



# **Civil Liability Act 2003**

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Queensland

# Civil Liability Act 2003

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# Civil Liability Act 2003

**An Act to reform the law of civil liability for negligent acts, and for other purposes**

## Chapter 1 Preliminary

### Part 1 Introduction

#### 1 Short title

This Act may be cited as the *Civil Liability Act 2003*.

#### 2 Commencement

- (1) Subject to subsections (2) and (3), this Act is taken to have commenced on 2 December 2002.
- (2) The following provisions commence on assent—
  - chapter 2, part 1, division 7, part 3, division 2 and part 4
  - chapter 3, parts 2 and 4
  - sections 53, 54 and 56 to 60
  - chapter 4, parts 1 and 2
  - chapter 5
  - chapter 6 and schedule 1.
- (3) Chapter 2, part 2 commences on a day to be fixed by proclamation.

### **3 Notes in text**

A note in the text of this Act is part of this Act.

## **Part 2 Application of Act**

### **4 Application of Act**

- (1) Subject to section 5, this Act applies to any civil claim for damages for harm.
- (2) The following provisions apply only in relation to a breach of duty happening on or after 2 December 2002—
  - chapter 2, part 1, divisions 1 to 6
  - chapter 2, part 3, division 1
  - section 55.
- (3) Chapter 2, part 2 applies only in relation to a breach of duty happening on or after the commencement of this subsection.
- (4) The following provisions apply in relation to a breach of duty happening on or after the day this Act receives assent—
  - chapter 2, part 4
  - sections 52, 54, 56, 57, 58, 59, 60, 72.
- (5) Chapter 2, part 5 applies only in relation to a breach of duty happening on or after the commencement of this subsection.
- (6) Sections 64, 65, 66, 67 and 73 apply in relation to personal injuries damages regardless of when the injury happened.

### **5 Civil liability excluded from Act**

- (1) This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting from the breach of duty is or includes—

- 
- (a) an injury for which compensation is payable under the *WorkCover Queensland Act 1996*, other than an injury to which section 36(1)(c) or 37 of that Act applies; or

*Example for paragraph (a)—*

A worker employed under a contract of service with a labour hire company is injured at the premises of a host employer while driving a defective machine. The worker pursues claims for damages for civil liability against the labour hire company, the host employer and the manufacturer of the machine. The worker suffers a number of injuries but only 1 of them is accepted as an injury under the *WorkCover Queensland Act 1996*, section 34. This Act does not apply to any of the claims for damages.

- (b) an injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies; or
- (c) an injury that is a dust-related condition; or
- (d) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.
- (2) For subsection (1)(a) or (b), the following is immaterial—
- (a) whether compensation for the injury is actually claimed under the relevant Workers' Compensation Act;
- (b) whether the entitlement to seek damages for the injury is regulated under that Act.
- (3) Despite subsection (1)(c) and (d), this Act applies for deciding awards of section 59A damages relating to an injury mentioned in subsection (1)(c) or (d).
- (4) To remove any doubt, it is declared that a breach of duty mentioned in subsection (1) includes a breach of duty giving rise to a dependency claim.
- (5) In this section—
- compensation** for injury, under a relevant Workers' Compensation Act, includes payment of—
- (a) reasonable expenses for medical treatment or attendance; and

(b) funeral expenses.

*relevant Workers' Compensation Act* means—

- (a) for compensation, or an entitlement to seek damages, for an injury mentioned in subsection (1)(a)—the *WorkCover Queensland Act 1996*; or
- (b) for compensation, or an entitlement to seek damages, for an injury mentioned in subsection (1)(b)—the *Workers' Compensation and Rehabilitation Act 2003*.

## 6 Act binds all persons

This Act binds all persons including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.

## 7 Provisions relating to operation of Act

- (1) Subject to sections 5(3) and 59A, this Act does not create or confer any cause of civil action for the recovery of damages.
- (2) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

*Note—*

See, for example, the following provisions giving protection from civil liability to particular persons—

- the *Forestry Act 1959*, sections 96E, 96F and 96G
  - the *Marine Parks Act 2004*, section 147
  - the *Nature Conservation Act 1992*, section 142
  - the *Recreation Areas Management Act 2006*, section 228.
- (3) This Act, other than chapter 2, part 2 and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the *express provision*) in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

- (4) Subsection (3) extends to any provision of this Act even if the provision applies to liability in contract.
- (5) This Act is not a codification of the law relating to civil claims for damages for harm.

## **Part 3 Interpretation**

### **8 Definitions**

The dictionary in schedule 2 defines particular words used in this Act.

## **Chapter 2 Civil liability for harm**

### **Part 1 Breach of duty**

#### **Division 1 General standard of care**

### **9 General principles**

- (1) A person does not breach a duty to take precautions against a risk of harm unless—
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
- (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;
  - (d) the social utility of the activity that creates the risk of harm.

## 10 Other principles

In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

## Division 2 Causation

### 11 General principles

- (1) A decision that a breach of duty caused particular harm comprises the following elements—

- (a) the breach of duty was a necessary condition of the occurrence of the harm (*factual causation*);
  - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (*scope of liability*).
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
- (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
  - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

## 12 Onus of proof

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

## Division 3                      Assumption of risk

### 13            Meaning of *obvious risk*

- (1) For this division, an *obvious risk* to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

*Examples for subsection (5)—*

- 1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.
- 2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.

### 14            Persons suffering harm presumed to be aware of obvious risks

- (1) If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.



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*Editor's note—*

'Voluntary assumption of risk' is sometimes stated as 'volenti non fit injuria'.

- (2) For this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

## **15 No proactive duty to warn of obvious risk**

- (1) A person (*defendant*) does not owe a duty to another person (*plaintiff*) to warn of an obvious risk to the plaintiff.
- (2) Subsection (1) does not apply if—
  - (a) the plaintiff has requested advice or information about the risk from the defendant; or
  - (b) the defendant is required by a written law to warn the plaintiff of the risk; or
  - (c) the defendant is a professional, other than a doctor, and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

*Note—*

In relation to paragraphs (a) and (b), see section 21 for the duty of a doctor to warn of risk.

- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.
- (4) In this section—

*a professional* has the same meaning as it has in division 5.

## **16 No liability for materialisation of inherent risk**

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

[s 17]

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- (2) An inherent risk is a risk of something occurring that can not be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

## **Division 4                    Dangerous recreational activities**

### **17            Application of div 4**

- (1) This division applies only in relation to liability in negligence for harm to a person resulting from a dangerous recreational activity engaged in by the plaintiff.
- (2) This division does not limit the operation of division 3 in relation to a recreational activity.

### **18            Definitions for div 4**

In this division—

*dangerous recreational activity* means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.

*obvious risk* has the same meaning as it has in division 3.

### **19            No liability for personal injury suffered from obvious risks of dangerous recreational activities**

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.
- (2) This section applies whether or not the person suffering harm was aware of the risk.

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## Division 5                      Duty of professionals

### 20            Definition for div 5

In this division—

*a professional* means a person practising a profession.

### 21            Proactive and reactive duty of doctor to warn of risk

(1) A doctor does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of being given medical advice) that will involve a risk of personal injury to the patient, unless the doctor at that time fails to give or arrange to be given to the patient the following information about the risk—

- (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
- (b) information that the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

(2) In this section—

*patient*, when used in a context of giving or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

*Example—*

the responsibility a parent has for an infant child

### 22            Standard of care for professionals

(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the

professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.

- (2) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.
- (3) The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.

## **Division 6                      Contributory negligence**

### **23            Standard of care in relation to contributory negligence**

- (1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence in failing to take precautions against the risk of that harm.
- (2) For that purpose—
  - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

- (b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

## **24 Contributory negligence can defeat claim**

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

## **Division 7                    Enhancement of public safety**

### **25 Definition for div 7**

In this division—

*person in distress* includes—

- (a) a person who is injured, apparently injured or at risk of injury; and
- (b) a person who is suffering, or apparently suffering, from an illness.

### **26 Protection of persons performing duties for entities to enhance public safety**

- (1) Civil liability does not attach to a person in relation to an act done or omitted in the course of rendering first aid or other aid or assistance to a person in distress if—
  - (a) the first aid or other aid or assistance is given by the person while performing duties to enhance public safety for an entity prescribed under a regulation that provides services to enhance public safety; and
  - (b) the first aid or other aid or assistance is given in circumstances of emergency; and

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- (c) the act is done or omitted in good faith and without reckless disregard for the safety of the person in distress or someone else.
- (2) Subsection (1) does not limit or affect the *Law Reform Act 1995*, part 5.

