

# TWO PROBLEMS OF OCCUPIERS' LIABILITY

## PART TWO — THE OCCUPIERS' LIABILITY AND CIVIL LIABILITY LEGISLATION

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*The enactment of occupiers' liability legislation in four Australian jurisdictions between 1983 and 2002 has given rise to important problems about the relationship between the legislation and the common law of negligence. From 2002 onwards, the civil liability legislation has added another dimension of difficulty: the courts have to contend not only with the relationship between each enactment and the common law, but also with that between the two sets of statutory provisions. As the Chief Justice of Western Australia said in *Town of Port Hedland v Hodder*, in many cases courts are failing to grapple with these issues. In this two-part article the authors explore the relationship between the occupiers' liability Acts and the common law, and between those Acts and the civil liability legislation. With the aid of comparative insights, and applying principles of statutory interpretation, they offer conclusions as to the way in which occupiers' liability actions should be pleaded and determined in the four occupiers' liability Act jurisdictions. Key provisions are gathered together in a table appearing at the end of this article.*

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## I THE IPP REPORT AND CIVIL LIABILITY REFORMS IN AUSTRALIA

### *A Background*

Part One of this article<sup>1</sup> outlined the introduction of occupiers' liability legislation in Australia and its impact on and interaction with the common law. In the early part of the 21<sup>st</sup> century, the legal landscape for occupiers in Australia changed again, with sweeping reforms being made to civil liability regimes across the country. In this Part Two, the authors will address the new challenges posed by the introduction of new civil liability legislation into the occupiers' liability Act ('OLA') jurisdictions.<sup>2</sup>

The background to the civil liability reforms has been dealt with more extensively elsewhere,<sup>3</sup> but it is helpful to recall it here in brief. The immediate trigger for legislative action was the collapse of the general insurer HIH Insurance (and associated group of companies), and the impetus for reform was maintained with the subsequent failure of the medical indemnity insurer, United Medical Protection.<sup>4</sup> These collapses occurred against a backdrop of

<sup>1</sup> Peter Handford and Brenda McGivern, 'Two Problems of Occupiers' Liability: Part One — The Occupiers' Liability Acts and the Common Law' (2015) 39 *Melbourne University Law Review* 128.

<sup>2</sup> As discussed in Part One of this article, the OLA jurisdictions are the Australian Capital Territory, South Australia, Victoria and Western Australia: *ibid* 146–8.

<sup>3</sup> See especially Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649; Peter Underwood, 'Is Ms Donoghue's Snail in Mortal Peril?' (2004) 12 *Torts Law Journal* 39; John Keeler, 'Personal Responsibility and the Reforms Recommended by the Ipp Report: "Time Future Contained in Time Past"' (2006) 14 *Torts Law Journal* 48; Chief Justice J J Spigelman, 'Tort Law Reform: An Overview' (2006) 14 *Tort Law Review* 5.

<sup>4</sup> Keeler, above n 3, 48; Spigelman, 'Tort Law Reform', above n 3, 13.

significant political and commercial angst created from a combination of factors nationally and internationally. Natural disasters, the terrorist attacks of 11 September 2001, and a flagging share market had placed significant strain on the large insurers, with negative impacts on the availability of reinsurance internationally.<sup>5</sup> In addition, from around the mid-1980s, there had been an observable 'stretching'<sup>6</sup> of the law of negligence, resulting in growing concern (expressed both judicially<sup>7</sup> and extra-judicially<sup>8</sup>) about increased liability and rates of recovery, particularly in personal injury actions. In 2001, Thomas JA summarised the principal areas of expansion (or 'mischief')<sup>9</sup> as follows:

The rules currently embraced by our system include:

1. A reduced level of causation necessary to sustain a claim.
2. The rule, epitomised in *Watts v. Rake*, that a defendant 'must take his victim as he finds him and pay damages accordingly'.
3. Relaxation of control devices such as remoteness of damage to stem the arguable endlessness of the consequence of every human act.
4. Common use of hindsight, despite frequent disavowal, in concluding that virtually anything that has happened was reasonably foreseeable.
5. Ever-increasing levels of damage, aided by the methodology of economic rationalism, unalleviated by collateral benefits actually received, and aggra-

<sup>5</sup> Spigelman, 'Tort Law Reform', above n 3, 13; The Treasury, *Available and Affordable: Improvements in Liability Insurance Following Tort Law Reform in Australia* (CanPrint Communications, 2006) 1–2.

<sup>6</sup> P S Atiyah, *The Damages Lottery* (Hart Publishing, 1997) chs 2–3.

<sup>7</sup> See, eg, *Lisle v Brice* [2002] 2 Qd R 168, 173–4 (Thomas JA); *Bankstown Foundry Pty Ltd v Braistina* (1985) Aust Torts Reports ¶80-713, 69 127 (McHugh JA). See also commentary in Underwood, above n 3, 47–8.

<sup>8</sup> Perhaps the leading example was an influential article written by the then Chief Justice of New South Wales, the content of which appears to have shaped at least some of the Ipp Report: Chief Justice J J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432. See also commentary in Spigelman, 'Tort Law Reform', above n 3, 7. For commentary by a Western Australian judge prior to the publication of the Ipp Report, see Justice Carmel McLure, 'Risk and Responsibility: The Interplay between Insurance and Tort Law' (2002) 29(9) *Brief* 7.

<sup>9</sup> To adopt the expression in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); see also Handford and McGivern, above n 1, 136 n 44 and accompanying text.

vated by the inclusion of heads of damage that a claimant does not suffer assessed at 'commercial' rates.

These are some of the tools that increasingly permit unrealistic results in such cases, in both liability and quantum.<sup>10</sup>

A study commissioned by the Commonwealth, state and territory governments in 2002 found that in the preceding decade, personal injury damages awards had increased at an average rate of 10 per cent per annum, compared with an average rate of inflation of 2.5 per cent<sup>11</sup> (though notably it also concluded that, while there had been a steady increase in personal injury claims over the relevant period, there was no evidence of an 'explosion of litigation').<sup>12</sup>

These pressures were felt by government both at a political level (with media coverage of the unavailability of insurance fuelling concerns about the viability of public and community events),<sup>13</sup> and at a direct financial level (through the emerging role of government as the 'reinsurer of last resort'<sup>14</sup> and as a defendant in actions against public bodies).<sup>15</sup> Against this backdrop, and without awaiting the outcomes of inquiries that revealed (amongst other things) serious mismanagement and significant under-reserving as key contributors to HIH Insurance's demise,<sup>16</sup> the initial focus of the governmental response to the 'insurance crisis' was on civil liability litigation.<sup>17</sup>

<sup>10</sup> *Lisle v Brice* [2002] 2 Qd R 168, 173–4 [4] (citations omitted).

<sup>11</sup> Treasury, above n 5, 2–3. The commissioned report is: Trowbridge Consulting, 'Public Liability Insurance: Practical Proposals for Reform' (Report to the Insurance Issues Working Group of Heads of Treasuries, 30 May 2002) ('Trowbridge Report'). See also Underwood, above n 3, 40–1.

<sup>12</sup> Trowbridge Report, above n 11, 59. See also Cane, above n 3, 657.

<sup>13</sup> Keeler, above n 3, 48; Spigelman, 'Tort Law Reform', above n 3, 7.

<sup>14</sup> Spigelman, 'Negligence', above n 8, 435; Spigelman, 'Tort Law Reform', above n 3, 7.

<sup>15</sup> See, eg, in high profile cases such as *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and, notably, *Nagle v Rottneest Island Authority* (1993) 177 CLR 423.

<sup>16</sup> Commonwealth, The HIH Royal Commission, *The Failure of HIH Insurance: A Corporate Collapse and Its Lessons* (2003) vol 1, xvii; Gregor Allan, 'The HIH Collapse: A Costly Catalyst for Reform' (2006) 11(2) *Deakin Law Review* 137.

<sup>17</sup> Underwood, above n 3, 40–1.

