

Australia: Developments in Liability and Professional Indemnity Claims

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INTRODUCTION

1. Since 2002 in New South Wales, Victoria and Queensland legislation has been enacted to compel the greatest change to public liability in decades (**the Reform Acts**)². The ultimate impact of the Reform Acts is unknown, however in the past few years the Superior Courts have started to provide guidance on how it interprets these changes.
2. In the area of public liability, the Reform Acts have mandated changes to the Courts' approach to issues such as:
 - a. non economic loss assessments; and
 - b. the obviousness of risks.
3. In the professional indemnity and directors' and officers' classes, the Reform Acts have also mandated changes through the introduction of proportionate liability (as opposed to joint and several liability) throughout Australia.

GENERAL OVER-VIEW OF CLAIM NUMBERS AND TYPES

4. Following the Reforms Acts, the number of claims coming before the Courts continues to fall. At least in theory with the progressive

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² In New South Wales, *Civil Liability Act* 2002 (NSW), in Victoria the *Wrongs Act* 1958 (VIC), and in Queensland both the *Civil Liability Act* 2003 (QLD) and the *Personal Injuries Proceedings Act* 2002 (QLD).

introduction of Proportionate liability throughout Australia since 2004, claims numbers should continue to fall.

5. Nevertheless, the decline in claim numbers may slow or reverse having regard to:
 - a. the pressure to wind back the tort reforms;
 - b. the Courts' apparent approach to the Reform Acts; and
 - c. the likely increased mobilisation of litigation funders.
6. First however, the current numbers:

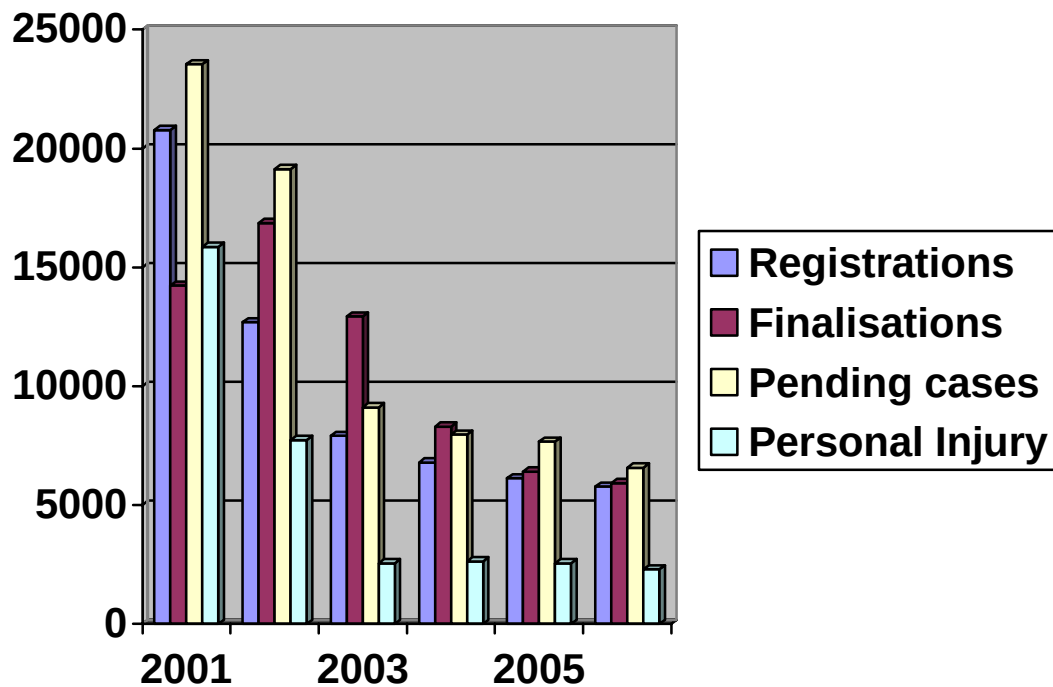
New South Wales

7. In New South Wales the majority of professional indemnity and public liability cases are commenced in the District Court or the Supreme Court. In its civil jurisdiction the District Court deals with:
 - a. all motor accident cases, irrespective of the amount claimed; and
 - b. other claims to a maximum amount of \$750,000, although the District Court may now also deal with matters exceeding this amount if the parties consent, or alternatively if the defendant fails to object 3 months prior to the hearing.³
8. Whereas in 2001, new filings in the District Court were 20,784, and a quarter of them were for personal injury, in 2006 new filings were only 5,769, and around 40% of those were for personal injury. The cause of the decline in filings has been directly attributed to the *Civil Liability Act* 2002 (CLA) which both restricted the right to commence civil actions and also placed caps on legal fees.⁴

³ *District Court Act* 1973 (NSW) s.51.

⁴ Forward to the Annual Review of the District Court of New South Wales 2005 by the Honourable Justice R O Blanch AM, Chief Judge.

9. What is somewhat worrying however is the slowdown in finalisations⁵. This suggests that despite the District Court's efforts in relation to case management, cases are still slow to finalise, which of course impacts on defence costs. A table with those statistics is set out below:



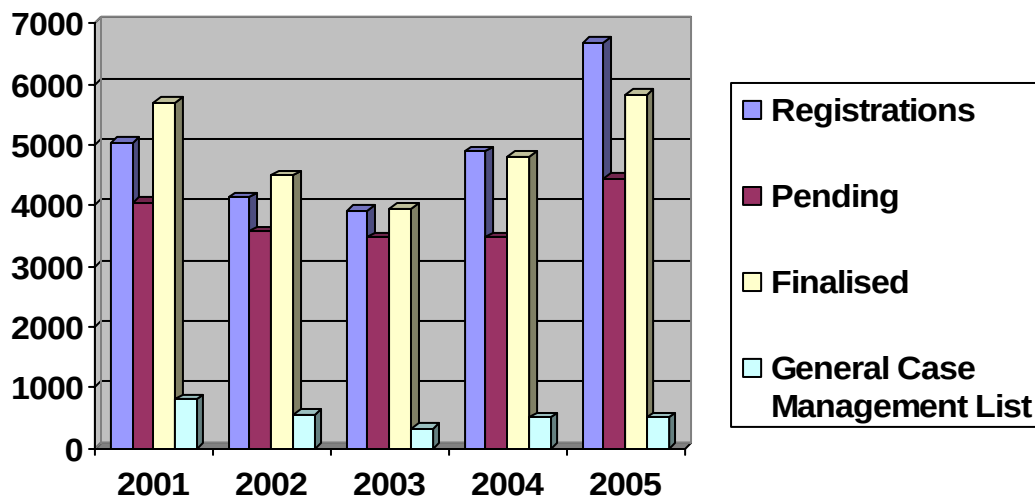
10. The same slowdown is apparent both in appeals to the Court of Appeal, and claims commenced in the Supreme Court of New South Wales (where the Court's jurisdiction is unlimited). At the end of 2005, the number of new cases going to the Court of Appeal (often on appeal from the District Court) decreased by approximately 9%. The Court expects that reduction to continue with a 22% reduction in holding appeals in 2005 compared to 2004.⁶
11. The Common law Division of the Supreme Court deals with all serious personal injury and contractual actions. While its claim numbers continued to increase in each of 2004 and 2005 (the latter

⁵ In part, the Honourable Justice R O Blanch AM, Chief Judge attributes the slow down to a decrease in the number of sitting Judges.

⁶ 2005 Annual Review of the Supreme Court of New South Wales, page 26.

by 37%), the increase has been attributed to uncontested matters in the Possession List which have soared. While at first blush overall disposals substantially increased (by 21%), that is largely on account of the increased number of cases proceeding to default judgment.

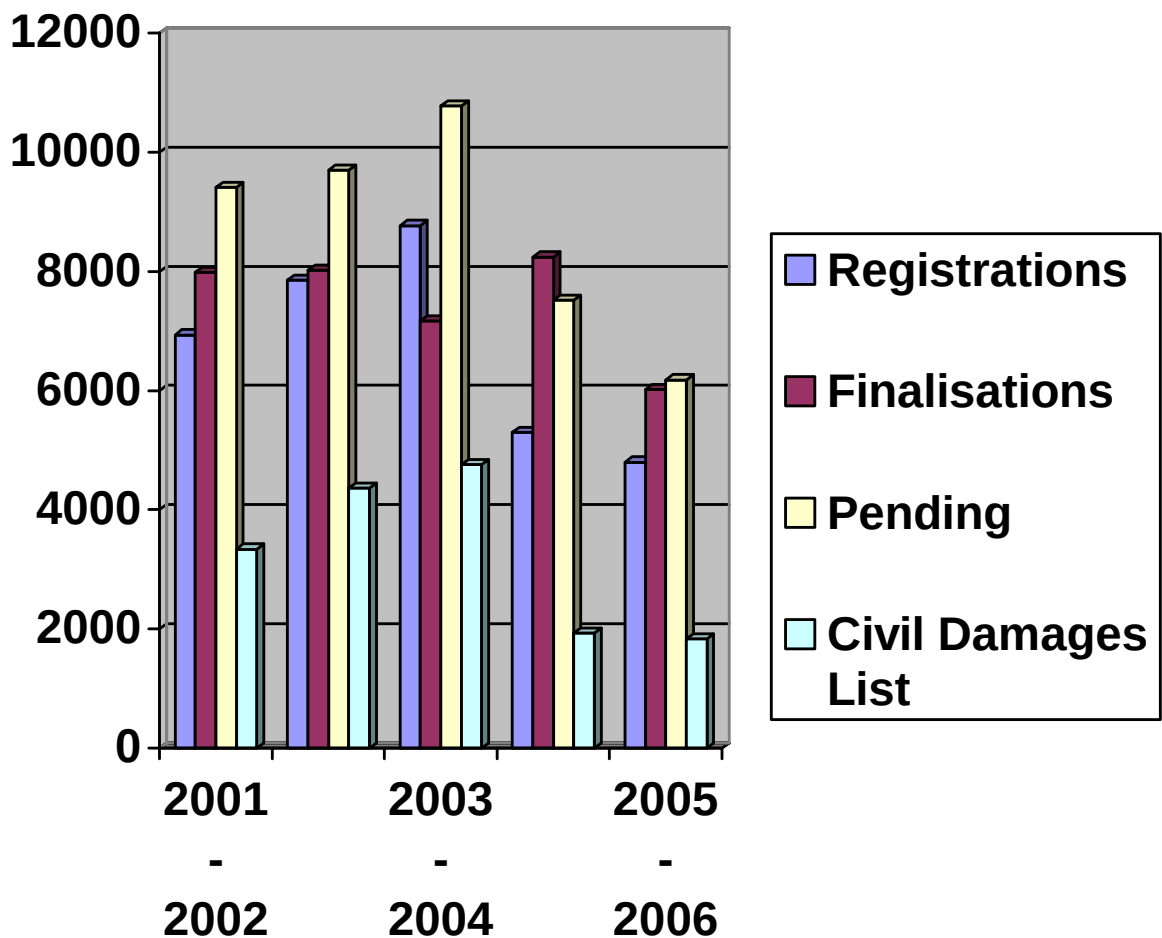
12. The statistics for the Common Law Division of the Supreme Court are summarised below:



13. The Equity Division of the Supreme Court exercises the traditional Equity jurisdiction, and also hears most of the professional indemnity and commercial claims. The claims in the Equity Division have not experienced the same dramatic decrease, and fell by 6% in 2005.

