



Australian Capital Territory

Civil Law (Wrongs) Amendment Act 2003 (No 2)

A2003-35

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Australian Capital Territory

Civil Law (Wrongs) Amendment Act 2003 (No 2)

A2003-35

An Act to amend the *Civil Law (Wrongs) Act 2002*, and for other purposes

*Notified under the Legislation Act 2001 on 8 September 2003
(see www.legislation.act.gov.au)*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Part 1 Preliminary

1 Name of Act

This Act is the *Civil Law (Wrongs) Amendment Act 2003 (No 2)*.

2 Commencement

- (1) This Act (other than sections 13 and 23) commences on the day after its notification day.
- (2) Sections 13 and 23 commence on a day fixed by the Minister by written notice.

Note 1 The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see Legislation Act, s 77 (1)).

Note 3 If a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period (see Legislation Act, s 79).

Part 2 Civil Law (Wrongs) Act 2002

3 Act amended—pt 2

This part amends the *Civil Law (Wrongs) Act 2002*.

4 New section 4A

in chapter 1, insert

4A Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to the following offences against this Act (see Code, pt 2.1):

- section 31ZL (Offence not to disclose particular material)
- section 31ZR (False or misleading statements)

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

5 New part 2.2A

insert

Part 2.2A Apologies

11A Application of pt 2.2A

- (1) This part applies to civil liability of any kind.

- (2) However, this part does not apply to civil liability for an award of damages or compensation—
- (a) for defamation; or
 - (b) under any of the following:
 - (i) the *Discrimination Act 1991*;
 - (ii) the *Victims of Crime (Financial Assistance) Act 1983*;
 - (iii) the *Workers Compensation Act 1951*.

11B Meaning of *apology* in pt 2.2A

In this part:

apology means an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident.

11C Effect of apology on liability etc

- (1) An apology made by or on behalf of a person in relation to an incident claimed to have been caused by the person—
- (a) is not (and must not be taken to be) an express or implied admission of fault or liability by the person in relation to the incident; and
 - (b) is not relevant to deciding fault or liability in relation to the incident.
- (2) Evidence of an apology made by or on behalf of a person in relation to an incident claimed to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the incident.

**6 Damages for a person's death
Section 22 (2)**

omit

part 4.1 (General exclusions and limitations about damages)

substitute

part 4.1 (Damages for personal injuries—exclusions and limitations)

**7 Contributory negligence not defence in relation to death
Section 24 (2)**

omit

part 4.1 (General exclusions and limitations about damages)

substitute

part 4.1 (Damages for personal injuries—exclusions and limitations)

8 Part 3.2 heading

substitute

Part 3.2 Mental harm**9 Definitions for pt 3.2
Section 29**

insert

consequential mental harm, to a person, means mental harm to the person that is a consequence of bodily injury to the person.

mental harm, to a person, means impairment of the person's mental condition.

negligence means failure to exercise reasonable care and skill.

pure mental harm, to a person, means mental harm to the person other than consequential mental harm.

10 New sections 30A and 30B

30A Mental harm—duty of care

- (1) A person (the *defendant*) does not owe a duty to another person (the *plaintiff*) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the application of this section in relation to pure mental harm to a person, the circumstances of the case to which the court must have regard include—
 - (a) whether or not the mental harm was suffered as the result of a sudden shock; and
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger; and
 - (c) the nature of the relationship between the plaintiff and anyone killed, injured or put in danger; and
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the application of this section in relation to consequential mental harm to a person, the circumstances of the case to which the court must have regard include the nature of the bodily injury out of which the mental harm arose.
- (4) This section does not affect the duty of care a person (the *defendant*) has to another person (the *plaintiff*) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

30B Mental harm—damages

- (1) Damages must not be awarded for pure mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.
- (2) Damages must not be awarded for economic loss for consequential mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.

**11 Extensions of liability under pt 3.2 in certain cases
Section 31 (5)**

omit

part 4.1 (General exclusions and limitations about damages)

substitute

part 4.1 (Damages for personal injuries—exclusions and limitations)

12 New chapter 3A

insert

Chapter 3A Negligence**Part 3A.1 Preliminary****31D Definitions for ch 3A**

In this chapter:

harm means harm of any kind, and includes—

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

negligence means failure to exercise reasonable care and skill.

31DA Application of ch 3A

- (1) This chapter applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) However, this chapter does not apply to a claim under the *Workers Compensation Act 1951*.

Part 3A.2 Duty of care

31E Standard of care

For deciding whether a person (the *defendant*) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

31F Precautions against risk—general principles

- (1) A person is not negligent in failing 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 to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):

- (a) the probability that the harm would happen if precautions 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 creating the risk of harm.

31G Precautions against risk—other principles

In a proceeding in relation to liability for negligence—

- (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 it 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 is not of itself an admission of liability in relation to the risk.

Part 3A.3 Causation

31H General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).

- (2) However, if a person (the *plaintiff*) has been negligently exposed to a similar risk of harm by a number of different people (the *defendants*) and it is not possible to assign responsibility for causing the harm to any 1 or more of them—
- (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

31I Burden of proof

In deciding liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Part 3A.4 Other provisions—negligence

31J Contributory negligence can defeat claim

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

31K Remedy available if claim fraudulent

- (1) This section applies to a person if—
- (a) the person did, or omitted to do, something in relation to a claim; and

- (b) the person did, or omitted to do, the thing—
- (i) for the purpose of obtaining a financial benefit; or
 - (ii) knowing that the thing (or something else resulting from doing or omitting to do the thing) is false or misleading.

Example of something done in relation to claim

the making of a statement

Example of something resulting from the doing of the thing

the statement

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) If this section applies to a claimant in relation to a claim—
- (a) a person who has a liability in relation to a payment, settlement, compromise or judgment relating to the claim is relieved from the liability to the extent of the financial benefit obtained by the claimant; and
 - (b) a person who has paid an amount to the claimant in relation to the claim (whether under a settlement, compromise, judgment or otherwise) is entitled to recover from the claimant the amount of the financial benefit obtained by the claimant and any costs incurred in relation to the claim.
- (3) If this section applies to a person other than a claimant in relation to a claim, the claimant is entitled to recover from the person as a debt the amount of the financial benefit obtained by the person and any costs incurred by the claimant in relation to the claim.

13 New chapter 3B

insert

Chapter 3B Personal injuries claims— pre-court procedures

Part 3B.1 Preliminary

31N Definitions for ch 3B

In this chapter:

claim means a claim (however described) for damages based on a liability for personal injury, whether the liability is based in tort or contract or on another form of action (including breach of statutory duty), and, for a fatal injury, includes a claim for the dead person's dependants or estate.

claimant means a person by whom, or on whose behalf, a claim is made.

complying notice of claim means a notice of claim under section 31O (Notice of claim) or section 31S (Claimant may add later respondents) that is given as required under this chapter.

contribution notice—see section 31U (Respondent may add someone else as contributor).

contributor means a person added as a contributor under section 31U (Respondent may add someone else as contributor).

court, in relation to a claim, means—

- (a) if a proceeding based on a claim has been begun—the court hearing the proceeding; or
- (b) if no proceeding based on the claim has been begun—a court with jurisdiction to hear the claim.

insurer, of a person in relation to a claim, means the insurer or other entity providing, or purportedly providing, the person cover or an indemnity against the claim.

party means claimant, respondent or contributor.

respondent means a person who—

- (a) is a respondent under section 31O (Notice of claim); or
- (b) is a later respondent under section 31S (Claimant may add later respondents).

31NA Application of ch 3B

- (1) This chapter applies to all claims for damages for personal injury, including claims to which the *Road Transport (General) Act 1999*, part 10 (Compulsory vehicle insurance) applies.
- (2) However, this chapter does not apply to—
 - (a) a claim under the *Workers Compensation Act 1951*; or
 - (b) a claim for which—
 - (i) notice has been given by or for the claimant under the *Limitation Act 1985*, section 30A (2) (Special provision for injuries to children); and
 - (ii) notice has been given by a respondent under that Act, section 30A (6).

Part 3B.2 Claims procedures

31O Notice of claim

- (1) Before a claimant brings a proceeding against someone else (a *respondent*) based on a claim in relation to a personal injury, the claimant must give the respondent written notice of the claim.

Note 1 A proceeding must be brought before the end of the relevant limitation period under the *Limitation Act 1985*.

Note 2 If a form is approved under s 147 for a notice of claim, the form must be used.