At a joint ministerial meeting in May 2002, the federal, state and territory governments decided to establish a 'panel of eminent persons' ('Panel')<sup>18</sup> to conduct a review of the law of negligence, which was appointed in July 2002. The Panel was given a remarkably short timeframe in which to make its recommendations: it was instructed to report to the Commonwealth Assistant Treasurer and Minister of Finance on 30 August 2002, and to submit its final report (which has become known as the 'Ipp Report')<sup>19</sup> on 30 September 2002.<sup>20</sup> Contrary to conventional law reform processes, the Panel was instructed on a number of key objectives<sup>21</sup> and had little opportunity to test the underlying assumptions or to recommend a different course.<sup>22</sup> Those instructions included that the Panel should '[d]evelop and evaluate principled options to limit liability and quantum of awards for damages' and

must ... develop and evaluate proposals to allow self assumption of risk to override common law principles [and] consider proposals to restrict the circumstances in which a person must guard against the negligence of others.<sup>23</sup>

### B *Key Recommendations*

The Ipp Report contains 61 recommendations for reform.<sup>24</sup> The first tranche of legislative reforms based on these recommendations related to the assessment of damages which is, for present purposes, of limited relevance.<sup>25</sup> The second tranche, enacted within a matter of weeks following the publication of

<sup>18</sup> The Panel was chaired by the Hon David A Ipp and also comprised Professor Peter Cane, Associate Professor Don Sheldon and Mr Ian Macintosh.

<sup>19</sup> Panel, *Review of the Law of Negligence: Final Report (2002)* ('Ipp Report').

<sup>20</sup> *Ibid* xi, 25–6, 31. See also Cane, above n 3, 665–6; Underwood, above n 3, 46.

<sup>21</sup> Ipp Report, above n 19, ix–xi.

<sup>22</sup> Cane, above n 3, 666–7, 669; Underwood, above n 3, 45–6.

<sup>23</sup> Ipp Report, above n 19, ix (terms of reference (2), (3)(b)–(c)).

<sup>24</sup> *Ibid* 1–24.

<sup>25</sup> *Ibid* 18–24 (recommendations 45–61), ch 13. For a summary of the implementation provisions see Des Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 *Torts Law Journal* 203, 211–13.

the Ipp Report,<sup>26</sup> concerned the broader principles of civil liability. In this latter regard, the Ipp Report recommendations reflected in some cases a restatement (codification) of the existing common law of negligence, and in other cases major or minor alterations to it.<sup>27</sup>

The first and key recommendation was that any legislative response be nationally uniform.<sup>28</sup> Unfortunately, that recommendation has not been followed with the remaining substantive recommendations receiving varying responses across the jurisdictions. Some have been adopted in many or most states and territories, while others have been exceeded or ignored in some jurisdictions.<sup>29</sup> Given the focus of this article, we will deal only with the civil liability Acts ('CLAs') in the jurisdictions having OLAs.<sup>30</sup>

It is well beyond the scope of this article to consider all of the Ipp Report recommendations and their implementation. Rather, we will consider the recommendations most relevant to the intersection between the civil liability and occupiers' liability regimes, being those dealing with the general principles of negligence.

### 1 *Intended Application*

To begin, it is worth saying something about the scope of the proposed reforms. The Panel considered that a principled approach to reform required 'general rules governing as many types of cases and as many categories of potential defendants as is reasonably possible' so that the recommended principles would apply to civil liability claims 'regardless of the legal category (tort, contract, equity, under statute or otherwise)' under which they were

<sup>26</sup> Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443, 445.

<sup>27</sup> See Barbara McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* 268; Keeler, above n 3, 51; Joachim Dietrich, 'Duty of Care under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17, 19–21.

<sup>28</sup> Ipp Report, above n 19, 35 [2.1]; see also at 26 [1.9].

<sup>29</sup> See Butler, above n 25. See also McDonald, 'The Impact of the Civil Liability Legislation', above n 27; Dietrich, above n 27, 19–21.

<sup>30</sup> Borrowing from the approach of Dietrich, above n 27, 18, we will for convenience refer to the legislation introduced in response to the Ipp Report as the CLAs, despite the variation in their titles: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 1936* (SA); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

made.<sup>31</sup> It is certainly clear too that occupiers' liability claims (at least insofar as they involve personal injury) were within the contemplated scope of the recommendations. The discussion and examples provided in the Ipp Report explicitly refer to occupiers' liability matters in no fewer than five of its chapters.<sup>32</sup> This is unsurprising since many of the high profile cases criticised for expanding the rules of negligence in favour of plaintiffs, at the expense of defendants and the general public through insurance premiums,<sup>33</sup> involved claims against occupiers. For example, *Nagle v Rottneest Island Authority* ('*Nagle*'),<sup>34</sup> widely considered to be the high-water mark of the expansionist approach,<sup>35</sup> was founded on breach of the duty owed by the Rottneest Island Board as occupier of the reserve at which the plaintiff was injured.<sup>36</sup>

## 2 Duty of Care

In terms of general principles, ch 7 of the Ipp Report (headed 'Foreseeability, Standard of Care, Causation and Remoteness of Damage') addresses those terms of reference that were formulated around the elements of a negligence action.<sup>37</sup> While recognising that the negligence enquiry begins with establishing the existence of a duty of care, the Ipp Report does not squarely address this element (other than to note that foreseeability is relevant to it). The explanation offered alludes to the Panel's view of the intended application of the recommendations: that questions of taking precautions against risk and of causation extend to civil liability actions brought in other forms, such as in contract, whereas the concept of a duty of care is a particular feature of negligence actions.<sup>38</sup> Accordingly, the general principles for determining the

<sup>31</sup> Ipp Report, above n 19, 30 [1.27]–[1.28].

<sup>32</sup> Ibid 67 [4.28], 78 [5.32], 132 [8.37]–[8.38], 154–5 [10.16], 169 [11.17].

<sup>33</sup> Spigelman, 'Tort Law Reform', above n 3, 7 (describing this phenomenon as a 'form of taxation by judicial decision'); Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions — Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836, 839.

<sup>34</sup> (1993) 177 CLR 423.

<sup>35</sup> See, eg, Spigelman, 'Negligence', above n 8, 443. This 'controversial' case is specifically referred to in the Ipp Report, above n 19, 68 [4.30].

<sup>36</sup> *Nagle* (1993) 177 CLR 423, 428–30 (Mason CJ, Deane, Dawson and Gaudron JJ).

<sup>37</sup> Ipp Report, above n 19, 101 [7.2].

<sup>38</sup> Ibid 101–2 [7.2]–[7.4].

existence of a duty are left essentially untouched, but context-specific rules or limitations are recommended in other parts of the report.<sup>39</sup>

### 3 *Standard of Care and Breach*

One of the most stringent criticisms made of the law of negligence (as it had come to be applied) was in relation to the approach to standard of care and breach of duty determinations. The first tier of those criticisms was that reasonable foreseeability of harm as a control factor had become unrealistically undemanding following the adoption of the ‘not far-fetched or fanciful’ test in *Wyong Shire Council v Shirt* (*‘Shirt’*).<sup>40</sup> In that regard the Chief Justice of New South Wales commented: ‘I cannot see that “reasonableness” has anything to do with a test which only excludes that which is “far fetched or fanciful”. The test appears to be one of ‘conceivable foreseeability’, rather than “reasonable foreseeability”’.<sup>41</sup>

The second tier of criticism concerned the perceived lack of rigor in relation to the second limb of the breach determination articulated by Mason J in *Shirt*, which required consideration and balancing of such factors as the magnitude of risk, the probability of its occurrence, the cost and inconvenience of taking precautions, and any other conflicting responsibilities which the defendant may have.<sup>42</sup> As was noted by the Panel, the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.<sup>43</sup> However, there was increasing concern that insufficient attention was being paid to the so-called ‘*Shirt* calculus’ with judges either failing entirely to weigh up these

<sup>39</sup> For example, the Panel recommended limitations to the duties owed in the context of the obvious risks of recreational activities: *ibid* 62–5 [4.11]–[4.18] (recommendation 11); the absence of a duty to warn of obvious risks: at 67–9 [4.26]–[4.34] (recommendation 14); principles limiting the duties owed in the context of mental harm: at 137–45 [9.8]–[9.30] (recommendations 34–5); and by public authorities: at 151–9 [10.1]–[10.33] (recommendation 39). See also Dietrich, above n 27.

<sup>40</sup> (1980) 146 CLR 40, 48 (Mason J).

<sup>41</sup> Spigelman, ‘Negligence’, above n 8, 441. For later criticisms made in the High Court of an approach that under-emphasises reasonableness, see *Swain v Waverley Municipal Council* (2005) 220 CLR 517, 547–8 [79]–[81] (McHugh J); *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 64 [54] (Callinan J); *New South Wales v Fahy* (2007) 232 CLR 486, 515 [216] (Callinan and Heydon JJ).

<sup>42</sup> (1980) 146 CLR 40, 47–8.