Victoria

14. Claim numbers in Victoria have also dipped. In the County Court (which hears actions up to the jurisdictional limit of \$200,000) claims have fallen from a high of 9,637 in 2001-2002 to around 4800 in 2005-2006.
15. Their statistics are summarised below:

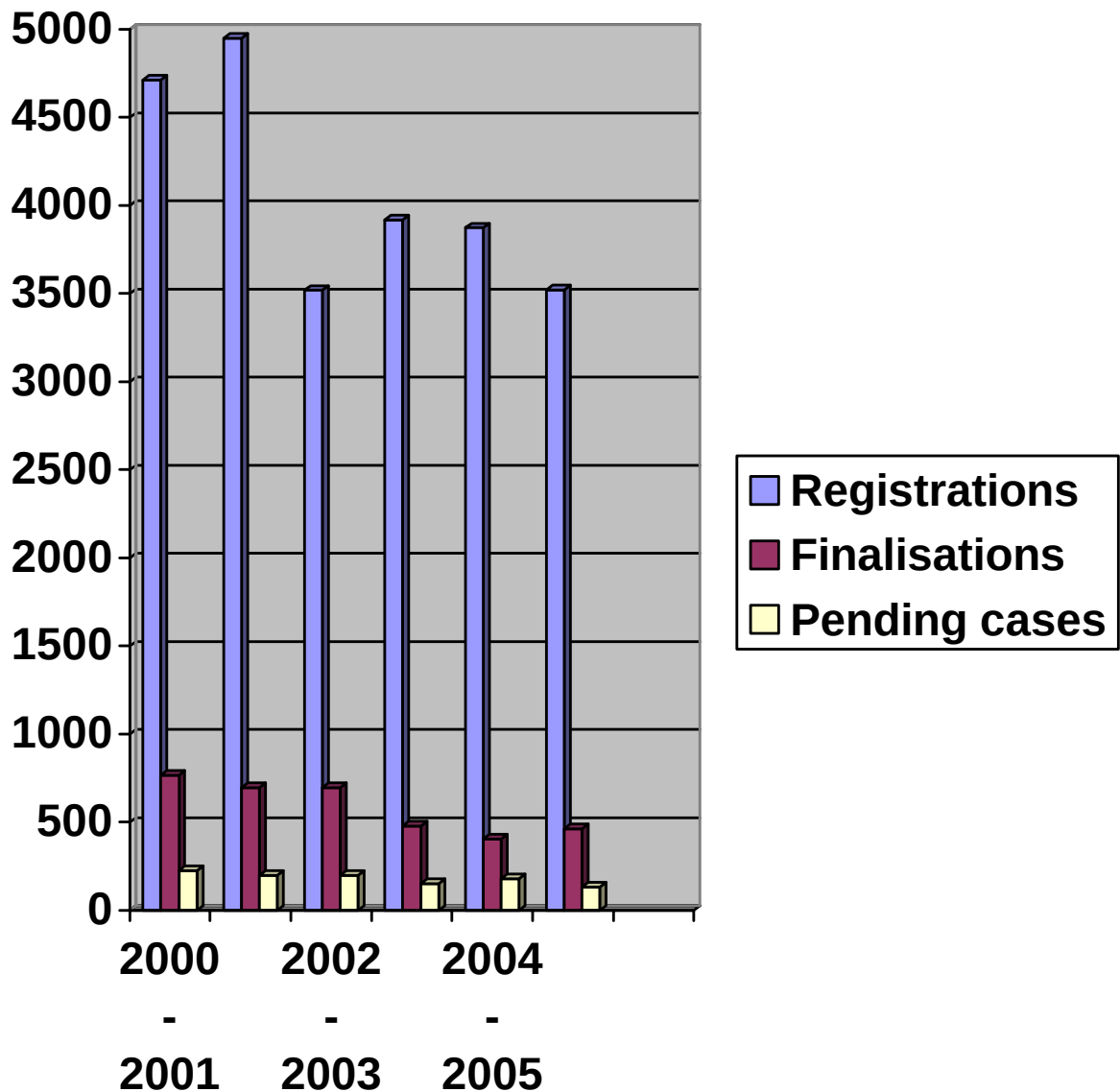


16. The Supreme Court of Victoria (which deals with claims in excess of \$200,000) only has statistics available up until 2004-2005. They suggest that civil claims have remained steady at between 6000 and 6500 per annum despite the introduction of the Reform Acts.

QUEENSLAND

17. Queensland appears to be bucking the national trend as claim numbers are no longer declining. In the District Court (where the jurisdictional limit is \$250,000) claims have remained fairly stable over the past few years. They have actually grown in the Supreme Court:

- a. In 2000-2001 new filings in the District Court were 4,713. There was a dip in 2002-2003, where new filings dropped to 3,519, and they have levelled out at the 3500 to 4000 number⁷.
- b. In the Supreme Court claims have increased from around 4300 in 2002-2003, to 5559 in 2005-2006⁸.



⁷ District Court of Queensland Annual Report 2005-2006, page 47.

⁸ Annual Report of the Supreme Court of Queensland 2005-2006, page 33.

SIGNIFICANT LIABILITY DECISIONS IN THE LAST 12 MONTHS

18. In New South Wales, a reasonable number of claims which fall within the provisions of the *CLA* have now been considered by the New South Wales Court of Appeal. The focus here is on the past 12 months.

Duty of Care: failing to take precautions against a risk of harm

19. The Reform Acts have attempted to restrict the circumstances in which a person is negligent where they have failed to take precautions against a risk of harm. It is effectively a two stage process. First the risk must be foreseeable and not insignificant. Secondly, the claimant must establish that, in the circumstances, 'a reasonable person in the defendant's position would have taken those precautions' having regard to:
- a. the probability that the harm would occur if care were not taken;
 - b. the likely seriousness of the harm;
 - c. the burden of taking precautions to avoid the risk of harm; and
 - d. the social utility of the activity that creates the risk of harm.
20. What amounts to 'reasonable precautions against a risk of injury' was considered by the New South Wales Court of Appeal in *Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWCA 132.
21. The facts are that a schoolgirl on a school excursion slipped and fell from a 3.8 metre high ramp in an obstacle course and broke her leg. Although the ramp was slippery due to rain, it had an incident free history.
22. The Court held that notwithstanding the incident free history of the ramp, spotters had noted that other girls had already slipped (but not been injured). Accordingly, the climbing of the ramp in the rain was an

increased risk which was both foreseeable and not insignificant, and could have been easily avoided by taking a different route. Accordingly, the school was negligent for failing to properly instruct and supervise the schoolgirls.

23. Accordingly, rarity of a particular kind of accident does not prevent it from being foreseeable. In *Sheridan & Anor v Borgmeyer* [2006] NSWCA 201, the claimant, a shearer was injured while shearing when he fell off the shearing board (which was a platform around 3 foot from the ground). The board did not have a guardrail because the defendant was concerned that the introduction of a guardrail would impede the work of the rouseabouts (although there was no evidence to that effect). While the risk of falling was somewhat obvious, and there had not previously been an incident, the Court held that the risk of a shearer being injured by falling off the board was foreseeable, and in the absence of evidence that it would impede the work of the rouseabouts the defendant owed the claimant a relevant duty.
24. In *Drinkwater & Ors v Howarth* [2006] NSWCA 222 the New South Wales Court of Appeal commented on a possible distinction between positive acts of negligence, and failing to take reasonable precautions against a risk of harm. The facts are that two friends were ejected from a hotel by a security guard who shoved one of them, who then struck the claimant causing injury. Whilst the Court technically did not have to determine the question in this case (as it had not been argued at trial) the Court suggested that the test of whether a risk is 'not insignificant' is only referable to failing to take precautions against a risk of harm.
25. Furthermore, Basten JA commented that there may be little between the *CLA* test in s.5B, and the previous test in accordance with the *Wyong Shire Council v Shirt* calculus, stating

A risk which is much more than far-fetched or fanciful may not differ materially from a risk which is not insignificant. [16]

Obviousness of Risk

26. One of the main planks of the Reform Acts was incorporating the concept of the obviousness of risk. That is “a *risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person*”⁹

27. As the Court of Appeal recently stated:

A danger or risk may be relatively commonplace. But is it also an obvious risk? And what follows if it is, for the inadvertent plaintiff? *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136

28. Over the past few years in cases including *Vairy v Wyong Shire Council* (2005) 80 ALJR 1, and *Mulligan v Coffs Harbour City Council* (2005) 80 ALJR 43 the Courts have confirmed that the expression “obviousness of risk” is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent.

29. Judges, particularly at first instance, have previously erred in holding that in all circumstances where a risk was obvious, no duty of care was owed. The correct interpretation appears to be that the “obviousness of risk” is **one** factor that is relevant to whether there has been a breach of the duty of care, and the weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances, it may be of such significance and importance so as to be effectively conclusive.

30. The test for whether a risk is obvious is objective, ie it is irrelevant whether the particular claimant actually observed the risk *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136 at [109].

31. Importantly, an obvious risk does not necessarily exculpate a defendant. Where a woman fell and injured herself on spilt polish (that she did not notice) on a recently polished floor, the Court stated that an obvious risk does not necessarily exculpate a defendant, or there

⁹ s5F(1) CLA

would be little room for the doctrine of contributory negligence: *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136 at [108]. Therefore what would appear to constitute an obvious risk – may not be so obvious.

32. In *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 a claimant was injured when his jumper caught on a wagon while he was riding his bicycle through a narrow gap between rail wagons on the one side, and the concrete edge of a bridge on the other side. While the bridge was on privately owned land, the owner was aware and permitted regular conduct of members of the public in traversing the bridge. The claimant fell almost 5 metres and was rendered a paraplegic.
33. Having regard to the obviousness of risk, the Court of Appeal considered that:
 - a. the defendant had acted unreasonably by allowing the rail wagons to be parked across the bridge, having regard to the public's regular use of the bridge; and
 - b. equally the claimant ought to have appreciated the risk brought about by the parking of the rail wagons on the bridge.
34. The danger was therefore as obvious to the claimant as it was to the defendant. Accordingly the Court held that the blameworthiness of both parties was the same, and reduced the claimant's damages by 50% for contributory negligence [72].
35. In *Randwick City Council v Muzic* [2006] NSWCA 66, a woman slipped on algae on her way into a sea bath and sued the Council for failing to remove it. The Court of Appeal held that, even though a risk may be obvious, this does not negate a defendant's duty to act reasonably in response to the risk of injury, hence the Council owed the claimant a duty of care.

36. However in *Falvo v Australian Oztag Sports Association & Anor* [2006] NSWCA 17 the Court of Appeal was somewhat firmer. The facts are that a player of Oztag tripped when playing on a standard Oztag oval. The Court of Appeal considered that the risk of slightly differing levels and sandy patches on sports grounds are part of the practical reality of every day life and the state of the field was obvious to all players.
37. Finally in *Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of NSW v Dederer & Anor* [2006] NSWCA 101 a 14 year old boy dived off a bridge and was rendered a paraplegic. Both the Council and the RTA were aware of people jumping off the bridge and put pictograph signs at the approach to the bridge.
38. The Council (which was joined to the action late) successfully relied upon the obviousness of risk provisions in the *CLA*. Those provisions did not apply to the claim against the RTA as that action was brought before the *CLA* commenced.
39. Nevertheless, the Court held that:
 - a. the RTA exercised a significant degree of control over the bridge, and performed acts that tended to attract a duty of care to it;
 - b. the RTA knew or ought to have known that persons, including children, were jumping and diving from the bridge (which was about nine to ten metres above the surface of the water) into depths that varied but were not more than two to three meters;
 - c. the serious risk of devastating injury must have been obvious to the RTA;
 - d. the pictograph signs prohibiting diving (which were the only measure taken by the RTA) were not serving the purpose for which they had been erected as it was common knowledge that the practice of jumping and diving off the bridge was continuing

unabated. In these circumstances, the RTA knew that the signs were ineffective; and

- e. the obvious risks involved in jumping and diving off the bridge were not a deterrent, and as many of the visitors to the bridge were children the RTA could not assume that they would take reasonable care for their own safety

40. Ultimately the Court held the claimant 50% responsible for his own injuries.

Dangerous Activities

41. Another of the reforms was to limit liability for harm suffered from the obvious risks of dangerous activities¹⁰.

42. The Court of Appeal took a fairly restrictive approach to whether the injury occurred during the course of a dangerous activity in *Fallas v Murlas* 65 NSWLR 418. The facts are that four men drove 300km from Sydney to Bathurst, had dinner and a couple of beers, and then went to 'spotlight kangaroos'. The claimant was holding a spotlight in the vehicle and the other 3 men were shooting at the kangaroos. When the defendant got back into the vehicle with his gun still loaded he and the claimant engaged in debate about whether the gun was loaded. The defendant tried to un-jam his gun, and it went off shooting the claimant in the leg.