## **27 Protection of prescribed entities performing duties to enhance public safety**

- (1) Civil liability does not attach to an entity, prescribed under a regulation, that provides services to enhance public safety in relation to an act done or omitted in the course of rendering first aid or other aid or assistance to a person in distress if—
  - (a) the first aid or other aid or assistance is given by the entity while performing duties to enhance public safety; and
  - (b) the first aid or other aid or assistance is given in circumstances of emergency; and
  - (c) the act is done or omitted in good faith and without reckless disregard for the safety of the person in distress or someone else.
- (2) Subsection (1) does not limit or affect the *Law Reform Act 1995*, part 5.

## **Part 2 Proportionate liability**

### **28 Application of pt 2**

- (1) This part applies to either or both of the following claims (*apportionable claim*)—
  - (a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;

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- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1989* for a contravention of the Australian Consumer Law (Queensland), section 18.
  - (2) For this part, if more than 1 claim of a kind mentioned in subsection (1)(a) or (1)(b) or both provisions is based on the same loss or damage, the claims must be treated as a single apportionable claim.
  - (3) This part does not apply to a claim—
    - (a) arising out of personal injury; or
    - (b) by a consumer.
  - (4) Also, this part does not apply to a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several.
  - (5) A provision of this part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.

## 29 Definitions for pt 2

In this part—

***apportionable claim*** see section 28(1).

***consumer*** means an individual whose claim is based on rights relating to goods or services, or both, in circumstances where the particular goods or services—

- (a) are being acquired for personal, domestic or household use or consumption; or
- (b) relate to advice given by a professional to the individual for the individual's use, other than for a business carried on by the individual whether solely or as a member of a business partnership.

***court***, in relation to a claim for damages, means any court by or before which the claim falls to be decided.

*defendant* includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this part, under rules of court or otherwise.

### **30 Who is a concurrent wrongdoer**

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.
- (2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

### **31 Proportionate liability for apportionable claims**

- (1) In any proceeding involving an apportionable claim—
  - (a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage; and
  - (b) judgment must not be given against the defendant for more than that amount in relation to the claim.
- (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
  - (a) liability for the apportionable claim, to the extent it involves concurrent wrongdoers, is to be decided in accordance with this part; and
  - (b) liability for the other claim, and the apportionable claim to the extent it is not provided for under paragraph (a), is to be decided in accordance with the legal rules, if any, that, apart from this part, are relevant.
- (3) In apportioning responsibility between defendants in a proceeding the court may have regard to the comparative



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responsibility of any concurrent wrongdoer who is not a party to the proceeding.

- (4) This section applies to a proceeding in relation to an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding.

## **32 Onus of parties to identify all relevant parties**

- (1) A person (*claimant*) who makes a claim to which this part applies is to make the claim against all persons the claimant has reasonable grounds to believe may be liable for the loss or damage.
- (2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has—
- (a) that is likely to help the claimant to identify and locate any other person (not being a concurrent wrongdoer known to the claimant) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and
  - (b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.
- (3) The concurrent wrongdoer must give the information to the claimant, in writing, as soon as practicable after becoming aware of the claim being made or of the information, whichever is the later.
- (4) If the claimant fails to comply with the claimant's obligations under this section, a court may, on a concurrent wrongdoer's application, make orders as it considers just and equitable in the circumstances of the case on the following—
- (a) apportionment of damages proven to have been claimable;
  - (b) costs thrown away as a result of the failure to comply.

[s 32A]

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- (5) If a concurrent wrongdoer fails to comply with the concurrent wrongdoer's obligations under this section, a court may on application, if it considers it just and equitable to do so, make either or both of the following orders—
  - (a) an order that the concurrent wrongdoer is severally liable for any award of damages made;
  - (b) an order that the concurrent wrongdoer pay costs thrown away as a result of the failure to comply.
- (6) However if, as a result of information given by a concurrent wrongdoer under subsection (2), the claimant joins another party to the proceeding for the claim, and that party is found not to be liable to the claimant, the court may make orders about costs as it considers just and equitable in the circumstances of the case.

### **32A Contribution not recoverable from concurrent wrongdoer**

Subject to this part, a concurrent wrongdoer against whom judgment is given under this part in relation to an apportionable claim—

- (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the damages are recovered or recoverable in the same proceeding in which the judgment is given; and
- (b) can not be required to indemnify the other concurrent wrongdoer.

### **32B Subsequent actions**

- (1) In relation to an apportionable claim, nothing in this part prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.
- (2) However, in any proceeding in relation to the other action, the plaintiff can not recover an amount of damages that, having

regard to any damages previously recovered by the plaintiff in relation to the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.

### **32C Joining non-party concurrent wrongdoer in the action**

- (1) Subject to subsection (2), the court may give leave for any 1 or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

### **32D What if a concurrent wrongdoer is fraudulent**

Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.

### **32E What if a concurrent wrongdoer intends to cause loss or damage**

Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who is found to have intended to cause the loss or damage suffered, and is found liable for damages, is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.

### **32F What if a concurrent wrongdoer is proved to have engaged in misleading or deceptive conduct under the Fair Trading Act**

Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who

contravenes the Australian Consumer Law (Queensland), section 18 is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.

### **32G Liability for contributory negligence not affected**

In apportioning responsibility as between concurrent wrongdoers, the court is to exclude the proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law.

### **32H Concurrent wrongdoer may seek contribution from person not a party to the original proceeding**

Nothing in this part prevents a concurrent wrongdoer from seeking, in another proceeding, contribution from someone else in relation to the apportionable claim.

### **32I Part not to affect other liability**

Nothing in this part—

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or
- (b) prevents a person from being held jointly and severally liable for the damages awarded against another person as agent of the person; or
- (c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (d) prevents a court from awarding exemplary or punitive damages against a defendant in a proceeding.

### **33 Court may give directions**

- (1) This section applies for the purposes of this part in relation to a claim for damages.
- (2) To the extent a matter about the court's procedure is not provided for by rules of court, the matter may be dealt with by a direction under subsection (3).
- (3) On application by a party, the court may give directions about the way a matter not dealt with by the rules is to proceed.

## **Part 2A Liability of institutions for child abuse**

### **Division 1 Preliminary**

#### **33A Definitions for part**

In this part—

*abuse*, of a child—

- (a) for division 2—means sexual abuse or serious physical abuse of the child; or
- (b) otherwise, means—
  - (i) sexual abuse or serious physical abuse of the child; or
  - (ii) psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse of the child.

*abuse claim* means a claim arising from the abuse of a child by a person associated with an institution while the child was under the care, supervision, control or authority of the institution.

*associated trust*, of an institution, see section 33B.

*associated with*, an institution, see section 33C.

*current office holder* see section 33G(2).

*head*, of an institution, means the person who—

- (a) is acknowledged by the institution as its head; or
- (b) if paragraph (a) does not apply—has overall responsibility for the institution.

*institution*—

- (a) means an entity that provides an activity, program or service of a kind that gives an opportunity for a person to have contact with a child; and
- (b) includes a public sector unit that is an entity mentioned in paragraph (a); and
- (c) does not include a family.

*nominee*, for an institution, means a person who is the institution's nominee because of a nomination or court order under section 33H.

*office of authority*, in an institution, includes—

- (a) a position as a member of a management committee of the institution; and
- (b) a position in which the holder is concerned with, or takes part in, the management of the institution.

### **33B Meaning of *associated trust***

- (1) For this part, a trust is an *associated trust* of an institution if the institution uses the trust to carry out its functions or activities and—
  - (a) the institution has, directly or indirectly, any of the following powers—
    - (i) a power to control the application of income of the trust or the distribution of property of the trust;

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- (ii) a power to obtain the beneficial enjoyment of the property or income of the trust, with or without the consent of another entity;
  - (iii) a power to appoint or remove a trustee or beneficiary of the trust;
  - (iv) a power to determine the outcome of any other decision about the trust's operations; or
- (b) a member or manager of the institution has, under the trust deed for the trust, a power mentioned in paragraph (a); or
  - (c) a trustee is accustomed to acting, or is under a formal or informal obligation to act, according to the directions, instructions or wishes of the institution or a member or manager of the institution.
- (2) Also, a reference in division 4 or 5 to an *associated trust* of an institution includes a trust in relation to which an order is in force under section 33H(6) (in relation to any abuse claim against the institution).

