial and financial transactions, not to claims for personal injury and death.

5.16 Nevertheless, there has been judicial recognition that the unconscionable conduct provisions can be used to found claims for personal injury and death.

5.17 In *Pritchard v Racecourse Pty Ltd* (1997) 72 FCR 203 a claim for damages was brought by the widow of a man who died after being struck by a motor vehicle that was being driven in a race. An issue was whether such a claim could be brought under s 51AA of the TPA. In submitting that such a claim should be recognised, counsel for the plaintiff referred to the vulnerability of the deceased to exploitation by the organisers of the race. The statement of claim asserted that the organisers knew that persons in the class to which the deceased belonged trusted and relied upon them as to important matters, and the organisers acted in disregard of such trust and reliance. The Full Court of the Federal Court decided that it was open to argument that a claim for damages in respect of the death could be brought under s 51AA in such circumstances.

5.18 The important point to note about this decision is that the argument advanced on behalf of the plaintiff in *Pritchard* was based on elements that are now recognised at the highest judicial level as elements of claims based on negligence. Moreover, the facts of *Pritchard* were the kind of facts that classically give rise to claims for negligence. *Pritchard* demonstrates the potential of s 51AA to provide a basis for claims for personal injury and death.

5.19 However, unlike liability under the misleading or deceptive conduct provisions in Part V Div 1, liability for unconscionable conduct depends upon the plaintiff establishing fault on the part of the defendant (ie unconscionable conduct as defined). This requirement of fault limits the potential of Part IVA as a basis for claims for personal injury and death.

5.20 For this reason, the Panel considers that it is not necessary to prevent claims for personal injury and death being brought under Part IVA. The requirement of fault will limit the type of claim for personal injury and death for which Part IVA can provide a basis.

5.21 On the other hand, because of the potential of Part IVA to provide a basis for claims for negligently-caused personal injury and death, we think it desirable that the regime of rules about limitation of actions that we recommend in this Report, and the recommendations that we will make in our second report about quantum of damages should be explicitly expressed to apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

5.22 We also think it desirable that as a general principle, other limitations on liability that we recommend in this Report and will recommend in our second report, should apply, to the extent that they are relevant and

appropriate, to any claim for negligently-caused personal injury and death that is brought under Part IVA in the form of an unconscionable conduct claim.

#### **Recommendation 17**

**The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.**

#### **Recommendation 18**

**The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.**

## **Part V Div 1**

5.23 Section 52 of the TPA has had a vast influence on the law of contract. The section is a major source of litigation in Australia. It has yet to be a significant influence on the law of negligence but, once avenues for plaintiffs under the law of negligence are blocked or made less attractive by reforms, this is likely to change.

5.24 Section 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault. Often, a plaintiff will plead, as an alternative to a claim under s 52, a claim for negligent misrepresentation or deceit. In order for such common law claims to succeed it would be necessary for the plaintiff to prove not only that the defendant made a false representation, but also that he or she did so negligently or dishonestly (as the case may be). Under s 52, however, the plaintiff can succeed merely by proving that the statement was misleading or deceptive, even if the defendant made the statement with the utmost care and with complete honesty.

5.25 In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 a worker was seriously injured, allegedly as a result of a misleading statement made to him by a foreman about a grate that he was instructed to remove from an air-conditioning shaft. The worker brought an action for personal injuries

under s 52 of the TPA. A majority of the High Court held that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purpose of, its overall trading or commercial business. The majority held that s 52 was concerned only with conduct in the course of activities which, of their nature, bore a trading or commercial character and thus were 'in' trade or commerce. It was held that the foreman's statement was not made 'in trade or commerce'. The limitation of the application of s 52 to conduct 'in trade or commerce' restricts the potential of Part V Div 1 to provide a basis for claims for negligently-caused personal injury and death.

5.26 Nevertheless, the Panel considers that the potential of Part V, Div I as a basis for claims for negligently-caused personal injury and death remains substantial. There are various areas of everyday life that are likely to give rise to claims for personal injury and death that could (despite *Concrete Constructions (NSW) Pty Ltd v Nelson*) be made under Part V Div 1. The most obvious are claims arising out of the provision of professional services and the occupation of land.

5.27 Much advice given (or not given) by professionals in the course of practising their professions is advice given (or not given) in trade or commerce (*Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215) and, hence, is capable of giving rise to claims for misleading or deceptive conduct. This applies to persons such as health-care professionals, engineers, architects and, indeed, all occupational groups whose advice might be relied on by consumers.

5.28 The circumstances under which claims for personal injury and death could be made under Part V Div 1, and the range of potential defendants who would be susceptible to such claims, are infinite. It is not required that the plaintiff was acting as a consumer when injured or killed. The majority in *Concrete Constructions (NSW) Pty Ltd v Nelson* made it clear that the only requirement is that the relevant conduct was 'in' trade or commerce.

5.29 It is appropriate to give some examples of claims for negligently-caused personal injury and death that might be brought against professionals under Part V Div 1 or its equivalent or mirror provisions in State and Territory legislation.

5.30 As regards architects and engineers, incorrect advice leading to the collapse of a structure, with the result that a bystander is killed or injured, could ground such a claim.

5.31 Medical practitioners are also at risk. The following scenario is but one of an infinite variety of circumstances that could give rise to claims against such practitioners. Assume that a surgeon informs a patient that a certain operation would improve a patient's state of health. Assume further that this advice is given after all reasonable care has been taken in recommending the treatment. Assume that in the course of the operation the surgeon decides — as a result of unforeseeable circumstances undetected by the previous tests — that the operation should not proceed further and was, in effect, not necessary. The patient might then be able to claim damages in respect of the unnecessary operation on the ground that the surgeon was guilty of misleading conduct in advising that the operation should take place.