43. The Court held that, although the claimant was engaged in a dangerous recreational activity with an obvious risk, it was not that risk that materialised. Rather the gross negligence of the defendant was so extreme, that it did not constitute an obvious harm.

44. Interestingly in *Falvo* (discussed above) the Court of Appeal commented that while amateur sports such as Oztag and touch rugby may not fall into the category of a dangerous activity with significant

¹⁰ CLA s.5L

risk of physical harm, other sports such as football, cricket, hockey etc would fall within the definition.

45. In *Lormine Pty Ltd & Anor v Xuereb* [2006] NSWCA 200 the claimant sustained injuries when a rogue wave swept her overboard whilst participating in a dolphin watching cruise. The Court of Appeal again took quite a restrictive approach to dangerous activities finding that the harm suffered by the claimant was not as a result of a materialisation of an obvious risk, but rather as a result of the ship captain's want of reasonable care and skill.

Road Authorities

46. Section 45(1) of the *CLA* provides a partial immunity for highway authorities mandating that a roads authority is not liable for harm arising from a failure to either carry out road work, or to consider carrying out road work, unless the authority has **actual** knowledge of the risk that materialises.
47. The Courts have taken a restrictive approach finding that actual knowledge was not established by:
 - a. evidence that two Council employees walked past the area where the hole was: *Porter v Lachlan Shire Council* [2006] NSWCA 126; and
 - b. evidence that Council street sweepers had regularly swept gutters in the vicinity of a hole, in circumstances where the street sweepers themselves were not called, and the evidence of their supervisors was that they were not aware of the hole: *North Sydney Council v Roman* [2007] NSWCA 27.

Occupier's Liability

48. In *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136, the Court of Appeal held that a hotel occupier and a cleaner were equally liable for a woman's injury when she slipped and fell on spilt

floor polish. The Court considered that the hotel-occupier should have done more than place a warning sign that could easily be overlooked. Being in control of the premises, it should have roped off the area being cleaned or otherwise prevented access. That would not have involved great expense or inconvenience where there was an appreciable risk of not trivial physical injury for hotel entrants. Similarly, the cleaner was careless in failing to remove the unbuffed polish [120]. The hotel occupier and cleaner were found to be equally liable.

49. In *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 the Court of Appeal held that the standard of care which an occupier of private land owes to a claimant will generally be greater than that owed by a local authority which occupies large tracts of public land.
50. In *Shellharbour City Council v Rhiannon Rigby & Anor* [2006] NSWCA 308 the Court of Appeal considered a claim for damages following a 13 year old's accident on a local BMX bike track. The Court accepted that both the local Council and the Club that set up the bike track exercised a degree of control over the track and in particular over a starting ramp which enabled users of the track to gain considerable momentum and caused the majority of the injuries. It is likely that the age of the potential entrants (in part) motivated the Court's finding that a higher standard of care was owed because the children would be less cognisant of risks.
51. Two recent New South Wales Court of Appeal cases, *Spedding v Nobles & McNally* [2007] NSWCA 29 and *Wagstaff v Haslam & Anor* [2007] NSWCA 28 concern the obligations and potential liability of a hotel licensee or occupier where its patrons are injured as a result of an assault by another patron.
52. In the first case of *Spedding* three women were on their way into a hotel when one was knocked to the ground and robbed of her watch by a man who then went into the hotel. The women sought help from the

night manager who declined to help on the basis that he did not have enough staff.

53. The women attempted to retrieve the watch themselves and one suffered serious injuries, including being rendered unconscious, a torn spilt bowel, and a fractured skull and cheekbone. Both women sought damages against the licensee, who argued that he did not have a duty to assist them.
54. The Court held that, as the licensee knew both of the earlier assault and robbery, and that the women were intent on recovering the watch, the defendant was on notice of the real potential for further violence in its hotel. Its failure to take any steps in response to that known risk meant that it was in breach of its duty to the women.
55. In *Wagstaff* the claimant was involved in an altercation with other patrons of the hotel. The altercation developed (starting with verbal abuse and the accidental smashing of a glass which was held towards the faces of the Mr and Mrs Wagstaff). The bar manager collected the broken glass and left. The altercation then restarted, and both Mr and Mrs Wagstaff were injured. They claimed damages against the licensee of the hotel, and the occupier of the premises.
56. The primary judge found for Mr and Mrs Wagstaff. Mrs Wagstaff appealed on damages and the licensee/occupier successfully appealed on liability. The Court of Appeal was satisfied that the bar manager did not know the patrons, and was not aware of their aggressive behaviour under the influence of alcohol.
57. The Court commented that although intoxicated people may become aggressive, it is not reasonable to expect that a hotel occupier/licensee should assume that all intoxicated patrons are a potential risk of harm to other patrons. Rather, an additional element of knowledge, either actual or constructive, of the aggressive nature of a person, when intoxicated, is required.

58. Additionally, the Court commented on the interesting issue of causation in this case. It could not be satisfied that the assault would have been prevented even if the bar manager had taken steps to remove the other patrons.

Landlord's Liability

59. The New South Wales Court of Appeal has recently restated that a landlord's duty is to take reasonable care to avoid foreseeable risk of injury. Importantly, the Court has confirmed that the landlord does not have to make the premises as safe as reasonable care could make them. Therefore in *New South Wales Department of Housing v Hume & Anor* [2007] NSWCA 69 at [87] where steps had been used for many years, and could have been made safer, it did not mean that they were dangerous or defective.

SIGNIFICANT PROFESSIONAL INDEMNITY DECISIONS OF THE LAST 12 MONTHS

Liability of an Insurance Broker

60. In *Caldwell v J A Neilson Investments Pty Ltd* [2007] NSWCA 3 the New South Wales Court of Appeal considered whether an insurance agent owed a duty of care to insured.
61. Ipp JA, with whom Mason P agreed, held that while an insurance broker must use reasonable skill and care to ascertain its customer's needs by instructions or otherwise, an insurance agent, generally speaking, is the agent of the insurer (not the insured). That does not mean that they owe no tortious duty to the insured. The Court considered that there is no difference in this context between an insurance agent (carrying on business at an office separate from that of the insurer) and an employee of an insurer, sitting behind the counter at the insurer's offices. Both of them have the same task, ie to sell insurance [112].

Dishonesty by solicitors and justices of the peace

62. In a recent decision by the NSW Court of Appeal, *Graham v Hall* [2006] NSWCA 208 the Court considered a justice of the peace's duty of care to avoid causing economic loss. A Justice of the Peace, Mr Graham, witnessed the purported signature of Mrs Hall on a mortgage application in relation to a house owned jointly with her husband. The JP indicated that he had seen Mrs Hall sign, and that she was personally known to him. Both these things were untrue - Mr Hall apparently presented Mr Graham with a pre-signed (forged) form. Mrs Hall discovered the fraud and the registered mortgage when Mr Hall died two years later.
63. The Court held that Mr Graham owed Mrs Hall a duty as in acting in his official capacity he certified that the signature on the document was Mrs Hall's and it was clearly foreseeable that harm might flow to Mrs Hall in that circumstance. Finally the Court concluded that signing an attestation clause like this dishonestly was an act done "maliciously".
64. In *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 his Honour Justice Hoeben referred to and relied upon the Court of Appeal's reasoning in *Graham v Hall* in finding that a solicitor was liable to the plaintiff in negligence where he falsely attested that he had witnessed the plaintiff signing mortgage documents in his presence.
65. In this case the client and his signature was known to the solicitor, so when the client's daughter-in-law presented a signed mortgage to the solicitor, he countersigned the documentation as witness and swore a statutory declaration that he had explained the contents to the client, even though the client was not present.
66. As it turned out the signature was forged, and the client lost his house (the daughter-in-law being nowhere to be found). The Court held that it was obvious that the interest of a mortgagor is put at risk when a signature is falsely attested, the solicitor was in breach of his duty, and as his action made a significant contribution to the completion of the transactions it was a cause of the plaintiff's loss: [113]-[115].

67. Unsurprisingly American Reinsurance Company (Am Re), through Lawcover [129] refused indemnity in reliance on the dishonesty exclusion [132].
68. Hoeben J held that the following acts by the solicitor amounted to dishonest acts or omissions:
 - a. making false assertions in allowing documents to be provided to the lenders and their solicitor representing that he had witnessed the plaintiff signing the documents, when he had not; and
 - b. attesting to statutory declarations when he knew the contents to be false [133].
69. The Court noted the Court of Appeal's finding in *Graham v Hall* that these were dishonest misrepresentations and acts done maliciously, and held that these comments apply with even more force to the actions of a solicitor and an officer of the Supreme Court, and upheld Am Re's decision to refuse indemnity [135] – [136].
70. In *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28 the Court of Appeal dealt with an appeal in relation to a firm of solicitors' (MDRN) who claimed on their professional indemnity policy with St Paul. St Paul denied indemnity in reliance on the dishonesty exclusion, in circumstances where an employee, Mr Blackadder had engaged in dishonest conduct.
71. MDRN conducted a private lending business with its funds coming from many of the clients of its legal practice. 39 of its investors brought proceedings against it for misleading and deceptive conduct. Ultimately 37 of the investors were successful and relevantly:
 - a. MDRN was liable to 36 of the investors for loss and damage as a result of their reliance on particular representations which involved Mr Blackadder's dishonesty;

- b. MDRN was liable to 1 further investor on unrelated grounds;
 - c. 2 investors failed altogether.
72. MDRN argued in the appeal that to fall within the exclusion, Mr Blackadder must be shown to have known that his actions were dishonest, and that he was motivated to conceal the truth or obtain an advantage.
73. The Court did not accept this argument. Rather the Court confirmed that, while a conclusion of dishonesty cannot be reached if the individual believes in the truth of the statement, it is not necessary to establish that the person making the false statement understood it to be dishonest by that standard and had a motive for lying [34].
74. Justice Allsop dealt with perhaps the most interesting aspect of the case, being what to do with the defence costs in circumstances where two of the claimants failed, and one of the claimants succeeded in areas unrelated to the dishonesty of Mr Blackadder.
75. Some of the policy terms that are particularly relevant are the insuring clause, the related costs clause and the dishonesty exclusion:

Insuring Clauses.

On the terms and conditions herein contained the Insurer shall indemnify the Assured up to an amount not exceeding the Sum Insured against all loss to the Assured (including Related Costs incurred by the Assured and claimants costs) whensoever occurring arising from any claim or claims first made against the Assured during the Period of insurance in respect of any description of civil liability whatsoever incurred in connection with the Practice other than loss arising out of any circumstances or occurrence in respect of which the Assured is entitled to indemnity under any other insurance.

Provided that:

(a) For the purposes hereof all claims arising from the same act or omission, whether made against one or more Assured, shall be regarded as one claim.

(f) 'Related Costs' means all costs and expenses incurred:

- a. (i) by the Assured with the insurer's consent (such consent not to be unreasonably withheld); or
- b. (ii) by the Insurer,

in the investigation, defence or settlement of any claim or circumstances which may give rise to a claim against or notified by the Assured.