<sup>43</sup> Ipp Report, above n 19, 102–3 [7.7].

factors, or paying attention only to those that favoured liability while ignoring countervailing considerations.<sup>44</sup>

One of the principal recommendations of the Ipp Report, therefore, concerned the standard of care and breach determinations. That recommendation was, first, to modify the common law approach to foreseeability (recommending that a person should not be liable for failing to take precautions against a foreseeable risk unless that risk was 'not insignificant'), and second, that there be a restatement of the necessary factors to weigh up in determining whether a reasonable person would take precautions against such a risk.<sup>45</sup> The latter factors, expressed as necessary but not exclusive considerations, are framed in terms of 'the probability that the harm would occur if care was not taken; the likely seriousness of that harm; the burden of taking precautions to avoid the harm; and the social utility of the risk-creating activity'.<sup>46</sup> As will be seen, this recommendation was adopted in all of the OLA jurisdictions, with remarkable consistency.<sup>47</sup>

#### 4 Causation

Like the criticisms made of the development of the common law in relation to breach, criticisms of causation and remoteness were largely aimed at a perceived lack of judicial rigor, in part attributed to the so-called 'commonsense' approach to causation.<sup>48</sup> This is a reference to the seminal statement by Mason CJ in *March v E & M H Stramare Pty Ltd* that questions of causation were 'ultimately a matter of common sense'.<sup>49</sup> The adoption and application of this approach was ultimately criticised for having introduced value judgements into determinations of causation in fact, leading to a

<sup>44</sup> Ibid 105 [7.14]; *Tame v New South Wales* (2002) 211 CLR 317, 351–7 [96]–[108] (McHugh J); McDonald, 'The Impact of the Civil Liability Legislation', above n 27, 274.

<sup>45</sup> Ipp Report, above n 19, 102–5 [7.5]–[7.14], 105–7 [7.15]–[7.19], 106–7 [7.18] (recommendation 28); see also McDonald, 'The Impact of the Civil Liability Legislation', above n 27, 275–6; Underwood, above n 3, 42; Keeler, above n 3, 56–8.

<sup>46</sup> Ipp Report, above n 19, 106 [7.18]. Although not identical in terms with the 'Shirt calculus', this reformulation has been described as restating the substance of the common law approach: *Waverley Council v Ferreira* (2005) Aust Torts Reports ¶81-818, 68 079 [45] (Ipp JA).

<sup>47</sup> See Butler, above n 25, 209.

<sup>48</sup> Ipp Report, above n 19, 108–9 [7.25]–[7.26].

<sup>49</sup> (1991) 171 CLR 506, 515, quoting *Fitzgerald v Penn* (1954) 91 CLR 268, 277 (Dixon CJ, Fullagar and Kitto JJ).

perceived softening of the rules relating to proof.<sup>50</sup> This was seen as particularly troubling in relation to the use of inferences to bridge ‘evidentiary gaps’,<sup>51</sup> but the Panel also identified the use of hindsight evidence by plaintiffs as warranting restriction.<sup>52</sup>

In response to these matters, the Panel recommended legislation reflecting the two distinct strands of a causation enquiry: factual causation and scope of liability.<sup>53</sup> It also recommended a restatement of the rule that the plaintiff bears the onus of proof in relation to causation.<sup>54</sup>

### 5 Personal Responsibility

One of the key objectives and terms of reference for the review was to ‘develop and evaluate proposals to allow self assumption of risk to override common law principles.’<sup>55</sup> Reflecting this, the Panel commented that the existing state of the law was seen as imposing on people ‘too great a burden to take care of others and not enough of a burden to take care of themselves’.<sup>56</sup>

As with the criticisms made of the ‘stretching’ of foreseeability, there had been marked dissatisfaction with the judicial tendency (particularly in the 1990s) to give inadequate weight to the conduct of the plaintiff,<sup>57</sup> while placing a heavy burden on defendants (on the implicit assumption that most

<sup>50</sup> The distinction between factual causation and remoteness of damage, and the background development of the common law in relation to these matters, is complex. We do not attempt to outline it here. For a discussion of these matters, see, eg, Jane Stapleton, ‘Lords a’Leaping Evidentiary Gaps’ (2002) 10 *Torts Law Journal* 276; Susan Bartie, ‘Ambition Versus Judicial Reality: Causation and Remoteness under Civil Liability Legislation’ (2007) 33 *University of Western Australia Law Review* 415; Jane Stapleton, ‘Factual Causation’ (2010) 38 *Federal Law Review* 467.

<sup>51</sup> Ipp Report, above n 19, 109–12 [7.27]–[7.36]; see also Stapleton, ‘Lords a’Leaping Evidentiary Gaps’, above n 50; Stapleton, ‘Factual Causation’, above n 50.

<sup>52</sup> Ipp Report, above n 19, 112–14 [7.37]–[7.40].

<sup>53</sup> *Ibid* 114–18 [7.41]–[7.49] (recommendations 29(b)–(h)). This organisation and terminology draws on the analysis of Jane Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 *Vanderbilt Law Review* 941 and Jane Stapleton, ‘Cause-in-Fact and the Scope of Liability for Consequences’ (2003) 119 *Law Quarterly Review* 388 (the latter — forthcoming at the time of the Ipp Report — was specifically acknowledged by the Panel: at 109 n 6).

<sup>54</sup> Ipp Report, above n 19, 117 [7.49] (recommendation 29(a)).

<sup>55</sup> *Ibid* 121.

<sup>56</sup> *Ibid* 29 [1.24].

<sup>57</sup> Spigelman, ‘Negligence’, above n 8, 433, 444.

were insured) to avoid almost any risk of harm.<sup>58</sup> One of the manifestations of this concern was the relatively undemanding approach taken to the assessment of a plaintiff's conduct and culpability in the context of contributory negligence.<sup>59</sup> The Panel commented that community expectations supported the view that people should take 'as much care for themselves as they expect others to take for them',<sup>60</sup> and recommended:

a legislative statement setting out the approach to be followed in dealing with the issue of contributory negligence, emphasising that contributory negligence is to be measured against an objective standard of reasonable conduct, stating that the standard of care applicable to negligence and contributory negligence is the same, and establishing the negligence calculus as a suitable basis for considering contributory negligence ...<sup>61</sup>

The concept of personal responsibility also underpins the Panel's treatment of obvious risks. In this regard, recommendations were made: to modify the test for, and reverse the onus of proof in relation to, awareness of obvious risks (relevant to the *volenti non fit injuria* defence);<sup>62</sup> to exclude liability for the manifestation of an obvious risk of a recreational activity;<sup>63</sup> and to clarify that there is no duty to warn of obvious risks.<sup>64</sup> Notwithstanding that eight years had passed and that the common law had already started to wind back its

<sup>58</sup> Spigelman, 'Tort Law Reform', above n 3, 6.

<sup>59</sup> Ipp Report, above n 19, 123 n 4, citing the following cases as instances in which a lower standard of care had expressly been applied in the assessment of the plaintiffs' contributory negligence: *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563, 577–8 (Murphy J); *Cocks v Sheppard* (1979) 25 ALR 325; *Watt v Bretag* (1982) 41 ALR 597; *Pollard v Ensor* [1969] SASR 57; *Evers v Bennett* (1982) 31 SASR 228.

<sup>60</sup> Ipp Report, above n 19, 123 [8.10].

<sup>61</sup> *Ibid* 124–5 [8.13]; see also at recommendation 30. It is notable, however, that the Panel did not recommend any further context-specific rules to apply to contributory negligence, such as in relation to persons who were intoxicated at the time of their injury: at 125–6 [8.15]–[8.16].

<sup>62</sup> At common law, a defendant seeking to establish a *volenti non fit injuria* defence needs to prove on the balance of probabilities that the plaintiff was aware of the particular risk that eventuated. The Ipp Report included recommendations that in the case of obvious risks, awareness of the same class of risk is sufficient and that a plaintiff would be presumed to be aware of such risks, and bear the onus of displacing that presumption: Ipp Report, above n 19, 129–30 [8.29]–[8.32], 130 (recommendation 32).

<sup>63</sup> *Ibid* 64 (recommendation 11), 62–5 [4.11]–[4.18].

<sup>64</sup> *Ibid* 68 (recommendation 14), 67–9 [4.26]–[4.34].

expansive approach to civil liability, it seems that these recommendations were at least partly influenced by the long shadow cast by *Nagle* (which as Justice Underwood has noted, would certainly have been decided differently under the recommended regime).<sup>65</sup>

## II THE CLAS AND THEIR INTERACTIONS WITH THE OLAS

### *A Case Law on the Interaction between the OLAs and CLAs*

Before considering the particular provisions of the civil liability and occupiers' liability legislation, it is worth noting the limited extent to which courts have grappled with the interaction between the two regimes.