- (2) The notice must—
- (a) contain a statement of the information required under the regulations; and
 - (b) authorise each of the following to have access to the records and sources of information relevant to the claim that are required under the regulations:
 - (i) the respondent;
 - (ii) if the respondent is insured against the claim—the respondent’s insurer for the claim; and
 - (c) be accompanied by the documents required under the regulations.
- (3) The notice must be given within the period that ends on the earlier of the following days:
- (a) the day that is 9 months after—
 - (i) the day the accident giving rise to the personal injury happened; or
 - (ii) if symptoms of the injury are not immediately apparent—the day symptoms of the injury first appear;
 - (b) that day that is 4 months after the day the claimant first consults a lawyer to obtain advice about seeking damages for the personal injury and the respondent is identified.
- (4) If the claimant is a child, the claimant’s parent or legal guardian may give the notice for the claimant.

Note For another procedure for a claim in relation to a personal injury suffered by a child, see the *Limitation Act 1985*, s 30A (Special provision for injuries to children).

- (5) If the notice is not given within the period required under subsection (3), a reasonable excuse for the delay must be given in the notice or by separate written notice to the respondent.

Note If the notice is not given as required under s (3), the obligation to give the notice continues until it is given (see Legislation Act, s 152).

- (6) If the respondent knows of anyone else (a **relevant person**) against whom a proceeding based on the claim may be begun by the claimant, the respondent must, within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the respondent receives the notice)—
- (a) give a copy of the notice to each relevant person; and
 - (b) tell the claimant in writing about each relevant person and give the claimant a short written statement explaining why each of them may be a relevant person.
- (7) If the respondent is a child, the respondent's parent or legal guardian may comply with subsection (6) for the respondent.

31P Preliminary response to claimant

- (1) A respondent must, in writing and within the required period—
- (a) give notice to the claimant under section 31R (Respondent's response to notice of claim); or
 - (b) if the respondent cannot decide on the information in the notice whether or not the respondent is properly a respondent to the claim—tell the claimant, in writing, about the further information the respondent reasonably needs to decide whether the respondent is properly a respondent to the claim; or
 - (c) if the respondent considers that the respondent is not properly a respondent to the claim, tell the claimant, in writing, that the respondent considers the respondent is not properly a respondent to the claim and give the claimant, in writing—

- (i) reasons why the respondent considers the respondent is not properly a respondent to the claim; and
 - (ii) any information the respondent has that may help the claimant identify someone who should be a respondent to the claim.
- (2) If the claimant is told that further information is needed under subsection (1) (b), the claimant must, within the required period—
 - (a) give the respondent the further information; or
 - (b) tell the respondent, in writing, that the claimant considers the respondent to be properly a respondent to the claim and requires the respondent to give notice to the claimant under section 31R.
- (3) Within the required period after being given information under subsection (2) (a), the respondent must, having regard to that information—
 - (a) give notice to the claimant under section 31R; or
 - (b) if the respondent considers that the respondent is not properly a respondent to the claim, tell the claimant, in writing, that the respondent considers the respondent is not properly a respondent to the claim and give the claimant, in writing—
 - (i) reasons why the respondent considers the respondent is not properly a respondent to the claim; and
 - (ii) any information the respondent has that may help the claimant identify someone who should be a respondent to the claim.
- (4) If the claimant is told under subsection (1) (c) or (3) (b) that the respondent is not properly a respondent to the claim, the claimant must, within the required period, tell the respondent, in writing, that—

- (a) the claimant accepts that the respondent is not properly a respondent to the claim; or
 - (b) the claimant considers the respondent to be properly a respondent to the claim and requires the respondent to give notice to the claimant under section 31R.
- (5) Advice given to the respondent under subsection (4) (a) does not prevent the claimant from giving the respondent another notice of claim under section 31O at a later time.
- (6) In this section:
- required period* means—
- (a) the period prescribed under the regulations; or
 - (b) if no period is prescribed, the following:
 - (i) for subsection (1)—1 month after the day the respondent receives a notice of claim under section 31O;
 - (ii) for subsection (2)—1 month after the day the claimant is told under subsection (1) (b) that further information is needed;
 - (iii) for subsection (3)—1 month after the day the respondent is given the information;
 - (iv) for subsection (4)—1 month after the day the claimant is told under subsection (1) (c) or (3) (b) that the respondent is not properly a respondent to claim.

31Q Acknowledgment that proper respondent not admission of liability

Advice by a respondent that the respondent considers that the respondent is properly a respondent to a claim is not an admission of liability by the respondent in relation to the claim.

31R Respondent's response to notice of claim

- (1) This section applies if a respondent—
 - (a) considers the respondent to be properly a respondent to a claim; or
 - (b) is told under section 31P (2) (b) or (4) (b) (Preliminary response to claimant) that the claimant considers the respondent to be properly a respondent to a claim.
- (2) The respondent must, within the required period, give the claimant written notice (a *response*)—
 - (a) stating whether the respondent is satisfied that the notice is a complying notice of claim; and
 - (b) if the respondent is not satisfied—identifying the noncompliance and stating whether the respondent waives compliance with the requirements; and
 - (c) if the respondent does not waive compliance with the requirements—allowing the claimant a reasonable period, of at least 1 month, stated in the response to—
 - (i) satisfy the respondent that the claimant has complied with the requirements; or
 - (ii) take reasonable action stated in the response to remedy the noncompliance.
- (3) If the respondent does not give a response within the required period, the respondent is conclusively presumed to be satisfied that the notice is a complying notice of claim.
- (4) If subsection (2) (c) applies, the respondent must, within 1 month after the day the period stated in the response ends, give the claimant a written notice—
 - (a) stating that the respondent is satisfied the claimant has complied with the relevant requirements, is satisfied with the

action taken by the claimant to remedy the noncompliance, or waives the noncompliance; or

- (b) stating that the respondent is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, and giving full particulars of the noncompliance and the claimant's failure to remedy it.

(5) In this section:

required period means—

- (a) if the respondent responds directly to the claimant under this section as mentioned in section 31P (1) (a)—the period applying under section 31P (1); and
- (b) in any other case—
 - (i) the period prescribed under the regulations; or
 - (ii) if no period is prescribed, the later of the following:
 - (A) if the respondent gives notice to the claimant under section 31P (3) (a)—1 month after the day the respondent is given the further information under section 31P (2) (a);
 - (B) if the claimant tells the respondent under section 31P (2) (b) or (4) (b) that the claimant considers the respondent to be properly a respondent to the claim—1 month after the day the claimant tells the respondent under that paragraph.

31S Claimant may add later respondents

- (1) After a claimant has given notice of a claim to a respondent under section 31O, the claimant may add someone else as a respondent (a *later respondent*) to the claim by giving the later respondent—
 - (a) a notice of a claim complying with section 31O (2); and

- (b) copies of other documents given to or received from any other respondent under this chapter.
- (2) However, the claimant may add a later respondent only—
 - (a) within the time prescribed under the regulations; or
 - (b) if the later respondent and all parties to the claim agree; or
 - (c) if the court gives leave.
- (3) If the claimant adds a later respondent under this section—
 - (a) the later respondent must respond to the notice as if it were a notice of a claim given under section 31O; and
 - (b) the claimant must, in writing, tell each other respondent of the addition within the time prescribed under the regulations.

31T Multiple respondents

- (1) If there are 2 or more respondents to a claim, one of the respondents (the *respondents' claim manager*) may act for 1 or more of the other respondents under this chapter with the agreement of the other respondents.
- (2) The respondents' claim manager—
 - (a) may exercise the functions given under this chapter in relation to the claim and the claimant for all respondents for whom the respondents' claim manager acts; and
 - (b) must act as far as practicable with the agreement of the other respondents for whom the manager acts.
- (3) Action taken, or an agreement made, by the respondents' claim manager in relation to the claim is binding on each respondent for whom the respondents' claim manager acts so far as it affects the claimant.
- (4) However, if the respondents' claim manager acts beyond the scope of the manager's authority under the agreement under

subsection (1), the manager is liable to each other respondent who is a party to the agreement for any loss suffered by the other respondent.