### **33C When is a person *associated with* an institution**

- (1) For this part, the persons *associated with* an institution include—
- (a) an officer, office holder, representative, leader, owner, member, employee, agent, volunteer or contractor of the institution; and
  - (b) for an institution that is a religious organisation—a minister of religion, religious leader or member of the personnel of the organisation; and
  - (c) if the institution has delegated the care, supervision, control or authority over a child to another entity (the *delegate*)—
    - (i) if the delegate is an individual—the delegate; and

[s 33D]

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- (ii) a person who would be a person mentioned in paragraph (a) or (b) if the delegate were the delegating institution; and
  - (d) a person prescribed by regulation.
- (2) To remove any doubt, it is declared that a person is not a delegate mentioned in subsection (1)(c) only because a child protection order is made granting long-term guardianship of a child to the person.
- (3) A person is not associated with an institution only because the person is associated with an entity that is funded or regulated by the institution.

## **Division 2                    Duty of institutions**

### **33D    Duty to prevent child abuse**

An institution has a duty to take all reasonable steps to prevent the abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution.

### **33E    Proof of whether duty was breached**

- (1) This section applies if a person associated with an institution abuses a child while the child is under the care, supervision, control or authority of the institution.
- (2) The institution is taken to have breached its duty under section 33D unless the institution proves it took all reasonable steps to prevent the abuse.
- (3) In deciding whether the institution took all reasonable steps to prevent the abuse, the matters that are relevant include—
- (a) the nature of the institution; and
  - (b) the resources that were reasonably available to the institution; and



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- (c) the relationship between the institution and the child; and
  - (d) the position in which the institution placed the person in relation to the child, including the extent to which the position gave the person—
    - (i) authority, power or control over the child; or
    - (ii) an ability to achieve intimacy with the child or gain the child’s trust.

### **Division 3                      Liability of particular institutions and office holders**

#### **33F      Liability of incorporated institution that was unincorporated at time of abuse**

- (1) This section applies if—
  - (a) a person (the *claimant*) suffered abuse as a child by a person associated with an institution (the *associated person*) while the claimant was under the care, supervision, control or authority of the institution; and
  - (b) the claimant has or had a cause of action against a person (the *former office holder*) who held an office of authority in the institution (the *relevant office*) when the cause of action accrued, founded on the former office holder’s responsibility for the institution or for the associated person; and
  - (c) the institution was an unincorporated body when the cause of action accrued; and
  - (d) the institution is an incorporated body; and
  - (e) the claimant is able to maintain an action on the cause of action, or would be able to maintain an action on the cause of action if the former office holder still held the relevant office.

- (2) A proceeding for the claimant's cause of action may be started or continued against the institution.
- (3) The following apply for the purpose of a proceeding started or continued under subsection (2)—
  - (a) any liability that the former office holder has or would have had in relation to the cause of action is taken to be a liability of the institution;
  - (b) anything done by the former office holder is taken to have been done by the institution;
  - (c) a duty or obligation that the former office holder would have had in relation to the proceeding is a duty or obligation of the institution;
  - (d) the institution may rely on any defence or immunity that would have been available to the former office holder as a defendant in the proceeding;
  - (e) any right of the former office holder to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the institution.

### **33G Liability of current office holder of unincorporated institution**

- (1) This section applies if—
  - (a) a person (the *claimant*) suffered abuse as a child by a person associated with an institution (the *associated person*) while the claimant was under the care, supervision, control or authority of the institution; and
  - (b) the claimant has or had a cause of action against a person (the *former office holder*) who held an office of authority in the institution (the *relevant office*) when the cause of action accrued, founded on the former office holder's responsibility for the institution or for the associated person; and

- (c) the institution was an unincorporated body when the cause of action accrued; and
  - (d) the institution is an unincorporated body; and
  - (e) the former office holder no longer holds the relevant office; and
  - (f) the claimant would be able to maintain an action on the cause of action if the former office holder still held the relevant office.
- (2) A proceeding for the claimant's cause of action may be started or continued against the current holder of the relevant office (the *current office holder*) in the name of the office.
- (3) The following apply for the purpose of a proceeding started or continued under subsection (2)—
- (a) any liability that the former office holder has or would have had in relation to the cause of action is taken to be a liability of the current office holder;
  - (b) anything done by the former office holder is taken to have been done by the current office holder;
  - (c) a duty or obligation that the former office holder would have had in relation to the proceeding is a duty or obligation of the current office holder;
  - (d) the current office holder may rely on any defence or immunity that would have been available to the former office holder as a defendant in the proceeding;
  - (e) any right of the former office holder to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the current office holder.

### **33H Claim against unincorporated institution and nomination of appropriate defendant**

- (1) This section applies in relation to an institution that is an unincorporated body.

- (2) A proceeding for an abuse claim may be started against the institution.
- (3) A notice of a claim required to be given to the institution under the *Personal Injuries Proceedings Act 2002*, section 9(1) must be given to the head of the institution.
- (4) The institution may nominate a person, with the person's consent, to be the appropriate defendant for the purposes of an abuse claim against the institution.
- (5) Subsection (6) applies if—
  - (a) at least 120 days have passed since a proceeding for an abuse claim was started against the institution; and
  - (b) either—
    - (i) there is no nominee for the institution; or
    - (ii) a court is satisfied the institution's nominee does not have sufficient assets to satisfy a liability that may be found under a decision on the abuse claim.
- (6) On application by the claimant, a court may order that the trustee of a trust is the institution's nominee if the court is satisfied—
  - (a) the trust is, or used to be, an associated trust of the institution; and
  - (b) for a trust that is no longer an associated trust of the institution—a reason for causing the trust to cease to be an associated trust was to try to avoid trust property being applied to satisfy a liability that may be found under a decision on an abuse claim; and
  - (c) the order would be appropriate.
- (7) A court may—
  - (a) order the institution to do the following within 28 days or any other period the court considers appropriate—
    - (i) identify to the court any trusts that are, or used to be, associated trusts of the institution;

- (ii) provide particular information about the financial capacity of the trusts; and
- (b) make any other orders, and give the directions, it considers appropriate for the purpose of establishing—
  - (i) whether a trust is, or used to be, an associated trust of the institution; or
  - (ii) the financial capacity of a trust mentioned in subparagraph (i); or
  - (iii) whether a nominee of the institution has sufficient assets to satisfy a liability that may be found under a decision on the abuse claim; or
  - (iv) whether it would be appropriate to make an order in relation to a trustee under subsection (6).

### **33I Proceeding against nominee of unincorporated institution**

The following apply if, under section 33H, there is a nominee for an institution—

- (a) a proceeding for an abuse claim may be started or continued against the nominee;
- (b) any liability of the institution under the court's decision on the abuse claim is incurred by the nominee;
- (c) anything done by the institution is taken to have been done by the nominee;
- (d) a duty or obligation of the institution in relation to the proceeding is a duty or obligation of the nominee;
- (e) the institution must continue to participate in the proceeding and a court may make an order or give a direction relating to the institution as if it were a person;
- (f) a court may make a substantive finding in the proceeding against the institution as if it were a person;

[s 33J]

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- (g) the nominee may rely on any defence or immunity that would be available to the institution as a defendant in the proceeding if the institution were a person;
- (h) any right of the institution to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the nominee;
- (i) if there is more than 1 nominee, the nominees must file a single defence and proceed as a single defendant.

## **Division 4                      Satisfaction of liability**

### **33J      Assets available to satisfy liability of institution**

- (1) This section applies if an institution has a liability under a judgment in, or settlement of, an abuse claim.
- (2) The institution may satisfy the liability out of the assets of the institution and the assets of an associated trust of the institution.

### **33K      Assets available to satisfy liability of nominee**

- (1) This section applies if an institution's nominee has a liability under a judgment in, or settlement of, an abuse claim.
- (2) If the nominee is the trustee of an associated trust of the institution, the nominee may satisfy the liability out of the assets of the trust and the assets of the institution.
- (3) Otherwise, the nominee may satisfy the liability out of its assets and the assets of the institution.

### **33L      Assets available to satisfy liability of current office holder**

- (1) This section applies if, under section 33G(3), a current office holder has a liability under a judgment in, or settlement of, an abuse claim.

- (2) The current office holder is not personally liable but may satisfy the liability out of the assets of the institution and the assets of an associated trust of the institution.

### **33M Satisfaction of liability by trustee of associated trust**

- (1) This section applies in relation to a liability that, under section 33J, 33K or 33L, may be satisfied out of the assets of an associated trust of an institution.
- (2) The trustee of the associated trust may pay an amount in satisfaction of the liability and, for that purpose, may realise assets of the trust.
- (3) The satisfaction of the liability is a proper expense for which the trustee may be indemnified out of the trust property, irrespective of any limitation on any right of indemnity the trustee may have.
- (4) The liability of the trustee of the associated trust as the institution's nominee is limited to the value of the trust property.
- (5) The trustee is not liable for a breach of trust only because of doing anything authorised by this section.