5 (e) This insurance shall not indemnify the Assured in respect of any liability:

(v) brought about by the dishonest or fraudulent act or omission of the Assured including any Partner or former Partner of the Assured or any person employed in connection with the Practice (including any articulated clerk and any solicitor or conveyancer who is a Consultant or Associate with the Firm);

76. The first issue was whether St Paul was liable to pay the full amount of the defence costs even if Mr Blackadder was dishonest. MDRN argued that it should be indemnified for all of its defence costs because of the distinction between "loss" in the insuring clause and "liability" in general exclusion 5(e)(v). MDRN submitted that whilst the dishonesty may disentitle MDRN to indemnity in respect of the liability to the claimants that was different to the indemnity for Related Costs [67].

77. In having regard to the commercial purpose of the policy [69], Justice Allsopp stated:

General exclusion 5(e) contains a list of circumstances in which the insurance does not respond ("shall not indemnify"). To understand the notion of indemnity and its extent one goes to the insuring clause. There one finds (subject to the terms and conditions of the policy) indemnity against loss (including Related Costs) arising from any claim in respect of any description of civil liability. The phrase "in respect of ... civil liability" in general exclusion 5(e) dovetails with the insuring clause using the same prepositional phrase. Reading the policy as a whole, in particular reading the insuring clause and general exclusion 5(e)(v) together, one sees the policy stating that there is indemnity against loss (including Related Costs) arising from any claim in respect of any description of civil liability, but not against loss (including Related Costs) arising from any claim in respect of liability brought about by the dishonest or fraudulent act or omission of a relevant person [68].

78. Accordingly (and unsurprisingly) Justice Allsop expressly rejected MDRN's approach, finding that MDRN was not entitled to any indemnity against loss, including their defence costs, arising from the respective claims of the 36 applicants that were in respect of the civil liability brought about by the dishonesty or fraud of Mr Blackadder [78].

79. Next Justice Allsop had to determine whether St Paul had an obligation to pay costs in relation to the 2 successful claimants who did not rely upon Mr Blackadder's dishonest conduct and the 1 unsuccessful claimant.
80. St Paul submitted that while notionally the costs are referable to the investigation and defence of both an uncovered claim (because of Mr Blackadder's dishonesty) and a covered claim, St Paul is not liable for such costs and expenses in accordance with the Wane Tank principle.
81. Justice Allsopp disagreed, determining that MDRN are entitled to the defence costs referable to the covered claim. This is because those costs fall into an indemnity which is otherwise untouched in its operation by any exclusion, as:

The cover as agreed was not for loss or damage to property caused by an insured peril. It was not for any defence costs up to a monetary limit caused by included causes with and exception for defence costs caused by an excluded cause (fraud). Rather it was against loss (including, relevantly, the costs of investigating and defending claims by third parties) arising from any claim in respect of any description of civil liability but not liability brought about by fraud. Subject to the operation of proviso (a) in the "Insuring Clauses", one is directed to each claim ("any claim or claims") for which indemnity is sought in order to assess the operation of the policy. Taking each of the three claims not brought about by fraud, the insureds are seen to be entitled to an indemnity against loss arising from each claim. That indemnity is to be measured according to its full terms. No relevant exception or exclusion can be seen to operate on the indemnity to which the insureds are entitled in those respects. When one turns to the indemnity sought in respect of the other 36 claims, the insureds are not entitled to indemnity against loss arising from the claims in respect of the civil liability brought about by fraud. The width of the relational phrases "arising from" and "in respect of" are such that if the liability of the insured is brought about by fraud there is no indemnity against loss arising out of a claim or claims that are in respect of such liability. That is the position in relation to these 36 claims. However, that conclusion about each of these 36 claims, does not affect the indemnity against loss arising from each of the other three claims, to which the exclusion had no relevance [118].

Known Circumstances Exclusion

82. In *CGU Insurance Ltd. v Porthouse* [2007] NSWCA 80 the New South Wales Court of Appeal upheld the District Court's decision on the applicability of a 'known circumstances' exclusion.

83. The facts are that a barrister had negligently failed to advise a client about the impact of changes to the workers compensation legislation. The Barrister's professional indemnity policy excluded from cover included any fact, situation or circumstance which a reasonable person in the insured's professional position would have thought, before the policy began, might result in someone making an allegation against insured in respect of a liability that might be covered by policy.
84. Whilst the barrister knew that he had not advised the worker of the changes prior to their coming into force, at the time of entry into the Policy he was still acting for the worker and had taken all reasonable steps to prepare the claim. He considered that (even though an arbitrator and the District Court Judge had dismissed the claim) the worker had good prospects of success in the Court of Appeal. The first time that the worker referred to possibility that there could be fault on the part of the legal representatives was after the appeal had been heard and reserved. This was after the relevant policy had commenced.
85. The Court held that on the construction of the insurance agreement, the phrase "thought...might result" can cover a spectrum of likelihoods. The primary judge applied the correct standard of "believed as a realistic possibility", having construed the agreement *contra proferentem* against the insurer.
86. The Court of appeal approached the question of whether a reasonable person in the respondent's position "would have thought" something, by considering the barrister's actual state of mind, and then considering whether this was reasonable.
87. Interestingly one member of the Court dissented, holding that the test was solely objective. Applying the objective test, a reasonable person in the respondent's position would have been far more perceptive of the consequences of his oversight than he was.

88. Unsurprisingly an application has been made for Special Leave to Appeal to the High Court.

Double Insurance

89. In *John Collyear v CGU* [2007] NSWSC 379 his Honour Justice McDougall dealt with the indemnity issues arising following the Lagoon Restaurant's destruction by fire. The owner of the business/ lessee was insured under an industrial special risks policy underwritten by the plaintiffs (Euclidian), who paid out \$2.3 million for the reinstatement of the premises.
90. Euclidian brought proceedings against CGU seeking contribution on the basis that CGU insured the lessor of the premises through an industrial special risks policy in favour of Wollongong City Council and relevantly the Stuart Park (D580060) Reserve Trust" (the Trustee).
91. His Honour held that Euclidian would be entitled to contribution if:
- a. both Euclidian and CGU insured the Trustee for the same risk;
 - b. that risk materialised and caused loss to the Trustee;
 - c. Euclidian indemnified the trustee for that loss; and
 - d. Euclidian thereby discharged the liability that otherwise CGU would otherwise have to indemnify.
92. However, although the payment made by Euclidian permitted the owner to discharge its liability under the lease to the trustee, the owner had no entitlement to be indemnified by CGU in respect of that liability. Therefore:
- a. the trustee made no claim on Euclidian;
 - b. Euclidian paid no amount to the trustee, the claim that Euclidian paid was a claim made by Emibarb; and

- c. there was no payment by Euclidian to a doubly insured policy holder, the trustee.

SIGNIFICANT QUANTUM ISSUES: PUBLIC LIABILITY

93. As no doubt you are aware, the Reform Acts limit the determination of damages for non-economic loss in two ways:

- a. First in order to be able to seek damages, the non-economic loss component must be at least 15% of the "most extreme case". The maximum for the recovery of non-economic loss is indexed annually as at 1 October and it is currently \$427,000.
- b. Second, gratuitous services is limited, unless the claimant can establish a need for a minimum of 6 hours per week for 6 months.

94. In the last 12 we have seen:

- a. A marked reluctance by the New South Wales Court of Appeal to alter the award for non-economic loss ordered by the trial judge so long as it is not outside of range of sound discretionary judgment. The Court has indicated that it will only disturb findings below where it is "wholly erroneous" and "so unreasonable and plainly unjust that error in the exercise of the discretion must be inferred" : *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136; *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376; *Jopling v Isaac* [2006] NSWCA 299.
- b. A finding that 25% of a most extreme case was reasonable for a broken leg and some scarring for a 14 year old girl: *Martin v. The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWCA 132.

- c. A finding in the District Court of 28% of a most extreme case for an 18 year old's fractured ankle. Whilst the Court of Appeal indicated that it would not have considered that it exceeded 20%, as the respondent had conceded that 23-25% was reasonable, 28% was not outside the range of what was reasonable: *Porter v. Lachlan Shire Council* [2006] NSWCA 126.
 - d. A finding of 35% of a most extreme case for a fracture of the left leg with a greater likelihood of arthritis in the left knee in the future: *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376.
 - e. A finding that 28% of a most extreme case was not outside the range of what was reasonable for a fractured patella with restrictions in squatting, kneeling, walking, running and with scarring and muscle wasting: *Jopling v Isaac* [2006] NSWCA 299
95. Putting non-economic loss to one side, the New South Wales Court of Appeal has also made findings relating to other aspects of damages for personal injuries. For example, the Court of Appeal has determined that claimants will not automatically be awarded a buffer for future economic loss because they may suffer some disadvantage by reason of an injury caused by the defendant. Rather there must be an "unquestionable reduction in earning capacity before a claimant is entitled to a buffer: *Sophie Fegan by her tutor Inga Rozenauers v Lane Cove House Pty Limited* [2007] NSWCA 88.
96. In Queensland the Reform Acts also significantly reduced claimants' entitlements for damages, however the courts appear to have taken a favourable attitude towards claimants in awarding damages for past and future economic loss often despite evidence of a poor past work history or issues of credit.

- a. In *McMillan v Kissick & Anor* [2006] QSC 202 a 25 year old plaintiff suffered whiplash in a motor vehicle accident which lead to a chronic pain disorder and a narcotic dependency. Whilst he had worked consistently as a labourer, he had not held any one job for any length of time. He had a poor social history having served a three month jail sentence at the age of 17 years for the manslaughter of his then girlfriend's three month old child, domestic violence orders, drug use, binge drinking, psychological problems including depression and suicidal feelings and a criminal history in South Australia. Douglas J awarded the plaintiff a total of \$620,560.07, including \$111,843 for past economic loss and \$317,995.20 for future economic loss, which took into account employment until 65, but discounted by 40% taking into account his future prospects of employment.
- b. In *Wells v Abbotsleigh Citrus* [2006] QSC 355, the claimant injured her back whilst working, cleaning a post harvest machine. The claimant had no particular job skills, a poor work history prior to the accident, had not worked since the accident, and was receiving a disability pension. There was also evidence of mental health issues, and drug and alcohol abuse. Dutney J assessed the claimant's claim for future loss of income at two thirds of her capacity at the time she was injured, awarding the claimant \$392,350.98 which included \$77,400 for past economic loss and \$205,800 for future economic loss.
- c. The Court of Appeal in *Moore v Kelly & Anor* [2006] QCA 380 awarded a 57 year old former plumber \$85,000 for past and future economic loss. The claimant's plumbing business went into liquidation in the early 1990s and he had not worked since that time until his injury. The trial judge assessed that the claimant had a 20% chance of working until retirement at an age

of between 60 to 65 years. The Court of Appeal upheld the trial judge's assessment.

SIGNIFICANT QUANTUM ISSUES: PROFESSIONAL INDEMNITY

97. Since 2003 each Australian jurisdiction has passed legislation to make 'concurrent wrongdoers' only liable for the proportion of loss or damage which they themselves have caused. The Proportionate liability scheme only applies to some categories of common law and statutory claims for economic loss or damage to property. Relevantly it should cover most insured professional negligence claims.
98. Proportionate liability is generally about limiting a defendant's liability for certain cases of pure economic loss and property damage, with the aim that one "wrongdoer" no longer has to pay the total amount of compensation, simply because the other "wrongdoers" are unable to pay their share.

Application: New South Wales and the Commonwealth

99. In New South Wales, the Proportionate liability scheme applies to all causes of action which both accrue on or after 26 July 2004, and which are also commenced after 1 December 2004. The Supreme Court and Court of Appeal are currently dealing with a challenge to the validity of these dates in the legislation. In *Bestcare Foods Limited v Origin Energy LPG Limited* [2007] NSWSC 354, a party is alleging that the scheme ought to apply to all causes of action which commenced after 1 December 2004 (irrespective of when the cause of action accrued). Whilst the application was dismissed by Justice Hammerschlag, an appeal has been filed.
100. The Commonwealth Acts apply to all causes of action accruing on or after 26 July 2004.