Perhaps because they exist in separate Acts in Western Australia, the issue has been most ventilated in that State. The seminal judgment in that regard is that of Buss JA in *Department of Housing and Works v Smith [No 2]* ('*Smith*'),<sup>66</sup> who noted that the relationship between the provisions of the OLA and CLA had yet to be determined (or squarely raised by litigants) in Western Australia, but who proffered the view that the two could and should be read together,<sup>67</sup> and that both would continue to be informed by the common law of negligence (particularly as regards the existence of a duty of care and the approach to determinations of breach and causation).<sup>68</sup> This view has been adopted and applied in subsequent decisions, notwithstanding the continued resistance of litigants to squarely address the courts on that issue.<sup>69</sup>

<sup>65</sup> Underwood, above n 3, 51, 58.

<sup>66</sup> (2010) 41 WAR 217.

<sup>67</sup> *Ibid* 235 [84]–[85].

<sup>68</sup> *Ibid* 233 [77], 235–6 [87], 237–8 [92]–[94].

<sup>69</sup> In the Court of Appeal: *Shire of Manjimup v Cheetham* [2010] WASCA 225 (29 November 2010); *Town of Port Hedland v Hodder [No 2]* (2012) 43 WAR 383; *MR & RC Smith Pty Ltd v Wyatt [No 2]* (2012) Aust Torts Reports ¶82-108; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287; and in the District Court: *Blaine v The Owners of Duesburys House Strata Plan 7239* [2010] WADC 81 (28 May 2010); *Grimes v Grimes* [2010] WADC 137 (17 September 2010); *Hodge v Barham* (2011) 74 SR (WA) 340; *Drouet v Garbett* (2011) 75 SR (WA) 231; *Jones v Darkan Hotel* [2013] WADC 70 (17 May 2013); *Dunmall v O'Sullivan [No 6]* [2014] WADC 61 (9 May 2014).

In the remaining OLA jurisdictions, there is limited case law considering the civil liability provisions in the context of occupiers' liability claims,<sup>70</sup> and none squarely tackling their interaction with the OLA provisions. However, very recently Master Mossop, in the Australian Capital Territory Supreme Court, adopted an approach similar to that of Buss JA, commenting (briefly) that:

Although the legislature's intention as to the relationship between the tests ... is not clear (and worthy of some legislative consideration), I proceed on the basis that the provisions of chapter 4 of the *Civil Law (Wrongs) Act* need to be applied, in addition to [the OLA provisions].<sup>71</sup>

Accordingly, since the matter has not yet been finally determined in the courts, we turn to the OLA and CLA provisions themselves.

## B Relevant Statutory Provisions

### 1 Application

The breadth of application recommended in the Ipp Report is evident (and in some respects exceeded) in the CLAs — although to varying degrees and expressed in varying terms, and subject to general exclusions usually relating

<sup>70</sup> In the Australian Capital Territory Supreme Court: *Doolan v Belgravia Health and Leisure Group Pty Ltd* [2011] ACTSC 202 (16 December 2011); *Morales v Commissioner for Social Housing* [2012] ACTSC 117 (13 July 2012); *Bailey v Lend Lease Funds Management Ltd* [2013] ACTSC 56 (5 April 2013); *Hauser v Commissioner for Social Housing* [2013] ACTSC 104 (13 June 2013); *Harris v Commissioner for Social Housing* (2013) 8 ACTLR 98; *Stone v The Owners — Units Plan 1214* [2012] ACTSC 164 (25 October 2012); *Broznic v ISS Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014). In Victoria's Court of Appeal: *Central Goldfields Shire v Haley* (2009) 24 VR 378; in the Supreme Court of Victoria: *Victorian WorkCover Authority v Jones Lang Lasalle (Vic) Pty Ltd* [2012] VSC 412 (12 September 2012); and in the County Court of Victoria: *Crnojevic v Winter* [2008] VCC 490 (29 April 2008); *O'Hare v Garvey* [2009] VCC 1473 (14 September 2009); *Dekort v Closter* [2010] VCC 1640 (8 November 2010); *Gottlieb v Australian Leisure and Hospitality Group Pty Ltd* [2011] VCC 1399 (24 November 2011); *Carter v Traralgon Greyhound Racing Club Inc* [2011] VCC 1424 (6 December 2011); *Korlevski v Lea Group North (Vic) Pty Ltd* [2011] VCC 1168 (26 August 2011); *Georges v Victoria* [2013] VCC 1235 (19 September 2013); *Victorian WorkCover Authority v Direxa Engineering Australia Pty Ltd* [2013] VCC 1039 (23 September 2013); *Victorian YMCA Community Programming Pty Ltd v Nillumbik Shire Council* (2014) Aust Torts Reports ¶82-181. We have been unable to find any relevant cases in South Australia.

<sup>71</sup> *Broznic v ISS Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014) [52].

to actions dealt with under other statutory regimes.<sup>72</sup> Notably, despite the Ipp Report's contemplated reach being limited to personal injury and death,<sup>73</sup> each of the CLAs refers to the concept of harm as attracting potential liability, and that term is defined to include damage to property and economic loss, as well as personal injury.<sup>74</sup>

The Acts in both the Australian Capital Territory and Victoria explicitly provide that the civil liability provisions apply to claims for damages resulting from negligence,<sup>75</sup> whether those actions are 'brought in tort, in contract, under statute or otherwise'.<sup>76</sup> In Western Australia, the relevant provisions apply to claims for 'harm caused by the fault of a person', whether brought 'for breach of contract or any other action'.<sup>77</sup> In South Australia, the Act is said to apply 'to the determination of liability and the assessment of damages for harm arising from an accident occurring in [the] State', with that provision applying to the exclusion of inconsistent laws of any other place, and extending rather than limiting the application of the Act.<sup>78</sup> Thus, subject to any

<sup>72</sup> Dietrich, above n 27, 20 (citations omitted), summarises the position as follows:

To simplify somewhat, the general exclusions to the operation of (the whole or parts of) each Act include claims covered by motor vehicle accident and workers' compensation legislation; claims arising from dust-related conditions, tobacco use or exposure to tobacco smoke; or claims that result from intentional torts or sexual assaults.

This summary is broadly consistent with the position in Western Australia: *Civil Liability Act 2002* (WA) s 3A. However, the exclusions under the Victorian legislation are much broader: *Wrongs Act 1958* (Vic) s 45, while the Australian Capital Territory exclusions are considerably narrower and restricted in application: *Civil Law (Wrongs) Act 2002* (ACT) ss 5(2), 8(2)(a). There are no equivalent exclusions in the *Civil Liability Act 1936* (SA).

<sup>73</sup> Ipp Report, above n 19, 36 [2.3] (recommendation 2); see also at 35 [2.2]–[2.3].

<sup>74</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Civil Liability Act 1936* (SA) s 3(1) (definition of 'harm'); *Wrongs Act 1958* (Vic) s 43; *Civil Liability Act 2002* (WA) s 3.

<sup>75</sup> 'Negligence' is defined in each case as a failure to exercise reasonable care and skill: see *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Wrongs Act 1958* (Vic) s 43.

<sup>76</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 41; *Wrongs Act 1958* (Vic) s 44. The Victorian Act also clarifies that, except as provided, pt X relating to negligence is 'not intended to affect the common law': *Wrongs Act 1958* (Vic) s 47.

<sup>77</sup> *Civil Liability Act 2002* (WA) s 5A(2). The term 'fault' is not defined.

<sup>78</sup> *Civil Liability Act 1936* (SA) ss 4(1)–(2); 'accident' is defined in s 3(1) as 'an incident out of which personal injury arises and includes a motor accident'. Accordingly, it would appear that personal injury is a necessary condition for the application of the Act, although once attracted, the relevant provisions will apply to the whole of the claim (including in respect of harm beyond personal injury). Cf Keeler, above n 3, 52 who, commenting on the South Australian legislation, states that 'it is an important feature of the Act that its general provisions apply to

general exclusions (outlined above), and with the possible exception of South Australia, all of the CLAs expressly apply to actions for damages where the claim is founded on allegations of negligence (defined as a failure to exercise reasonable care and skill)<sup>79</sup> or fault<sup>80</sup> causing harm, irrespective of the pleaded cause of action.<sup>81</sup> In South Australia, the statutory language is sufficiently broad to cover statutory claims concerning 'accidents' in the State.