### **33MA References to liability**

A reference in this division to a liability under a judgment in, or settlement of, an abuse claim includes any costs associated with a proceeding for the claim.

## **Division 5 Miscellaneous**

### **33N Entities may act despite other laws and duties**

An institution, an institution's nominee, a current office holder or the trustee of an associated trust of an institution may act under division 4, and the trustee of an associated trust of an

institution may consent to being the institution's nominee, despite—

- (a) another law; or
- (b) the terms of the associated trust (including a trust for a charitable purpose); or
- (c) a duty, whether as the current holder of an office in the institution or as trustee or otherwise.

### **330 Continuity of institutions**

- (1) For this part, an institution (the *current institution*) is taken to be the same institution as the institution that breached its duty under section 33D or was an institution mentioned in section 33F(1)(a) or 33G(1)(a) (the *old institution*) if it is substantially the same as it was when the relevant cause of action accrued, even if—
  - (a) its name has changed; or
  - (b) its organisational structure has changed; or
  - (c) it has become incorporated; or
  - (d) its functions or activities are carried out at a different place.
- (2) Without limiting subsection (1), the current institution is taken to be substantially the same as it was when the relevant cause of action accrued if the type of member, and its primary purposes or functions, are substantially the same as they were at that time.
- (3) If there is no institution that is the same institution, or substantially the same institution, as the old institution, a relevant successor of the old institution is taken to be the same institution as the old institution.
- (4) For subsection (3), an institution (also the *current institution*) is a relevant successor of the old institution if—
  - (a) all or part of the old institution merged into the current institution; or



- (b) all or part of the old institution merged with 1 or more other entities to form the current institution; or
  - (c) the current institution is the remainder of the old institution after part of the old institution ceased to be part of the old institution; or
  - (d) in a case in which there is at least 1 institution interposed, over time, between the old institution and the current institution—at least 1 of the following circumstances applies to each link in the chain between the old institution and the current institution—
    - (i) all or part of an earlier institution merged into another institution;
    - (ii) all or part of an earlier institution merged with 1 or more other entities to form another institution;
    - (iii) an institution is the remainder of an earlier institution after part of the earlier institution ceased to be part of the earlier institution;
    - (iv) an institution as it is at a particular time is substantially the same as it was at an earlier time; or
  - (e) the current institution is prescribed by regulation to be the relevant successor of the old institution.
- (5) The Minister may recommend to the Governor in Council the making of a regulation under subsection (4)(e) only if satisfied that—
- (a) the current institution has a relevant connection to the old institution; or
  - (b) the head of the current institution has agreed to the current institution being the relevant successor of the old institution for this section.

### **33P Continuity of offices**

- (1) This section applies for the purpose of section 33G.

[s 33Q]

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- (2) It is sufficient that an office in the institution is substantially the same as it was when the relevant cause of action accrued.
- (3) If there is no current office in the institution that is the same or substantially the same as the relevant office mentioned in section 33G(1)(b), the current head of the institution is taken to be the current office holder.

### **33Q Corporations Act displacement**

Sections 33I to 33N are declared to be Corporations legislation displacement provisions for the Corporations Act, section 5G in relation to the Corporations legislation generally.

## **Part 3 Liability of public and other authorities and volunteers**

### **Division 1 Public and other authorities**

#### **34 Definitions for div 1**

In this division—

*function* includes power.

*public or other authority* means—

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1980*); or
- (b) a local government; or
- (c) any public authority constituted under an Act.

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**35 Principles concerning resources, responsibilities etc. of public or other authorities**

The following principles apply to a proceeding in deciding whether a public or other authority has a duty or has breached a duty—

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
- (b) the general allocation of financial or other resources by the authority is not open to challenge;
- (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
- (d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

**36 Proceedings against public or other authorities based on breach of statutory duty**

- (1) This section applies to a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority.
- (2) For the purposes of the proceeding, an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

### **37 Restriction on liability of public or other authorities with functions of road authorities**

- (1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority—
  - (a) to repair a road or to keep a road in repair; or
  - (b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair.
- (2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
- (3) In this section—

*road* see the *Transport Operations (Road Use Management) Act 1995*, schedule 4.

*road authority* means the entity responsible for carrying out any road work.

## **Division 2 Food donors and volunteers**

### **Subdivision 1 Interpretation**

#### **38 Interpretation**

- (1) In this division—

*community organisation* means any of the following that organises the doing of community work by volunteers—

  - (a) a corporation;
  - (b) a trustee acting in the capacity of trustee;
  - (c) a church or other religious group;
  - (d) a registered political party as defined under the *Electoral Act 1992* or the *Commonwealth Electoral Act 1918* (Cwlth);

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- (e) a public or other authority as defined under section 34;
  - (f) a parents and citizens association formed under the *Education (General Provisions) Act 2006*, chapter 7;
  - (g) another entity prescribed under a regulation.

**community work** means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose, and includes making donations of food if the donations are not for private financial gain and are done for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose.

**food donor**—

- (a) means an entity that, in good faith for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose, donates or distributes food with the intention that the consumer of the food will not have to pay for the food; but
- (b) does not include—
  - (i) an entity that directly distributes the food to the consumer of the food; or
  - (ii) a volunteer.

**organised** includes directed or supervised.

**possession** includes control.

**volunteer** means an individual who—

- (a) does community work on a voluntary basis; or
- (b) donates food in the circumstances mentioned in section 39(3).

**work** includes any activity.

- (2) For the purposes of this division—
  - (a) community work done by a person under an order of a court is not to be regarded as work done on a voluntary basis; and

- (b) community work for which a person receives remuneration by way of reimbursement of the person's reasonable expenses in doing the work is to be regarded as work done on a voluntary basis.

## Subdivision 2 Food donors

### 38A Protection of food donors

- (1) A food donor does not incur any civil liability in relation to any act or omission done or made by the food donor, when donating or distributing food in the circumstances mentioned in subsection (2), giving rise to harm resulting from the consumption of the food.
- (2) The circumstances are—
  - (a) that the food was safe to consume at the time it left the food donor's possession; and
  - (b) if the food was of a nature that required it to be handled in a particular way to remain safe to consume after it left the food donor's possession—that the food donor informed the recipient of the food of the handling requirements; and
  - (c) if the food only remained safe to consume for a particular period of time after it left the food donor's possession—that the food donor informed the recipient of the food of the time limit.
- (3) In this section—

*recipient*, of the food, means the entity directly receiving the food from the food donor.

### 38B Liability not excluded if insurance required

This subdivision does not confer protection from liability on a food donor if the liability is a liability that is required under a written law of the State to be insured against.

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### **38C Liability not excluded for motor accidents**

The protection from liability conferred on a food donor by this subdivision does not apply if the liability would, apart from this subdivision, be covered by a CTP insurance policy under the *Motor Accident Insurance Act 1994*, or be recoverable from the Nominal Defendant under that Act.

## **Subdivision 3 Volunteers**

### **39 Protection of volunteers**

- (1) A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—
  - (a) organised by a community organisation; or
  - (b) as an office holder of a community organisation.
- (2) A person does not incur any personal civil liability in relation to any act or omission done or made by the person, when donating food in the circumstances mentioned in subsection (3), giving rise to harm resulting from the consumption of the food.
- (3) The circumstances are—
  - (a) that the person donated the food to a community organisation—
    - (i) in good faith for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose; and
    - (ii) with the intention that the consumer of the food would not have to pay for the food; and
  - (b) that the food was safe to consume at the time it left the person's possession; and
  - (c) if the food was of a nature that required it to be handled in a particular way to remain safe to consume after it left the person's possession—that the person informed the

community organisation of the handling requirements;  
and

- (d) if the food only remained safe to consume for a particular period of time after it left the person's possession—that the person informed the community organisation of the time limit.

#### **40 Liability not excluded for criminal acts**

This subdivision does not confer protection from personal liability on a volunteer in relation to an act or omission of the volunteer if it is established (on the balance of probabilities) that at the time of the act or omission the volunteer was engaged in conduct that constitutes an offence.

#### **41 Liability of intoxicated volunteer not excluded**

The protection from personal liability conferred on a volunteer by this subdivision in connection with any community work does not apply if the volunteer—

- (a) was intoxicated when doing the work; and
- (b) failed to exercise due care and skill when doing the work.