Requirements of the Proportionate Liability Scheme

101. To fall within the proportionate liability scheme the proceedings must have the following elements:

- a. An apportionable claim, which is an "action for damages" for economic loss or property damage arising from a failure to take reasonable care. It excludes both claims for personal injury¹¹ and claims involving intentional or fraudulent conduct.¹²
- b. More than one "Concurrent Wrongdoer". A concurrent wrongdoer is "a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim"¹³.

102. A Concurrent Wrongdoer can be a plaintiff, a current defendant or cross-defendant, or a potential defendant or cross-defendant. In addition in some states, in particular New South Wales a stranger to the litigation who is **not** joined to the litigation can be a Concurrent Wrongdoer.

103. The Scheme is fairly recent. There are a number of articles which have been written about how it may operate in practice¹⁴. However, there is little caselaw or guidance by the New South Wales courts on the practical implications of the Scheme.

Concurrent Wrong-doers - What do defendants have to do about them?

104. In New South Wales, in apportioning liability the Court may have regard to the comparative responsibility of any concurrent wrongdoer, whether or not they are a party to the proceedings. This differs from

¹¹ Section 34(1)(a) *Civil Liability Act 2002*

¹² Section 34A(1) *Civil Liability Act 2002*

¹³ Section 34(2) *Civil Liability Act 2002*

¹⁴ *In whose Interest? Identifying the issues in proportionate liability litigation* by Greg William, (2006) 3(3) CL 25; *Proportionate liability; reviewing the 'national approach'* by Tracey Carver 2(5) CL 53; *What Proportionate liability means for defendants* by Stefan Sudweeks (2005) 2(8) CL 97; *Recent Developments in Proportionate Liability* (2005) 20(4) ILB 59; *Proportionate Liability in Australia: the devil in the detail* by Barbara McDonald (2004); *Problems with the New Regime of Proportionate Liability for Misleading and Deceptive Conduct* by Wayne Courtney (2005) 32 UWAL Rev 164

Victoria where the Court can only have regard to concurrent wrongdoers who are before the Court.

105. While the scheme appears to assume that a defendant will tell the plaintiff about concurrent wrongdoers at an early stage, that has not been mandated in the legislation. For example in New South Wales, the defendant may suffer a costs penalty if they fail to give notice of a potential concurrent wrongdoer as soon as practicable, and the plaintiff wastes costs because they were unaware of the other concurrent wrongdoer.
106. The Supreme Court has taken a firmer approach in each of *Nemeth v Prynew* [2005] NSWSC 1296, and *Ucak v Avante Developments* [2007] NSWSC 367 requiring defendants to fully plead in their defence the material facts on which they rely in order to assert that their liability is limited by reason of the Proportionate liability scheme. This is consistent with Justice McDougal's extra curial comments that in order to rely on the Proportionate liability scheme, a defendant had to plead its defence with the same degree of precision and particularity as would have been required with a cross-claim.
107. Accordingly, to the extent that defendants have hoped to plead reliance on the scheme and then hold their cards to their chest, the Courts are disinclined to allow it. Justice Einstein even went so far as to order that the defendant answer interrogatories explaining the basis of its opinion that another party was liable in respect of the same loss.
108. Insured defendants will need to be particularly wary because plaintiffs in general are unlikely to be enthused by Proportionate liability scheme (because it places the onus on them to sue each concurrent wrongdoer in order to recover all of their loss). A plaintiff may try to draft their claim so that it is either not an apportionable claim, or it is ambiguous.

For example, a plaintiff may plead negligence and intentional damage in the alternative.¹⁵

109. If that is the case, then a defendant will need to press for particulars prior to filing their defence, so that it is clear whether the plaintiff's case involves an apportionable claim.

How the Courts will deal with Concurrent Wrongdoers not joined

110. Under the New South Wales Scheme, the Courts are entitled to have regard to the comparative responsibilities of a concurrent wrongdoer who is not a party. This situation may occur where a plaintiff (because of the risk of an adverse cost order, trying to avoid a proliferation of parties or other reasons) does not join all persons identified by the defendant as a potential concurrent wrongdoer.
111. McDougall J in his paper noted that if the Court decides to have regard to the comparative responsibilities of a concurrent wrongdoer who is not a party, then logically it will try to determine the amount of damages to be payable by that concurrent wrong doer. This will be a difficult task for the Court as:
- a. the Court generally will not have heard evidence from the non-party, and would not have had the benefit of submissions;
 - b. the defendant's interest would be to try to fix the non party with as much of the responsibility as possible; and
 - c. the plaintiff has a competing interest to try to fix the defendant with as much responsibility as possible, although the plaintiff may lack the information or resources available to the defendants.

¹⁵ In proceedings involving both an apportionable claim and a claim that is not apportionable, liability for the apportionable claim is still determined under the *Civil Liability Act*.

112. In addition, it may not provide an ultimate benefit to the plaintiff as:

- a. the non-party will not be bound by the decision; and
- b. a future Court hearing a subsequent proceedings commenced by the plaintiff against the non-party will not be bound by the previous decision (on liability or quantum) thus giving rise to the risk of inconsistent judgments;

accordingly, a party who has ultimately sued all concurrent wrongdoers will not necessarily recover the full amount of their loss.

Conclusion

113. While these provisions are still fairly new, and have been aimed to limit 'deep pocket litigation' the difficulties of the potential for multiplicity in proceedings, and inconsistent judgements through plaintiffs re-running their cases against subsequent defendants is such that the overall impact on professional indemnity litigation is uncertain.

WHERE TO NOW?

114. Whilst over the past few years new court filings have been at unprecedented levels, one may query whether that situation will remain, in part having regard to:

- a. the pressure to wind back the tort reforms;
- b. the approach of the Courts to the Reform Acts; and
- c. the increased mobilisation of litigation funders.

The Pressure to wind back the Tort Reforms

115. The Tort reforms are not universally adored. Extra curial comments by senior members of the judiciary include criticisms of the extent of the Tort reform by both the Hon Justice D A Ipp AO who chaired the panel

into the legislative reforms, and also by the Hon P de Jersey AC, Chief Justice of Queensland.

116. Justice Ipp recently stated:

Certain of the statutory barriers that plaintiffs now face are inordinately high. ... Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen. It is difficult to accept that public sentiment will allow all these changes to remain long-term features of the law.¹⁶

117. Justice de Jersey's comments are even more pointed:

I have spoken previously about the two Queensland statutes of recent years which have significantly interfered with the awarding of compensation to those who have suffered injury because of the actionable fault of another. Now we would all accept that a person injured through the fault of another should be adequately compensated by that other. The issue is whether the legislative reforms went too far. Some change was justified, although legislation was not necessarily the only way of securing it. There had been a shift discernible from court decisions over recent years towards according more primacy to individual responsibility for those engaged in ordinary day-to-day activities. The tripping cases exemplify that.¹⁷

...

Last year I expressed serious reservation whether the so-called "insurance crisis" which led to the Ipp reforms was substantially caused by anything other than lack of prudent financial planning and forecasting by insurance companies, including premiums set uncommercially low for competitive reasons. The President of the Law Council of Australia, Mr John North, recently referred to current high levels of profitability in insurance companies. Many commentators have highlighted what has appeared to be minimal reduction in insurance premiums. Many remain to be convinced that the reduced financial burden on insurers, consequent upon these legislative changes, is benefiting anyone other than those insurers themselves.¹⁸

¹⁶ *The Metamorphosis of Slip and Fall* The Hon Justice D A Ipp AO 30 March 2007 paper delivered on 30 March 2007 to the New South Wales State Conference of the Australian Lawyers Alliance

¹⁷ *Challenges and opportunities for personal injuries practitioners in Queensland* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Queensland Law Society Personal Injuries Conference 28 July 2006 and *Tort Law Reform in Queensland: was it necessary, is it fair and who has benefited from it?* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Australian Lawyers Alliance, Queensland Conference.

¹⁸ *Tort Law Reform in Queensland: was it necessary, is it fair and who has benefited from it?* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Australian Lawyers Alliance, Queensland Conference.

118. Members of Queensland's judiciary appear to have the most grievance about:

- a. the \$250,000 cap on General Damages in Queensland;¹⁹
- b. the cap on past and future economic loss to no more than 3 times the average weekly earnings per week;²⁰
- c. the limitation on the award of damages for gratuitous services, being dependant on the provision of services for at least six months and at least six hours per week;²¹ and
- d. the inflexibility inherent in the new formula for calculating damages.²²

119. Despite comments such as these, there does not appear to be a serious move to wind back the provisions in any real respect.

The Courts approach to the Reform Acts

120. The New South Wales Court of Appeal approach to the CLA may suggest that that Court does not approach the CLA with enormous warmth, and that approach appears to be shared by the District Court.

121. In part this can be seen in a recent decision of the District Court, *Yu-Mei Chu v State Rail Authority of New South Wales* [2007] NSWDC 41. There, the Judge held the State Rail Authority (SRA) liable to compensate a woman who broke her ankle falling down stairs at a CityRail station, and then some weeks later at the home of an acquaintance was sexually assaulted when she couldn't escape due to the injury to her ankle.

122. The plaintiff suffered significant psychological injury, and contended that the sexual assault would not have occurred but for the injury to her

¹⁹ *ibid*
²⁰ *ibid*
²¹ *ibid*
²² *ibid*

ankle, because otherwise she would have been able to successfully repel the man and escape.

123. After considering the provisions of section 5D of the CLA Goldring DCJ held that but for the injury to her ankle, the plaintiff would not have suffered the sexual assault and its consequences. Goldring DCJ states:

I find, therefore, that the psychological injury to the plaintiff, which she would not have suffered but for the ankle injury, but which she did suffer because of the sexual assault, is within the scope of the defendant's responsibility. In terms of the common law, this would be a foreseeable consequence of the defendant's breach of duty, which led to the ankle injury.

124. The Judge held that the psychological injury was caused by the sexual assault, rather than the fall, but awarded damages both as a result of the physical injuries and loss sustained as a result of the fall and the psychological harm caused as a result of the rape.
125. The casual connection as found by the Court could be viewed as a convenient method of circumventing what was otherwise an obstacle in the plaintiff's claim. Not surprisingly, Railcorp has indicated that it will appeal the decision.
126. Turning to the New South Wales Court of Appeal, if the authorities over the last 12 months are an accurate barometer, the Court's approach is to:
- a. only rarely interfere with the discretion exercised by the Court below on damages for non-economic loss;
 - b. to suggest that the *CLA* does not carry with it any change to the previous test of when reasonable precautions have been taken against a risk of injury;
 - c. to indicate that "not insignificant" in the language of the *CLA*, is essentially the same as the previous test of a risk that is "not far fetched or fanciful"; and

- d. consider that where a risk is obvious that is not a factor that goes to whether or not a duty is owed.

127. On one view, the Court is interpreting the *CLA* in light of the previous common law, and reading some of the exclusionary provisions in the *CLA*, such as the dangerous risk provisions in a fairly narrow fashion.

The potential impact of litigation funders

128. Whilst litigation funding for claims is not new in Australia, historically, the common law prohibited maintenance (supporting litigation, regardless of the reason) and champerty (supporting litigation in exchange for a share of the proceeds of that litigation), on the basis that they are contrary to public policy. Although recent court decisions have made it plain that litigation funding is now a reality in Australia, the decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 by the High Court of Australia, there was some uncertainty as to what elements of a litigation funding agreement might render it contrary to public policy and an abuse of process.
129. The underlying proceeding (a class action) by a number of tobacco retailers against licensed wholesalers for the recovery of state licence fees, was financed by a litigation funder, Firmstone, on the basis that it would take one-third of the proceeds if the case were successful.
130. The High Court held that where the crimes and torts of maintenance and champerty had been abolished by statute (each of New South Wales, Victoria, South Australia and the ACT), there was no foundation to conclude that the people seek to profit from assisting in litigation, and seeking out and encouraging litigation could only be maintaining an action could be contrary to public policy.
131. Moreover, fears concerning the adverse effects on the processes of litigation and the fairness of the agreement between the funder and the plaintiff are not sufficient to justify an 'overarching rule of public policy' that would prohibit funded actions or require funding agreements to

meet particular standards concerning the funder's degree of control or reward. Such a rule 'would take too broad an axe to the problems that may be seen to lie behind the fears'. Similarly, fears for the administration of justice (for example, that the funder might inflame the damages or suppress evidence) can be adequately met by existing doctrines of abuse of process, and fears that lawyers might find themselves in positions of conflict are also adequately addressed by the existing rules regulating their duties to the court and clients.

