CIVIL LIABILITY AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

Overview of Bill

The objects of this Bill are to amend the *Civil Liability Act 2002* in two respects – to introduce a new evidentiary test in relation to the standard of care required of health professionals; and to make further provision with respect to proportionate liability.

Clause 9 to the *Civil Liability Amendment Act 2003* is to insert a new Part 1F (Proportionate liability) before Part 2 of the *Civil Liability Act 2002*. Clause 9 has not been commenced to the extent that it inserts Part 1F.

The Bill makes amendments to proposed Part 1F as part of the process of refining the operation of the proportionate liability provisions currently being undertaken by the States, the Territories and the Commonwealth.

Outline of provisions

Part 1 – Preliminary

Clause 1 sets out the short title of the proposed Act.

Clause 2 provides for commencement. The provisions in Part 2 dealing with the standard of care for health professionals are to commence on assent. The amendments relating to proportionate liability in Part 3 will commence at the same time as the relevant provisions of the principal Act are proclaimed to commence.

Clause 3 is a formal provision that gives effect to the amendments to the *Civil Liability Act 2002.*

Part 2 – Standard of care for health professionals

Clause 4 replaces existing subsections 5A(3) and 5A(5). Its effect is that the new Division 7, which is inserted by clause 5, will apply to harm arising from incidents that occur on or after the date of assent to the Bill.

Clause 5 inserts into Part 1A a new Division 7 the effect of which will be that the liability in negligence of health professionals for treatment and diagnosis will ordinarily be determined, not according to the Court's view of reasonable conduct (which is the position in Australia following the decision of the High Court in *Rogers v Whitaker* (1992) 175 CLR 479), but according to whether the conduct would be widely accepted as reasonable by the professional's peers (which has been the legal position in the UK following the decision of *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582).

The principle has been confined in the Bill to health professionals (as distinct from applying to professionals generally) because the litigation exposures of the health

professions are, in many respects, unique. In particular, public expectations as to what health professionals ought to achieve medically continue to rise, as do the number of claims associated with medical procedures. The Bill's provisions will discourage inappropriate expert "shopping" and reduce the costs of claims by rendering the outcome of litigation against health professionals more predictable.

Section 5PA lists the health professionals whose clinical conduct will attract the operation of the new *Bolam* type test.

Section 5PB provides that the conduct of a health professional cannot be characterised as negligent if it was in accordance with a practice widely accepted by the health professional's peers as competent. The principle applies notwithstanding that the conduct may be inconsistent with an alternative practice also widely accepted by the professional's peers as competent. The onus of proving negligence remains on the plaintiff.

There are two major exceptions to the application of the principle. The first is that the Court will not be bound by peers' views as to the reasonableness of a defendant health practitioner's conduct if it forms the opinion that the conduct was so unreasonable that no reasonable practitioner in the defendant's position could have acted in that way. This qualification to the principle reflects the position arrived at by the common law in the UK. The second exception is that the principle does not apply if the relevant conduct relates to informing the patient of the medical risks associated with proposed treatment or a proposed diagnostic procedure.

These two provisos ensure that a proper balance is struck between the interests of health practitioners and the interests of the patients they are treating.

Part 3 – Proportionate liability

Clause 6 amends proposed ***section 5AI*** of the *Civil Liability Act 2002* to redefine the concept of an apportionable claim for the purposes of proposed Part 1F. The new rules for determining the proportionate liability of concurrent wrongdoers will only apply to apportionable claims. An ***apportionable claim*** will be:

> (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, or
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> (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 10 of that Act.

Under this amendment, proportionate liability will apply to an apportionable claim even though the respective obligations of the defendants may have different sources (eg tort, contract or statute).

Subclause (2) makes a technical amendment which relies on the *Interpretation Act 1984* section 10(c) as providing that words in the singular number include the plural.

Clause 7 amends proposed ***section 5AJ*** of the Act to provide that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action.

Clause 8 inserts a new ***section 5AJA*** to make it clear that certain concurrent wrongdoers in proceedings involving an apportionable claim will not have their liability limited by the new apportionment provisions. The concurrent wrongdoers who will be excluded are:

(a) concurrent wrongdoers who intended to cause the economic loss or damage to property that is the subject of the claim, and

(b) concurrent wrongdoers who fraudulently caused the economic loss or damage to property that is the subject of the claim, and

(c) concurrent wrongdoers whose civil liability was otherwise of a kind excluded from the operation of proposed Part 1F by section 3A.

The new section will ensure that such excluded concurrent wrongdoers will have their liability determined in accordance with any relevant legal rules (apart from those in proposed Part 1F). However, the liability of any other non-excluded concurrent wrongdoer will continue to be limited by the apportionment provisions.

Clause 9 inserts a new ***section 5AKA*** in the Act to enable a court to award costs against a defendant in proceedings involving proportionate liability if the defendant fails to notify the plaintiff of the identity of any other concurrent wrongdoers of which the defendant ought to be aware and as a result causes the plaintiff to incur unnecessary costs.

Clause 10 makes a minor amendment to correct a drafting error.