31U Respondent may add someone else as contributor

- (1) A respondent who receives a complying notice of claim may, within the time prescribed under the regulations, add someone else as a contributor for this chapter by giving the person a written notice (a *contribution notice*)—
 - (a) claiming an indemnity from, or contribution towards, the respondent's liability; and
 - (b) stating the grounds on which the respondent holds the person liable; and
 - (c) stating any other information prescribed under the regulations; and
 - (d) accompanied by copies of documents about the claim given to or received from any other party under this chapter.
- (2) If the time prescribed under subsection (1) for adding a contributor has ended, the respondent may add someone else as a contributor only if—
 - (a) the contributor and all parties to the claim agree; or
 - (b) the court gives leave.
- (3) If the respondent adds someone else as a contributor under this section, the respondent must give a copy of the contribution notice to each other party within the time prescribed under the regulations.

31V Contributor's response

- (1) A contributor must, within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the contributor receives a contribution notice), give the

respondent who gave the contribution notice a written response (the *contributor's response*)—

- (a) containing a statement of information prescribed under the regulations; and
 - (b) accompanied by the documents (if any) prescribed under the regulations.
- (2) The contributor's response must also state—
- (a) whether the claim for the contribution or indemnity claimed in the contribution notice is admitted, denied or admitted in part; and
 - (b) if the claim for the contribution or indemnity is admitted in part—the extent to which it is admitted.
- (3) An admission of liability in the contributor's response—
- (a) is not binding on the contributor in relation to any other claim; and
 - (b) is not binding on the contributor at all if it later appears the admission was induced by fraud.
- (4) If the respondent requires information provided by a contributor under this section to be verified by statutory declaration, the contributor must verify the information by statutory declaration.

31W Claimant's failure to give complying notice of claim

- (1) If a claimant does not give a complying notice of claim, the claimant cannot proceed further with the claim unless—
 - (a) the respondent to whom notice of the claim was purportedly given—
 - (i) has given the claimant a written notice to the effect that the respondent is satisfied the notice is a complying

notice of claim or the claimant has taken reasonable action to remedy the noncompliance; or

(ii) is presumed, under section 31R (3) (Respondent's response to notice of claim), to be satisfied the notice is a complying notice of claim; or

(b) the respondent has waived any noncompliance; or

(c) the court, on application by the claimant—

(i) declares that the claimant has remedied the noncompliance; or

(ii) authorises the claimant to proceed further with the claim despite the noncompliance.

(2) An order of the court under subsection (1) (c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's noncompliance.

31X Legal disabilities

(1) A claimant is not required to comply with an obligation under this chapter while the claimant is under a legal disability.

Note If the claimant is a child, under s 31O (4) a parent or guardian of the child may give the notice of claim for the child.

(2) The period within which the obligation must be complied with begins when the claimant's legal disability ends.

(3) This chapter applies to the claimant as if—

(a) a reference to the day the accident giving rise to the personal injury happened were a reference to the day the claimant's legal disability ends; and

(b) all other changes were made to give effect to this section.

(4) This section does not prevent a claimant, or a person acting for a claimant, from complying with an obligation under this chapter while the claimant is under a legal disability.

(5) In this section:

legal disability—a claimant is under a *legal disability* in the circumstances in which a person is under a disability for the *Limitation Act 1985*.

31Y Respondent must attempt to resolve claim

(1) A respondent must, within the period prescribed under the regulations (or, if no period is prescribed, within 6 months after the day the respondent receives a complying notice of claim)—

- (a) take any reasonable steps necessary to find out about the accident claimed to have given rise to the personal injury to which the claim relates; and
- (b) give the claimant written notice stating—
 - (i) whether liability is admitted or denied; and
 - (ii) if contributory negligence is claimed—the degree of the contributory negligence expressed as a percentage; and
- (c) if the claimant made an offer of settlement in the notice of claim—tell the claimant whether the respondent accepts or rejects the offer; and
- (d) if the claimant did not make an offer of settlement in the notice of claim—invite the claimant to make a written offer of settlement; and
- (e) make a fair and reasonable estimate of the damages to which the claimant would be entitled in a proceeding against the respondent; and
- (f) either—

- (i) make a written offer, or counteroffer, of settlement to the claimant setting out in detail the basis on which the offer is made; or
 - (ii) settle the claim by accepting an offer made by the claimant.
- (2) If a notice of claim is not a complying notice of claim, a respondent is taken to have been given a complying notice of claim when—
 - (a) the respondent gives the claimant written notice that the respondent waives compliance with the requirement that has not been complied with or is satisfied the claimant has taken reasonable action to remedy the noncompliance; or
 - (b) the court makes a declaration that the claimant has remedied the noncompliance, or authorises the claimant to proceed further with the claim despite the noncompliance.
- (3) An offer, or counteroffer, of settlement must be accompanied by a copy of medical reports, assessments of cognitive, functional or vocational capacity and all other material, including documents relevant to assessing economic loss, in the offerer's possession or control that may help the person to whom the offer is made make a proper assessment of the offer.
- (4) A respondent or claimant to whom a written offer, or counteroffer, of settlement is made must, unless a response to the offer is to be made under subsection (1) (c), respond in writing to the offer within the period prescribed under the regulations after the day the respondent or claimant receives it (or, if no period is prescribed, within 3 months), indicating acceptance or rejection of the offer.
- (5) An admission of liability by a respondent under this section—
 - (a) is not binding on the respondent in relation to any other claim; and
 - (b) is not binding on the respondent at all if it later appears the admission was induced by fraud.

31Z Consequences of noncompliance with pt 3B.2

- (1) If a claimant does not comply with the requirements of this part, a court in which the claimant begins a proceeding based on the claim—
 - (a) may, on a respondent's application in the proceeding, award in the respondent's favour costs (including legal and investigation costs) reasonably incurred by the respondent because of the claimant's noncompliance; and
 - (b) may only award interest in the claimant's favour for a period for which the claimant was in noncompliance if the court is satisfied there is a reasonable excuse for the noncompliance.
- (2) If a respondent does not comply with the requirements of this part, a court in which the respondent defends a proceeding based on the claim may, on a claimant's application in the proceeding, award in the claimant's favour costs (including legal and investigation costs) reasonably incurred by the claimant because of the respondent's noncompliance.

Part 3B.3 Obligations of parties to give documents and information**31ZA Purpose of pt 3B.3**

The purpose of this part is to put the parties in a position where they have enough information to assess liability and quantum in relation to a claim.

31ZB Claimant to give documents etc to respondent

- (1) A claimant must give a respondent—
 - (a) copies of the following in the claimant's possession:

- (i) reports and other documents about the accident claimed to have given rise to the personal injury to which the claim relates;
 - (ii) reports about the claimant's medical condition or prospects of rehabilitation;
 - (iii) reports about the claimant's cognitive, functional or vocational capacity; and
- (b) information reasonably requested by the respondent about any of the following:
- (i) the accident;
 - (ii) the nature of the personal injury and of any consequent disabilities;
 - (iii) if applicable, the medical treatment and rehabilitation services the claimant has sought or obtained;
 - (iv) the claimant's medical history, as far as it is relevant to the claim, and any other claims for damages for personal injury made by the claimant;
 - (v) the claimant's claim for past and future economic loss;
 - (vi) any claim known to the claimant for gratuitous services consequent on the claimant's personal injury.
- (2) The claimant must give the copies mentioned in subsection (1) (a)—
- (a) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the claimant gives notice of the claim under part 3B.2, or purportedly under part 3B.2); and
 - (b) to the extent that a report or other document mentioned in subsection (1) (a) comes into the claimant's possession later, within 7 days after the day it comes into the claimant's possession.

- (3) The claimant must respond to a request under subsection (1) (b) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the request is received).
- (4) If a respondent requires information given by a claimant under this section to be verified by statutory declaration, the claimant must verify the information by statutory declaration.
- (5) If a claimant fails, without proper reason, to comply fully with this section, the claimant is liable for costs to the respondent resulting from the failure.

31ZC Respondent and claimant may jointly arrange for expert report

- (1) A respondent and a claimant may jointly arrange for an expert report about 1 or more of the following:
 - (a) the cause, or probable cause, of the accident claimed to have given rise to the personal injury to which the claim relates and whether, in the expert's opinion, 1 or more people (who may be named) are responsible for, or contributed to, the accident;
 - (b) the cause, or probable cause, of the personal injury and whether, in the expert's opinion, 1 or more people (who may be named) are responsible for, or contributed to, the accident;
 - (c) the claimant's medical condition or prospects of rehabilitation;
 - (d) the claimant's cognitive, functional or vocational capacity.
- (2) Neither the respondent nor the claimant is under an obligation to agree to a proposal to obtain a report under this section.
- (3) The person from whom an expert report is obtained must be a person, agreed to by both parties, with appropriate qualifications and experience in the relevant field.
- (4) The person preparing the expert report must give both parties a copy of the report.