132. The High Court's decision is likely to encourage the number of litigation funders and funded cases, particularly for class actions which through economies of scale may be seen to offer the best chance of a large return for funders.
133. A good example is that attached to this paper, being a copy of the investment portfolio of one of Australia's largest litigation funders, IMF Limited. This investment portfolio, which is available on the internet and is announced quarterly to ASIC, lists each of IMF's funded matters and its potential return.

THE DRAFT BILL TO AMEND THE INSURANCE CONTRACTS ACT 1984 (CTH)

Section 54

134. First, section 54 *ICA* seems to have given rise to more contentious litigation than almost any other section in the *ICA*. Its purpose was to prevent an insurer from arbitrarily and, so it was said, unfairly refusing to pay a claim where there was a breach of a policy condition, but where the breach was totally unrelated to the circumstances of the particular claim.
135. However, section 54 deals provides that where there was a breach of a policy condition by the insured, the underwriter could not refuse to pay

the claim, BUT the underwriter's remedy was that its liability in respect of the claim was reduced by the amount that fairly represented the extent to which the underwriter's interests were prejudiced as a result of the claim.

136. Secondly, the "*deeming*" clause in a claims made policy has been held to be a condition of the policy to which section 54 applied – so that where an insured became aware of a circumstance that was likely to give rise to a claim, and which ultimately did give rise to a claim against the insured, the failure of the insured to give notice of the circumstances during the policy period, being a condition of the deeming clause, could not be relied upon by the underwriter to deny the claim unless the underwriter could demonstrate prejudice – the fact of the claim itself not being the sort of prejudice that was required.
137. Underwriters generally responded to this decision by deleting the "*deeming*" clause from the policy. This was seen by the Regulator as an unfortunate backwards step that itself prejudiced the interests of insureds.
138. A new Section 54A has also been included in the Act which modifies the provisions and impact of Section 54 in relation to the cases of late notification of facts and circumstances.
139. Section 54A provides that despite what is said in Section 54, the underwriter may refuse a claim where the insured became aware of facts that might give rise to a claim, BUT did not give notice in writing to the underwriter of those facts during the policy period or within 28 days of expiry of the policy period.

140.

Section 40(3)

141. This section provides that where an insured gives notice of facts which might give rise to a claim against the insured as soon as was

reasonably practicable after the insured became aware of those facts but before the insurance cover expired, the insurer was not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

142. This provision provided the insured with some measure of protection and was a form of a modified "*deeming*" provision. However, the section provided that the notice of circumstances or facts that might give rise to a claim must be given to the underwriter during the policy period. It has been held that the provisions of Section 54 ICA (which might give some relief and "*protection*" to an insured for late notification) did not apply to benefit of an insured in relation to the provisions of Section 40(3). Particularly it did not benefit an insured who did not give notice of the facts and circumstances until after the contract had expired.

143. The proposed amendment to Section 40(3) provides as follows that:

- a. if the insured becomes aware, during the policy period, of facts that might give rise to a claim, and
- b. the insured gives notice in writing of those facts as soon as reasonably practicable but not later than 28 days after the contract expires,

then, the underwriter cannot refuse to pay the claim on the grounds of late notification (that is notification must be within the policy period or within 28 days after the expiry of the policy period).

144. We have already seen as mentioned above that the Courts in Australia have held that the relieving and prejudice provisions of Section 54 did not apply to the old Section 40(3) because the rights given under that section were statutory rights and were not rights implied into the contract of insurance. It was held that the relieving provisions of Section 54 applied to the provisions of a contract of insurance, it did not

apply to a statutory right given to the insured by the *Insurance Contracts Act*. Therefore, the new Section 40(3) giving a right of notification up to 28 days after expiry, being a statutory right, did not need the new provision of Section 54A for its efficacy. However, the legislature thought it was desirable to make the position clearer.

Section 40(4)

145. The amendments to Section 40 also contain two notification requirements that are important to an underwriter because failure to comply with these notification requirements may deny the underwriter the right to refuse a claim where notification of the facts of the claim were given more than 28 days after expiry.
146. The first notification requirement, in Section 40(4) ICA is that the insurer must clearly inform the insured of the effect of failing to give notice in writing to the insurer of facts that might give rise to a claim as soon as is reasonably practicable after becoming aware of them, but not later than 28 days after expiry of the insurance cover, and such notification of information must be given in writing not later than 14 days before the insurance cover provided by the contract expires.
147. Presumably, underwriters will adopt the practice of giving this notification at the same time as they give notification of the expiry of the policy pursuant to Section 58 which imposes on the underwriter an obligation to give to the insured within the same time period – that is 14 days before expiry – notice of the date of expiry of the policy and information as to whether or not the underwriter is prepared to negotiate to renew the insurance.
148. The second notification provision is that where an insured cancels the policy before expiry, the insurer must clearly inform the insured of the matters referred to previously by notice in writing as soon as reasonably practicable but not later than 14 days after the date on which the contract was cancelled.

149. These are important notification provisions because, as stated, the underwriter must already accept an extension of 28 days after expiry for notification of circumstances and, presumably, the late service of the notification required under sub-section 4, that is notification to the insured of the affect of the insured failing to give notice of the facts and circumstances before the expiry of the 28 day period, means that the insured can give such notification at any time he likes and still be entitled to coverage under the policy.
150. For example, if the notification by the underwriter, or more likely in your case the underwriting agent, is given say 13 days before expiry then there has not been a compliance with the strict provisions of sub-section 4 and the question would then arise as to whether the entitlement to give notification of circumstances is no longer 28 days but is an infinite period. This does not seem to have been addressed in the legislation. In other words, late notification by the underwriter of the notice to clearly inform the insured in sub-section 4 has not been considered.
151. It would seem to me fair and reasonable that in such circumstances the insured should have up to 42 days from the service of a "late" notification to give to advise of facts and circumstances – that is the 14 days notice plus the 28 days under sub-section 3.

Section 77

152. A quick reminder of the notification section of the Act in Section 77 which permits a notice that is required to be given under the act to be served by post. To find out what this means one then goes to Section 29 of the *Act's Interpretation Act 1901* which provides that the service shall deemed to have been effected by properly addressing, pre-paying and posting the document as a letter, and unless the contrary is provided, to have been effected at the time which the letter would be delivered in the ordinary course of post.

153. The "*giving*" of notice means that the insured must receive the notice by or within the stipulated period. This has a number of consequences:
- a. The underwriter must be in a position to prove the time period for the ordinary course of post;
 - b. must be able to prove, by the appropriate "*chain*" of evidence that the information notice was prepared and posted (nor always easy to do retrospectively in a large corporation); and
 - c. it is always open to the insured to prove that it was not in fact received.

Section 71

154. Section 71 says that where insurance is arranged by an insurance broker as agent of the insured (for example not an insurance broker acting under a binder) then, except in relation to an expiry notice under Section 58, notice can be given to the broker not to the insured. However, Section 71 only applies, at least at the present time, to the information to be given "*before a contract of insurance is entered into*" and therefore does not apply to the new provisions of Section 40(3) which, of course, relates to information to be given during the period of the policy and before expiry.

When do the amendments come into effect?

155. Finally, the amendments to Section 40 apply to a contract of insurance entered into 28 days after the date of Royal Assent. As disclosures are required at the end of the policy period, it would generally be 12 months after commencement before an insurer would be required to comply with the new disclosure requirements. Although, the potential liability to indemnity arises under any contract that comes into force from the date of commencement and the amendment.

COMMENTARY ON AMENDMENTS TO INSURANCE CONTRACTS ACT AFFECTING GENERAL INSURERS

The amendments have been introduced to address insurance market developments and judicial interpretations since the introduction of the Insurance Contracts Act in 1984 and have regard to the need to preserve an appropriate balance between the rights and obligations of insurers and insureds.

AMENDMENTS	COMMENTS
1. Good Faith 1.1 <u>Section 13</u> – amended to add a provision that a failure by a party to a contract of insurance to comply with the duty of utmost good faith is a breach of the requirements of the ICA. 1.2 <u>Section 14</u> - amended to provide also that if reliance by a party on a provision of the <i>Insurance Contracts Act</i> would be to fail to act with the utmost good faith, then the party cannot rely on that provision of the Act.	1.1 Previously, "good faith" was only an implied term in the contract of insurance. This amendment will permit ASIC to prosecute an insurer for a breach of the duty of good faith. The Legislation Impact Statement identified poor claims handling as an instance of bad faith by an insurer which would be a breach of <u>Section 13</u> and in respect of which ASIC may now prosecute the insurer. 1.2 <u>Section 14</u> - provided that if reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, then the party may not rely on that provision. The amendment extends this provision to prevent either party from relying on any provision of ICA if it would not be in good faith to do so.
2. Marine Insurance Exclusion 2.1 <u>Section 9A(1A)</u> – a new section providing that the <i>Marine Insurance Act</i> does not apply to a contract of marine insurance made in respect of the transportation by water of property that is used or intended to be used for personal, domestic or household purposes by: (a) the insured; (b) a relative of the insured; or (c) any person with whom the insured resides.	2.1 <u>Section 91(1)(d)</u> provides that if the <i>Marine Insurance Act</i> applies to a contract of insurance, then Insurance Contracts Act does not apply. This exclusion from the application of ICA does not apply to a contract made for the purposes stated in the new <u>Section 9A (1A)</u>.

AMENDMENTS	COMMENTS
3. Foreign Insurers 3.1 <u>Section 8(1A)</u> – a new section inserted to provide that the Act extends to contracts of insurance if either: (a) the contracts are entered into by a person who is domiciled in Australia; or (b) the contracts provide insurance cover against the risk of loss or damage occurring in Australia.	3.1 This amendment does not apply to contracts of insurance that are excluded by Section 9 (e.g. reinsurance, health insurance, marine insurance, workers compensation, etc.) The amendment addresses concerns expressed about direct offshore foreign insurers (DOFIs) having a competitive advantage over domestic insurers, lack of legislative control, less rigorous consumer protection laws, etc. The amendment states expressly that ICA applies to all contracts by DOFIs in respect of Australian insureds and Australian risks or both. It is acknowledged that the provisions may not be observed in all foreign courts.
4. Electronic Communication 4.1 <u>Section 72</u> (concerning legibility of writing) is amended to provide that a reference to the giving of a notice or other document to a person, in writing, is a reference to giving the person a notice or other document in writing that complies with the requirements (if any) prescribed (by Regulation) as to: (a) the content and legibility of the notice or other document; and (b) the material that may accompany the notice or other document. 4.2 Amendment to <u>Section 77(1)(b)(ii)</u> and new <u>Section 77(1A) to (1E)</u> providing that: • a notice required to be given to a natural person should be given by sending it to the address nominated by that person, or if no nomination, then the last-known address. • a notice that is given by electronic communication must, as far as practicable, be presented in a way that will allow the person to whom it is given to keep a copy of it. • the Regulations may make provision for electronic retention of notices or other documents,	4.1 The objective of the provision is to permit a range of means of communication between the parties, including electronic means, provided that the risks for the recipient in the use of electronic means are not unreasonable. This is achieved by imposing safeguards in regulations by prescribed restrictions and exemptions (including requiring hard copies of some notices in certain instances). 4.2 • The existing Section 77(1) provided that a notice may be given to a natural person's last-known address. • The amendment enables an Insured to nominate a service address.