Notably, in all jurisdictions but Western Australia, the OLA and CLA provisions are contained in the same Act.<sup>82</sup> In those jurisdictions, it is clear that the relevant Acts will be construed so as to give greatest effect to the statute as a whole.<sup>83</sup> Despite the fact that the OLA and CLA provisions appear in different parts of the Acts, a construction promoting the harmonious operation of those parts will be preferred if disunity between their provisions can be avoided.<sup>84</sup>

In Western Australia, the *Occupiers' Liability Act 1985* (WA) is distinct from the *Civil Liability Act 2002* (WA). This gives rise to a potential tension between two maxims of interpretation: the syntactical presumption that general matters are constrained by specific matters (*ejusdem generis*)<sup>85</sup> and the approach that later Acts impliedly repeal earlier inconsistent Acts (*leges posteriores contrarias abrogant*).<sup>86</sup> Arguably, the former maxim would support a view that if the specific provisions of the OLA 'cover the field' of occupiers' liability, they operate without constraint from the general provision of the CLA. The latter maxim, on the other hand, would suggest that if inconsistency

all cases of negligence and not simply to the personal injury and death claims which were the subject of the Ipp Panel's terms of reference and report.

<sup>79</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Wrongs Act 1958* (Vic) s 43.

<sup>80</sup> *Civil Liability Act 2002* (WA) s 5A(2).

<sup>81</sup> See Peter Handford, 'Intention, Negligence and the Civil Liability Acts' (2012) 86 *Australian Law Journal* 100.

<sup>82</sup> *Civil Law (Wrongs) Act 2002* (ACT) ch 4, ch 12 pt 12.1; *Civil Liability Act 1936* (SA) pts 4, 6; *Wrongs Act 1958* (Vic) pts IIA, X.

<sup>83</sup> *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J); *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 (Gummow J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>84</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [70] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>85</sup> See *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629.

<sup>86</sup> See *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ).

arises between the OLA and the CLA, the latter prevails. However, in our view, neither of these maxims lead to the conclusion that one or other only of the OLA and the CLA can apply to occupiers' liability claims. Both maxims are exercised with caution<sup>87</sup> and, in any event, require a level of inconsistency or disharmony between the provisions of the Acts.<sup>88</sup> As will be seen in our discussion that follows, it is possible to read the provisions of both Acts as having joint and coherent operation in the occupiers' liability context, and such a construction is to be preferred.<sup>89</sup>

It is clear from the express language of the OLAs that whether or not an occupiers' liability claim is properly characterised as arising under the common law of negligence modified by statute (as we argued in Part One), or as a distinct statutory cause of action, liability is always determined by reference to whether or not the occupier has exercised reasonable care. Accordingly, these claims fall squarely within the intended scope of operation of the CLAs.<sup>90</sup> There is nothing in the language of the OLA provisions that would suggest that the general principles contained in the CLAs and having application to all actions based on a failure to exercise reasonable care should not, *prima facie*, apply to the negligence of an occupier.

## 2 *Duty of Care*

Consistent with the approach of the Panel, the CLAs do not attempt to codify or reformulate the principles relevant to determining the existence of a duty of care.<sup>91</sup> Although each of the CLAs includes the heading 'Duty of care',<sup>92</sup> the

<sup>87</sup> See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 136–7 [4.25], 264 [7.10].

<sup>88</sup> See, eg, *Goodwin v Phillips* (1908) 7 CLR 1, 10 where Barton J noted that implied repeal would be found only when the two enactments are so repugnant that they cannot stand together. Similarly, if general and specific provisions can stand together then there will be no reason to limit the words of general application: *R v Regos* (1947) 74 CLR 613, 623 (Latham CJ).

<sup>89</sup> There is a strong presumption that legislatures do not intend to contradict themselves but rather, where two Acts exist, intend both Acts to operate: *Butler v A-G (Vic)* (1961) 106 CLR 268, 276 (Fullagar J). See, eg, *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 432 [11] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>90</sup> Insofar as the incident giving rise to the claim occurs on or after the relevant commencement date for the relevant parts of the CLAs.

<sup>91</sup> See Dietrich, above n 27, 21–4.

<sup>92</sup> *Civil Law (Wrongs) Act 2002* (ACT) ch 4 pt 4.2; *Civil Liability Act 1936* (SA) pt 6 div 1; *Wrongs Act 1958* (Vic) pt X div 2; *Civil Liability Act 2002* (WA) pt 1A div 2.

High Court has commented (in relation to an equivalent heading in the New South Wales Act) that the heading is apt to mislead, since it is apparent that element of an action in negligence is not the subject matter of the substantive provisions.<sup>93</sup> One possible exception arises in Western Australia, where the Act's reference to 'fault' rather than negligence arguably leaves open the argument that duty of care has been removed as an element of civil liability actions.<sup>94</sup> Although that theoretical possibility exists, it does not seem to have been argued in the decade that has passed since the passage of the legislation, and it is questionable whether a purposive interpretation of the term 'fault' would admit such a result. It is in our view more likely that 'fault' would be given an interpretation consistent with the failure to exercise reasonable care (which interpretation is consistent with the use of the term in s 5B of the Act, discussed below).<sup>95</sup> Accordingly, the common law continues to govern the general principles applicable to establishing the existence of a duty in actions alleging a failure to take reasonable care.

As identified in *Roads and Traffic Authority (NSW) v Dederer*, duties of care are not owed in the abstract.<sup>96</sup> It is necessary to identify a duty by reference to its scope and content<sup>97</sup> (and not merely to determine its existence *simpliciter*). On our analysis, in the context of occupiers' liability, the determination and identification of the relationship of entrant and occupier of premises,<sup>98</sup> such as to call into existence the relevant duty of care, will remain

<sup>93</sup> *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 432–3 [13] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>94</sup> Dietrich, above n 27, 18, 24.

<sup>95</sup> This view is also consistent with approach taken by Buss JA in *Smith* (2010) 41 WAR 217, 233 [77], who was satisfied 'that s 5B of the CLA relates to breach of a duty of care and does not modify or supplant the common law principles which determine whether a duty of care exists or not'.

<sup>96</sup> (2007) 234 CLR 330, 345–6 [43]–[46] (Gummow J).

<sup>97</sup> *Ibid* 345 [43], 346 [46]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 370–2 [20]–[22] (French CJ and Gummow J); *Sydney Water Corporation v Turano* (2009) 239 CLR 51, 70 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53–4 [19]–[22] (McHugh, Gummow, Hayne and Heydon JJ).

<sup>98</sup> With due regard to the statutory definitions of the terms 'occupier of premises' and 'premises': *Civil Law (Wrongs) Act 2002* (ACT) s 168(6), Dictionary (definition of 'premises'); *Civil Liability Act 1936* (SA) s 19; *Wrongs Act 1958* (Vic) s 14A; *Occupiers' Liability Act 1985* (WA) s 2.

a matter for the common law.<sup>99</sup> Attendant questions of the extent and nature of the control exercised by a defendant over the premises are also left to the common law and, noting that there may be more than one occupier of premises,<sup>100</sup> will be relevant to the scope of the duty owed. Having determined its existence, the content of the relevant duty is largely (except in South Australia)<sup>101</sup> set out in the OLAs, which operate in place of the common law in this regard.<sup>102</sup> Even then, although these provisions cover the field of the content of the ordinary duty, two OLAs explicitly recognise the potential for the continued operation of the common law in setting a higher (as opposed to lower) standard of care than that attaching to the ordinary duty.<sup>103</sup>

There is no conflict between the CLAs which do not enter, let alone cover, the field of the general principles for determining the existence of a duty of care, and the OLAs which provide general principles as to the content of the duty owed by occupiers.<sup>104</sup> Further, to the extent that the CLAs limit or qualify the duties or liabilities of defendants in particular contexts,<sup>105</sup> those provisions are not inconsistent with the general content of the duty owed by occupiers in those contexts. For example, a public body who occupies land will owe a duty to take reasonable care in respect of dangers to persons entering that land (as provided by the OLAs), subject to the specific

<sup>99</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 168(5)(a); *Civil Liability Act 1936* (SA) s 20(1); *Wrongs Act 1958* (Vic) s 14B(2); *Occupiers' Liability Act 1985* (WA) s 4(2).

<sup>100</sup> *Jones v Bartlett* (2000) 205 CLR 166, 181 [45] (Gleeson CJ); *Di Vincenzo v McKrill* [2005] WASCA 222 (22 November 2005) [41], [58] (Miller AJA).

