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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LAW REFORM (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2000

EXPLANATORY MEMORANDUM

Circulated by authority of
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This Bill amends the *Law Reform (Miscellaneous Provisions) Act 1955*. The principal purpose of the amendments is to restore the law to the position commonly understood before the High Court decision in *Astley v Austrust Pty Ltd*. In addition, consequential and minor amendments are made to the 1955 Act and the *Compensation (Fatal Injuries) Act 1968*.

As these amendments arose from agreement between the States and Territories to adopt a uniform approach to the High Court decision, the Standing Committee on Justice and Community Safety was notified in accordance with the *Administration (Interstate Agreements) Act 1997*.

Notes on Clauses

Clause 1 Short Title
This clause explains that when the Bill becomes an Act, it will be known as the *Law Reform (Miscellaneous Provisions) Amendment Act 2000*.

Clause 2 Commencement
The amendments commence on notification of the making of this Act in the Gazette.

Clause 3 Acts amended etc.
The *Law Reform (Miscellaneous Provisions) Act 1955* is amended by clause 4 and Schedule 1. In addition to amendments in Schedule 1 that are consequential on the changes made by clause 4, a number of minor amendments are made to the Act to simplify it.

Clause 4 Substitution
This clause substitutes a new part 5 into the Act dealing with contributory negligence. The substantive changes (new ss 14, 15) are outlined in the Attachment. In addition, a number of minor amendments are made to the Part to simplify it.

Clause 5 Act amended etc.
The *Compensation (Fatal Injuries) Act 1968* is amended by Schedule 2. In addition to amendments in Schedule 2 that are consequential on the changes made by clause 4, a number of minor amendments are made to the Act to simplify it. In particular, section 11 of that Act (which dealt with contributory negligence by calling up "fault" as previously defined in the *Law Reform (Miscellaneous Provisions) Act 1955*) is amended to make the provision self-contained.

Attachment

Background to section 15

Section 15 of the *Law Reform (Miscellaneous Provisions) Act 1955* (the Act) provides that a person's (A's) legal proceedings (claim) against another person (B) are not liable to be defeated because A contributed to the damage A suffered. The section goes on to provide that the damages that may be awarded to A are to be reduced by an amount the court considers just and equitable.

This provision was inserted in the Act to overcome the common law doctrine that A's contributory negligence was a complete defence to a claim against B. If A had committed an act that amounted to contributory negligence they would be unable to recover any damages even if their contribution to their damage had been relatively trivial.

This provision does not apply in cases where A has suffered damage on account of B's breach of statutory duty, for example, if B is in breach of requirements imposed under the *Occupational Health and Safety Act 1989*. In such cases section 20A, inserted into the Act in 1991, provides that A's damages will not be reduced.

It was commonly understood that section 15 applied to A's claim whether A was alleging that B had breached a contractually imposed duty of care (a contractual claim) or whether A was alleging that B had breached the common law duty of care (a negligence claim). There are many circumstances where A's claim can raise both a contractual claim and a negligence claim. Common examples are a patient's claim against their doctor; a client's claim against their solicitor or accountant; and a worker's claim against their employer.

The effect of the High Court's decision in relation to section 15

In *Astley v Austrust Ltd* (1999) 73 ALJR 403 (4 March 1999) (the High Court's decision) the High Court held that this common understanding was incorrect and that if A's claim against B could be characterised as a contractual claim the damages that A could receive were not liable to be reduced even though A had contributed to the damage they had suffered.

The result of this decision is that a negligence claim will be treated differently to a contractual claim. In the former, contributory negligence will be recognised to reduce the award of damages proportionate to the level of contribution to the damage by A; whereas in the latter no such contribution will be recognised. In reaching the decision the court drew heavily on section 15's history and on historical distinctions between negligence claims and contract claims.

Purpose of the amendment

The High Court's decision appeared likely to have a number of practical implications:

(a) to maximise the damages they may receive A will attempt to ensure that the claim is a contractual claim rather than a negligence claim;

(b) to minimise the damages they may be required to pay B will attempt to make a negligence claim against A. For example, if B is A's employer B will attempt to allege that A has, by allowing themself to be injured, breached their common law, or contractual, duty to B;

(c) associated with (a) and (b) above court proceedings will become more complicated, time consuming and costly; and

(d) associated with (a), (b) and (c) above insurance premiums for workers compensation and professional indemnity policies are likely to be increased. Partly this increase will be to protect insurers against having to pay more in damages and partly it will be to cover the insurer against the additional legal and administrative costs resulting from court proceedings becoming more complicated.

The likely effects of the High Court's decision were considered by the State and Territory Attorneys-General. Attorneys-General concluded that the High Court's decision should be overridden by legislation because, having regard to the complexities such a distinction will introduce, there is no longer a policy basis to support this distinction.

The new provisions

The definition of "fault" in section 14 is replaced by a definition of "wrong". The definition makes it clear that a wrong may include a liability in tort or a liability in contract.

Section 15 has been recast. It provides that a claimant's action against another for a wrong is not liable to be defeated because the claimant contributed to the damage suffered. A similar change has been made in section 17.

Contracting out

Sub-section 15 (2) of the existing *Law Reform (Miscellaneous Provisions) Act 1955* provides that section 15 (dealing with the apportionment of liability) "does not operate to defeat any defence arising under a contract". The majority judgment in *Astley* (see 161 ALR 155 at page 172 and page 182) discussed the effect of this provision (ie. that parties are free to make their own rules about tortious liability by contract).

The majority, in paragraph 86 of its judgment (see 161 ALR 155 at page 181), said:

> "If the defendant wishes to reduce its liability in a situation where the plaintiff's own conduct contributes to the damage suffered, it is open to the defendant to make a bargain with the plaintiff to achieve that end. Of course, the result of such a bargain may be that the defendant will have to take a reduced consideration for its promise to take reasonable care. But the bargain will be the product of the parties' voluntary agreement to subject themselves to their respective obligations."

The Court did not suggest that the existence of the provision formed the basis for its view that the apportionment legislation only applied to breaches of tortious duties of care. As noted above, the provision simply makes it possible for parties to adjust their liability.

Proposed sub-clause 15(3) simply relocates existing sub-section 15(2). As previously, section 15(3) simply serves to ensure that parties can adjust liability in relation to contractual (as well as tortious) liability.

Retrospectivity

Arguably, the amendments have retrospective effect in that they will apply to a matter whether or not the cause of action accrued before the commencement of the amendments. The retrospective operation of the amendments is judged appropriate in this case because the legislation returns the law to a position it was generally thought to have been in.