

A state-by-state look at recreational injuries: The legislative noose



A client provides a history of injury sustained while parachuting, scuba diving, skiing or participating in some other recreational pursuit. Would a personal injury claim succeed in the current environment? In the past, damages would be recoverable if negligence was demonstrated.

Alternatively, section 74 of the *Trade Practices Act 1974 (Cth)* ('TPA') implied a warranty of due care and skill in a contract between a defendant corporation and a consumer for the supply of a service in the course of a business.



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Section 68 of the TPA prevented a defendant from contractually excluding this form of consumer protection. State legislation emulated the Commonwealth provisions.

The insertion of section 68B into the TPA by the *Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth)* has potentially removed much of this protection for consumers of recreational services. The amendment's aim was to limit liability in relation to the supply of recreational services by preventing plaintiffs from using the TPA to avoid the restrictions being implemented in the states and territories.

STATE-BY-STATE OVERVIEW OF RECREATIONAL SERVICES LIABILITY REFORM

New South Wales

New South Wales is regarded as the

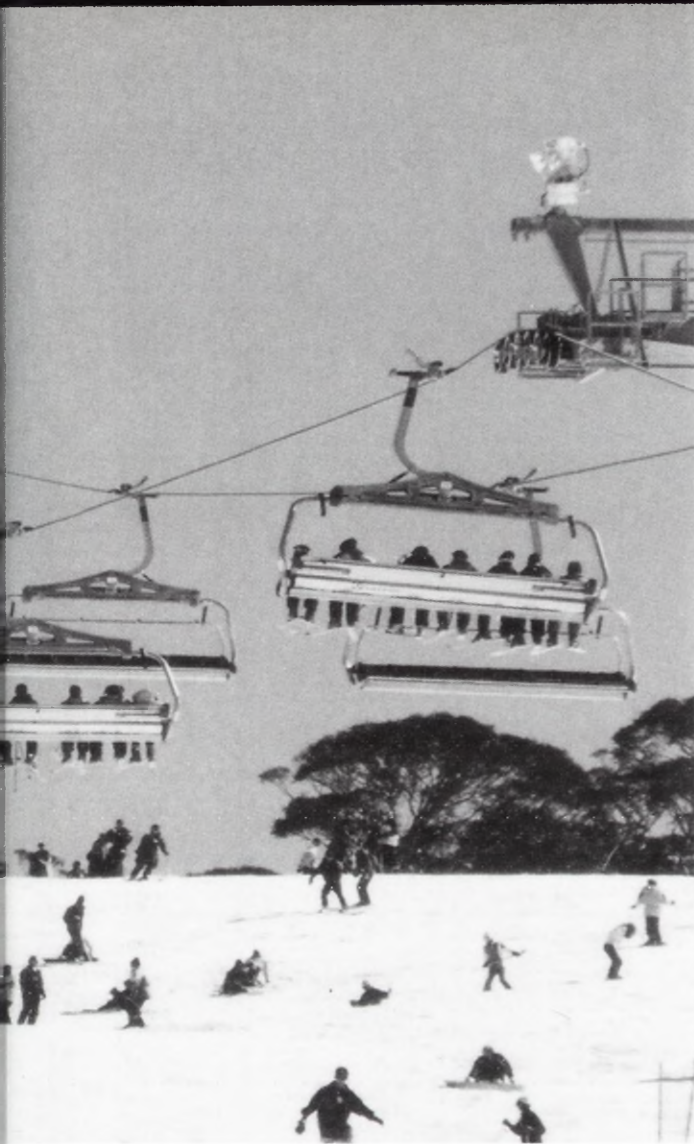
reform front-runner. Division 5 of the *Civil Liability Act 2002 (NSW)* deals with liability in negligence for harm to a plaintiff resulting from a recreational activity.

Section 5K broadly defines 'recreational activity' as including any sport, any pursuit or activity engaged in for enjoyment, relaxation or leisure, and any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in such activity.

Section 5L provides that a defendant is not liable in negligence for harm suffered by a plaintiff if an obvious risk becomes apparent during engagement in a recreational activity.

Section 5M removes the duty of care for recreational activity when the provider gives a risk warning.

Finally, section 5N allows a provider to exclude, restrict or modify



liability that results from a breach of an express or implied warranty that services will be rendered with reasonable care and skill.

Western Australia

The *Civil Liability Act 2002* (WA) became effective on 1 January 2003. The second phase of legislative reform relates to the provision of recreational services. At the time of writing, the state parliament was debating the *Civil Liability Amendment Bill 2003* (WA), and it is likely the Bill will have been passed by the time of printing. The amending Bill includes definitions of 'recreational activity', 'dangerous recreational activity', 'inherent risk' and 'obvious risk'. The Bill contains similar provisions to those in New South Wales.

Australian Capital Territory

The *Civil Liability Act 2002* (ACT)

was amended by the *Civil Law (Wrongs) Amendment Bill 2003* (ACT). The second phase of reforms started on 1 July 2003 and do not include specific provisions for recreational activities.

South Australia

The legislative position in South Australia has remained

unchanged since the enactment of the *Recreational Services (Limitation of Liability) Act 2002* (SA) in September 2002. The Act provides for the registration of codes of practice to modify the duty of care owed. Any such code has to comply with regulations that are yet to be promulgated.

Northern Territory

The Northern Territory has incorporated section 68A of the TPA into the *Consumer Affairs and Fair Trading Act 1996* (NT) ('the NT Act'). Section 68A of the NT Act enables the waiver of protection otherwise provided by section 66 in relation to the provision of recreational services. The NT Act uses the same definition of 'recreational services' as the TPA.

Victoria

A new section 97A was inserted

into the *Goods Act 1958* (Vic) by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic). The TPA definition of 'recreational services' is used. The Goods Act enables the exclusion or restriction of statutory obligations. A waiver is conditional upon obtaining the participant's signature and not acting with, among other things, a 'reckless disregard'.

Queensland

Queensland has enacted chapter 2, part 1, division 4 of the *Civil Liability Act 2003* (Qld). Section 18 of the Act contains a definition of 'dangerous recreational activity'. Section 19 excludes liability in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk while engaging in a dangerous recreational activity.

Tasmania

Tasmania's *Civil Liability Act 2002* (Tas) was amended in July 2003 by the *Civil Liability Amendment Bill 2003* (Tas). Division 5 of part 6 relates to the provision of recreational services. Section 19 defines both 'recreational activity' and 'dangerous recreational activity'. Section 20 excludes liability for a breach of duty for harm arising out of a dangerous recreational activity. This operative provision is in similar terms to the Queensland provision.

COMMENT

Beyond the specific provisions for recreational services, other reform measures, such as those relating to limitation periods and intoxication, may also impact on the liability of recreational service providers. ■