LAW REFORM (CONTRIBUTORY NEGLIGENCE) AMENDMENT BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

OBJECTIVES OF THE LEGISLATION

The purpose of this Bill is to address the impact of the decision of the High Court in *Astley v Austrust Limited* (1999) 197 CLR 1. The Bill will enable the apportionment of liability in a claim for damages where the claim is based on grounds other than negligence.

REASONS FOR THE OBJECTIVES AND HOW THEY WILL BE ACHIEVED

At common law, a defendant being sued for a tort could generally raise the contributory negligence of the plaintiff as a complete defence to the claim. That is, if the damage suffered by the plaintiff was partly due to the plaintiff's failure to take reasonable care, the plaintiff could not recover any damages at all from the defendant. (For example, a pedestrian injured by a speeding vehicle would not be able to claim damages if the pedestrian had contributed to the accident by failing to keep a proper lookout for vehicles.)

The *Law Reform Act 1995* (the Act) modifies the common law by providing for apportionment of damages in cases of contributory negligence. Under the Act, if a plaintiff's damage is the result partly of the plaintiff's fault and partly of the fault of the defendant, the plaintiff can still recover damages from the defendant but the amount of damages is reduced to the extent that the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

The apportionment provisions contained in the Act (originally in the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952* before relocation to the *Law Reform Act 1995*) were based on United Kingdom legislation. There are similar provisions in the other Australian States and Territories. The apportionment

provisions apply to claims of negligence and other claims in tort where contributory negligence could be a defence to the claim.

Some contracts contain an express or implied term that one of the parties has a duty to act with reasonable care. If that duty is breached, in some circumstances the other party may be able to sue for breach of duty of care both in tort and in contract. There was support in some Australian and United Kingdom cases for the view that the apportionment legislation extended to claims in contract for damages for breach of a contractual duty of care, where the duty of care owed by the defendant is the same in contract as in tort.

The High Court of Australia decided in *Astley v Austrust Limited* (1999) 197 CLR 1 that the apportionment provisions contained in the *Wrongs Act 1936* of South Australia applied only to claims for damages in tort; they did not apply to claims of breach of contractual duty of care. As a result, if a plaintiff sues a defendant for breach of duty of care in both contract and in tort, the plaintiff's damages may be reduced for contributory negligence in the claim in tort, but not in the claim in contract.

That outcome is plainly unfair. While it might be thought that the effect of this decision is limited to litigants, there is a wider negative impact. If higher damages are awarded against individuals, the result is likely to be higher insurance premiums for all.

The High Court acknowledged in its judgment that governments may wish to respond by amending the legislation. The majority of the High Court stated –

> *"Perhaps the apportionment statute should be imposed on parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no view about it, it will have to be done by amendment to the legislation."*

The Court of Appeal determined that *Astley* applies to section 10 of the *Law Reform Act 1995* in *Wylie v ANI Ltd* [2000] QCA 314 (unreported). In that decision, the President of the Court of Appeal, the Honourable Justice McMurdo, commented as follows -

> *"Since Astley, where an employee suffers injury in the workplace caused by the employer's breach of contract of employment, damages will no longer be able to be reduced because of the employee's contributory negligence. The commendable spirit of modern workplace health and safety legislation requires that employer and employee cooperatively work together to develop and maintain a safe workplace. It is not inconsistent with that spirit to require workers to*

be accountable for their own negligence consistent with their tortious obligations and apportionment legislation. The effect of Astley goes well beyond cases involving personal injury in the course of employment. But it is for the legislature, not the courts, to consider whether the law should be changed to reflect the position generally thought to exist before Astley."

ADMINISTRATIVE COST TO GOVERNMENT OF IMPLEMENTATION

The Bill will not have any adverse financial consequences for Government. It will result in reduced damages awards as courts will be able to apportion liability for damages in claims based on a breach of contract where a plaintiff has a share in the responsibility for the damages that they have incurred.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

The Bill operates retrospectively. As noted above, this is essential to correct the unintended consequences brought about by the High Court's decision in *Astley v Austrust Limited* (1999) 197 CLR 1.