#### **42 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions**

This subdivision does not confer protection on a volunteer from personal liability in relation to an act or omission of a volunteer if the volunteer knew or ought reasonably to have known that he or she was acting—

- (a) outside the scope of the activities authorised by the community organisation concerned; or
- (b) contrary to instructions given by the community organisation.



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**43 Liability not excluded if insurance required**

This subdivision does not confer protection from personal liability on a volunteer if the liability is a liability that the volunteer is required under a written law of the State to be insured against.

**44 Liability not excluded for motor accidents**

The protection from personal liability conferred on a volunteer by this subdivision does not apply if the liability would, apart from this subdivision, be covered by a CTP insurance policy under the *Motor Accident Insurance Act 1994*, or be recoverable from the Nominal Defendant under that Act.

**Part 4 Exclusion from claiming damages because of particular behaviour**

**Division 1 Criminal behaviour**

**45 Criminals not to be awarded damages**

- (1) A person does not incur civil liability if the court is satisfied on the balance of probabilities that—
- (a) the breach of duty from which civil liability would arise, apart from this section, happened while the person who suffered harm was engaged in conduct that is an indictable offence; and
  - (b) the person's conduct contributed materially to the risk of the harm.

- (2) Despite subsection (1), the court may award damages in a particular case if satisfied that in the circumstances of the case, subsection (1) would operate harshly and unjustly.
- (3) If the court decides to award damages under subsection (2), the court must assess damages on the basis that the damages to which the injured person would be entitled, apart from this section, are to be reduced, on account of the injured person's conduct, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
- (4) It does not matter whether the person whose conduct is alleged to constitute an indictable offence has been, will be or is or was capable of being proceeded against or convicted of an indictable offence.
- (5) If the person has been dealt with for the offence, it does not matter whether the person was dealt with on indictment or summarily.

## **Division 2                      Intoxication**

### **46            Effect of intoxication on duty and standard of care**

- (1) The following principles apply in relation to the effect that a person's intoxication has on the duty and standard of care that the person is owed—
  - (a) in deciding whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or that a person who is intoxicated may be exposed to increased risk because the person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated;
  - (b) a person is not owed a duty of care merely because the person is intoxicated;
  - (c) the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.

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- (2) Subsection (1) does not affect a liability arising out of conduct happening on licensed premises.
  - (3) In this section—  
*licensed premises* see the *Liquor Act 1992*, section 4.

#### **47 Presumption of contributory negligence if person who suffers harm is intoxicated**

- (1) This section applies if a person who suffered harm was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged by the defendant.
- (2) Contributory negligence will, subject to this section, be presumed.
- (3) The person may only rebut the presumption by establishing on the balance of probabilities—
  - (a) that the intoxication did not contribute to the breach of duty; or
  - (b) that the intoxication was not self-induced.
- (4) Unless the person rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
- (5) If, in the case of a motor vehicle accident, the person who suffered harm was the driver of a motor vehicle involved in the accident and the evidence establishes—
  - (a) that the concentration of alcohol in the driver's blood was 150mg or more of alcohol in 100mL of blood; or
  - (b) that the driver was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by subsection (4) is increased to 50%.

**48 Presumption of contributory negligence if person who suffers harm relies on care and skill of person known to be intoxicated**

- (1) This section applies to a person who suffered harm (*plaintiff*) who—
  - (a) was at least 16 years at the time of the breach of duty giving rise to the harm; and
  - (b) relied on the care and skill of a person who was intoxicated at the time of the breach of duty (*defendant*); and
  - (c) was aware, or ought reasonably to have been aware, that the defendant was intoxicated.
- (2) If the harm suffered by the plaintiff was caused through the negligence of the defendant and the defendant alleges contributory negligence on the part of the plaintiff, contributory negligence will, subject to this section, be presumed.
- (3) The plaintiff may only rebut the presumption if the plaintiff establishes, on the balance of probabilities, that—
  - (a) the defendant's intoxication did not contribute to the breach of duty; or
  - (b) the plaintiff could not reasonably be expected to have avoided relying on the defendant's care and skill.
- (4) Unless the plaintiff rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the plaintiff would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
- (5) The common law defence of voluntary assumption of risk does not apply to a matter to which this section applies.

*Editor's note—*

'Voluntary assumption of risk' is sometimes stated as 'volenti non fit injuria'.

#### **49 Additional presumption for motor vehicle accident**

- (1) This section applies to a plaintiff and defendant mentioned in section 48.
- (2) If—
  - (a) the breach of duty giving rise to the harm suffered by the plaintiff was a motor vehicle accident; and
  - (b) the plaintiff was a passenger in the motor vehicle; and
  - (c) the motor vehicle was driven by the defendant; and
  - (d) either—
    - (i) the concentration of alcohol in the defendant's blood was 150mg or more of alcohol in 100mL of blood; or
    - (ii) the defendant was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;

the minimum reduction prescribed by section 48(4) is increased to 50%.
- (3) The plaintiff is taken, for this section, to rely on the care and skill of the defendant.

## **Part 5                      Awards for economic loss                                      following sterilisation                                      procedure or contraceptive                                      procedure or advice**

### **49A      Failed sterilisation procedures**

- (1) This section applies if, following a procedure to effect the sterilisation of an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about, or performing, the procedure.

*Examples of sterilisation procedures—*

tubal ligation and vasectomy

- (2) A court can not award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child.

### **49B      Failed contraceptive procedure or contraceptive advice**

- (1) This section applies if, following a contraceptive procedure on an individual or the giving of contraceptive advice to an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about, or performing, the procedure or giving the advice.
- (2) A court can not award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child.

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## Chapter 3      **Assessment of damages for personal injury**

### Part 1              **Preliminary**

#### 50      **Application of ch 3**

Subject to section 5, this chapter applies only in relation to an award of personal injury damages.

#### 51      **Definitions for ch 3**

In this chapter—

*general damages* means damages for—

- (a) pain and suffering; or
- (b) loss of amenities of life; or
- (c) loss of expectation of life; or
- (d) disfigurement.

*injury* means personal injury.

### Part 2              **Exemplary and similar damages**

#### 52      **Exemplary, punitive or aggravated damages can not be awarded**

- (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
- (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was—

- (a) an unlawful intentional act done with intent to cause personal injury; or
- (b) an unlawful sexual assault or other unlawful sexual misconduct.

## Part 2A                      Participants in national injury insurance scheme, Queensland

### 52A      Definitions for part

In this part—

*insurance agency* means the National Injury Insurance Agency, Queensland established under the National Injury Act.

*insurance scheme* means the national injury insurance scheme, Queensland established under the National Injury Act, chapter 2.

*motor accident* see the National Injury Act, section 4(1)(b).

*National Injury Act* means the *National Injury Insurance Scheme (Queensland) Act 2016*.

*serious personal injury* see the National Injury Act, schedule 1.

### 52B      Restriction on damages for participants in insurance scheme

- (1) This section applies to the awarding of damages for personal injury resulting from a motor accident if the person suffering the injury is, or was, a participant in the insurance scheme in relation to a serious personal injury resulting from the motor accident.
- (2) A court can not award damages in relation to the person's treatment, care and support needs that—



- (a) result from the personal injury; and
  - (b) arise, or arose, while the person is, or was, a participant in the insurance scheme.
- (3) This section applies—
- (a) whether or not the personal injury is a serious personal injury; and
  - (b) whether or not the treatment, care and support needs are an approved service for the person under the National Injury Act; and
  - (c) whether or not the insurance agency must, under that Act, make a payment in relation to the treatment, care and support needs; and
  - (d) whether or not the treatment, care and support is provided without charge.
- (4) Also, this section applies subject to section 52C.
- (5) In this section—

*participant*, in the insurance scheme, see the National Injury Act, section 14(1).

*treatment, care and support needs* see the National Injury Act, section 8.

## **52C Damages if insurance agency is liable to contribute**

- (1) This section applies to a claim for personal injury damages against an insurer under the *Motor Accident Insurance Act 1994* if—
- (a) the personal injury resulted from a motor accident; and
  - (b) the person suffering the personal injury is a lifetime participant in the insurance scheme in relation to a serious personal injury resulting from the motor accident; and
  - (c) a court decides—

- (i) the person is not guilty of contributory negligence in relation to the claim; or
    - (ii) the person is guilty of contributory negligence in relation to the claim and the damages that the person would be entitled to in the absence of contributory negligence are to be reduced, because of the contributory negligence, by less than 50%; and
  - (d) the insurance agency is liable, under the National Injury Act, section 42, to contribute towards the insurer's liability on the claim for treatment, care and support damages.
- (2) The court may award treatment, care and support damages.
  - (3) However, if the court awards treatment, care and support damages, the court must not, in assessing the amount of the treatment, care and support damages, take into account any contributory negligence of the person.
  - (4) In this section—  
*lifetime participant* see the National Injury Act, section 14(2).  
*treatment, care and support damages* see the National Injury Act, schedule 1.