5.32 Many cases of occupier's liability could be brought as cases of misleading conduct. Take a corporation that advertises a particular area in the country as being attractive for camping, or advertises a hotel as being suitable for families. Assume that there is a muddy patch in the camping area and someone slips, or that there are uneven stairs in the hotel on which a child or elderly person trips. At present claims arising out of these circumstances would ordinarily be brought on the basis that the injuries arose from failures to take reasonable care. Any competent lawyer, however, would be able to frame such claims so that they come within the requirements of misleading or deceptive conduct under Part V Div 1.

5.33 For the reasons we have given, the possibility of making claims for damages for negligently-caused personal injury and death under Part V Div 1 and similar legislation could have an adverse effect on the reforms recommended in this Report, and that will be recommended in our second report. Accordingly, the Panel is of the view that the possibility of basing claims for personal injury and death on such provisions should be removed.

### **Recommendation 19**

**The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.**

5.34 Following on from Recommendation 17, the Panel also considers that the power of the ACCC to bring representative actions for damages for personal injury and death under Part V, Div 1 (see s 87(1A), s 87 (1B) of the TPA) should also be removed. (It is to be noted that the ACCC has no power to bring representative actions for breaches of the statutory warranties under Part V Div 2 and Div 2A).

## Recommendation 20

**The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.**

5.35 Under Part VI of the TPA various actions can be taken, and various remedies can be sought, by the ACCC and persons who have suffered or are likely to suffer loss or damage as a result of conduct of another person in contravention of the TPA. The remedies include injunctive relief (s 80), non-punitive orders (s 86C), punitive orders (s 86D), orders to pay pecuniary penalties (s 76) and range of other orders (s 87 and 87A).<sup>1</sup> The ACCC can also accept written undertakings in connection with matters under the TPA (s 87B). Criminal proceedings can be brought under Part VC. Recommendations 19 and 20 are not intended to affect any of these actions or powers in any way. Both recommendations are concerned only with actions for damages.

## Part V Div 1A, Part V Div 2A and Part VA

5.36 We repeat that these provisions are specifically intended to give protection to persons who suffer personal injury and death as a result of defects in goods. If the law of negligence is reformed in ways that the Panel recommends in this Report, and will recommend in our second report, greater attention may be paid to them by claimants as possible bases for personal injury claims.

5.37 In the Panel's opinion, the potential of these provisions to undermine reforms of personal injury law is not as great as that of Part V Div 1.

5.38 First, they are limited to harm resulting from defects in products.

5.39 Secondly, fault will arguably be an element of many, if not all claims under these provisions. For this reason, such claims may fall within the terms of Recommendation 1. That is, they may fall within the description of actions for negligently-caused personal injury and death.

5.40 Notwithstanding what is said in paragraph 5.39, the Panel thinks that for the sake of clarity and certainty, it would be desirable that the regime of rules about limitation of actions that we recommend in this Report, and the

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<sup>1</sup> The ACCC also has power to seek declarations under s 163A(1) of the TPA.

recommendations that we will make, in our second report, about quantum of damages should be explicitly expressed to apply to any claim for negligently-caused personal injury and death that is brought under these provisions in the form of an unconscionable conduct claim.

5.41 We also think it would be desirable, and we recommend, that as a general principle, claims for negligently-caused personal injury and death that are brought under these provisions should be subject to the other limitations of liability that the Panel is recommending in this Report, and will recommend in our Second Report, to the extent that they are relevant and appropriate.

### **Recommendation 21**

**The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.**

### **Recommendation 22**

**The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel's second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.**

## **Consumer Protection**

5.42 It is our considered opinion that implementation of Recommendations 19 and 20 (preventing actions for damages for personal injury and death being brought under Part V Div 1 of the TPA) will not unacceptably reduce legal protection of consumers. Its main effect will be to remove a basis of strict liability for personal injury and death resulting from misleading or deceptive conduct. It will not prevent claims, in respect of the sorts of conduct covered by Part V Div 1, being brought as negligence claims.

5.43 In any event, the actions that can be taken and the remedies that can be sought under Part VI of the TPA afford considerable protection to consumers. As stated in paragraph 5.35, these include injunctive relief, non-punitive orders, punitive orders, orders to pay pecuniary penalties, and other orders, as

well as the bringing of criminal proceedings. This is a formidable armoury for individuals and the ACCC.

5.44 As regards Part IVA, Parts V Div 1A, Part V Div 2A and Part VA, our view is that although our recommendations may reduce the level of consumer protection currently provided under the TPA (and equivalent or mirror legislation in the States and Territories) they do so consistently with the objectives underlying our Terms of Reference.

5.45 The ACCC opposes any reduction of the level of consumer protection provided by the TPA. Its opposition is based on concepts such as 'the economics of accidents', 'the optimal allocation of risk', and 'efficient management of risk'. The Panel accepts that all these are valid considerations. But we do not view personal injury law solely as a regulatory mechanism or a risk-management tool. The Panel believes that, consistently with its Terms of Reference, other considerations of importance need to be taken into account. These include the inherent value of personal autonomy, and the desirability of persons taking responsibility for their own actions and safety.

5.46 The Panel is also required by its Terms of Reference to assume that the award of damages has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another, and to propose reforms that will meet the objective of limiting liability and the quantum of damages arising from personal injury and death.

5.47 Taking a global view, the Panel does not consider that the reforms it proposes will reduce consumer protection unacceptably.

## Section 74, s 68 and the Bill

5.48 Section 74(1) implies into contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be rendered with due care and skill. Section 74(2) implies into certain contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be reasonably fit for their intended purpose.

5.49 Section 68 provides that any term of a contract that purports to exclude or restrict the warranties implied by s 74 is void.

5.50 The Bill will prevent s 68 rendering void provisions in contracts for recreational services that purport to exclude, restrict or modify those implied warranties. In other words, the Bill will allow consumers to 'waive' the implied warranties in the case of contracts for the supply of recreational services, as defined in the Bill.