31ZD Cost of expert report obtained by agreement

- (1) If an expert report is obtained by agreement between a respondent and a claimant and the claimant is liable for the cost of obtaining the report, the respondent must, at the claimant's request, reimburse the claimant for the reasonable cost of obtaining the report.
- (2) However, a claimant's right to reimbursement under this section is subject to any agreement between the claimant and the respondent.

31ZE Examination by expert if no agreement

- (1) This section applies if a respondent wants to obtain an expert report about 1 or more of the matters mentioned in section 31ZC (1) but fails to obtain the claimant's agreement.
- (2) The claimant must comply with a request by the respondent to undergo, at the respondent's expense, either or both of the following:
 - (a) a medical examination by a doctor to be selected by the claimant from a panel of at least 3 doctors with appropriate qualifications and experience in the relevant field nominated by the respondent in the request;
 - (b) an assessment of cognitive, functional or vocational capacity by an expert to be selected by the claimant from a panel of at least 3 experts with appropriate qualifications and experience in the relevant field nominated by the respondent in the request.
- (3) However, a claimant is not obliged to undergo an examination or assessment under this section if it is unreasonable or unnecessarily repetitious.
- (4) If 3 doctors or experts with appropriate qualifications and experience in the relevant field are not available for inclusion on a panel under subsection (2), the number on the panel may be reduced to 2.

31ZF Respondent to give documents etc to claimant

- (1) A respondent must give a claimant—
- (a) copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim:
 - (i) reports and other documents about the accident claimed to have given rise to the personal injury to which the claim relates;
 - (ii) reports about the claimant's medical condition or prospects of rehabilitation;
 - (iii) reports about the claimant's cognitive, functional or vocational capacity; and
 - (b) if asked by the claimant—
 - (i) information that is in the respondent's possession about the circumstances of, or the reasons for, the accident; or
 - (ii) if the respondent is an insurer of a person for the claim—information that can be found out from the insured person for the claim about the circumstances of, or the reasons for, the accident.
- (2) The respondent must give the copies mentioned in subsection (1) (a)—
- (a) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the respondent receives a complying notice of claim); and
 - (b) to the extent that a report or other document mentioned in subsection (1) (a) comes into the claimant's possession later, within 7 days after the day it comes into the claimant's possession.

- (4) The respondent must respond to a request under subsection (1) (b) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the request is received).
- (5) If a claimant requires information given by a respondent under this section to be verified by statutory declaration, the respondent must verify the information by statutory declaration.
- (6) If a respondent fails, without proper reason, to comply fully with this section, the respondent is liable for costs to the claimant resulting from the failure.

31ZG Respondent to give documents etc to contributor

- (1) A respondent must give a contributor added by the respondent copies of the following that are in the respondent's possession:
 - (a) reports and other documents about the accident claimed to have given rise to the personal injury to which the claim relates;
 - (b) reports about the claimant's medical condition or prospects of rehabilitation;
 - (c) reports about the claimant's cognitive, functional or vocational capacity;
 - (d) reports about the claimant's person injury and of any consequent disabilities;
 - (e) if applicable, information about the medical treatment and rehabilitation services the claimant has sought or obtained;
 - (f) information about the claimant's medical history, as far as it is relevant to the claim, and any other claims for damages for personal injury made by the claimant;
 - (g) information about the claimant's claim for past and future economic loss;

- (h) information about any claim known to the respondent for gratuitous services consequent on the claimant's personal injury.
- (2) The respondent must give the copies—
- (a) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the respondent gives a contribution notice to the contributor); and
- (b) to the extent that a report or other document or information mentioned in subsection (1) comes into the respondent's possession later, within 7 days after the day it comes into the respondent's possession.

31ZH Contributor to give documents to respondent

- (1) A contributor must give the respondent who added the contributor copies of reports and other documents about the accident claimed to have given rise to the personal injury to which the claim relates that are in the contributor's possession.
- (2) The contributor must give the copies—
- (a) within the period prescribed under the regulations (or, if no period is prescribed, within 1 month after the day the contributor is added as a contributor); and
- (b) to the extent that a report or other document mentioned in subsection (1) comes into the respondent's possession later, within 7 days after the day it comes into the respondent's possession.

31ZI Alternative provision if more than 200 pages

- (1) In this section:

relevant section means any of the following sections:

- section 31ZF (Respondent to give documents etc to claimant)

- section 31ZG (Respondent to give documents etc to contributor)
 - section 31ZH (Contributor to give documents to respondent).
- (2) This section applies to the extent that a relevant section requires a person (the *disclosing person*) to give copies of reports or other documents or information (*relevant material*) to someone else and the total number of pages of the copies exceeds 200 pages.
- (3) Within the time the disclosing person would, apart from this section, be required to give relevant material to someone else under the relevant section, the disclosing person need only offer the other person a reasonable opportunity to inspect the material.
- (4) If the other person, whether on inspection or otherwise, by written notice given to the disclosing person, requires the disclosing person to give the other person copies of some or all of the relevant material, the disclosing person must comply with the requirement within—
- (a) if the total number of pages does not exceed 200—1 month after the day the requirement is made; or
 - (b) in any other case—1 month after the day the other person pays 50 cents for each page by which the total number of pages exceeds 200 pages.

Note If, under a provision of an Act or statutory instrument, an act is required to be done, the obligation to do the act continues until it is done (see Legislation Act, s 152).

Part 3B.4 Other provisions—pre-court procedures

31ZJ Nondisclosure of documents etc—client legal privilege

- (1) A party is not obliged to disclose a document or information under this chapter if the document or information is protected by client legal privilege.
- (2) However, an investigative report, medical report or report relevant to the claimant's rehabilitation must be disclosed even though otherwise protected by client legal privilege.
- (3) The regulations may prescribe exceptions to subsection (2).
- (4) If a report mentioned in subsection (2) is required to be disclosed, it may be disclosed with the omission of passages containing only statements of opinion.
- (5) In this section:

investigative reports does not include a document prepared in relation to an application for, an opinion on or a decision about indemnity against the claim from the Territory.

31ZK Nondisclosure of documents etc—suspected fraud

- (1) If a respondent has reasonable grounds to suspect a claimant of fraud, the respondent may apply to the court for approval to withhold from disclosure under this chapter documents or information that—
 - (a) would alert the claimant to the suspicion; or
 - (b) could help further the fraud.
- (2) The application may be made without notice to the claimant.

- (3) If the court gives approval on application under subsection (1), the respondent may withhold from disclosure the documents or information in accordance with the approval.

31ZL Offence not to disclose particular material

A respondent must not withhold information or documents from disclosure under this chapter if the withholding is not—

- (a) permitted under this chapter; or
- (b) approved by the court.

Maximum penalty: 100 penalty units.

31ZM Consequences of failure to give document

- (1) This section applies if a party fails to comply with a provision of this chapter requiring the party to disclose a document to another party.
- (2) The document cannot be used by the party in a later court proceeding based on the claim, or the deciding of the claim, unless the court orders otherwise.
- (3) If the document comes to the other party's knowledge, the document may be used by the other party.

31ZN Privilege generally for documents etc

The information, reports and other documents given or disclosed under this chapter are protected by the same privileges as if disclosed in a proceeding in the Supreme Court.

31ZO No requirement to give documents etc if already in other party's possession

This chapter does not require a party to give a document or other information to another party if the document or information is already in the possession of the other party.

31ZP Court's power to enforce compliance with pt 3B.2 and pt 3B.3

- (1) If a party (the *first party*) fails to comply with a duty imposed under part 3B.2 or 3B.3, the court may, on the application of a party to whom the duty is owed, order the first party to take stated action to remedy the noncompliance within a time stated by the court.
- (2) The court may make consequential or ancillary orders, including orders about costs.

31ZQ Need for urgent proceeding

- (1) The court, on application by a claimant, may give leave to the claimant to begin a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this chapter if the court is satisfied there is an urgent need to begin the proceeding.
- (2) The order giving leave may be made on conditions the court considers appropriate having regard to the circumstances of the case.
- (3) If leave is given, the proceeding begun by leave is stayed until the claimant complies with this chapter or the proceeding is discontinued or otherwise ends.
- (4) However, the proceeding is not stayed if—
 - (a) the court is satisfied that—
 - (i) the claimant is suffering from a terminal condition; and
 - (ii) the trial of the proceeding should be expedited; and
 - (b) the court orders the proceeding be given priority in the allocation of a trial date.
- (5) If, under subsection (4), the proceeding is not stayed, this chapter (other than this section) does not apply in relation to the personal injury.