## Part 3 Assessment of damages

### 53 Notice requiring mitigation of damages

- (1) If a defendant is not satisfied with the action taken by a plaintiff to mitigate damages, the defendant may give the plaintiff written notice suggesting specified action the plaintiff should take to mitigate damages.
- (2) The notice may, for example, suggest that—

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- (a) the plaintiff should undergo medical treatment of a specified kind; or
  - (b) the plaintiff should return to work or take specified steps to obtain employment; or
  - (c) the plaintiff should undergo rehabilitation therapy of a specified kind, or undertake specified programs of rehabilitation and training.
- (3) Subsection (1) does not limit the plaintiff's duty to mitigate damages.
- (4) In assessing damages for personal injury, the court must—
- (a) consider whether the plaintiff has failed to take reasonable steps to mitigate damages by not following suggestions made under this section or a written notice given under the *Personal Injuries Proceedings Act 2002*, section 26; and
  - (b) if the notice suggested that the plaintiff undergo medical treatment or rehabilitation therapy of a specified kind—consider whether the notice was accompanied by an offer by the defendant to pay for the cost of the treatment or therapy; and
  - (c) if it appears the plaintiff has failed to take steps to mitigate damages by not following the suggestions—reduce the plaintiff's damages to an appropriate extent reflecting the failure if, in all the circumstances, the court considers that the plaintiff's failure to follow the suggestions was not reasonable.
- (5) Subsection (4) does not apply in assessing damages for personal injury if leave to start the proceeding was given under the *Personal Injuries Proceedings Act 2002*, section 43(1) and was not stayed under section 43(3) of that Act because section 43(4) of that Act applied.
- (6) In this section—
- defendant** means a person against whom a claim for personal injury damages is made whether or not a proceeding for the claim has been started.

*plaintiff* means an injured person making a claim for personal injury damages whether or not a proceeding for the claim has been started.

#### **54 Damages for loss of earnings**

- (1) In making an award of damages for loss of earnings, including in a dependency claim, the maximum award a court may make is for an amount equal to the limit fixed by subsection (2).
- (2) The limit is an amount equal to the present value of 3 times average weekly earnings per week for each week of the period of loss of earnings.
- (3) In this section—

*present value* means the value when the award is made.

#### **55 When earnings can not be precisely calculated**

- (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
- (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
- (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
- (4) The limitation mentioned in section 54(2) applies to an award of damages under this section.

#### **56 Damages for loss of superannuation entitlements**

- (1) The maximum amount of damages that may be awarded to an employee for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this part) for the

deprivation or impairment of the earning capacity on which the entitlement to the contributions is based.

- (2) The relevant percentage is the percentage of earnings that is the minimum percentage required by a written law to be paid on the employee's behalf as employer superannuation contributions.

### **57 Discount rate for calculating present value of future loss or gratuitous services**

- (1) When assessing an amount of damages as a lump sum for a future loss or gratuitous services, the amount must be the present value, calculated using the prescribed discount rate, of the future loss or gratuitous services.

- (2) In this section—

*prescribed discount rate*, for an award, see the *Civil Proceedings Act 2011*, section 61.

### **58 Damages for loss of consortium or loss of servitium**

- (1) A court must not award damages for loss of consortium or loss of servitium unless—
  - (a) the injured person died as a result of injuries suffered; or
  - (b) general damages for the injured person are assessed (before allowing for contributory negligence) at the amount prescribed under a regulation for this provision, or more.

*Note—*

Under section 75, the Minister must make a recommendation about the amount to be prescribed.

- (2) The court must not assess damages for loss of servitium above the limit fixed by subsection (3).
- (3) The limit is 3 times average weekly earnings per week.

**59 Damages for gratuitous services provided to an injured person**

- (1) Damages for gratuitous services provided to an injured person are not to be awarded unless—
  - (a) the services are necessary; and
  - (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
  - (c) the services are provided, or are to be provided—
    - (i) for at least 6 hours per week; and
    - (ii) for at least 6 months.
- (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
- (3) In assessing damages for gratuitous services, a court must take into account—
  - (a) any offsetting benefit the service provider obtains through providing the services; and
  - (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.

**59A Damages for gratuitous domestic services provided by an injured person**

- (1) Subject to section 59B, damages (*section 59A damages*) may be awarded to an injured person for any loss of the person's capacity to provide gratuitous domestic services to someone else (the *recipient*) if subsection (2) or (4) applies.
- (2) Generally, the court may award section 59A damages only if it is satisfied of all of the following—
  - (a) either—
    - (i) the injured person died as a result of the injuries suffered; or

- (ii) general damages for the injured person are assessed (before allowing for contributory negligence) at the amount prescribed under section 58, or more;
  - (b) at the relevant time the recipient was—
    - (i) a person who resided at the injured person’s usual residence; or
    - (ii) an unborn child of the injured person;
  - (c) before the relevant time, the injured person—
    - (i) provided the services to the recipient; or
    - (ii) if the recipient was then an unborn child—would have provided services to the recipient had the recipient been born;
  - (d) the recipient was, or will be, incapable of performing the services personally because of the recipient’s age or physical or mental incapacity;
  - (e) there is a reasonable expectation that, if not for the relevant injury, the injured person would have provided the services to the recipient—
    - (i) for at least 6 hours a week; and
    - (ii) for a period of at least 6 months;
  - (f) there will be a need for the services for the hours and the period mentioned in paragraph (e), and the need is reasonable in all the circumstances.
- (3) Subsection (4) applies if—
- (a) the court is satisfied, as required under subsection (2), in all respects other than that the injured person would have provided the services for the hours and the period mentioned in subsection (2)(e) and (f); and
  - (b) the recipient was provided with accommodation by a parent other than the injured person or with other care to which all of the following apply—

- (i) it included accommodation provided other than by the injured person;
  - (ii) it was provided because the recipient is aged, frail or suffers from a mental or physical disability;
  - (iii) its primary purpose was to give the recipient or the injured person a break from their usual care arrangements.
- (4) The court may award section 59A damages if it considers that—
- (a) the injured person would not have provided the services for the hours and the period because of the provision of the accommodation or the other care; and
  - (b) awarding the damages is reasonable in all the circumstances.

*Examples of circumstances that may make the award reasonable—*

- 1 The injured person would have had custody of the recipient each alternate week for a full week at a time.
- 2 The recipient would have spent part of their school holidays with a non-custodial parent.
- 3 The recipient is an elderly parent and is placed in short-term or occasional respite care at a nursing home.

- (5) In this section—

***gratuitous domestic services*** means services of a domestic nature for which there has been, and will be, no payment or liability to pay.

***parent*** includes a person who stands in the place of a parent.

***relevant time*** means—

- (a) generally, when the relevant injury happened; or
- (b) if the symptoms of the relevant injury were not immediately apparent when it happened, when the nature and extent of the injury becomes known.



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**59B Circumstances in which section 59A damages can not be awarded**

- (1) To remove any doubt, it is declared that section 59A damages can not be awarded if the recipient is not a person mentioned in section 59A(2)(b).
- (2) Section 59A damages can not be awarded for loss if, and to the extent—
  - (a) the injured person can recover damages for gratuitous services mentioned in section 59 for the same injury that caused the loss; and
  - (b) the provision of gratuitous services to the injured person also resulted, or would also result, in the recipient being provided with the domestic services that the person has lost the capacity to provide.
- (3) Section 59A damages can not be awarded if, and to the extent—
  - (a) the loss resulted from personal injury to which the *Motor Accident Insurance Act 1994* applies; and  
*Note—*  
For when the *Motor Accident Insurance Act 1994* applies, see section 5 of that Act.
  - (b) under section 51 of that Act an insurer has paid, or is liable to pay, the cost of providing rehabilitation services to the injured person; and
  - (c) the provision of the rehabilitation services resulted, or would result, in the recipient being provided with the domestic services that the injured person has lost the capacity to provide.
- (4) An injured person, or an injured person's legal representative, can not be awarded section 59A damages for a loss if the recipient has previously recovered damages for a loss sustained because of the person's loss of capacity.

