

SAICORP

newsletter

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20

Editor's note:

Welcome to the October 2002 edition of the SAICORP Newsletter.

Public liability and insurance issues continue to feature prominently in the media, particularly in relation to relatively risky activities and community events. Four bills were recently passed in the SA Parliament in an attempt to help resolve some of the issues. An article relating to the new legislation is featured in the Newsletter.

A number of initiatives have been undertaken by Government agencies to assist various sectors of the community and not-for-profit organisations in managing their risks and to assist them in obtaining public liability insurance. Agencies such as the Office for Volunteers, the Office for Recreation and Sport and the South Australian Tourism Commission have been involved in developing risk management programs for these sectors. An article detailing the initiatives is featured in the Newsletter.

Congratulations to Peter Brass, Principal Adviser Risk Management and Audit, Primary Industries and Resources SA, on being elected President of ARIMA (SA). The ARIMA National Conference, *Limiting liability: legislation and litigation*, is being conducted on 17 – 20 November 2002 in Perth. A summary of the Conference program is included in the Newsletter.

A reminder that the Newsletter can be accessed electronically on the SAICORP Website at www.treasury.sa.gov.au/saicorp. Back copies of the Newsletter can also be accessed on the Website.

– Regards Graham
(editor)

Contributions on any subject related to insurance or risk management can be forwarded to:

The Editor
SAICORP
GPO Box 1045
ADELAIDE 5001

Fax: 8212 8289

E-mail: glover.graham@saugov.sa.gov.au



Government
of South Australia

Recent Amendments Affecting Civil Liability Claims

There are four Acts of Parliament which have been passed in recent times, three of which have not yet been proclaimed, which will affect civil claims in the future.

Volunteers Protection Act 2001

The Volunteers Protection Act 2001 is in operation and has been since January 2002. The Act protects a volunteer of an incorporated community organisation, whilst carrying out volunteer work for that community organisation from personal civil liability. The liability instead attaches to the community organisation, which can include a Government agency.

Statutes Amendment (Structured Settlements) Act 2002

The Supreme, District and Magistrates Court Acts have been amended by way of the Statutes Amendment (Structured Settlements) Act 2002 to allow the Court, by consent, to make orders for damages to be paid by way of periodic payments (Structured Settlements) instead of lump sums. This Act has been assented to but not proclaimed as yet.

Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002

The Wrongs Act has been amended by way of the Wrongs (Liability and Damages for Personal Injury) Amendment Act. Section 24 - 24 O has been enacted and replaces Section 35A which was the section of the Wrongs Act related to the assessment of damages in motor vehicle accidents only. The Wrongs Act provisions in Section 24 now apply to all accidents. There are caps and special contributory negligence provisions, whilst non economic loss is to be assessed on a scaled/ points system (0 – 60). In 2002, the value of a point will be the same whatever the injury (as in CTP) and the current maximum for 60 points is \$102,600. From 2003, the more serious the

injury, the more the monetary value assigned to a point. The maximum for non economic loss at 60 points is \$241,500 for 2003. After 2003 the values of the points are indexed.

Mental or nervous shock damages have been limited to those who are physically injured in an accident or present at the scene when the accident occurred, or the parent, spouse or child of a person killed, injured or endangered. The old provisions of Section 35A in relation to future loss, gratuitous services, interest, earning capacity and management fees have been retained, although the total economic loss is capped at \$2.2 million.

Damages are now excluded if the injured person is engaged in an indictable offence at the time of the injury and the offence contributed materially to the risk of injury. However, a Court may award damages if the circumstances of a case are exceptional and the principle would operate harshly and unjustly. Contributory negligence is now presumed if a person is intoxicated at the time of the accident, unless the injured person proves on the balance of probabilities that the intoxication did not contribute to the accident or that the intoxication was not self induced. The minimum contributory negligence for intoxication is 25 per cent. In relation to motor vehicle accidents the minimum can be 50 per cent if the driver has a blood alcohol level of 0.15 or more.

The Act now includes a provision that a Good Samaritan is not liable for an act or omission done in good faith and without recklessness in assisting a person in apparent need of emergency assistance. Definitions of a Good Samaritan and Emergency Assistance are detailed in the Act. The Act also provides that expressions of regret may be made without them being held to be an admission of liability or fault.

The transitional provisions of the amendments to the Wrongs Act mean that the amendments only apply to accidents occurring on or after the commencement of these sections.