31ZR False or misleading statements

- (1) A person commits an offence if—
- (a) the person makes a statement in a notice, response or other document given under this chapter; and
 - (b) the person does so knowing that the statement—
 - (i) is false or misleading; or
 - (ii) omits anything without which the statement is misleading.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (2) Subsection (1) (b) (i) does not apply if the statement is not false or misleading in a material particular.
- (3) Subsection (1) (b) (ii) does not apply if the omission does not make the statement misleading in a material particular.
- (4) A person commits an offence if—
- (a) the person makes a statement in a notice, response or other document given under this chapter; and
 - (b) the person is reckless about whether the statement—
 - (i) is false or misleading; or
 - (ii) omits anything without which the statement is misleading.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (5) Subsection (4) (b) (i) does not apply if the statement is not false or misleading in a material particular.
- (6) Subsection (4) (b) (ii) does not apply if the omission does not make the statement misleading in a material particular.

14 New chapter 3C*insert***Chapter 3C Expert medical evidence****31ZT Purpose of ch 3C**

The purpose of this chapter is to define the role, and limit the number, of witnesses who may give expert medical evidence in a proceeding based on a claim.

31ZU Definitions for ch 3C

In this chapter:

agreed expert—see section 31ZW.

appointed expert—see section 31ZW.

claim means a claim (however described) for damages based on a liability for personal injury, whether the liability is based in tort or contract or on another form of action (including breach of statutory duty), and, for a fatal injury, includes a claim for the dead person's dependants or estate.

evidence means evidence given orally or in writing.

expert, in relation to an issue, means a person who has specialised knowledge about matters relevant to the issue based on the person's training, study or experience.

expert medical evidence means opinion evidence on a medical issue given by an expert in relation to the issue.

medical issue—an issue is a *medical issue* if it relates to—

- (a) the medical condition or prospects of rehabilitation of a person;
or
- (b) the cognitive, functional or vocational capacity of a person; or

- (c) the question whether particular medical treatment amounts to professional negligence.

31ZV Application of ch 3C

- (1) This chapter applies to all claims for damages for personal injury, including claims to which the *Road Transport (General) Act 1999*, part 10 (Compulsory vehicle insurance) applies.
- (2) However, this chapter does not apply to a claim under the *Workers Compensation Act 1951*.

31ZW Limitation on expert medical evidence

Expert medical evidence may be given in a proceeding in a court based on a claim only by—

- (a) an expert appointed by the parties under section 31ZX or 31ZZA (1) (an *agreed expert*); or
- (b) an expert appointed by the court under section 31ZY or 31ZZA (2) (an *appointed expert*).

31ZX Agreed expert

- (1) The parties to the proceeding may agree, in writing, to appoint 1 stated person to give expert medical evidence in the proceeding.
- (2) The agreed expert may be (but need not be)—
- (a) a person who prepared an expert report for the parties under section 31ZC (Respondent and claimant may jointly arrange for expert report); or
- (b) a person on a panel mentioned in section 31ZE (Examination by expert if no agreement).
- (3) The agreed expert may give evidence in the proceeding as an expert on any issue on which the expert is qualified to give evidence based on the expert's specialised knowledge.

31ZY Appointed expert

- (1) If the parties do not appoint an agreed expert, the court may, on application by 1 or more of the parties or on its own initiative, appoint a stated person to give expert medical evidence in the proceeding.
- (2) The court may appoint an additional expert, or additional experts, to give expert medical evidence in the proceeding if—
 - (a) expert medical evidence is required on 2 or more issues in the proceeding and the agreed or appointed expert is not qualified to give evidence on all the issues based on the expert's specialised knowledge; or
 - (b) the court considers that the interests of justice otherwise require it.
- (3) The court must not appoint more than 1 expert to give expert medical evidence on any particular issue unless the court considers that the interests of justice require it.
- (4) The court must not appoint a person to give expert medical evidence on an issue unless the court is satisfied the person is an expert in relation to the issue.
- (5) An appointed expert may be (but need not be)—
 - (a) a person who prepared an expert report for the parties under section 31ZC (Respondent and claimant may jointly arrange for expert report); or
 - (b) a person on a panel mentioned in section 31ZE (Examination by expert if no agreement).
- (6) An appointed expert may give evidence in the proceeding as an expert on any issue on which the expert is qualified to give evidence based on the expert's specialised knowledge.

31ZYA Role of expert

- (1) The role of an agreed or appointed expert is to assist the court impartially on the issue or issues on which the expert is giving expert medical evidence.
- (2) The expert's primary duty is to the court.
- (3) The expert is not an advocate for a party to the proceeding.
- (4) In giving evidence in relation to the question whether particular medical treatment amounts to professional negligence, the expert must have regard to whether the treatment was in accordance with an opinion widely held by a significant number of respected practitioners in Australia in the relevant field.

31ZZ Documents etc to be given to expert

The parties to a proceeding must ensure that—

- (a) all reports and other documents or information relevant to the issue or issues on which an agreed or appointed expert is to give evidence are made available to the expert; and
- (b) the expert is jointly briefed by the parties or the parties have equal opportunity to brief the expert.

31ZZA If agreed or appointed expert unavailable

- (1) If an agreed expert is not available to give evidence on an issue when required, the court may, on application by the parties, allow the parties to appoint another agreed expert to give evidence on the issue.
- (2) If an appointed expert is not available to give evidence on an issue when required the court may appoint another expert to give evidence on the issue.

31ZZB Costs of experts

The costs and expenses of an agreed or appointed expert must be paid by the parties in equal shares or as otherwise agreed by them or ordered by the court.

31ZZC Rules etc to make further provision

- (1) For a proceeding in the Supreme Court, rules under the *Supreme Court Act 1933* may make provision in relation to—
 - (a) how the court is to choose an expert; and
 - (b) how experts may give evidence and be questioned.
- (2) For a proceeding in the Magistrates Court, the regulations may make provision in relation to—
 - (a) how the court is to choose an expert; and
 - (b) how the expert may give evidence and be questioned.

15 Part 4.1 heading

substitute

Part 4.1 Damages for personal injuries—exclusions and limitations**16 Definitions for pt 4.1**
Section 32, definitions of *accident*, *motor accident*, *motor vehicle* and *personal injury*

omit

17 New section 38A

in part 4.1, insert

38A Tariffs for damages for non-economic loss

- (1) In deciding damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceeding.
- (2) For that purpose, the parties to the proceeding or their lawyers may bring the court's attention to awards of damages for non-economic loss in those earlier decisions.
- (3) This section does not change the rules for deciding other damages.
- (4) In this section:
non-economic loss includes the following:
 - (a) pain and suffering;
 - (b) loss of amenities of life;
 - (c) loss of expectation of life;
 - (d) disfigurement.

**18 Apportionment of liability—contributory negligence
Section 41 (5)**

omit

part 4.1 (General exclusions and limitations about damages)

substitute

part 4.1 (Damages for personal injuries—exclusions and limitations)

19 New chapter 4A

insert

Chapter 4A Liability of public and other authorities

46A Application of ch 4A

- (1) This chapter applies in relation to civil liability in tort.
- (2) This chapter extends to any such liability even if the damages are sought in an action for breach of contract or any other action.
- (3) However, this chapter does not apply to—
 - (a) a claim to which the *Road Transport (General) Act 1999*, part 10 (Compulsory vehicle insurance) applies; or
 - (b) a claim under the *Workers Compensation Act 1951*.

46B Definitions for ch 4A

In this chapter:

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

public or other authority means any of the following:

- (a) the Territory;
- (b) an administrative unit;
- (c) a Territory authority;
- (d) an entity prescribed under the regulations for this paragraph;
- (e) any entity so far as the entity exercises a function prescribed under the regulations for this paragraph.

46C Principles about resources, responsibilities etc of public or other authorities

The following principles apply in deciding in a proceeding whether a public or other authority has a duty of care or has breached a duty of care:

- (a) the functions required to be exercised by the authority are limited by the financial and other resources reasonably available to the authority for exercising the functions;
- (b) the general allocation of the 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 only by reference to the matter to which the proceeding relates);
- (d) the authority may rely on evidence of its compliance with the general procedures and 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.