### **59C Provisions for assessment of section 59A damages**

- (1) In deciding, for section 59A, the value of any gratuitous domestic services that an injured person has lost the capacity to provide to the recipient, the court must take into account—
  - (a) the extent of the injured person’s capacity to provide the services before the relevant time under section 59A; and
  - (b) the extent to which provision of the services would, if not for the injury sustained by the injured person, have also benefited persons outside the injured person’s household; and
  - (c) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.
- (2) Section 59A damages must be assessed on the injured person’s life expectancy immediately before the relevant time under section 59A.
- (3) However, if the injured person’s life is shortened by an unrelated event, section 59A damages can not be awarded for any period after the person’s death.

*Example of an unrelated event—*

a life-limiting illness first suffered after the breach of duty happened

- (4) In deciding the amount of section 59A damages, if any, to be awarded to the injured person for a loss of capacity mentioned in section 59A, a court—
  - (a) may only award damages for that loss as provided under section 59A; and
  - (b) must not include in any general damages awarded to the injured person a component that compensates the person for the loss of that capacity.

### **59D Restriction on damages if section 59A damages already recovered**

- (1) This section applies to anyone (the *claimant*), including a recipient mentioned in section 59A(1), who makes a claim for

loss sustained because of personal injury suffered by an injured person.

- (2) The claimant can not be awarded damages for a loss sustained by the claimant because of the injured person's loss of capacity to provide gratuitous domestic services if the injured person or the person's legal representative has previously recovered section 59A damages for that loss.

## 60 Interest

- (1) A court can not order the payment of interest on—
  - (a) an award for general damages; or
  - (b) an award of damages for gratuitous services provided to an injured person.
- (2) Interest awarded on damages compensating past monetary loss—
  - (a) must not be more than interest at the appropriate rate; and
  - (b) must be related in an appropriate way to the period over which the loss was incurred.
- (3) The appropriate rate is the rate for 10 year Treasury bonds published by the Reserve Bank of Australia under 'Capital Market Yields—Government Bonds—Daily—F2' as at the beginning of the quarter in which the award of interest is made.

*Example of calculation of interest for this section—*

Suppose that past monetary loss consists of medical expenses that have been incurred at a uniform rate over a particular period. The interest to be awarded would be calculated under the following formula—

$$A = am/100 \times p \times 0.5$$

where—

*A* is the amount of the award of interest.

*a* is a percentage rate decided by the court subject to the limit fixed in subsection (2).

*m* is the aggregate of the medical expenses.

*p* is the period over which the medical expenses have been incurred (expressed in years).

## 61 Assessment by court of injury scale

- (1) If general damages are to be awarded by a court in relation to an injury arising after 1 December 2002, the court must assess an injury scale value as follows—
  - (a) the injured person's total general damages must be assigned a numerical value (*injury scale value*) on a scale running from 0 to 100;
  - (b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;
  - (c) in assessing the injury scale value, the court must—
    - (i) assess the injury scale value under any rules provided under a regulation; and
    - (ii) have regard to the injury scale values given to similar injuries in previous proceedings.
- (2) If a court assesses an injury scale value for a particular injury to be more or less than any injury scale value prescribed for or attributed to similar particular injuries under subsection (1)(c), the court must state the factors on which the assessment is based that justify the assessed injury scale value.

## 62 Calculation of general damages

- (1) For an injury arising after 1 December 2002, general damages must be calculated by reference to the general damages calculation provisions applying to the period within which the injury arose.
- (2) In this section—

*general damages calculation provisions*, applying to a period, means the provisions prescribed for the period under a regulation.

## Part 4                      Structured settlements

### 63            Definition for pt 4

In this part—

*structured settlement* means an agreement providing for the payment of all or part of an award of personal injury damages in the form of periodic payments funded by an annuity or other agreed means.

### 64            Court required to inform parties of proposed award

- (1) The purpose of this section is to enable the court to give the parties to a proceeding a reasonable opportunity to negotiate a structured settlement.
- (2) A court that decides to make an award for future loss (not including interest) of more than the amount prescribed under a regulation for this section must first notify all the parties to the proceeding of the terms of the award it proposes to make.

*Note—*

Under section 75, the Minister must make a recommendation about the amount to be prescribed.

### 65            Court may make consent order for structured settlement

A court may, on the application of the parties to a claim for personal injury damages, make an order approving of or in the terms of a structured settlement even though the payment of damages is not in the form of a lump sum award of damages.

**66 Obligation of legal practitioners to provide advice**

A lawyer engaged by a plaintiff must advise the plaintiff, in writing, about the following if the plaintiff proposes to negotiate a settlement of a claim for personal injury damages—

- (a) the availability of structured settlements;
- (b) the desirability of the plaintiff obtaining independent financial advice about structured settlements and lump sum settlements of the claim.

**67 Offer of structured settlement—legal costs**

- (1) The *Uniform Civil Procedure Rules 1999*, chapter 9, part 5 extends to an offer of compromise by way of a structured settlement on a claim for personal injury damages.
- (2) In that case, the court is to have regard to the cost to the defendant of the proposed structured settlement as compared to the lump sum payment of damages when deciding whether a reasonable offer of compromise has been made.

## Chapter 4 Miscellaneous

### Part 1 Expressions of regret

**68 Application of pt 1**

This part applies only in relation to a claim for personal injury damages.

**69 Definition for pt 1**

In this part—

*liability* includes the following—

- (a) fault;
- (b) negligence.

## **70 Purpose of pt 1**

The purpose of this part is to allow an individual to express regret about an incident that may give rise to an action for personal injury damages without being concerned that the expression of regret may be construed or used as an admission of liability on a claim or in a proceeding based on a claim arising out of the incident.

## **71 Meaning of *expression of regret***

An *expression of regret* made by an individual in relation to an incident alleged to give rise to an action for damages is any oral or written statement expressing regret for the incident to the extent that it does not contain an admission of liability on the part of the individual or someone else.

## **72 Expressions of regret are inadmissible**

An expression of regret made by an individual in relation to an incident alleged to give rise to an action for damages at any time before a civil proceeding is started in a court in relation to the incident is not admissible in the proceeding.

*Example—*

Suppose a patient attended a health service and was diagnosed as suffering from gall stones. Removal of the gall bladder was recommended for treatment of the condition. The procedure was attempted, but there was an adverse outcome.

A health care provider stated that the provider was sorry that there was an adverse outcome.

The statement is inadmissible in any future proceeding against the health care provider in relation to a personal injury allegedly arising out of the procedure.

## Part 1A Apologies

### 72A Application of pt 1A

- (1) This part applies to civil liability of any kind.
- (2) However, this part does not apply to the following—
  - (a) civil liability that is excluded from the operation of this part by section 5;
  - (b) civil liability for defamation;
  - (c) civil liability of a person for an unlawful intentional act done by the person with intent to cause personal injury;
  - (d) civil liability of a person for an unlawful sexual assault or other unlawful sexual misconduct committed by the person.
- (3) Despite subsection (2)(c) and (d), this part applies to an apology made by or on behalf of an institution in relation to the abuse of a child by a person associated with the institution.
- (4) In this section—

***abuse***, of a child, means—
  - (a) sexual abuse or serious physical abuse of the child; or
  - (b) psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse of the child.

***associated with***, an institution, see section 33C.

***institution*** see section 33A.

### 72B Purpose of pt 1A

The purpose of this part is to allow a person to make an apology about a matter without the apology being construed or used as an admission of liability in relation to the matter.



### **72C Meaning of *apology***

An *apology* is an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to the matter.

### **72D Effect of apology on liability**

- (1) An apology made by or on behalf of a person in relation to any matter alleged to have been caused by the person—
  - (a) does not constitute an express or implied admission of fault or liability by the person in relation to the matter; and
  - (b) is not relevant to the determination of fault or liability in relation to matter.
- (2) Evidence of an apology made by a person is not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the matter.

## **Part 2 Jury trials**

### **73 Exclusion of jury trial**

A proceeding in a court based on a claim for personal injury damages must be decided by the court sitting without a jury.

## Part 3                      General

### 74      Regulation-making power

- (1) The Governor in Council may make regulations under this Act.
- (2) A regulation may do any of the following—
  - (a) prescribe offences for a contravention of a regulation, and fix a maximum penalty of not more than 20 penalty units for a contravention;
  - (b) prescribe fees payable under this Act.

### 75      Indexation of particular amounts

- (1) The Minister must, on or before 1 July 2011 and on or before 1 July in each succeeding year, recommend to the Governor in Council the amounts that are to be prescribed under a regulation for or under the following provisions—
  - (a) section 58(1)(b);
  - (b) section 62(2), definition *general damages calculation provisions*;
  - (c) section 64(2).
- (2) The amount recommended for or under the provision is to be the amount last prescribed under a regulation for or under the provision adjusted by the percentage change in average weekly earnings over the 12 months preceding the date of the recommendation and rounded to the nearest ten dollar.
- (3) However, if the percentage change in average weekly earnings over the 12 months preceding the date of the recommendation would reduce the amount prescribed for or under the provision or result in no change to the amount, the Minister need not make a recommendation.
- (4) If the percentage change in average weekly earnings mentioned in subsection (2) is not available from the

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Australian Statistician, the Minister must advise the Governor in Council accordingly.