Section 4(3)(g) of the Legislative Standards Act 1992 provides that one of the fundamental legislative principles is whether legislation adversely affects rights and liberties, or imposes obligations, retrospectively.

Retrospective laws are generally passed to validate past actions, correct defects in legislation or confer benefits retrospectively. This Bill corrects a defect in the *Law Reform Act 1995*, which prior to Astley was regarded as applying the apportionment provisions to liability in contract as well as in tort.

The Bill restores the law to the position that was commonly accepted as applying in Queensland before the Astley decision.

The amendments are drafted so that the rights of parties to proceedings that have been commenced or decided, or where a settlement has been negotiated, are unaffected.

The amendments are also expressed not to apply to claims under the *WorkCover Queensland Act 1996.* Concern was expressed during consultation on the Bill about the consequences for WorkCover claimants if the provisions of the Bill applied to claims under that Act. Few such claims

have been commenced in the courts because of the extensive pre-proceedings process set out in the *WorkCover Queensland Act 1996.*

The amendments will apply to any other act or omission that occurred before the amendments commenced.

Clause 2 provides that the amendments in the Bill are taken to have commenced on 7 August 2001.

This is an appropriate response that will ensure that the effect of the High Court's decision is quarantined as much as possible, without adversely affecting the position of litigants who have acted on the basis of the law as determined in *Astley.*

CONSULTATION

A range of community groups have requested that legislation be introduced to remedy the effects of the High Court's decision in *Astley.* These included:

- Insurance Council of Australia
- Queensland Workers' Compensation Self Insurers Association; and
- Commerce Queensland

These groups expressed concern about the impact of the High Court's decision in *Astley* on common law master and servant claims, and the potential flow on effects in terms of increases in premiums paid to private sector insurers and WorkCover for worker's compensation, public liability, professional indemnity and other insurance.

The draft Bill was developed for the Standing Committee of Attorneys-General by the Parliamentary Counsel's Committee. Similar legislation has been introduced by all other States (with the exception of Western Australia) and in the Australian Capital Territory and the Northern Territory.

Consultation on the draft Bill occurred with the following groups:

- Commerce Queensland
- WorkCover Queensland
- Queensland Workers' Compensation Self Insurers Association
- Insurance Council of Australia
- Bar Association of Queensland

- Queensland Law Society
- Australian Plaintiff Lawyers Association
- Queensland Council of Unions
- Australian Workers Union

NOTES ON PROVISIONS

Clause 1 is the short title.

Clause 2 provides that the Bill is taken to have commenced on 7 August 2001.

Clause 3 provides that the Bill amends the *Law Reform Act 1995.*

Clause 4 inserts a new definition of 'wrong' in section 5 of the Act to include a breach of a contractual duty of care that is concurrent with a duty of care in tort.

Clause 5 inserts a new section 10(1) and (2) into the *Law Reform Act 1995.* These *subsections* amend the apportionment provisions to clarify that a court should reduce a plaintiff's damages arising from a wrong, as defined by the Bill, if the plaintiff is guilty of contributory negligence. This is the fundamental clarification contained in the Bill and is intended to place Queensland litigants in the position they were in prior to the High Court's decision in *Astley.*

Clause 6 inserts a new section 21 by way of transitional provisions and provides that the amendments made by this Bill to part 3, divisions 1 and 3 to apply to wrongs that occurred before the commencement day as if those amendments had been in force when the wrong occurred.

The provisions of part 3 of the Act, as in force before the commencement day, continue to apply to a wrong if proceedings about the wrong were started but final relief has not been given before the commencement day.

The provisions of part 3 of the Act, as in force before the commencement day, also continue to apply to a wrong about which a court has, before commencement, given judgment or made a decision (including a judgment or decision about liability only).

The provisions of part 3 of the Act, as in force before the commencement day, also continue to apply to an injury for which a worker has an

entitlement to damages under the *WorkCover Queensland Act 1996,* that was sustained before 1 July 2001.