46D Proceedings against public or other authorities based on breach of statutory duty

- (1) This section applies to a proceeding based on a claimed breach of a statutory duty by a public or other authority (the *defendant authority*) in relation to the exercise of, or a failure to exercise, a function of the defendant authority.
- (2) For the proceeding, an act or omission of the defendant authority is a breach of statutory duty only if the act or omission was in the circumstances so unreasonable that no authority having the functions of the defendant authority could properly consider the act or omission to be a reasonable exercise of its functions.

- (3) For a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 46E.

46E When public or other authority not liable for failure to exercise regulatory functions

- (1) A public or other authority is not liable in a proceeding so far as the claim in the proceeding is based on the failure of the authority to exercise, or to consider exercising, a function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in a proceeding begun by the claimant.
- (2) Without limiting what is a function to regulate an activity for this section, a function to issue a licence, permit or other authority in relation to an activity, or to register or otherwise authorise a person in relation to an activity, is a function to regulate the activity.

46F Special nonfeasance protection in relation to roads etc

- (1) A public or other authority is not liable in a proceeding for harm arising from a failure of the authority to maintain, repair or renew a road, or to consider maintaining, repairing or renewing a road, unless at the time of the claimed failure the authority knew, or ought reasonably to have had known, of the particular risk the materialisation of which resulted in the harm.
- (2) This section does not operate—
- (a) to create a duty of care in relation to a risk only because the authority has actual knowledge of the risk; or
- (b) to affect any standard of care that would otherwise apply in relation to a risk.
- (3) In this section:

road means a street, road, lane, cyclepath, footpath or paved area that is open to, or used by, the public.

46G Exercise of function or decision to exercise does not create duty

The fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

**20 Definitions for pt 7.1
Section 76, definition of *motor vehicle***

omit

**21 Liability of occupiers
Section 101 (3)**

omit

part 4.1 (General exclusions and limitations about damages)

substitute

part 4.1 (Damages for personal injuries—exclusions and limitations)

22 New part 10.1 heading

insert

Part 10.1 Maximum costs for certain personal injury damages claims**23 New part 10.2**

insert

Part 10.2 **Costs in damages claims if no reasonable prospects of success**

118A Definitions for pt 10.2

In this part:

court includes a tribunal or arbitrator.

provable facts, in relation to a lawyer—a fact is *provable* in relation to a lawyer only if the lawyer believes on reasonable grounds that the material then available to the lawyer provides a proper basis for claiming the fact.

reasonable prospects of success—

- (a) a claim has *reasonable prospects of success* if there are reasonable prospects of damages being recovered on the claim; and
- (b) a defence has *reasonable prospects of success* if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.

118B Application of pt 10.2

- (1) This part applies despite any obligation of the lawyer to act in accordance with the instructions or wishes of the client.
- (2) This part does not apply to legal services provided by a lawyer in relation to a claim for damages at any time before the lawyer gives the certification required under section 118C for the claim.
- (3) Also, this part does not apply to a claim for damages if the court considers that it is in the interests of justice for the claim to be continued and makes an order to that effect.

118C Certificate that claim or defence has reasonable prospects of success

- (1) This section applies to a lawyer who is providing legal services on a claim for damages, or in defence of a claim for damages.
- (2) The lawyer must not sign a pleading in relation to the claim unless the lawyer has filed in the court a certificate stating that the lawyer believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.
- (3) Contravention of subsection (2) by a lawyer is not an offence but can be professional misconduct or unsatisfactory professional conduct under the *Legal Practitioners Act 1970*, part 8 (Discipline).
- (4) The regulations may make provision in relation to the certificate mentioned in subsection (2), including, for example, about the form of the certificate.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

118D Costs order against lawyer acting without reasonable prospects of success

- (1) If the court in which a pleading has been signed in relation to a claim for damages considers that legal services were provided by a lawyer for a client on the claim, or in defence of the claim, without the claim or defence having reasonable prospects of success, the court may (on its own initiative or on the application of a party to the proceeding) make either or both of the following orders:
 - (a) an order directing the lawyer to repay to the client (or to pay) all or part of the costs that the client has been ordered to pay to another party;
 - (b) an order directing the lawyer to indemnify a party other than the client against all or part of the costs payable by that party.

- (2) The Supreme Court may, on its own initiative or on the application of a party to the action, make any order that the court considers necessary for this section.
- (3) An application for an order under this section cannot be made after the court concerned (or a taxing officer) has made a final decision about the costs payable in the action.
- (4) A lawyer is not entitled to demand, recover or accept from a client any part of the costs for which the lawyer is directed to indemnify a party under an order under this section.

118E Onus on lawyer to show facts provided reasonable prospects of success

- (1) For this part, it must be presumed that legal services were provided for a client by a lawyer on a claim for damages, or in defence of a claim for damages, without the claim or defence having reasonable prospects of success if—
 - (a) the trial court hearing the action finds that the facts established by the evidence before the court do not form the basis for a belief on reasonable grounds that the claim or defence had reasonable prospects of success; or
 - (b) the Supreme Court (if it is not the trial court) is satisfied, because of a finding, or the judgment, of the trial court, that the facts established by the evidence before the trial court do not form the basis for a belief on reasonable grounds that the claim or defence had reasonable prospects of success.
- (2) The lawyer can rebut the presumption by establishing that, when the legal services were provided, there were provable facts that provided a basis for a belief on reasonable grounds that the claim or defence had reasonable prospects of success.
- (3) For the purpose of rebutting the presumption, a lawyer may disclose information or a document despite client legal privilege (including any duty of confidentiality to a client) if—

- (a) the client is the client for whom the legal services were provided; or
- (b) the client consents to the disclosure; or
- (c) the court is satisfied that the disclosure is necessary for the lawyer to rebut the presumption.

24 Part 11.1 heading

substitute

Part 11.1 Mediation and neutral evaluation**25 Purpose of pt 11.1 etc
Section 119**

before

neutral evaluation

insert

mediation or

26 Section 120 heading

substitute

120 Meaning of *mediation*, *neutral evaluation* etc**27 New section 120 (1A) and (1B)**

before section 120 (1), insert

- (1A) For this part, ***mediation*** is a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

- (1B) For this part, *mediation session* means a meeting arranged for the mediation of a matter under this part.

28 Section 120

renumber subsections when Act next republished under Legislation Act

29 New section 120A

insert

120A Who can be a mediator

A person can be a mediator if the person—

- (a) is a registered mediator under the *Mediation Act 1997*; and
- (b) is appointed by a court or tribunal as a mediator.

30 Section 122 heading

substitute

122 Referral by court or tribunal for mediation or neutral evaluation**31 Section 122 (1)**

before

neutral evaluation

insert

mediation or

32 Section 122 (2)

substitute

- (2) Mediation is to be undertaken by a mediator appointed by the court or tribunal, and neutral evaluation is to be undertaken by an evaluator appointed by the court or tribunal.
- (3) For a proceeding before the Supreme Court, an order under subsection (1), and an appointment under subsection (2), may be made by—
- (a) the master of the court; or
 - (b) if the rules of court allow—the registrar of the court.

**33 Duty of parties to take part in neutral evaluations
Section 123**

before

neutral evaluation

insert

mediation or

**34 Costs of neutral evaluation
Section 124**

before

neutral evaluation

insert

mediation or

35 New section 124A

insert

124A Agreements and arrangements arising from mediation sessions

- (1) The court or tribunal may make orders to give effect to an agreement or arrangement arising out of a mediation session.
- (2) This part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters that are the subject of the mediation session.

Note For provisions about privilege, secrecy and protection in relation to mediators, see the *Mediation Act 1997*.

**36 Application provisions—for certain new measures
Section 150 (2)**

omit

Part 4.1 (General exclusions and limitations about damages)

substitute

Part 4.1 (Damages for personal injuries—exclusions and limitations), other than section 38A (Tariffs for damages for non-economic loss),

37 Section 150 (3)

omit

Chapter 10 (Limitations on legal costs)

substitute

Part 10.1 (Maximum costs for certain personal injury damages claims)

38 New section 150 (3A)

insert

- (3A) Also, part 10.1 does not apply to a claim based on a cause of action that arose before the commencement of the part.