AMENDMENTS	COMMENTS
electronic access to those notices or other documents by the person to whom they were given and that any specified (by Regulation) notice or other document must be given in hard copy form.	
5. Powers of ASIC 5.1 <u>Section 11F</u> – a new section providing that ASIC may intervene in any proceedings relating to a matter arising under the act and in such cases ASIC is taken to be a party to the proceedings and has all the rights, duties and liabilities of such a party.	5.1 This power will enable ASIC to intervene to assist insureds in legal proceedings against insurers. (See also S.55A)
6. Insured's Duty of Disclosure 6.1 <u>Section 21(1)(b)</u> - a substituted section replacing the existing sub-section (b) providing that the duty of disclosure by the insured includes a matter that a reasonable person in the circumstances could be expected to know to be a matter relevant to the insurer, having regard to factors including, but not limited to: (i) the nature and extent of the insurance cover to be provided; and (ii) the class of persons for whom that kind of insurance cover is provided in the ordinary course of the insurer's business; and	6.1 • The existing section does not include the words commencing "having regard to ..." which have been added to the section. • The existing test of disclosure was said to impose an unreasonable burden on insureds to know what an insurer regards as relevant to its decision whether to enter into a contract of insurance – no other consumer contract was said to impose a burden on the consumer to know what information the other party requires. • A proposed amendment was to limit the disclosure to answering specific questions only (cf Section 21A(3)). This was not adopted.
(i.) the circumstances in which the relevant contract of insurance has been entered into, including the nature and extent of any questions asked by the insurer.	• The amendment provides for the retention of the current objective/subjective disclosure but to clarify and explain the application of the duty by reference to a non-exclusive list of factors including the nature of the particular cover being provided, the class and type of persons who would ordinarily be expected to apply for that type of insurance and the circumstances in which the contract is entered into. • The comparable S.26(2) relating to misrepresentations has not been similarly amended in the proposed bill.

AMENDMENTS	COMMENTS
	The amendment will commence 1 year after Royal Assent and will apply to all contracts of insurance irrespective of whether the contracts have been entered into before or after that date.
7. Eligible Contracts of Insurance 7.1 The existing <u>Section 21A</u> is repealed and substituted by a new section that provides: (1) The section applies to all eligible contracts of insurance. (2) The insurer is taken to have waived compliance with the duty of disclosure unless, before the contract is entered into, the insurer requests the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms. (3) If: (a) in accordance with sub-section (2) the insurer requests the insured to answer one or more specific questions; and (b) the insurer asks the insured to disclose to the insurer any other matters that would be covered by the duty of disclosure in relation to the contract. (c) the insurer is taken to have waived compliance with the duty of disclosure in relation to those matters. (4) If: (a) in accordance with sub-section 2, the insurer requests the insured to answer one or more specific questions; and (b) in answer to each specific question the insured discloses each matter that:	7.1 <u>Section 21A</u> - applies to eligible contracts of insurance which are prescribed by Regulation (insurance in respect of motor vehicles, home buildings, home contents, sickness and accident, consumer credit and travel). - The "catch-all" questions are not permitted. - As Section 21A is not included in Section 11(10) (Section 22 Notice not required to be given on renewal), and the old Section 21A(1) has been repealed, the obligations arise at the time the contract is originally entered into <u>AND</u> on each renewal. - The amendment will apply to all contracts of insurance entered into 12 months after the date of Royal Assent.

AMENDMENTS	COMMENTS
(i) is known to the insured; and (ii) a reasonable person in the circumstances could be expected to have disclosed an answer to that question. (c) the insured is taken to have complied with the duty of disclosure.	
8. Insurer's Duty to Inform of Duty of Disclosure 8.1 The existing Section 22(1) is repealed and substituted by a new Section 22(1) containing the same provision as the old section but also now provides that the information is to include a statement that the duty of disclosure applies from the date the information is received by the insured until the proposed contract is entered into. 8.2 Section 21(3) provides that if the insurer complies with sub-section(1) in relation to the giving of the information and the insurer accepts an offer by the insured to enter into a contract of insurance, and the insurer's acceptance is made more than two months after the insured's most recent disclosure for the purpose of complying with the duty of disclosure, then the insurer must give to the insured, with the acceptance, a reminder notice stating that the duty of disclosure applies until the proposed contract is entered into. 8.3 The new prescribed forms of these notices of disclosure are set out in the Regulations.	8.1 <u>Section 22(1)</u> is concerned with the information that is to be given to an insured as to the general nature and effect of the duty of disclosure before a contract is entered into. 8.2 This imposes an additional notice requirement on the insurer in the stated circumstances. 8.3 • The provisions in the old subsection (3) to the effect that an insurer who has not complied with the provisions of this section may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent, are now found in subsection (5). • The amendment will apply to all contracts of insurance entered into 12 months after the date of Royal Assent.

AMENDMENTS	COMMENTS
9. Non-Standard Provisions 9.1 By the amendment to <u>Section 35(2)</u> the word "<i>clearly</i>" has been deleted and a new <u>Section 35(2A)</u> inserted which provides that the information to be provided by the insurer in the document must be worded and presented in a clear, concise and effective manner. 9.2 A new <u>Section 37(2)</u> has been inserted requiring that this notification be worded and presented in a clear, concise and effective manner.	9.1 • <u>Section 35</u> relates to "<i>Standard Cover</i>" in relation to those classes of insurance prescribed in the Regulations (motor, householders, sickness and accident, consumer, travel). • <u>Section 35(2)</u> provides for the giving of a "<i>Derogation Notice</i>", varying the "<i>standard</i>" provisions in the contract of insurance that is issued. • The old Section 35(2) provided that the insurer "<i>clearly</i>" inform the insured in writing of the provisions in the Derogation Notice. • It may be that the giving of a copy of the policy with the proposal may not be sufficient to comply. 9.2 • Similarly, <u>Section 37</u> requires notification of "<i>unusual terms</i>" in a contract of insurance that complies with these requirements. • These amendments will commence 2 years after Royal Assent to allow insurer's time to amend their disclosure documents
10 Restriction on Insurers' Contractual Rights and Remedies 10.1 <u>Section 31</u> has been amended to provide that the Court's existing power to disregard avoidance of a contract of insurance for fraudulent non-disclosure or misrepresentation, where it would be harsh and unfair not to do so, also applies to a circumstance where the liability of the insurer in respect of the loss that is the subject of the proceedings has been significantly reduced (including being reduced to nil) on the ground of innocent non-disclosure or misrepresentation.	10.1 Previously this section only applied to fraudulent breach of duty of disclosure. It now may be used by a Court to excuse innocent breach of the duty of disclosure by the Insured, or in the case of a fraudulent non-disclosure where the insurer has not avoided the contract.
11. Statutory Policy – Premium 11.1 <u>Section 58(4)(b)</u> is amended and <u>Sections 58(5) and (6)</u> are repealed and replaced by a new <u>Section 58(4)(b)</u> the effect of which being that the premium payable by the insured, in the	11.1 <u>Section 58(3)</u> creates a statutory policy for the benefit of the insured where a loss or claim occurs in the circumstances where the insurer does not give a 14 day notice of expiry of the

AMENDMENTS	COMMENTS
event of a claim, for the statutory policy is an amount equal to the amount that would have been payable if the original contract had been renewed for the same period and on the same terms and conditions.	policy. Previously, the premium in the case of a partial loss was for the period to the date of claim. Now the insured must pay the premium for the same period as the original policy.
12. Third Party Beneficiaries 12.1 A new term "<i>Third Party Beneficiaries</i>" is introduced into the Act and is defined in <u>Section 11(1)</u> as meaning a person who is not a party to the contract of insurance but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends. 12.2 Amendments have been made to: • <u>Section 41</u> (liability insurance: insured may require insurer to provide that election can be required by a TPB.) • <u>Section 74</u> (policy documents to be supplied on request) to provide that the rights given to the insured in those sections extend also to Third Party Beneficiaries. • <u>Section 48</u> (entitlement of name to persons to claim) to substitute the term "<i>Third Party Beneficiaries</i>". • <u>Section 51</u> (right of third party to recover against insurer) to permit a claimant against a Third Party Beneficiary to recover against the insurer where the claim is made against the Third Party Beneficiary.	12.1 The amendments relating to TPB commence 12 months after the Act is passed to allow insurers a reasonable opportunity to factor the new rights and obligations of TPB into their business operations.
13. Subrogation 13.1 <u>Section 67</u> (rights with respect to monies recovered under subrogation) has been amended to provide: (a) that the insurer may retain from the amount recovered (where that amount exceeds the loss paid under the policy) the amount paid by the insurer for administrative and legal costs incurred in connection with the	13.1 This amendment clarifies the right of the insurer to retain administrative, legal costs and interest when subrogation recovery exceeds the amount of the indemnity paid by the insurer.

AMENDMENTS	COMMENTS
recovery; and (b) that where interest is recovered from a third party, such amount is to be divided fairly between the insurer and the insured.	
14. Claims Made (and Notified) Policies 14.1 <u>Section 40</u> (concerning certain contracts of liability insurance) is replaced by a new section which provides as follows: (1) The section applies in relation to a contract of liability insurance the effect of which is: (a) that the insurer's liability is excluded or limited if a claim against the insured in respect of a loss suffered by some other person is not made before the insurance cover provided by the contract expires; or (b) that the insurer's liability is excluded or limited if: (i.) a claim against the insured in respect of a loss suffered by some other person is not made before the insurance cover provided by the contract expires; or (ii.) a claim of that kind is made before the insurance cover provided by the contract expires, but notice of the claim is not given to the insurer before the insurance cover expires. 14.2 The existing <u>Section 40(3)</u> is replaced by a new section that provides that if: (a) the insured becomes aware, during the period in which insurance cover is provided by the contract, or facts that might give rise to a claim against the insured; and (b) the insured gives notice in writing to the insurer of those facts as soon as is reasonably	14.1 • A new definition of claims made and notified insurance is introduced. • It is a policy that provides that there is no cover where a claim against the insured is not made before the policy expires <u>OR</u> a claim is made against the insured before the policy expires but notice of the claim is not given by the insured to the insurer before the policy expires. • The section now covers both a claims made and notified policy (as it previously did) and a claims made policy. 14.2 • The present <u>Section 40(3)</u> operates so that where an insured notifies the insurer of facts that might give rise to a claim during the policy period, the Insurer is obliged to cover that insured for any claim that eventually arises. • The new provision allows an insured an additional 28 days after expiry to notify.