5.51 The Panel considers that the Bill will not significantly reduce consumer protection for the following reasons:

- (a) Exclusion of the implied warranties will be subject to the ordinary rules of contract law. These rules are stringent. It is notoriously difficult for parties relying on contractual exclusions of the kind contemplated to succeed.
- (b) There are two principal hurdles that must be overcome. First, the exclusion clause must be effectively 'incorporated into the contract'. The rules about incorporation are complex, and in cases where there is doubt about whether they have been met, the doubt will be resolved in favour of the consumer.
- (c) Secondly, to be effective, the words of the exclusion clause must be clear and unambiguous. Any doubts about the precise meaning of the clause will be resolved in favour of the consumer. For instance, clauses intended by the service-provider to exclude liability for negligence are often held ineffective to do so.
- (d) Finally, it should be emphasised that a contractual exclusion clause, even if effective in other respects, may only be effective against the other party to the contract. For instance, if one person enters a contract for the supply of recreational services to a group, the other members of the group may not be bound by the terms of

the contract. Moreover, many people who participate in recreational services do not do so pursuant to contracts. The very nature of recreational activities is such that people often take part in them spontaneously, without any thought of entering into a contract with the person organising the activity. The Bill will have no impact on the rights of such people.

5.52 In summary, the Bill removes the obstacle presented by s 68 to the exclusion of the warranties implied by s 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

5.53 Even so, if it is desired to allow exclusions of the kind contemplated in the Bill, an amendment to the TPA of the kind contained in the Bill is necessary.

5.54 To the extent that the Bill facilitates assumption of risk by consumers of recreational services, it is consistent with the objectives of the Panel's Terms of Reference. In this context we would draw attention to Recommendation 11 to the effect that a provider of recreational services should not be liable to a voluntary participant in the recreational activity in respect of the materialisation of an obvious risk.

5.55 In certain respects, the recommended rule is narrower in scope than the Bill.

- (a) First, it covers only obvious risks, whereas the sort of clause permitted by the Bill could, in theory, exclude liability for any risk of the activity.
- (b) Secondly, the definition of 'recreational services' contained in Recommendation 12 is considerably narrower than that in the Bill.

5.56 On the other hand, the recommended rule has significantly wider effect than the Bill in the sense that it excludes liability for certain risks rather than simply allowing liability to be excluded by agreement. Also, it applies to all participants in recreational activities (as defined) whether or not they have a contract with the provider of the relevant recreational services.

5.57 Attention should also be drawn to Recommendation 14 to the effect that there can be no liability for failure to warn of a risk that would, in the circumstances, have been obvious to the reasonable person. This

recommendation covers, but is not limited to, risks of recreational activities as defined in the Bill. It applies to any breach of an obligation to warn regardless of whether the obligation arises under a contract.

5.58 To the extent that the warranties implied by s 74 are warranties of due care and skill, they will fall within the terms of Recommendation 1. To that extent, Recommendations 11 and 14 will apply to claims for personal injury and death based on breaches of the s 74 warranties.

5.59 Together, these two recommendations afford significant protection, additional to that contemplated by the Bill, to providers of recreational services, and they make an important contribution to furthering the objectives underlying the Terms of Reference. At the same time, we consider that they strike a reasonable balance between the interests of providers and consumers of recreational services.

5.60 These two recommendations are consistent with and compliment the policy and terms of the Bill. The Panel sees no reason why they should not exist side-by-side.

5.61 Nevertheless, the Panel strongly suggests that paragraph (c) of the definition of 'personal injury' in clause (2) of the Bill be redrafted or, preferably, deleted. It is extremely (and, in our view, unacceptably) wide in its terms and very difficult to understand. We also suggest that consideration be given to narrowing the definition of 'recreational services' in the Bill to bring it into conformity with the definition in Recommendation 12.



## 6. Limitation of Actions

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### *Term of Reference*

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

***In developing options the panel must consider:***

- (a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and***
- (b) establishing the appropriate date when the limitation period commences.***

### The nature of limitation periods

6.1 Limitation periods provide a time limit for the bringing of legal proceedings. They should not be seen as arbitrary cut-off points unrelated to the demands of justice or the general welfare of society. They represent the legislature's judgment that the welfare of society is best served by causes of action being litigated within a limited time, notwithstanding that their enforcement may result in good causes of action being defeated.<sup>1</sup>

6.2 It has been said that there are four broad rationales for the enactment of limitation periods. These are:

- (a) As time goes by relevant evidence is likely to be lost.
- (b) It is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it occurred.
- (c) It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time.
- (d) The public interest requires that disputes be settled as quickly as possible<sup>2</sup>.

6.3 A workable limitation system needs to provide fairness to both plaintiffs and defendants. Plaintiffs need sufficient time to appreciate that they have

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<sup>1</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 per McHugh J.

<sup>2</sup> *Ibid.* 552 per McHugh J

claims, to investigate their claims and to commence proceedings. In some cases plaintiffs may be under a disability that prevents prompt action. In other cases, the detection of a disease or injury (or its cause) may not be possible until many years after the date of the event that caused it. A limitation system must be sufficiently flexible to cope fairly, not only with patent damage that is suffered immediately or shortly after the occurrence of a wrongful act, but with latent damage that can only be detected years after the relevant event.

6.4 The interests of defendants are encapsulated in the four rationales set out above.

6.5 Limitation rules should, as far as possible, be of general application, and undue complexity should be avoided. While procedural in nature, a limitation system operates on the substantive rights and liabilities of the parties. Therefore, striking a just balance is imperative.

## Limitation period issues

6.6 When evaluating an appropriate limitation system, consideration needs to be given to the following issues:

- (a) The date when the limitation period commences to run;
- (b) The length of the limitation period;
- (c) Whether there should be an ultimate bar to commencing proceedings (a “long-stop” provision);
- (d) Whether the court should have discretion to extend the limitation period and, if so, on what basis; and
- (e) Whether the limitation period should be suspended, particularly for minors and incapacitated persons.