<sup>101</sup> The South Australian legislation does not explicitly state the content of the duty; rather, that matter is left to be determined 'in accordance with the principles of the law of negligence', taking into account certain prescribed matters: *Civil Liability Act 1936* (SA) ss 20(1)–(2).

<sup>102</sup> *Civil Law (Wrongs) Act 2002* (ACT) ss 168(1)–(4); *Wrongs Act 1958* (Vic) ss 14B(1), (3); *Occupiers' Liability Act 1985* (WA) ss 4(1), 5(1).

<sup>103</sup> Referring to 'some other Act or law': *Civil Liability Act 1936* (SA) s 20(5) (emphasis added); referring to 'any enactment or rule of law': *Occupiers' Liability Act 1985* (WA) s 8(1) (emphasis added).

<sup>104</sup> See *Smith* (2010) 41 WAR 217, 233 [75] (Buss JA); *Central Goldfields Shire v Haley* (2009) 24 VR 378, 381 [5]–[6] (Neave JA); *Victorian WorkCover Authority v Jones Lang Lasalle (Vic) Pty Ltd* [2012] VSC 412 (12 September 2012) [5] (Beach J); *Georges v Victoria* [2013] VCC 1235 (19 September 2013) [14] (Parrish J); *Brozinic v ISS Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014) [51]–[52] (Master Mossop).

<sup>105</sup> In relation to public bodies: *Civil Law (Wrongs) Act 2002* (ACT) ss 110–14; in relation to liability of road authorities: *Civil Liability Act 1936* (SA) s 42; *Wrongs Act 1958* (Vic) ss 83–5; *Civil Liability Act 2002* (WA) ss 5W–5X, 5Z–5AA. See also, in relation to obvious risks: *Civil Liability Act 2002* (WA) ss 5F, 5H–5J.

considerations (such as matters of policy and resource limitations) provided in the CLAs.

A further specific limitation on the potential scope of an occupiers' duty arises under the OLA in Western Australia, which provides that:

#### 6 Negligence of independent contractor

- (1) An occupier is not liable under this Act where the damage is due to the negligence of an independent contractor engaged by the occupier if —
  - (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and
  - (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.<sup>106</sup>

The use of the term 'liability' in s 6 is unhelpful as it does not reflect the juridical operation of the provision: that is, whether it is intended to limit the scope of the duty owed by an occupier, or the basis upon which breach is determined.<sup>107</sup> This is significant in the context of the relationship between the OLA and the CLA because the limitation is stated not to 'abrogate or restrict the liability of an occupier for the negligence of [an] independent contractor imposed by any other Act',<sup>108</sup> and while the CLA does not impose duties, it does regulate breach.

A narrow textual approach, relying on the ordinary and natural meaning of 'liability', is unilluminating since liability is the consequence of a legal determination; it does not reflect the nature of, or steps in, the determination process itself. However, reading the provision as a whole and in context (of the Act and of the relevant common law), it is clear that the provision is intended to limit the scope of an occupier's duty, having been enacted to address the complexities that had arisen at common law in relation to the

<sup>106</sup> There are no equivalent provisions in the other OLA jurisdictions, perhaps because they were thought to be unnecessary: Law Reform Commission, *Occupiers' Liability*, Report No 42 (1988) 43 [87].

<sup>107</sup> A similar issue arises in relation to the use of that term in the *Civil Liability Act 2002* (WA) s 5B, where it is clear from the context that the provision operates to limit the basis upon which breach may be found: see below n 110 and accompanying text.

<sup>108</sup> *Civil Liability Act 2002* (WA) s 6(2).

vicarious liability and non-delegable duties of occupiers,<sup>109</sup> which are well established constructs of duty rather than of breach. Based on that construction, there is no inconsistency or overlap between the operation of this provision of the OLA and the general provisions of the CLA, and therefore no attendant difficulty with their concurrent operation.

### 3 *Standard of Care and Breach*

Each of the CLAs provides that a person is not liable for failing to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.<sup>110</sup>

Further, in determining whether a reasonable person would have taken precautions against a risk of harm, courts are to consider the following (amongst other relevant things):

- the probability that the harm would occur if precautions were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm; and
- the social utility of the activity that creates the risk of harm.<sup>111</sup>

Consistent with the recommendations of the Ipp Report, the specified 'calculus factors' outlined above are referred to inclusively, making explicit the

<sup>109</sup> See Law Reform Commission, above n 106, ch 6; see especially at 42–3 [85], [87].

<sup>110</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 43(1); *Civil Liability Act 1936* (SA) s 32(1); *Wrongs Act 1958* (Vic) s 48(1); *Civil Liability Act 2002* (WA) s 5B(1) — referred to collectively in the table below as 'foreseeability factors'. Although the quoted subsections are identical, there is some minor variation between the introductory words of the Western Australian Act ('A person is not liable for harm caused by that person's fault in failing to take precautions') and those of the other relevant jurisdictions ('A person is not negligent in failing to take precautions'). It is based on this distinction that Dietrich argues that the Western Australian legislation might arguably exclude the common law duty of care element: Dietrich, above n 27, 18, 24; see also above Part II(B)(2).

<sup>111</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 43(2); *Civil Liability Act 1936* (SA) s 32(2); *Wrongs Act 1958* (Vic) s 48(2); *Civil Liability Act 2002* (WA) s 5B(2) — referred to collectively in the table below as 'calculus factors'. These provisions are identical in substance, with slight variations in textual form.

expectation that other relevant matters will be weighed in the balance when determining whether there has been a breach of the requisite standard of care.<sup>112</sup> McDonald comments that this inclusive wording

appears to recognise that the principles of breach of duty in negligence are still open to development and that the 'considerations which ordinarily guide the conduct of human affairs' will continue to wax and wane with time and circumstance.<sup>113</sup>

That view is supported by judicial observations that the breach provisions are expressed in the negative; providing the minimum requirements for a finding of negligence (rather than a set of principles to positively determine breach),<sup>114</sup> and operating against the backdrop of the law of negligence.<sup>115</sup> Notably, the common law of negligence has long taken statutory obligations into account in determining what the standard of reasonable care might demand of a defendant.<sup>116</sup> Further, common law principles regarding the proper approach to breach have continued relevance, as long as those principles are not inconsistent with the statutory provisions.<sup>117</sup>

As with the CLAs, the greatest commonality between the OLAs exists in the provisions dealing with breach, which require certain matters to be taken into account in determining whether the prescribed duty has been discharged, being:

- (a) the gravity and likelihood of the probable injury;
- (b) the circumstances of the entry onto the premises;
- (c) the nature of the premises;

<sup>112</sup> See generally Keeler, above n 3, 58.

<sup>113</sup> McDonald, 'The Impact of the Civil Liability Legislation', above n 27, 277.

<sup>114</sup> *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, 397 [173] (Campbell JA).

<sup>115</sup> *Erwin v Iveco Trucks Australia Ltd* (2010) 267 ALR 752, 772 [81] (Sackville AJA).

<sup>116</sup> For example, in *Lowns v Woods* (1996) Aust Torts Reports ¶81-376 the conduct expected of a medical practitioner was influenced by the provisions contained in the professional registration and standards legislation. Similarly, road traffic rules may support a finding that a person who breached those rules also failed to exercise reasonable care.

<sup>117</sup> Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room' (2013) 36 *University of New South Wales Law Journal* 1002, 1014.

- (d) the knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises;
- (e) the age of the person entering the premises;
- (f) the ability of the person entering the premises to appreciate the danger; and
- (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.<sup>118</sup>

Although those considerations are necessary, they are not expressed as being exclusive, and it is clearly open (and indeed necessary)<sup>119</sup> for any other relevant circumstances also to be taken into account. Accordingly the breach provisions in the OLAs, while mandatory in nature, also do not cover the field.

As can be seen, there is considerable consistency between the broad considerations identified in the civil liability provisions and the more context-specific considerations identified in the occupiers' liability provisions. Both require consideration of the gravity or seriousness of the risk and the likelihood or probability of harm, and of the burden of taking precautions against the identified risk. The civil liability provisions add the further consideration of social utility, while the occupiers' liability provisions add considerations relevant to the knowledge of the occupier and the circumstances of entry. Given the inclusive nature of these considerations, there is no reason that both sets of provisions could not be read together. Buss JA considered in the context of the Western Australian legislation that:

The criteria in s 5(1) and (4) of the OLA must be read with s 5B of the CLA. There is no relevant inconsistency between the criteria in s 5(1) and (4) of the

<sup>118</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 168(2); *Wrongs Act 1958* (Vic) s 14B(4); *Occupiers' Liability Act 1985* (WA) s 5(4) — referred to collectively in the table below as 'occupation factors'. In South Australia, the relevant provision is phrased a little differently, referring to 'determining the standard of care to be exercised by the occupier': *Civil Liability Act 1936* (SA) s 20(2). Nothing, in our view, turns on the difference in this phraseology. The South Australian legislation also adds to the standard list of factors 'any other matter that the court thinks relevant': at s 20(2)(h). See table below.