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RECENT AMENDMENTS (continued)

Please note that at the time of writing this article the Wrongs Act amendment has not been proclaimed and therefore, it is not in effect yet.

Recreational Services (Limitation of Liability) Act 2002

The Recreational Services (Limitation of Liability) Act 2002 has been assented to, but not proclaimed pending the Commonwealth Trade Practices Amendment (Liability for Recreational Services) Bill 2002 being passed by the Federal Parliament. This legislation will allow the provider of Recreational Services to avoid liability if he has complied with a registered code of practice.

The legislation allows for the concept of waivers to apply whereby the duty of care owed by the provider may be modified so that the duty of care is governed by the registered code, limiting the liability of the provider.

The Treasurer has set up a Public Liability: Waivers and Codes Task Force, which is to look at such things as the mechanisms for registering a code, the content of the codes, the form of waiver that will be used, the form of notice where services are provided gratuitously, the procedure for amending or cancelling the registration of a code and any other matters necessary to the operation of the system.

The membership of the task force includes the Commissioner for Consumer Affairs, the Executive Director of the Office for Recreation and Sport, the Chief Executive of the South Australian Tourism Commission and representatives from the Attorney General's Department and the Parliamentary Counsel. The General Manager, SAICORP, is also a member of the Task Force.

Subject to the final provisions of the Trade Practices amendments, it may be that the State Act may have to be amended before it is promulgated any further.

(Thanks to Virginia Martindale, Managing Counsel SAICORP Legal Unit, Crown Solicitor's Office, for her help in the preparation of this article – Ed note)

STOP PRESS—Review of the Law of Negligence

Commonwealth, State and Territory Ministers and the President of the Australian Local Government Association met on 2 October 2002 and were briefed by the Honourable Justice David Ipp on the recommendations of the Review of the Law of Negligence.

The Review has recommended changes to the law which are designed to impose a reasonable burden of responsibility on individuals to take care of themselves and take care of others.

The changes are designed to strike the appropriate balance between the interests of injured people and the community at large. Ministers have instructed officials to prepare a report on the recommendations and related issues that should be implemented on a nationally consistent basis.

The officials report is to be delivered to Ministers who will then consider its recommendations prior to the next Ministerial Meeting to be held in November 2002.

New ARIMA SA President

Peter Brass, Principal Adviser, Risk Management and Audit, Primary Industries and Resources SA, was elected State President at the ARIMA SA Chapter's AGM on 22 August 2002. Peter was a member of the organising committee for the very successful State Conference, "Risk Odyssey 2002".

Inspector Michael O'Neill, Officer in Charge, STAR Group Operations SAPOL, and Suzanne Ridding, Financial Controller HomeStart Finance, were elected to the ARIMA State Executive for the first time.

Best wishes to all three in their new roles.

Retiring President Geraldine Wood, Risk Manager, Justice Portfolio, is to be congratulated for the professional manner in which she led the Chapter over the past two years. Through her efforts and outstanding leadership in the conduct of such events as the Risk Odyssey 2001 and 2002 Conferences, Geraldine has been primarily responsible for raising the profile of the SA Chapter. Geraldine continues in her role as South Australia's representative on the ARIMA National Board.

Assessing the Risk – Capping the Liability

– Treasurer's Instruction 26 (Limitation of Supplier Liability in Information Technology and Telecommunications Contracts)

Where a supplier seeks to cap liability in a contractual arrangement for the supply of Information Technology and Telecommunication Services, Treasurer's Instruction 26 (TI26) requires that before negotiating a cap, the agency must prepare a formal documented risk assessment (as per AS/NZS 4360: 1999 or equivalent) that quantifies the risk exposure and facilitates a judgement to be properly made as to the adequacy of the proposed cap.

Generally, when carrying out a risk assessment in accordance with AS/NZS 4360: 1999, the level of risk is determined by assessing the likelihood and consequences associated with the risk and rating the level of risk as low, moderate, high or extreme.

In assessing the risks associated with a cap of liability, the prime focus should be on the consequences, ie, what happens if the risk eventuates and what is the cost (\$) associated with it. Consideration should be given to the worst case scenario (but still applying common sense) and the consequences of that outcome, irrespective of the likelihood. TI26 dictates that the limit of liability must be specified in a dollar amount in the contract for each single occurrence or a series of related occurrences arising from a single cause of action.