6.7 None of these issues can be considered in isolation. As will become apparent, the various issues interact.

6.8 There is a bewildering array of different limitation regimes in Australian jurisdictions. The rules relating to the issues set out in paragraph 6.6 differ from jurisdiction to jurisdiction and, within each jurisdiction, from one cause of action to another. These differences lead to confusion, are themselves causes of litigious disputes, often materially influence the nature of the cause of action relied upon, and occasionally lead to forum shopping. Accordingly, any

sensible reform of the law relating to claims for personal injury or death arising out of negligence should include limitation rules that, as far as possible, are of general application and have nationwide effect.

6.9 Our Terms of Reference require us to 'consider ... the relationship with limitation periods for other forms of action, for example arising under contract or statute'. As we have pointed out in the Introduction to this Report, actions for negligently-caused personal injury and death can be brought under contract, statute and various other causes of action, as well as under the tort of negligence. It is desirable that the limitation periods relating to all actions of this kind, irrespective of the formal causes of action on which they are based, should be the same. This effect will be achieved if the Proposed Act makes it plain that all claims for negligently caused personal injury or death are governed by the limitation provisions proposed in this chapter.

### **Recommendation 23**

**The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.**

## The date when the limitation period should commence

6.10 There are four principal options in regard to the date from which the limitation period should run, namely:

- (a) The date of the event(s) that resulted in the personal injury or death;
- (b) The date of the accrual of the cause of action;
- (c) The date when damage occurred; and
- (d) The date of discoverability.

6.11 Whichever option is adopted, it will need to cater for many different kinds of damage. Different considerations arise depending upon whether damage is suffered in consequence of an accident that causes trauma or whether it is suffered in consequence of the contraction of a disease. In the case of an accident, the damage is usually (but not always) suffered immediately or soon after the accident. However, there are cases, such as those involving certain kinds of post-traumatic stress disorder, where the damage can manifest

itself many years after an accident. In the case of a disease (such as mesothelioma, for instance), damage may also manifest itself many years after negligent conduct. Damage may occur progressively, with the result that a plaintiff may only realise after many years of being subjected to wrongful conduct that significant damage has been sustained (for example, in the case of industrial deafness). There are some kinds of damage which manifest themselves late and which are not capable of ready classification. An example is the delayed psychological effect of sexual or other physical abuse.

6.12 The date from which the limitation period commences should deal fairly with all these various kinds of damage.

### Date of event

6.13 In statutes dealing with situations where the damage almost invariably arises at the date of the relevant event, it may be reasonable to provide that the date of the event will be the commencement date of the limitation period. Motor accident statutes are an example of this class of statutes<sup>3</sup>. But this approach would lead to injustice if applied in statutes dealing with claims for personal injury and death, generally. That is because, as we have explained, there are many instances when damage will occur many months or even years after the event. It would be unjust to provide for limitation periods to run before claimants have suffered damage or know that they have suffered damage.

### Date of accrual of cause of action

6.14 There is a basic problem in using the date of accrual of the cause of action as the commencing date. The package of reforms recommended and to be recommended by the Panel rests on the premise that, regardless of the cause of action, there should be only one set of rules that govern claims for personal injury or death resulting from negligence. The nature of the cause of action should have no legal significance. That being so, it would be illogical and inconsistent to tie the commencement date to the cause of action.

### Date when damage occurred

6.15 The next option to be considered is the date on which the damage occurred. There are basic problems with this option as well. First, it does not

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<sup>3</sup> See the *Motor Accidents Compensation Act 1999 (NSW)* and the *Motor Accidents (Compensation) Act (NT)*

cater adequately for those cases where damage can only be detected long after it occurs. Claims of that kind may easily become statute-barred before the injured party becomes aware of having suffered damage. Secondly, it does not cater adequately for those cases where the plaintiff has no reason to know, at the time the damage occurs, that it was caused by the negligence of another. In such cases, time would run against plaintiffs who had no reason to know that they had a claim.

6.16 Nevertheless, there are many limitation statutes that use the date of the occurrence of damage as the commencement date. Generally, they attempt to cope with the problems referred to in the preceding paragraph by conferring a discretionary power on the court to extend the limitation period at any time, or at any time within a fixed period.

6.17 These attempts to resolve the difficulties are inherently unsatisfactory. The discretionary provisions are often not adequate to cater fairly for cases of latent disease and cases where damage only manifests itself long after the wrongful act. This gives rise to the need for additional special legislation to cover such cases, and the objective of consistency and uniformity is harmed. Moreover, the existence of a discretion to extend the limitation period in every case is a source of expensive and, in the Panel's view, unnecessary, litigation.

### The date of discoverability

6.18 The date of discoverability is the Panel's preferred option<sup>4</sup>.

6.19 The date of discoverability means the date on which the plaintiff knew, or ought to have known, that personal injury or death:

- (a) Had occurred; and

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4 The date of discoverability is used in the Limitations Act 1935 (WA) s 38A, and the Limitation of Actions Act 1958 (Vic) s 5. It has also been adopted in the Limitations Act 1996 (Alta) s 3, Limitation Act 1980 (UK) s 11 and s 14, Statute of Limitations Amendment Act 1991 (Ire), Prescription and Limitation (Scotland) Act 1973 (UK) s 11, Limitation Act 1979 (BC) s 3, Consumer Protection Act 1987 (UK) s 6, and Uniform Limitations Act 1982 (Canada) s 13. Adoption of the date of discoverability has been recommended by the Law Reform Commission of Western Australia, *Limitation and Notice of Actions* (1997), the Alberta Law Reform Institute, *Limitations* (1989), the Newfoundland Law Reform Commission, *Report on Limitation of Actions* (1986), the Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989), the Scottish Law Reform Commission, *Report on Prescription and Limitation of Actions (Latent Damage and Other related issues)* (1987), the Irish Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (1987) and the English Law Commission, *Limitation of Actions* (2001).

- (b) Was attributable to negligent conduct of the defendant; and
- (c) In the case of personal injury, was sufficiently significant to warrant bringing proceedings.

6.20 The purpose of the requirement of knowledge that the personal injury was sufficiently significant to warrant bringing proceedings is to deal fairly with those cases where serious injury is sustained progressively over a period.