AMENDMENTS	COMMENTS
practicable after becoming aware of them, but no later than 28 days after the insurance cover provided by the contract expires; (c) the insurer is not relieved of liability under the contract in respect of the claim, when made, only because the claim is made or notified after the insurance cover provided by the contract is expired. 14.3 New <u>Sections</u>: <u>40(4)</u> The insurer must clearly inform the insured of the affect of failing to give notice under sub-section (3) by notice in writing given not later than 14 days before the insurance cover provided by the contract expires. <u>40(5)</u> If the insured cancels the contract of insurance before the insurance cover provided by it expires, the insurer must clearly advise the insured of the effect of failing to give notice under sub-section (3) by notice in writing as soon as reasonably practicable, but not later than 14 days after the date on which the contract was cancelled. 14.4 <u>Section 54A</u> applies in relation to a contract of insurance to which <u>Section 40</u> applies. It provides that despite <u>Section 54(1)</u> (insurer may not refuse to pay claims in certain circumstances), the insurer may refuse to pay a claim against the insured if: (a) the insured became aware, during the period in which the insurance cover was provided by the contract, of facts that might give rise to such a claim; and (b) the insured did not give notice in writing to the insurer of those facts: (i.) during the period of insurance; or	14.3 These notification provisions are new and require notices to be given prior to the expiry of the policy. 14.4 • <u>Section 54A</u> is a new section inserted arising from the changes made to Section 40 above. The provision of section 54(1) that precludes an insurer from refusing to pay the claim but reduces its liability to the extent that it has been prejudiced, does not apply to these policies. • The amendment applies to policies entered into after the date of the amendment coming into effect. • If the insured does not notify within 28 days of the expiry of a policy, there is no relief available to the insured who notifies after that period. • The amendment will apply to all contracts of insurance entered into

AMENDMENTS	COMMENTS
(ii.) within 28 days after that cover had expired.	28 days after Royal Assent. As disclosures are required at the end of the policy period, it would generally be 12 months after commencement before an insurer would be required to comply with the new disclosure requirements.
15. New Regulations 15.1 <u>Section 21A(9)</u> defines "<i>eligible contract of insurance</i>" as meaning a contract of insurance that is specified in the Regulations. The Regulation is Regulation 2B. The Regulation is amended to delete the words "<i>is for new business</i>". 15.2 The rate of interest payable by an insurer under <u>Section 67</u> on withheld claim payments is the 10 year Treasury Bond Yield published by the Reserve Bank plus 5%. 15.3 The new <u>Section 72</u> (see paragraph 4.1 above) provides for electronic communication of a Notice or other document to be given to a person in writing under the Act. Regulation 34 provides in relation to such electronic communication the following: (a) It must not incorporate any image, message, advertisement or other feature that: (i.) distracts the recipient; or (ii.) otherwise reduces or interferes with the recipient's ability to understand the Notice or document; and (b) Must be presented in a way that clearly identifies the information that is part of the notice of document; and (c) Must be presented in a way that would reasonably be expected to enable the recipient to be readily be able to scroll through the whole of the Notice or document. The electronic communication by an insurer must show its full address (not a Post Office Box) and telephone number.	15.1 The affect of this is that the notice requirements apply before each contract (including) renewals entered into). 15.2 Previously the rate was plus 3%. 15.3 This regulates the forum of the content of the notices.

AMENDMENTS	COMMENTS
15.4 <u>Schedule 1</u> to the Regulations which contains the form of the writing to inform insureds of the general nature and affect of the duty of disclosure (required by <u>Section 22</u>) has been amended as follows: 1. To state that the duty to disclose a matter applies until the proposed contract is entered into. 2. Amends the second last paragraph to read: <i>"... the insurer may be entitled to reduce its liability under the contract in relation to a claim and/or may cancel the contract"</i> (amendment highlighted) 3. The last paragraph of the Notice is amended as follows: <i>"If the non-disclosure or misrepresentation is fraudulent, the insurer may also have the option of refusing to pay a claim and treating the contract as never having worked"</i> (amendment highlighted)	



RELEASE TO AUSTRALIAN STOCK EXCHANGE (“ASX”)

THURSDAY, 26 APRIL 2007

CASE INVESTMENT PORTFOLIO

1. Attached hereto is a copy of the IMF Case Investment Portfolio as at 31 March 2007.
2. IMF will continue to update the Portfolio on a quarterly basis.

A handwritten signature in black ink that reads "John Walker". The signature is written in a cursive, flowing style.

Managing Director

IMF Investment Portfolio Report as at 31 March 2007 (Budgeted IMF Fee >\$500,000)			
Matter	Latest Completion Date ¹	Maximum Claim Value ¹ \$000's	Insolvency/ Group/Commercial
ACT v Newlands	December 2009 ²	5,000	Insolvency
Ainsworth ats SilkEarl	April 2007	5,000	Commercial
Allstate Explorations NL	December 2007	³	Group
AM Corporation, Smith, Rich & Lifetrack	June 2008	20,000	Group
Aristocrat Leisure Ltd	December 2007	240,000	Group
AWB	February 2009	25,000	Group
Centaur Mining v Gutnick	August 2008	30,000	Insolvency
Challenger ats Unit Holders	December 2009	5,000	Group
Concept Equity v Challenger	December 2007	2,000	Commercial
Coplex Resources NL	June 2008	20,000	Insolvency
Finance Brokers Case	June 2007	88,000	Group
Global Finance	October 2007	10,000	Insolvency
Interline v Transpacific	November 2007	5,000	Commercial
ION Limited ⁴	December 2008	65,000	Group
Kingsheath Club of the Clubs v Stamoulis	August 2007	5,000	Insolvency
Marlor Domestic Appliances Pty Ltd v Directors of TVSN	December 2008	5,000	Commercial
Meadow Springs v Colliers	June 2007	10,000	Insolvency
Multiplex Limited	December 2008	12,000	Commercial
NEIB v Minara Resources	February 2008	26,000	Commercial
Nomad Telecommunications	March 2008	15,000	Insolvency
Pan Pharmaceuticals ⁴	November 2007	30,000	Group
Peninsula Shipping	July 2008	6,000	Commercial
Performance Finance	December 2007	9,000	Insolvency
QPSX	December 2007	⁵	Commercial
Reynolds Wines (in liquidation)	June 2007	5,000	Insolvency
Shenton Park	December 2008	10,000	Insolvency
Sons of Gwalia (Administrators Appointed) ⁴	December 2007	40,000	Group
Spatial v Telstra	December 2008	50,000	Commercial
Symonds	September 2007	14,000	Commercial
Totterdell v Pollock	December 2008	20,000	Insolvency
Truckies v Pilbara Manganese Pty Ltd	December 2007	6,000	Group
Village Life	December 2008	25,000	Commercial
Vogue Homes	October 2007	3,000	Insolvency
Westpoint	August 2008	15,000	Commercial
Wright	December 2007	⁵	Commercial
TOTAL		926,000	

1 Note: The Latest Completion Date is IMF's current best assessment of when the case will be finalised. The case may finalise earlier than or later than this date. Equally, the Maximum Claim Value is IMF's current best estimate. ***The actual recovery in each case may differ significantly from the estimates.***

2 This funding agreement is subject to creditor or court approval.

3 Macquarie announced on 5 May 2006 that it will "give the intercompany debts of Allstate Explorations NL (which the Bank purchased in 2002) to a trust for the benefit of the mine employees".

4 The recoverable claim value is likely to be dependant upon percentage distributions to creditors by the respective external controller.

5 The claim value in respect of this matter is too uncertain to currently identify any recoverable amount, although the maximum claim value exceeds \$50 million.

About Us

Curwoods Lawyers – Curwoods is led by partners with a passion for using their legal knowledge to assist clients achieve their business goals. We place equal emphasis on legal excellence and service quality.

Understanding our clients' needs is paramount. This goes beyond industry and organisation knowledge and extends to operating style and tailored services to meet clients' changing needs.

Our new premises in Australia Square Plaza offer clients the latest in facilities and our significant investment in technology and knowledge sharing systems ensure fast, accurate advice and service.

Founded by Clive Curwood in 1967, the firm of Curwoods Lawyers has worked primarily with the insurance industry for almost 40 years. Providing expert assistance to global underwriters, their agents and insureds has been the core of Curwoods' business for many years.

While best known for its insurance practice, the firm has in recent years developed a thriving dispute resolution and commercial practice and acts for major construction companies, energy providers and many small to medium sized enterprises.

Service standards, checklists and making full use of the functionality of new IT systems has streamlined processes and improved speed and accuracy without adding any additional cost to our legal services.

Areas of Practice

Providing expert legal advice and representation to the insurance industry is the core business of the firm. With a track record of achieving successful claims outcomes across the majority of business classes, the firm is viewed as a leading insurance law practice.

Our insurance team has a proven track record in the areas of:

- Professional indemnity
- Public liability
- Products liability (including asbestos claims and latent diseases claims)
- Fidelity insurance
- Directors' and officers' liability
- Motor accident personal injury
- Motor accident property damage
- Life and disability insurance
- Householders' insurance
- ISR claims
- Workers' compensation

Further details of our practice can be found on our website www.curwoods.com.au.

We offer real time claims information through our Extranet, particularly useful for London Underwriters given the time difference.

We publish case notes on significant Court of Appeal and High Court decisions within 24 hours of Judgment. Case notes can be found on our web page. To subscribe to our distribution list, e-mail scott.kennedy@curwoods.com.au or peter.ford@curwoods.com.au.

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Our People

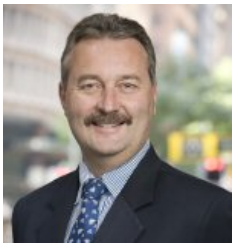


Clive Curwood | Partner

Clive is the founding partner of the firm and highly respected for his legal acumen in the area of insurance law. For many of the firm's largest clients he performs the role of quality assurance partner.

Clive has represented clients in Federal Court class actions and has acted for directors' and officers' liability insurers involved in major commercial litigation as well as for insurers involved in major personal injury litigation.

He has been appointed to the Legal Aid Review Committee; is a member of The Australian Insurance Law Association; has acted as an arbitrator; and has served on various litigation practice and insurance committees of the Law Society of NSW.



Brent Hedges | Partner

Brent is a founding partner of the firm. He has over 30 years' experience advising on a range of legal issues affecting the insurance industry. Brent's experience spans advising insurers, brokers, claims agents and underwriters, and the London markets.

Brent has:

- in the Court of Appeal of NSW successfully overturned a decision of the District Court of NSW involving a claim for personal injury damages sustained whilst playing sport. Questions of personal responsibility were involved in achieving this result. The potential exposure to the underwriter was significant;
- currently jointly defending an action brought by the Australian Competition & Consumer Commission against eleven defendants for alleged breaches of the *Trade Practices Act*;
- advised an underwriter on the denial of indemnity for breach of policy condition due to failure to exercise reasonable care. The potential exposure was \$8 million;



Scott Kennedy | Partner

Scott is a member of the firm's three-partner Management Committee and has been a strong advocate for diversifying the firm's practice, and investing in the systems, people and facilities required to meet the demands of Australia's sophisticated and demanding legal market.

Scott has:

- advised insurers and publicly listed companies on insurance policy interpretation; severity claims; large property damage claims; associated business interruption claims; and risk review;
- advised insurers or acted in the interests of public companies involved in significant property damage claims; domestic building disputes; multi-million dollar contractual disputes; fire claims; severity and personal injury claims;
- acted for Contractors in disputes over the construction of the Sydney Casino, including complex issues of indemnity under policies of insurance with the principal and sub-contractors and expeditiously resolving claims brought by sub-contractors to legal proceedings;
- acted on behalf of the building owner in a catastrophic brain damage claim to a minor who was injured at a shopping centre, successfully passing a claim on to the builder.



Peter Ford | Partner

Peter is one of Australia's most respected insurance lawyers. Known for his 'easy' manner, accurate judgement and service ethos, he has developed a strong public liability team within the firm. This team is the preferred supplier to a number of major general insurers.

Peter has advised on public liability and product liability claims for almost 25 years, ranging from occupier's liability claims, commercial, farm and domestic to defective product actions.

Peter has:

- advised the Club and Hotel Industry in relation to *Liquor Act* claims;
- acted for a number of major shopping centre groups;
- advised brokers, insurers and their clients on risk management, policy wordings and claims handling;
- considerable experience in catastrophic claims.

**Linda Hamilton | Partner**

Linda has practised in public liability and professional indemnity litigation since 1990.

Linda was formerly the national manager of liability and financial risk claims at a large general insurer and has acquired a knowledge of most insurance products through that experience.

Linda has advised on public liability, product liability, professional indemnity and financial risk claims and products for 17 years, in addition to managing one of the largest and most diverse claims management operations in Australia.

Linda has:

- Acted on behalf of private schools and religious groups in claims involving illegal acts of employees and ministers and due to the personal injury and death of students;
- Acted for structural, geotechnical and mechanical engineers in professional indemnity litigation;
- Provided advice and acted for, the mortgage broking industry and brokers in Australia;
- Acted for real estate agents, valuers and property and construction professionals nationally;
- Acted in commercial disputes including rectification of insurance contracts and contracts interpretation.