- (5) If the Minister advises the Governor in Council of the unavailability of the percentage change under subsection (4), the amount prescribed for or under the provision is the amount decided by the Governor in Council.
- (6) A regulation notified after 1 July in a year and specifying a date that is before the date it is notified as the date from which the amount prescribed for the provision is to apply has effect from the specified date.
- (7) Subsection (6) applies despite the *Statutory Instruments Act 1992*, section 34.
- (8) This section does not limit the power of the Governor in Council to amend the amount prescribed under a regulation for a limit.

## **Chapter 5            Transitional and other provisions**

### **Part 1                    Transitional provisions for Act No. 16 of 2003**

#### **76            Prescribed entities for ss 26 and 27**

- (1) Subsection (2) applies until a regulation under this Act prescribes an entity for section 26(1)(a).
- (2) The entities mentioned in the *Personal Injuries Proceedings Regulation 2002*, section 12, immediately before the commencement of this section are taken to be prescribed for section 26(1)(a) and 27(1).

## **77 Jury trials**

Despite the omission of the *Personal Injuries Proceedings Act 2002*, section 58 by chapter 6, part 1, of this Act and despite section 73 of this Act, a jury trial may be started or continued if it could have been started or continued under the *Personal Injuries Proceedings Act 2002*, section 77, immediately before the commencement of this section.

## **Part 2 Transitional provisions for Justice and Other Legislation Amendment Act 2004**

### **79 Food donations**

Chapter 2, part 3, division 2 applies in relation to persons donating food in circumstances mentioned in section 39(3) only after the commencement of the *Justice and Other Legislation Amendment Act 2004*, section 23.

### **80 Injuries under the Workers' Compensation and Rehabilitation Act 2003**

Section 5(b) has effect in relation to an injury as defined under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies, whether the injury happened before, on or after the commencement of this section.

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## **Part 3**                      **Transitional provision for Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005**

### **81**            **Awards of damages for loss of earnings**

- (1) It is declared that section 54, as amended by the *Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005*, applies in relation to all awards for damages for loss of earnings made on or after the commencement of this section, whether or not liability for the loss arose before or after the commencement.
- (2) To remove any doubt, it is declared that section 54 does not apply in relation to an appeal against an award for damages for loss of earnings heard on or after the commencement if the award was made before the commencement.

## **Part 4**                      **Declaration about commencement of chapter 2, part 2**

### **82**            **Commencement of ch 2, pt 2**

It is declared that chapter 2, part 2 commenced and has effect, and has always had effect, on and from 1 March 2005.

## Part 5

# Transitional provision for Criminal Code and Civil Liability Amendment Act 2007

### 83 Personal injury to which the amended s 5 extends as a result of the amendment

- (1) It is declared that section 5, to the extent it is amended by the amending Act, has effect to disapply this Act to a decision in relation to personal injury only if the personal injury, or any part of it, is or was caused on or after 6 November 2006.
- (2) However, section 5, to the extent it is amended by the amending Act, does not have effect to disapply this Act to a decision in relation to personal injury if, before the date of assent of the amending Act—
  - (a) the parties have entered into an agreement to pay damages for the personal injury; or
  - (b) the trial in relation to the personal injury has started but final relief has not been granted by the court; or
  - (c) final relief in relation to the personal injury has been granted by a court.
- (3) Section 5, as in force before 6 November 2006, continues to apply in relation to a decision mentioned in subsection (2).
- (4) In this section—

***amending Act*** means the *Criminal Code and Civil Liability Amendment Act 2007*.

***final relief***, in relation to personal injury, means the judgment or decision for the civil claim in relation to the personal injury, including the judgment or decision about liability only, whether or not an appeal has been made against the judgment or decision.







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## Schedule 2 Dictionary

### section 8

*abuse*, of a child, for chapter 2, part 2A, see section 33A.

*abuse claim*, for chapter 2, part 2A, see section 33A.

*apology*, for chapter 4, part 1A, see section 72C.

*apportionable claim*, for chapter 2, part 2, see section 29.

*a professional* see section 20.

*associated trust*, of an institution, for chapter 2, part 2A, see section 33B.

*associated with*, an institution, for chapter 2, part 2A, see section 33C.

*average weekly earnings*, for a financial year, means the amount of Queensland full-time adult persons ordinary time earnings declared by the Australian Statistician in the original series of the statistician's average weekly earnings publication most recently published before the start of the financial year.

*child protection order* means a child protection order under the *Child Protection Act 1999*.

*claim* means a claim, however described, for damages based on a liability for personal injury, damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty and, for a fatal injury, includes a claim for the deceased's dependants or estate.

*community organisation*, for chapter 2, part 3, division 2, see section 38.

*community work*, for chapter 2, part 3, division 2, see section 38.

*consumer*, for chapter 2, part 2, see section 29.

**contributory negligence** see the *Law Reform Act 1995*, section 10.

**court**, for chapter 2, part 2, see section 29.

**current office holder**, for chapter 2, part 2A, see section 33G(2).

**damages** includes any form of monetary compensation.

**dangerous recreational activity**, for chapter 2, part 1, division 4, see section 18.

**defendant**, for chapter 2, part 2, see section 29.

**dependency claim** means a claim in relation to a fatal injury brought on behalf of a deceased's dependants or estate.

**dust-related condition** means—

- (a) any of the following diseases—
- aluminosis
  - asbestos induced carcinoma
  - asbestosis
  - asbestos related pleural diseases
  - bagassosis
  - berylliosis
  - byssinosis
  - coal dust pneumoconiosis
  - farmers' lung
  - hard metal pneumoconiosis
  - mesothelioma
  - silicosis
  - silicotuberculosis
  - talcosis; or
- (b) any other pathological condition of the lung, pleura or peritoneum that is attributable to dust.

**duty** means—

- (a) a duty of care in tort; or
- (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
- (c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

***duty of care*** means a duty to take reasonable care or to exercise reasonable skill (or both duties).

***expression of regret*** see section 71.

***food donor***, for chapter 2, part 3, division 2, see section 38A(1).

***function***, for chapter 2, part 3, division 1, see section 34.

***future loss*** means all or any of the following—

- (a) future economic loss;
- (b) future general expenses;
- (c) future medical expenses.

***general damages***, for chapter 3, see section 51.

***harm*** means harm of any kind, including the following—

- (a) personal injury;
- (b) damage to property;
- (c) economic loss.

***head***, of an institution, for chapter 2, part 2A, see section 33A.

***injury***, for chapter 3, see section 51.

***injury scale value*** see section 61(1)(a).

***institution***, for chapter 2, part 2A, see section 33A.

***insurance agency***, for chapter 3, part 2A, see section 52A.

***insurance scheme***, for chapter 3, part 2A, see section 52A.

***intoxicated***, in relation to a person, means that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired.

**liability**, for chapter 4, part 1, see section 69.

**loss of earnings** means—

- (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; and
- (b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity.

**motor accident**, for chapter 3, part 2A, see section 52A.

**motor vehicle** means a vehicle for which registration is required under the *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* and includes a trailer.

**National Injury Act**, for chapter 3, part 2A, see section 52A.

**nominee**, for an institution, for chapter 2, part 2A, see section 33A.

**obvious risk**—

- (a) for chapter 2, part 1, division 3, see section 13; and
- (b) chapter 2, part 1, division 4, see section 18.

**office of authority**, for chapter 2, part 2A, see section 33A.

**organised**, for chapter 2, part 3, division 2, see section 38.

**personal injury** includes—

- (a) fatal injury; and
- (b) pre-natal injury; and
- (c) psychological or psychiatric injury; and
- (d) disease.

**personal injury damages** means damages that relate to the death of or injury to a person.

**person in distress**, for chapter 2, part 1, division 7, see section 25.

**possession**, for chapter 2, part 3, division 2, see section 38(1).

*public or other authority*, for chapter 2, part 3, division 1, see section 34.

*section 59A damages* see section 59A(1).

*serious personal injury*, for chapter 3, part 2A, see section 52A.

*structured settlement*, for chapter 3, part 4, see section 63.

*volunteer*, for chapter 2, part 3, division 2, see section 38.

*work*, for chapter 2, part 3, division 2, see section 38.