6.21 Adoption of the date of discoverability resolves all of the problems inherent in the other commencing dates we have discussed, although it brings with it problems of a different kind. In the Panel's view, however, these different problems can be resolved fairly and easily.

6.22 It is first necessary to explain how adopting the date of discoverability as the commencement date of the limitation period resolves the difficulties inherent in the other commencement dates.

6.23 One element of determining the date of discoverability is the time when the plaintiff could reasonably be expected to have discovered that damage had occurred. This means that it provides a fair way of dealing with those cases where damage manifests itself long after the event, or in a form difficult to detect.

6.24 In the same way, adopting the date of discoverability provides a fair way of dealing with those cases where it takes many years for a plaintiff to discover that his or her condition was caused by the negligence of another.

6.25 Because adopting the date of discoverability deals fairly with a wide range of cases, it avoids the need for separate legislation to cover those cases where damage manifests itself long after the event, or in a form difficult to detect. It promotes the cause of consistency and uniformity.

6.26 Adoption of the date of discoverability also allows an important requirement of the Term of Reference discussed in this Chapter to be met, namely that a limitation period of 3 years be applicable to all claims. The Panel is of the view that if time begins to run from the date of discoverability, the limitation period need be no longer than 3 years. Once the plaintiff knows or ought to know both of the damage sustained and the fact that it was attributable to the negligent conduct of the defendant, 3 years is a reasonable period within which to commence proceedings.

6.27 The Panel is also of the view that if time begins to run from the date of discoverability, it is unnecessary and indeed undesirable to give the court a discretion to extend the limitation period. Once the plaintiff knows or ought to

know the facts necessary to enable an action to be commenced, a period of 3 years provides a reasonable time for this to be done.<sup>5</sup>

6.28 The fact that the test proposed for determining the date of discoverability is objective will make it easier to prove when the date for commencement of the limitation period occurs. The date of discoverability is not when the claimant in fact discovered the damage and that the damage was caused by the negligence of another, but rather when a reasonable person in the claimant's position should have made the discovery. Accordingly, the evidence about what individual plaintiffs knew will carry less weight, as the date of discoverability will depend on what a reasonable person in the plaintiff's position would have known, and not what the plaintiff personally knew.

## The long-stop provision and the discretionary power to extend

6.29 We now turn to the difficulties that may be caused by adoption of the date of discoverability as the date for commencement of the limitation period.

6.30 These potential difficulties stem from the fact that the date of discoverability is not a fixed date, capable of ready determination. In cases where damage manifests itself long after the event, or in a form difficult to detect, the date of discoverability could extend interminably into the future.

6.31 Thus, unlike the date of the damage-causing event, or the date of accrual of the cause of action, or the date the damage occurred (which are all potentially unfair to plaintiffs), the date of discoverability is potentially unfair to defendants. The unfairness arises because, in cases where the date of discoverability may not occur until many years after the damage-causing event, witnesses may die or be difficult to find, memory may be impaired and records may be lost. In that event, the defendants could be hampered in the preparation of their defence and the fairness of the trial may be prejudiced.

6.32 Cases of the kind that lead to delay sufficiently long as to result, potentially, in an unfair trial are likely to be relatively few in number (although important in themselves). In the Panel's view, these cases could fairly be dealt with by what is termed an 'ultimate bar' or 'long-stop provision', coupled with a discretionary power on the part of the court, exercisable at any time, to extend the long-stop period.

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5 Examples of limitation statutes that do not confer power to extend the limitation period are the Work Health Act 1986 (NT), the Trade Practices Act 1974 (Cwth), and the Civil Aviation (Carriers Liability) Act 1959 (Cwth).

6.33 The purpose of a long-stop period is to fix a date on which an action will become statute-barred, irrespective of whether the date of discoverability has occurred. In other words, under the proposed system, a claim will become statute-barred on the expiry of the limitation period or the long-stop period, **whichever is the earlier.**

6.34 In the Panel's view, the long-stop period should run from the date on which the allegedly negligent conduct took place.

6.35 As the long-stop period is designed to cater for cases where damage manifests itself long after the event, or in a form difficult to detect, it has to be a relatively lengthy period. Various periods, ranging from 10 to 30 years, have been suggested as appropriate long-stop periods. The longer the long-stop period, the greater the danger of unfairness in the trial process.

6.36 The choice of the long-stop period is necessarily arbitrary. The Panel has concluded that the period should be 12 years from the date the allegedly negligent conduct occurred. In our view, this strikes a reasonable balance between the need to cater for cases in which damage manifests itself late and the need to ensure a fair trial. The Panel is aware that in some cases, damage will not manifest itself until after the expiry of the 12-year period. But plaintiffs who suffer such damage will be protected by the discretion to extend the long-stop period referred to in paragraph 6.37.

6.37 The Panel has previously noted that it is desirable to avoid providing for a discretionary extension of the limitation period. When it comes to the long-stop period, however, justice requires a discretionary power to extend in order to provide fairly for cases (including cases of diseases with a long latency period) in which damage is not discoverable until after the expiry of the long-stop period.

6.38 The long-stop coupled with the discretion to extend also caters for the legitimate interests of defendants. It does this by requiring a plaintiff who wishes to commence an action after the expiry of the long-stop period to seek the permission of the court. At this point the court is able to take account of the defendant's interest in securing a fair trial of the claim.

6.39 Because the date of discoverability will occur after the expiry of the long-stop period in only relatively few cases, occasions for the exercise of the discretion to extend the long-stop period will arise much less often than if the limitation period could be extended. For this reason, it will be less creative of uncertainty than a discretion to extend the limitation period would be.

6.40 A prospective plaintiff should be entitled to apply at any time before the expiry of 3 years after the date of discoverability for an extension of the long-stop period. The court should have the power to extend the long-stop period to the expiry of that 3-year period.