39 New section 150A

insert

150A Application provisions—for *Civil Law (Wrongs) Amendment Act 2003*

- (1) The following provisions do not apply to a claim based on a cause of action that arose before the commencement of the provision:
- (a) part 2.2A (Apologies);
 - (b) section 30A (Mental harm—duty of care);
 - (c) section 30B (Mental harm—damages);
 - (d) chapter 3A (Negligence);
 - (e) chapter 3C (Expert medical evidence);
 - (f) section 38A (Tariffs for damages for non-economic loss);
 - (g) chapter 4A (Liability of public and other authorities);
 - (h) part 10.2 (Costs in damages claims if no reasonable prospects of success);
 - (i) schedule 3 (Equine activities).
- (2) Chapter 3B (Personal injuries claims—pre-court procedures) does not apply to a claim if, before the commencement of the chapter, the claimant had consulted a lawyer to obtain advice about seeking damages for the personal injury.
- (3) This section expires 3 years after the day it commences.
- (4) Subsections (1) and (2) are declared to be laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

**40 Transitional regulations
Section 155 (4)**

omit

1 year

substitute

2 years

**41 Modification of ch 12's operation
Section 156 (2)**

omit

1 year

substitute

2 years

42 New schedule 3

insert

Schedule 3 Equine activities

1 Definitions for sch 3

In this schedule:

equine means a horse, donkey, mule or hinny.

equine activity means any of the following:

- (a) an equine show, fair, competition, performance or parade that involves 1 or more equines and 1 or more equine disciplines;
- (b) equine teaching or training activities;
- (c) agisting or boarding equines;

- (d) riding, inspecting or evaluating an equine belonging to someone else, whether or not the owner—
 - (i) receives any reward for use of the equine; or
 - (ii) is permitting a prospective buyer to ride, inspect or evaluate the equine;
- (e) a ride, trip, hunt or other activity (however informal or impromptu) that is sponsored by an equine activity sponsor;
- (f) placing or replacing horseshoes on an equine.

Examples for par (a)

dressage

3-day events

performance riding

polo

showjumping

steeplechasing

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

equine activity sponsor means—

- (a) an entity that (whether or not it operates for profit) sponsors, organises or provides a facility for an equine activity; or
- (b) an operator, instructor or promoter of an equine facility.

Examples for par (a)

pony clubs

riding clubs or schools

equestrian centres

school-sponsored classes

equine facility includes an equestrian centre, riding school, stable, clubhouse, fair or arena where an equine activity is held.

equine professional means a person engaged for reward in—

- (a) instructing a participant or renting an equine to a participant to—
 - (i) ride or be a passenger on the equine; or
 - (ii) drive the equine; or
- (b) renting equipment or tack to a participant.

inherent risks of equine activities means the dangers or conditions that are an integral part of equine activities, including, for example—

- (a) the propensity of an equine to behave in ways that may result in injury, harm or death to people on or around them; and
- (b) the unpredictability of an equine's reactions including to sounds, sudden movement and unfamiliar objects, people or animals; and
- (c) hazards such as surface and subsurface conditions; and
- (d) collisions with other equines or objects; and
- (e) the potential of a participant to act negligently that may contribute to injury to the participant or others.

Examples for par (e)

failing to maintain control over an equine

not acting within the participant's ability

participant means a person who participates in an equine activity (whether or not a fee is paid for the participation).

participate in an equine activity—

- (a) means—
 - (i) ride or be a passenger on an equine; or
 - (ii) drive or train an equine, whether mounted or unmounted; or

- (iii) assist in medical treatment of an equine, whether mounted or unmounted; or
 - (iv) assist a participant or show management; but
- (b) does not include be a spectator at an equine activity (unless the spectator is in an unauthorised area and in immediate proximity to the equine activity).

2 Application of sch 3

This schedule does not prevent or limit the liability of an equine activity sponsor, an equine professional or anyone else in relation to—

- (a) activities engaged in as part of the horseracing industry; or
- (b) any action for breach of the *Trade Practices Act 1974* (Cwlth) or the *Fair Trading Act 1992*; or
- (c) a claim under the *Workers Compensation Act 1951*.

3 Limitation on liability for injury or death of participant

- (1) An equine activity sponsor, an equine professional or anyone else is not liable for personal injury to a participant resulting from the inherent risks of equine activities.
- (2) However, this clause does not prevent or limit the liability of a person (the *defendant*) if—
 - (a) the injury was caused by faulty equipment or tack and the defendant—
 - (i) provided the equipment or tack; and
 - (ii) knew or ought reasonably to have known that the equipment or tack was faulty; or
 - (b) the defendant provided the equine and failed to make reasonable and prudent efforts to assess, based on the participant's representations, the participant's ability to—

- (i) engage safely in the equine activity; and
 - (ii) safely manage the particular equine; or
 - (c) the injury was caused by a dangerous latent condition of the land or facility used for the equine activity and—
 - (i) the defendant owned, leased or was otherwise in lawful possession of the land or facility; and
 - (ii) the defendant knew, or ought reasonably to have known, of the dangerous latent condition; and
 - (iii) a sign warning about the dangerous latent condition had not been conspicuously displayed on the land or at the facility; or
 - (d) the defendant acted, or omitted to act, in a way that showed intentional or reckless disregard for the safety of the participant and the act or omission caused the injury; or
 - (e) the defendant intentionally injured the participant.
- (3) Also, this clause does not prevent or limit an equine professional's liability to a participant in relation to an equine facility if, before the injury happened, the equine professional had not complied with clause 4 in relation to the facility.

4 Warning notice

- (1) An equine professional must ensure that a warning notice is displayed—
 - (a) on or near an equine facility that is owned, managed or controlled by the equine professional; and
 - (b) so that it can be clearly seen by participants before participating in equine activities at the facility.
- (2) The warning notice must be to the following effect:

WARNING

Under the *Civil Law (Wrongs) Act 2002*, an equine professional is not liable for injury to, or the death of, a participant in an equine activity that results from an inherent risk of the activity. This is subject to limitations set out in the Act.

- (3) The warning notice must be in black letters with each letter at least 2cm high.
- (4) The warning notice must also be included in clearly visible print in each written contract the equine professional enters into for the provision of professional services, instruction or rental of equipment or tack to a participant.

43 Dictionary, definition of *accident*

substitute

accident means an incident out of which personal injury arises, and includes a motor accident.

44 Dictionary, new definitions

insert

agreed expert, for chapter 3C (Expert medical evidence)—see section 31 ZW.

apology, for part 2.2A (Apologies)—see section 11B.

appointed expert, for chapter 3C (Expert medical evidence)—see section 31 ZW.

45 Dictionary, definition of *claim*

substitute

claim—

- (a) for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N; and

- (b) for chapter 3C (Expert medical evidence)—see section 31ZU; and
- (c) for part 4.1 (Damages for personal injuries—exclusions and limitations)—see section 32.

46 Dictionary, new definitions

insert

claimant, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N.

complying notice of claim, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N.

consequential mental harm, for part 3.2 (Mental harm)—see section 29.

contribution notice, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31U (Respondent may add someone else as contributor).

contributor, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N.

47 Dictionary, definition of court

substitute

court—

- (a) for part 2.4 (Proceedings against and contributions between wrongdoers)—see section 16; and
- (b) for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N; and
- (c) for part 4.1 (Damages for personal injuries—exclusions and limitations)—see section 32; and
- (d) for part 4.3 (Contributory negligence)—see section 40; and

- (e) for chapter 5 (Defamation)—see section 47; and
- (f) for chapter 9 (Misrepresentation)—see section 105; and
- (g) for part 10.1 (Maximum costs for certain personal injury damages claims)—see section 113.
- (h) for part 10.2 (Costs in damages claims if no reasonable prospects of success)—see section 118A.

48 Dictionary, new definitions

insert

duty of care, for chapter 4A (Liability of public and other authorities)—see section 46B.

equine, for schedule 3 (Equine activities)—see schedule 3, clause 1.

equine activity, for schedule 3 (Equine activities)—see schedule 3, clause 1.

equine activity sponsor, for schedule 3 (Equine activities)—see schedule 3, clause 1.

equine facility, for schedule 3 (Equine activities)—see schedule 3, clause 1.

equine professional, for schedule 3 (Equine activities)—see schedule 3, clause 1.

evidence, for chapter 3C (Expert medical evidence)—see section 31ZU.

expert, for chapter 3C (Expert medical evidence)—see section 31ZU.

expert medical evidence, for chapter 3C (Expert medical evidence)—see section 31ZU.

harm, for chapter 3A (Negligence)—see section 31D.

inherent risks of equine activities, for schedule 3 (Equine activities)—see schedule 3, clause 1.

49 Dictionary, definition of *insurer*

substitute

insurer—

- (a) of a person in relation to a claim, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N; and
- (b) for part 11.2 (General reporting requirements of insurers)—see section 128.