<sup>119</sup> Particularly taking into account the duty provisions which refer to the content of the duty being one to exercise reasonable care in all the circumstances — or, in South Australia, to being determined in accordance with the principles of negligence, which in turn imports consideration of all relevant circumstances, and the express inclusion of other matters in *Civil Liability Act 1936* (SA) s 20(2)(h).

OLA on the one hand and s 5B of the CLA on the other in their application to the facts and circumstances of the present case. It is therefore unnecessary to consider how any such inconsistency (if it were to emerge in any other case) should be resolved.<sup>120</sup>

Indeed it is difficult to anticipate how any such inconsistency could arise, particularly since the provisions go no further than to require consideration of the various factors (rather than that any particular factor should take precedence over another). This remains true of the further specific considerations in the CLAs that must be taken into account when assessing whether a public body has breached a duty of care,<sup>121</sup> which by their mandatory and general application will apply (in addition to the general 'calculus factors' under the CLAs and the 'occupation factors' under the OLAs) to determinations of breach in occupiers' liability actions against public bodies.

#### 4 Causation and Personal Responsibility

There is nothing in the OLAs that touches upon the question of causation. Accordingly, given our analysis of the application of the CLA provisions to all actions based on a breach of duty (whether under statute or otherwise, subject to the general exclusions), questions of causation in occupiers' liability actions should be determined according to the general principles contained in the CLAs.<sup>122</sup>

Each of the CLAs has implemented the recommendations relating to causation contained in the Ipp Report, amending the common law position to provide that:

##### 51 General principles

- (1) A determination that negligence caused particular harm comprises the following elements—
  - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*); and

<sup>120</sup> *Smith* (2010) 41 WAR 217, 235 [85]. See also *Brozinic v ISS Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014) [52] (Master Mossop).

<sup>121</sup> *Civil Law (Wrongs) Act 2002* (ACT) ss 110–14; *Civil Liability Act 1936* (SA) s 42; *Wrongs Act 1958* (Vic) ss 83–5; *Civil Liability Act 2002* (WA) ss 5W–5AA.

<sup>122</sup> See *Smith* (2010) 41 WAR 217, 236–7 [89]–[91] (Buss JA); *Brozinic v ISS Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014) [52] (Master Mossop).

- (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) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
  - (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (*the injured person*) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
  - (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

## 52 Burden of proof

In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.<sup>123</sup>

As outlined above, these provisions alter and reorganise the common law,<sup>124</sup> and so care should be taken to plead occupiers' liability actions in accordance with these principles. In particular, notwithstanding that the common law 'but for' test has been equated with the 'necessary condition' test under the CLAs,<sup>125</sup> it will be important to have regard to the exclusion of

<sup>123</sup> *Wrongs Act 1958* (Vic) ss 51–2 (emphasis in original); see also *Civil Law (Wrongs) Act 2002* (ACT) ss 45–6; *Civil Liability Act 1936* (SA) ss 34–5; *Civil Liability Act 2002* (WA) ss 5C–5D. The extract above is taken from the Victorian Act, although there is significant uniformity between the relevant causation provisions: see Butler, above n 25.

<sup>124</sup> For comment on and criticism of these provisions see generally Stapleton, 'Factual Causation' above n 50; Amanda Stickley, 'Causation in the High Court' (2008) 29 *Queensland Lawyer* 21; Pam Stewart and Anita Stuhmcke, 'The Rise of the Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?' (2013) 21 *Torts Law Journal* 126, 134–42.

<sup>125</sup> *Wallace v Kam* (2013) 250 CLR 375, 383 [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

normative reasoning and appeals to common sense in matters concerning factual causation.<sup>126</sup>

As with causation, the OLAs are in general silent on matters relating to personal responsibility (including contributory negligence and obvious risks) and these matters should be determined in accordance with the relevant civil liability provisions.

### III CONCLUSION

Given the apparent reluctance of litigants to squarely address the interaction between the common law, the OLAs and the CLAs, and the resultant dearth of case law resolving the issue, we offer the following view on the manner in which occupiers' liability actions should be pleaded and determined in the OLA jurisdictions.

First, the appropriate cause of action is negligence. There is not in our analysis a separate statutory cause of action under the OLAs; rather those Acts (like the CLAs) modify the law of negligence as it applies to occupiers.

Second, the *existence* of a duty of care and questions of control (relevant to scope of the duty) are left to the common law. The general *content* of that duty is as prescribed by the OLAs. Further, where the occupier is a public body or where the risk that has materialised meets the description of an obvious risk, then the CLAs may circumscribe the duty owed.

Third, whether or not the duty owed by an occupier has been breached must be determined in accordance with the provisions of both the CLAs and the OLAs, beginning with the CLA provisions which have the more general application. Accordingly, the first essential step is to identify the risk in respect of which it is alleged that the occupier ought to have taken precautions, and to plead or determine whether that risk was both foreseeable and not insignificant within the meaning of the CLAs. Whether a defendant was negligent in failing to take precautions against a foreseeable risk must then be determined by weighing up the 'calculus factors' in both the CLAs and the OLAs, taking appropriate account of other relevant matters. The approach to these questions may be informed by the common law to the extent that it is not inconsistent with the statutory requirements (for example, the common law's principles regarding the attributes of a reasonable person and the need to

<sup>126</sup> Ibid 383 [14].

determine breach prospectively are approaches that can and should be adopted when applying the statutory provisions).<sup>127</sup>

Finally, questions of causation and contributory negligence are to be determined in accordance with the CLAs, as they are informed by relevant and not inconsistent principles of the common law of negligence.<sup>128</sup>

A further observation, offered by way of conclusion, is that the OLAs appear now to offer little that the common law (following the High Court's decision in *Australian Safeway Store Pty Ltd v Zaluzna*)<sup>129</sup> and CLAs could not achieve. Indeed they offer a layer of complexity and uncertainty that is unhelpful. It is perhaps time for legislatures to re-examine the need for them and to consider their abolition. While they remain, however, their operation and intersection with other relevant bodies of law cannot and should not be ignored.

<sup>127</sup> See especially Stewart and Stuhmcke, above n 124.

<sup>128</sup> *Ibid.*

<sup>129</sup> (1987) 162 CLR 479.

**Table 1: Occupiers' and Civil Liability Legislation — A Comparison of Key Provisions (Emphasis Added)**

	Australian Capital Territory	South Australia	Victoria	Western Australia
Long title	An Act to consolidate and reform the statute law relating to wrongs, and for other purposes.	No long title	No long title	An Act <i>prescribing the standard of care</i> owed by occupiers and landlords of premises to persons and property on the premises.
Occupiers' liability application	<p>pt 12.1 — Occupiers Liability</p> <p>s 168(3): Part 7.1 (Damages for personal injuries — exclusions and limitations) and part 7.3 (Contributory negligence), other than section 102 (2), apply in relation to a claim brought by a person against an occupier of premises in relation to injury or damage.</p> <p>s 168(4): This section <i>replaces the common law rules about the standard of care</i> an occupier of premises must show to people entering on the premises in relation to any dangers to them.</p>	<p>pt 4 — Occupiers Liability</p> <p>s 20(1): Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be <i>determined in accordance with the principles of the law of negligence</i>.</p> <p>recht (1979) to subsection (2), this Part operates to the <i>exclusion of any other principles</i> on which liability for injury, damage or loss attributable to the state or condition of premises would,</p>	<p>pt IIA — Occupiers' Liability</p> <p>s 14B(1): The provisions of this Part apply <i>in place of the rules of the common law</i> which before the commencement of the <i>Occupiers' Liability Act 1983</i> determined the <i>standard of care</i> that an occupier was required to show towards persons entering on his premises in respect of dangers to them.</p> <p>s 14B(2): Except as is provided by subsection (1) the <i>rules of common law are not affected by this Part</i> with respect to the liability of occupiers to</p>	<p>OLA s 4(1): ... shall have effect, <i>in place of the rules of the common law</i>, for the purpose of determining the care which an occupier of premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers (a) to that person; or (b) to any property brought on to the premises by, and remaining on the premises in the possession and control of, that person, whether it is owned by that person or by any other person, which are due to the state of the</p>