#### **Recommendation 24**

**The Proposed Act should embody the following principles:**

- (a) The limitation period commences on the date of discoverability.**
- (b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:**
  - (i) had occurred; and**
  - (ii) was attributable to negligent conduct of the defendant; and**
  - (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.**
- (c) The limitation period is 3 years from the date of discoverability.**
- (d) Subject to (e), claims become statute-barred on the expiry of the earlier of**
  - (i) the limitation period; and**
  - (ii) a long-stop period of 12 years after the events on which the claim is based (“the long-stop period”).**
- (e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.**
- (f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:**
  - (i) whether the passage of time has prejudiced a fair trial of the claim.**
  - (ii) the nature and extent of the plaintiff's loss.**
  - (iii) the nature of the defendant's conduct.**

## Suspension of the limitation period: minors and incapacitated persons

6.41 The Panel has heard persuasive evidence from several sources about difficulties that are experienced by reason of the rule that limitation periods do not run against minors and mentally incapacitated persons. We shall give two examples of categories of persons who experience such difficulties.

6.42 The first is public liability and professional indemnity insurers. Their problems are caused by uncertainty in forecasting claims by minors and incapacitated persons. They emphasise the phenomenon that the older the claim, the more likely it is that the law will have changed substantially since the time the risk was underwritten. This gives rise to major difficulties in assessing premiums. This, in turn, gives rise to problems for defendants and, hence, is a consideration the Panel is required to take into account.

6.43 The second affected group consists of persons whose business or profession it is to deal with young children or incapacitated persons. Obstetricians are the obvious example of persons who fall into this category. The main problem for obstetricians is the possibility of being faced with claims, sometimes 20 years or more after the relevant event. Claims may be made years after the obstetrician has retired. The Panel was told, on the basis of anecdotal evidence, that this has led to shortage of obstetricians in some areas as a result of some ceasing to practise as such.

6.44 The Panel is not in a position to verify this assertion, but many people clearly perceive it to be correct. We have also been told that this perception is adversely affecting the availability of insurance at reasonable premiums. Having regard to our Terms of Reference, the Panel is required to take account of the perception.

6.45 One view, reflected in the limitation legislation in most jurisdictions, is that it is unjust to provide for the running of limitation periods against children and incapacitated persons. Generally, limitation periods are suspended in favour of minors and incapacitated persons.

6.46 Another view that has been expressed to the Panel is that society can reasonably expect parents and guardians, and those who care for incapacitated persons, to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community.

6.47 Existing legislation in some jurisdictions is consistent with this view. Limitation periods run against minors in Tasmania<sup>6</sup> and against minors and the mentally incapacitated under the *Motor Accident Compensation Act 1999* (NSW). The TPA has been construed<sup>7</sup> to mean that the limitation period in s 82 of the Act runs against minors and incapacitated persons.

6.48 After giving the issue careful consideration,<sup>8</sup> the Panel is satisfied that it is in the overall interests of the community as a whole that, as a general rule, the limitation period should run against minors and incapacitated persons. The Panel is accordingly of the view that the limitation and long-stop periods should run against minors except for periods when the minor is not in the custody of a parent or guardian, and against incapacitated persons except for periods during which no administrator has been appointed in respect of the person.

6.49 Minors who are not in the custody of a parent or guardian, minors who are in the custody of parents or guardians who are themselves under a disability, and incapacitated persons in respect of whom an administrator has not been appointed, should be regarded as persons under a disability. In those instances, the limitation period should not run against the minor or incapacitated person.

6.50 In cases where the plaintiff becomes a person under a disability after time has commenced running, the limitation period should be suspended for any period during which the plaintiff is under a disability.

6.51 In cases where a minor or incapacitated person is not under a disability, for the purposes of determining when the limitation period commences, the relevant knowledge would be that of the parent, guardian or administrator, as the case may be, and not that of the minor or incapacitated person.

6.52 There will also be cases where a parent or guardian of a minor, or a person in a close relationship with the parent or guardian, is the potential defendant. A close relationship is a relationship such that

- (a) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

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6 Limitation Act 1974 (Tas) s 26.

7 TPA s 82 see *Re: Vink And: Schering Pty Ltd* (1991) ATPR 41-073.

8 The Panel has relied heavily in this respect on the work of the Western Australian Law Reform Commission in its *Report on Limitation and Notice of Actions* (1997), paras 17.45-17.65.

- (b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

Special rules should be laid down for such cases.

6.53 In cases where the parent, guardian, or a person in a close relationship with the parent or guardian, is the potential defendant, the Panel recommends that the limitation period commence only when the plaintiff turns 25 years of age. This will give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings. The Panel also recommends that the limitation period in such cases (which will be referred to as 'the close-relationship limitation period') should be 3 years.

6.54 In some cases of this sort, the date of discoverability may not occur until after the expiry of the close-relationship limitation period. Therefore, the Panel recommends that in such cases the court should have a discretion, exercisable at any time, to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

6.55 In most limitation statutes, the limitation period is suspended where the plaintiff is prevented from knowing of the claim by reason of fraud or concealment on the part of the defendant. Such a provision is unnecessary under the system proposed as the principle of time running from the date of discoverability caters for this.

### **Recommendation 25**

**The Proposed Act should embody the following principles:**

- (a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.**
- (b) 'Person under a disability' means:**
  - (i) a minor who is not in the custody of a parent or guardian;**
  - (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.<sup>9</sup>**

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<sup>9</sup> Recommendation 25 is based on recommendation 69 of the West Australian Law Reform Commission *Report on Limitation and Notice of Actions* (1997), discussed in paras 22.17-22.24.

- (iii) a minor whose custodial parent or guardian is a person under a disability.
- (c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.
- (d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called ‘the close-relationship limitation period’) runs for 3 years from the date the plaintiff turns 25 years of age.
- (e) A close relationship is a relationship such that:

  - (i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
  - (ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.
- (f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

## Survival of actions<sup>10</sup>

### Recommendation 26

The Proposed Act should embody the following principles:

- (a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.
- (b) In such a case, the limitation period should begin at the earliest of the following times:

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<sup>10</sup> Recommendation 26 is based on paragraph 22.23 of the Law Reform Commission of Western Australia Report.