50 Dictionary, new definitions

insert

mediation—see section 120.

mediation session—see section 120.

medical issue, for chapter 3C (Expert medical evidence)—see section 31ZU.

mental harm, for part 3.2 (Mental harm)—see section 29.

51 Dictionary, definitions of *motor accident* and *motor vehicle*

substitute

motor accident means an accident caused by, or arising out of the use of, a motor vehicle.

motor vehicle means—

- (a) a motor vehicle under the *Road Transport (General) Act 1999*;
or
- (b) a vehicle operated on a railway or other fixed track;

and, for part 7.1 (Traveller accommodation providers liability), includes a boat, caravan and trailer attached to a motor vehicle.

52 Dictionary, new definitions

insert

negligence—

- (a) for part 3.2 (Mental harm)—see section 29; and
- (b) for chapter 3A (Negligence)—see section 31D.

participant, for schedule 3 (Equine activities)—see schedule 3, clause 1.

participate, for schedule 3 (Equine activities)—see schedule 3, clause 1.

party, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N.

53 Dictionary, definition of *personal injury*

substitute

personal injury means bodily injury, and includes—

- (a) mental or nervous shock; and
- (b) death.

54 Dictionary, new definitions

insert

provable facts, in relation to a lawyer, for part 10.2 (Costs in damages claims if no reasonable prospects of success)—see section 118A.

public or other authority, for chapter 4A (Liability of public and other authorities)—see section 46B.

pure mental harm, for part 3.2 (Mental harm)—see section 29.

reasonable prospects of success, for part 10.2 (Costs in damages claims if no reasonable prospects of success)—see section 118A.

respondent, for chapter 3B (Personal injuries claims—pre-court procedures)—see section 31N.

55 Act amended—renumbering

renumber provisions when Act next republished under Legislation Act

Part 3

**Civil Law (Wrongs)
Regulations 2002**

56 Regulations repealed

The Civil Law (Wrongs) Regulations 2002 No 41 are repealed.

- (b) the period that would have applied to the cause of action apart from this section.
- (5) Subsections (3) to (6) expire 5 years after the day this section commences.
- (6) Subsections (3) and (4) are declared to be laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

59 Section 30 (3)

substitute

- (3) This section does not apply to—
 - (a) a cause of action to recover a penalty or forfeiture or sum by way of penalty or forfeiture unless the person having the cause of action is an aggrieved party; or
 - (b) a cause of action to which section 30B (Special provision in relation to children—claims relating to health services) applies.

60 New section 30A

insert

30A Special provision for injuries to children

- (1) This section applies if—
 - (a) a child (the *plaintiff*) suffers personal injury that gives rise to a claim for damages; and
 - (b) a notice of claim has not been given under the *Civil Law (Wrongs) Act 2002*, chapter 3B (Personal injuries claims—pre-court procedures), or a proceeding has not been begun in a court, in relation to the claim; and
 - (c) the limitation period applying to the claim under this Act does not end within the relevant period.

Section 60

- (2) The plaintiff (or the plaintiff's parent or guardian) must, within the relevant period, give notice of an intended claim to anyone (the *defendant*) claimed to be liable for damages in relation to the claim.

Note If a form is approved under s 58 (Approved forms) for a notice, the form must be used.

- (3) If the injury is claimed to have arisen out of a motor accident, the notice must be given to the third-party insurer.
- (4) The notice must contain the information required under the regulations.
- (5) The plaintiff (or the plaintiff's parent or guardian) must comply with a reasonable request by the defendant—
- (a) to provide copies of medical and other records and reports in the possession of the plaintiff (or the plaintiff's parent or guardian) that are relevant to the nature and extent of the plaintiff's injury and any consequent disability; or
 - (b) to undergo examination, at the defendant's expense, by a medical expert for the purpose of finding out the nature and extent of the plaintiff's injury and any consequent disability.
- (6) The defendant may, by written notice given to the plaintiff, require the plaintiff, within 6 months after the day the notice is given, to bring a proceeding in a court so that the claim may be decided by the court.

Note A court may make a finding of liability on the claim independently of making an award of damages on the claim (see *Civil Law (Wrongs) Act 2002*, s 46).

- (7) Noncompliance with a requirement of this section by the plaintiff does not prevent the plaintiff from bringing a proceeding in a court for damages but, unless the court is satisfied there is compelling reason to excuse the noncompliance, damages must not be awarded in the proceeding to allow or compensate for medical, legal or gratuitous services provided to the plaintiff before the day the proceeding began.

(8) In this section:

accident means an incident out of which personal injury arises, and includes a motor accident.

claim means a claim (however described) for damages based on a liability for personal injury, whether the liability is based in tort or contract or on another form of action (including breach of statutory duty) but does not include a claim under the *Workers Compensation Act 1951*.

motor accident means an accident caused by, or arising out of the use of, a motor vehicle.

motor vehicle means—

- (a) a motor vehicle under the *Road Transport (General) Act 1999*;
or
- (b) a vehicle operated on a railway or other fixed track.

relevant period, in relation to a claim, means—

- (a) if the injury is or includes a disease or disorder—6 years after the day the plaintiff (or the plaintiff's parent or guardian) first knows—
 - (i) that the plaintiff has suffered an injury that is or includes a disease or disorder; and
 - (ii) that the injury is related to someone else's act or omission; or
- (b) in any other case—6 years after the day the accident giving rise to the injury happened.

(9) This section applies to an injury whenever it happened.

(10) However, the regulations may make provision in relation to the application of this section to injuries that happened before 1 July 2003.

- (11) Regulations made for this section within 6 months after the day this section commences may provide for the regulations to commence on or after 1 July 2003.
- (12) Subsections (9) to (13) expire 5 years after the day this section commences.
- (13) Subsections (9) to (11) are declared to be laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

61 New section 30B

30B Special provision in relation to children—claims relating to health services

- (1) This section applies if—
 - (a) a child (*the plaintiff*) suffers personal injury that gives rise to a claim for damages; and
 - (b) the claim relates to the provision of a health service.
- (2) A cause of action for damages in relation to the claim is not maintainable if brought 6 years or more after the day the accident giving rise to the injury happened.
- (3) However, if the injury is or includes a disease or disorder, the cause of action is not maintainable if brought after whichever of the following periods ends first:
 - (a) 6 years after the day the plaintiff (or the plaintiff's parent or guardian) first knows or ought reasonably to have first known—
 - (i) that the plaintiff has suffered an injury that is or includes a disease or disorder; or
 - (ii) that the injury is related to someone else's act or omission;

- (b) 12 years after the day the accident giving rise to the injury happened.

Note The period mentioned in s (3) can be extended under s 36 but the period mentioned in s (2) cannot be extended under that section (see s 36 (6)).

- (4) In considering whether or not the period mentioned in subsection (3) should be extended under section 36, the court must have regard to the opinion of a medical expert (or experts) on the question of when the plaintiff (or the plaintiff's parent or guardian) first knew, or ought reasonably to have first known—

- (a) that the plaintiff had suffered the injury; or
(b) that the injury is related to someone else's act or omission.

- (5) In this section:

health service—see the *Community and Health Services Complaints Act 1993*, section 4.

- (6) This section applies to a cause of action that arises on or after 1 July 2003.
- (7) If the cause of action arose before 1 July 2003, the cause of action is not maintainable if brought after whichever of the following periods ends first:
- (a) the period that would apply to the cause of action under this section if this section applied to the action;
- (b) the limitation period that applied to the cause of action before 1 July 2003.

62 Personal injuries Section 36 (5)

substitute

- (5) This section does not apply in relation to a cause of action to which either of the following applies:

- (a) section 16B (Other than claims for damages for personal injury);
 - (b) the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death).
- (6) Also, this section does not apply in relation to the period mentioned in section 30B (2) (Special provision in relation to children—claims relating to health services).

63 New division 4.5

insert

Division 4.5 Other provisions

58 Approved forms

- (1) The Minister may, in writing, approve forms for this Act
- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.

Note For other provisions about forms, see Legislation Act, s 255.

- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

59 Regulation-making power

The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Endnotes

Republications of amended laws

- 1 For the latest republication of amended laws, see www.legislation.act.gov.au.

Penalty units

- 2 The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

[Presentation speech made in Assembly on 24 June 2003]

I certify that the above is a true copy of the Civil Law (Wrongs) Amendment Bill 2003 which was passed by the Legislative Assembly on 21 August 2003.

Acting Clerk of the Legislative Assembly

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