	Australian Capital Territory	South Australia	Victoria	Western Australia
	<p>s 168(5): This section <i>does not affect</i> — (a) <i>other common law rules about the liability of occupiers</i> to people entering on their premises; or (b) any obligation an occupier of premises has under <i>another Act or any statutory instrument or contract</i>.</p>	<p>but for this Part, be determined in tort.</p> <p>s 22(2): This Part does not apply to a case where an occupier causes a dangerous state or condition of premises, or allows premises to fall into a dangerous state ... intending to cause injury, damage or loss to another.</p> <p>s 20(5): Where an occupier is, by contract or by reason of <i>some other Act or law</i>, subject to a higher standard of care than would be applicable apart from this subsection, the question of whether the occupier is liable for injury, damage or loss shall be determined by reference to that higher standard of care.</p>	<p>persons entering on their premises.</p> <p>s 14D: <i>Part V [Contributory Negligence] shall apply</i> in relation to any claim brought under this Part by a person against an occupier of premises in respect of injury or damage.</p>	<p>premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.</p> <p>OLA s 4(2): <i>Nothing in sections 5 to 7 shall be taken to alter the rules of the common law which determine the person on whom ... a duty to show the care referred to in subsection (1) towards a person entering those premises is incumbent.</i></p> <p>OLA s 8(1): <i>Nothing in this Act relieves an occupier of premises in any particular case from any duty to show a higher standard of care than in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons.</i></p>

	Australian Capital Territory	South Australia	Victoria	Western Australia
Occupiers' duty	s 168(1): An occupier of premises <i>owes a duty to take all care that is reasonable in the circumstances</i> to ensure that anyone on the premises does not suffer injury or damage because of ... (a) the <i>state of the premises</i> , or (b) <i>things done or omitted to be done about the state of the premises</i> .	s 20(1): Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the <i>principles of the law of negligence</i> .	s 14B(3): An occupier of premises <i>owes a duty to take such care as in all the circumstances of the case is reasonable</i> to see that any person on the premises will not be injured or damaged by reason of the <i>state of the premises</i> or of <i>things done or omitted to be done in relation to the state of the premises</i> .	OLA s 5(1): Subject to subsections (2) and (3) <i>the care which an occupier of premises is required by reason of the occupation or control of the premises to show</i> towards a person entering on the premises in respect of <i>dangers which are due to the state of the premises or to anything done or omitted to be done on the premises</i> and for which the occupier is <i>by law responsible</i> , shall ... be such care as in all the circumstances of the case is <i>reasonable</i> to see that that person will not suffer injury or damage by reason of any such danger.
Breach of occupiers' duty	s 168(2): Without limiting subsection (1), in deciding whether the duty of care has been discharged consideration must be given to the following ... [occupation factors].	s 20(2): In determining the <i>standard of care</i> to be exercised by the occupier of premises, a court shall take into account ... [occupation factors] ... and (h) any other matter that the	s 14B(4): Without restricting the generality of subsection (3), in determining whether the <i>duty of care under subsection (3)</i> has been <i>discharged</i>	OLA s 5(4): Without restricting the generality of subsection (1), <i>in determining whether an occupier of premises has discharged his duty of care</i> , consideration

	Australian Capital Territory	South Australia	Victoria	Western Australia
		court thinks relevant.	consideration shall be given to ... [occupation factors].	shall be given to ... [occupation factors].
Civil liability — application	s 41(1): This chapter [4] applies to all claims for damages for harm resulting <i>from negligence, whether the claim is brought in tort, in contract, under statute or otherwise.</i>	s 4(1): This Act is intended to apply to the exclusion of inconsistent laws of any other place to the determination of liability and the assessment of damages for <i>harm arising from an accident occurring in this State.</i>  s 4(2): Subsection (1) is intended to extend, and not to limit in any way, the application of this Act in accordance with its terms	s 44: This Part [X] applies to any claim for damages resulting <i>from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.</i>  s 47: Except as provided by this Part, this Part is not intended to affect the common law.	CLA s 5A(2): This Part [1A] extends to a claim for damages for <i>harm caused by the fault of a person</i> even if the damages are sought to be recovered in an <i>action for breach of contract or any other action.</i>
General duty of care	General principles not articulated.	General principles not articulated.	General principles not articulated.	General principles not articulated.
Breach of general duty	ch 4 — Negligence  pt 4.2 — Duty of care  s 42 'Standard of care': For deciding whether a person (the <i>defendant</i> ) was negligent, the <i>standard of care</i> required of the	pt 6 — Negligence  div 1 — Duty of care  s 31(1) 'Standard of care': For determining whether a person (the <i>defendant</i> ) was negligent, the <i>standard of care</i>	pt X — Negligence  div 2 — Duty of care  s 48 'General principles'  s 48(1): A person is not negligent in failing to take precautions against a risk of	CLA pt 1A — Liability for harm caused by the fault of a person  div 2 — Duty of care  s 5B 'General principles'  s 5B(1): A person is not liable for harm caused by that

	<b>Australian Capital Territory</b>	<b>South Australia</b>	<b>Victoria</b>	<b>Western Australia</b>
	<p>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.</p> <p>s 43 'Precautions against risk — general principles'</p> <p>s 43(1): A person is not negligent in failing to take precautions against a risk of harm unless ... [foreseeability factors].</p> <p>s 43(2): In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (amongst other relevant things) ... [calculus factors].</p>	<p>required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.</p> <p>s 32(1) 'Precautions against risk': A person is not negligent in failing to take precautions against a risk of harm unless ... [foreseeability factors].</p> <p>s 32(2): In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) ... [calculus factors].</p>	<p>harm unless ... [foreseeability factors].</p> <p>s 48(2): In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) ... [calculus factors].</p>	<p>person's fault in failing to take precautions against a risk of harm unless ... [foreseeability factors].</p> <p>s 5B(2): In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) ... [calculus factors].</p>

	Australian Capital Territory	South Australia	Victoria	Western Australia
Relevant definitions	<p>s 40: In this chapter [4]:</p> <p><i>harm</i> means harm of any kind, and includes — (a) personal injury; and (b) damage to property; and (c) economic loss.</p> <p><i>negligence</i> means failure to exercise reasonable care and skill ...</p> <p>s 168(6): <i>occupier</i>, of premises, includes the lessor of premises let under a tenancy who — (a) is under an obligation to the tenant to maintain or repair the premises; or (b) could exercise a right to enter the premises to carry out maintenance or repairs.</p> <p>Dictionary: <i>premises</i> includes any land or building, any fixed or moveable structure erected on any land, and any vehicle, vessel or aircraft.</p>	<p>s 3: <i>accident</i> means an incident out of which <i>personal injury arises</i> and includes a motor accident ...</p> <p><i>duty of care</i> means a duty to take reasonable care or to exercise reasonable skill (or both) ...</p> <p><i>harm</i> includes loss of life, personal injury, damage to property, economic loss and loss of any other kind.</p> <p>s 19: <i>occupier</i> of premises means a person in occupation or control of the premises, and includes a landlord;</p> <p><i>premises</i> means — (a) land; or (b) a building or structure (including a moveable building or structure); or (c) a vehicle (including an aircraft or a ship, boat or vessel).</p>	<p>s 14A: In this Part [IIA] —</p> <p>(a) a reference to the occupier of premises includes a reference to the landlord of premises let under a tenancy ... who — (i) is under an obligation to the tenant to maintain or repair the premises; or (ii) is, or could have put himself in, a position to exercise a right to enter on the premises to carry out maintenance or repairs; and</p> <p>(b) a reference to premises includes a reference to any fixed or moveable structure, including any vessel, vehicle or aircraft.</p> <p>s 43: <i>harm</i> means harm of any kind and includes — (a) injury or death; and (b) damage to property; and (c) economic loss.</p> <p><i>negligence</i> means failure to exercise reasonable care.</p>	<p>OLA s 2:</p> <p><i>occupier of premises</i> means person occupying or having control of land or other premises;</p> <p><i>premises</i> includes any fixed or movable structure, including any vessel, vehicle or aircraft.</p> <p>CLA s 3:</p> <p><i>harm</i> means harm of any kind, including ... (a) personal injury; (b) damage to property; (c) economic loss.</p>