- (i) When the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;**
- (ii) When the personal representative was appointed, if he or she had the necessary knowledge at that time;**
- (iii) When the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.**

## Contribution between tortfeasors

### **Recommendation 27**

**The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.**

## Early notification system

6.56 The Panel received submissions about a system for early notification of claims. Such systems currently exist in virtually all motor accident and workers compensation schemes in Australia, and in particular the *Personal Injuries Proceedings Act 2002* (Qld). The Panel has been informed that early notification systems are beneficial for effective injury-management and early resolution of claims. Given the time constraints on the Panel, it is not able to comment on these systems. The Panel does suggest, however, that this is an issue that warrants further investigation.

## Appendices

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## Appendix A: Trade Practices Act 1974 and state and territory equivalents

**Table A1: Unconscionable conduct**

Commonwealth Trade Practices Act 1974	NSW Fair Trading Act 1987	VIC Fair Trading Act 1999	QLD Fair Trading Act 1989	SA Fair Trading Act 1987	WA Fair Trading Act 1990	TAS Fair Trading Act 1987	ACT Fair Trading Act 1992	NT Consumer Affairs and Fair Trading Act 1990
Section 51AA	NIL	s 7	NIL	NIL	NIL	NIL	NIL	NIL
Section 51AB	s43	s8	s39	s57	s11	s15	s13	s43
Section 51AC	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL

\* The Australian Securities Commission Act 2001 (Cwith) duplicates the consumer protection provisions of the Act with regard to financial services.  
 ASIC Act (Cwith) s 12CA is equivalent to s 51AA of the Act.  
 ASIC Act (Cwith) s 12CB is equivalent to s 51AB of the Act.  
 ASIC Act (Cwith) s 12CC is equivalent to s 51AC of the Act.

**Table A2: Misleading or deceptive conduct**

Commonwealth Trade Practices Act 1974	Section 52	Section 53aa	Section 53c	Section 53f	Section 53g	Section 55A
NSW Fair Trading Act 1987	s42	sub-s44 (b)	sub-s44 (e)	sub-s44 (i)	sub-s44 (k)	s50
VIC Fair Trading Act 1999	s9	sub-s12 (b)	sub-s12 (e)	sub-s12 (i)	sub-s12 (k)	s11
QLD Fair Trading Act 1989	s38	sub-s40 (b)	sub-s40 (e)	sub-s40 (i)	sub-s40 (k)	s45
SA Fair Trading Act 1987	s56	sub-s58 (b)	sub-s58 (e)	sub-s58 (i)	sub-s58 (k)	s64
WA Fair Trading Act 1990	s10	para 12 (1) (b)	para 12 (1) (e)	para 12 (1) (k)	para 12 (1) (l)	s18
TAS Fair Trading Act 1987	s14	sub-s16 (b)	sub-s16 (e)	sub-s16 (i)	sub-s16 (k)	s21
ACT Fair Trading Act 1992	s12	sub-s14 (b)	sub-s14 (e)	sub-s14 (i)	sub-s14 (k)	s20
NT Consumer Affairs & Fair Trading Act 1998	s42	sub-s 44 (b)	sub-s44 (e)	sub-s44 (k)	sub-s44 (m)	s48

The Australian Securities and Investments Commission Act 2001 (Cwith) and the Corporations Act 2001 (Cwlfth) duplicate the consumer protection provisions of the Act with regard to financial services.  
ASIC Act (Cwth) s12DA and the Corp Act (Cwlfth) s1041H are equivalent to s52 of the Act.  
ASIC Act (Cwth) s12DB and the Corp Act (Cwlfth) s1041E are equivalent to s53 of the Act.

**Table A3: Product safety and product information  
Actions against manufacturers and importers of goods.**

	Commonwealth	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
TPA Section 65C Product safety and unsafe goods	Fair Trading Act 1987 (NSW) s27	Fair Trading Act 1999 (Vic) Pt 3 Div 1 ss 33 and 34	Fair Trading Act 1989 (QLD) Pt 4 Div 2 ss 83 and 84	Trade Standards Act 1979 (SA) Pt 3 Pt 4 ss22, 23 and 26	Fair Trading Act 1987 (WA) Pt 5 ss50 and 51	No generic product safety Act	Consumer Affairs Act 1973 (ACT) ss 15FBA and 15FE	Consumer Affairs and Fair Trading Act 1990 (NT) Pt 4 Div 1 to 3 ss 25 and 26	
TPA section 65D Product information standards	Fair Trading Act 1987 (NSW) ss 38 and 39	Fair Trading Act 1999 (Vic) Pt 3 Div 2 ss46, 47 and 48	Fair Trading Act 1989 (QLD) Pt 4 Div 1 ss 81 and 82	Trade Standards Act 1979 (SA) Pt 5 Pt 6 ss32,33 and 44	Fair Trading Act 1987 (WA) Pt 6 ss 59 and 60	No generic product safety Act	Consumer Affairs Act 1973 (ACT) ss 15FC and 15FC	Consumer Affairs and Fair Trading Act 1990 (NT) Pt 4 Div 4 ss38 and 39	
TPA section 74B Fitness for Particular purpose	Sale of Goods Act 1923 (NSW) s19	Goods Act 1958 (Vic) Pt 1 Div 6 s19	Sale of Goods Act 1896 (Qld) s 17	Sale of Goods Act 1895 (SA) sub-s14(I)	Sale of Goods Act 1895 (WA) s14	Sale of Goods Act 1896 (TAS) s19	Sale of Goods Act 1954 (ACT) Div 5 and 6 s 19	Consumer Affairs and Fair Trading Act 1990 (NT) s 73	
TPA section 74C Actions in respect of false descriptions	Sale of Goods Act 1923 (NSW) s18	Goods Act 1958 (Vic) Pt 1 Div 6 s 18	Sale of Goods Act 1896(QLD) s 16	Sale of Goods Act 1895 (SA) s13	Sale of Goods Act 1895 (WA) s13	Sale of Goods Act 1896 (TAS) s18	Sale of Goods Act 1954 (ACT) Div 5 s 18	Consumer Affairs and Fair Trading Act 1990 (NT) s 74	
TPA section 74D Actions in respect of goods of unmerchantable quality	Sale of Goods Act 1923 (NSW) s 19	Goods Act 1958 (Vic) Pt 1 Div 6 s19	Sale of Goods Act 1896 (QLD) s 17	Sale of Goods Act 1895 (SA) sub-s14(II)	Sale of Goods Act 1895(WA) s14	Sale of Goods Act 1896 (TAS) s19	Sale of Goods Act 1954 (ACT) Div 5 s19	Consumer Affairs and Fair Trading Act 1990 (NT) s 75	

**Table A4: Conditions and warranties in consumer transactions**

(Cwith)	NSW Sale of Goods Act 1974	VIC Goods Act 1958	QLD Sale of Goods Act 1896	SA Consumer Transactions Act 1972	WA Fair Trading Act 1997	Tas Sale of Goods Act 1896	ACT Sale of Goods Act 1954	NT Consumer Affairs & Fair Trading Act 1990
Section 74	Nil	sub-s91(a) implied condition that services will be rendered with due care and skill	Nil	sub-s71(1) implied condition in consumer contracts that services will be rendered with due care and skill	s40 duplicates s74 TPA	Nil	Nil	sub-s66 (f) implied warranty that services supplied to a consumer will be rendered with due care and skill
Section 68	Nil	s113 implied condition or warranty implied by the Goods Act does not negative an express term except in so far as it is inconsistent with the implied condition	Nil	s8 conditions implied into a consumer contract may not be excluded, limited or modified by agreement	s34: Provisions of contracts purporting to modify, exclude or restrict the warranty for the provision of due care and skill in services is void.	Nil	Nil	s68 renders void any contractual terms that supports to exclude, restrict or modify any liability for any condition implied by s66

The *Australian Securities and Investments Commission Act 2001* (Cwith) duplicates the consumer protection provisions of the Act with regard to financial services.

Section 12ED is equivalent to s74 of the Act with regard to contracts for financial services.

Section 12EB is equivalent to s 68 of the Act with regard to contracts for financial services.

**Table A5: Remedies**

<i>Trade Practices Act 1974 (Cwlth)</i>	<i>NSW Fair Trading Act 1987 (NSW)</i>	<i>VIC Fair Trading Act 1999 (Vic)</i>	<i>QLD Fair Trading Act 1989 (QLD)</i>	<i>SA Fair Trading Act 1987 (SA)</i>	<i>WA Fair Trading Act 1987 (WA)</i>	<i>TAS Fair Trading Act 1990 (Tas)</i>	<i>ACT Fair Trading Act 1992 (ACT)</i>	<i>NT Consumer Affairs and Fair Trading Act 1990 (NT)</i>
Section 80 Injunction	ss65 and 66	ss 149 to 151	s 98	s83	ss74 to 76	ss 34 and 35	s 44	s89
Section 86C Non Punitive Orders	s 72	s 158	s 100	s82	s 77	s41	s 50	s 90
Section 86D Punitive Orders	s 67	s 153	s100	s 82	s 77	s 36	s 45	s90
Section 76 Pecuniary Penalties				s 82			s42	
Section 87A Preservation Orders	s 73	s154	s 102	s82	s 78	s 42	s 51	
Section 87 Other Orders	s 72	s 158	s 100	s 82 and 85	s 77	s 41	s50	s95
Section 87B Undertakings	s73A	ss 146 –148	Pt 5 Div 1B	Div 2			s 36	
Pt V Criminal Proceedings	ss62 to 64	Pt 11 Div 1	ss 92 to 94	Div 3	ss 69 to 73		s 43	s 88

**Table A6: Regulatory Authorities**

Commonwealth	NSW	Victoria	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
Australian Competition and Consumer Commission	NSW Office of Fair Trading	Victorian Office of Fair Trading and Business Affairs	Queensland Office of Fair Trading	South Australian Office of Consumer and Business Affairs	Western Australian Department of Consumer and Employment Protection	Tasmanian Consumer Affairs and Fair Trading	ACT Office of Fair Trading	Northern Territory Consumer and Business Affairs



## Definitions

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For the purposes of this Report, the following definitions apply:

### **Date of discoverability**

The date on which the plaintiff knew, or ought to have known, that personal injury or death (a) had occurred, (b) was attributable to negligent conduct of the defendant, and (c) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

### **Inherent risk**

A risk that cannot be removed or avoided by the exercise of reasonable care.

### **Negligence**

Failure to exercise reasonable care and skill.

### **Not-for-profit organisation (NPO)**

An organisation that is prohibited under its governing rules or documents from distributing profits to its members, owners or managers.

### **Obvious risk**

Includes risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

### **Personal injury**

Includes (a) any disease, (b) any impairment of a person's physical or mental condition, and (c) pre-natal injury.

### **Personal injury law**

The law governing liability and damages for personal injury and death resulting from negligence.

### **Proactive duty to inform**

A duty to give information that a reasonable person in the circumstances would want to be told before making a decision.

### **Reactive duty to inform**

A duty to give the information that the information-giver knows or ought to know the person wants to be told before the person makes a decision.

### **Recreational activity**

An activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

### **Recreational services**

Services of (a) providing facilities for participation in a recreational activity, (b) training a person to participate in a recreational activity, or (c) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.

### **The close-relationship limitation period**

A period of 3 years from the date the prospective plaintiff turns 25 years of age.

### **The limitation period**

A period of 3 years from the date of discoverability.

### **The long-stop period**

A period of 12 years from the date of the conduct or events on which the claim is based.

### **The Proposed Act**

The Act referred to Recommendation 1.

### **Work risks**

Risks associated with work done by one person for another.