Therefore, a dollar amount needs to be put on the risk. It will only be after that risk is quantified that it will be possible to make an assessment as to the appropriateness of the cap.

TI26 prescribes that if liability is to be capped then certain specified heads of liability must remain uncapped. It is very important to clearly understand these liabilities when negotiating the terms of a contract. The best way to ensure this is to be familiar with the contractual terms outlined in TI26 and any terms proposed by the supplier.

Ensure that the contract specifies those terms and the application of the same as per TI26, in order to be satisfied that liability remains uncapped in the prescribed areas.

Of concern in respect to capping is the situation that sometimes arises where agencies appear to be "forced" into accepting a cap because they have started informal negotiations with a supplier and have essentially formed a binding association for the provision of services. There may, however, be other suppliers who can provide the services even though they are the "second choice". Those suppliers may become more attractive once the "first choice" declares that they wish to cap their liability. In addition, by capping the liability, the supplier's bid may become a non-conforming tender. It is important to keep these issues in focus when negotiating with suppliers at all stages.

Finally, there is a misconception in some agencies that the setting of a level of insurance (eg Public Liability of \$20 million) and capping of liability are one and the same. That is not the case. Insurance merely provides a funding mechanism to respond to meet the cost of a claim. The level of liability is not limited by the level of insurance, although in many cases the supplier will try to link the same. If a supplier is exposed to liability beyond the level of their insurance, they will have to "self fund" that excess exposure. For example, a company with a relatively low level of insurance but high asset level, may be called upon to realise those assets in the event of a claim which exceeds the level of insurance.

If you require further information with regard to any capping of liability issues, contact Margaret Ribarich, Senior Solicitor SAICORP Legal Unit, Crown Solicitor's Office, on telephone 8204 1522.

Auditing to add Value! – NEW!

HB 158-2002, 'A guide to the use of AS/NZS 4360: 1999, Risk Management, within the Internal Audit process', provides guidance to the auditor in the use of AS/NZS 4360 in the internal audit process. It contains a series of worked examples that build from the COSO model and IIA standards and it illustrates how AS/NZS 4360 can help the internal auditor in their task. Specific areas addressed in the guide include annual internal audit planning, planning individual assignments, control self assessment and control design.

Also available is VID 032-2002, 'Gorilla in the Midst – Auditing to add value'.

The video comes equipped with a CD-ROM containing a training facilitator's kit and a fully developed PowerPoint presentation. Standards Australia describes this as an indispensable resource for all



internal and external auditors!

It shows how an auditor's performance is dependent on:

- ▶ The audit process – planning and structure
- ▶ Personal traits of auditors – both desirable and undesirable
- ▶ Power – stemming from business knowledge and experience
- ▶ Influence – relationship building and persuasion

The guide and video can be purchased from the Standards Australia website at www.standards.com.au or by contacting the Customer Service Centre on Phone 1300 65 46 46, Fax 1300 65 49 49 or E-mail sales@standards.com.au. Prior to purchase, a free 5 minute preview of the video can be viewed by visiting the website.



ARIMA 2002

Limiting liability: legislation and litigation



BURSWOOD INTERNATIONAL RESORT CASINO PERTH 17 - 20 NOVEMBER 2002

The ARIMA National Conference program features a wide range of plenary sessions, interactive workshops, and lectures conducted by experts in their fields, with strong emphasis on "Limiting liability: legislation and litigation". The Conference Moderator is Dr Lynn Drennan, Head of the Risk Management Division at the Glasgow Caledonian University (GCU). Lynn holds the position previously occupied by Professor Gordon Dickson prior to his promotion to the position of Pro Vice Chancellor at GCU.

Presentations at the Conference include:

Risk for the knowledge age: Ms Jo Bryson, Director, Knowledge Age, NT

The current state of risk management and the insurance industry in the US: Ms Tracy Dahl-Webb, President, Public Risk Management Association (PRIMA), USA

Pointing the finger at brokers: Ms Geraldine Gray, Senior Associate, and Mr Daniel Marquet, Partner, Corrs Chambers Westgarth, VIC

Managing risk in Indigenous communities: Mr Glenn Jones, Director - ATSIC Fraud Unit, ATSIC, ACT

21st century disability surveillance - the future is here: Mr Bill Kizorek, Chairman Emeritus, InPhoto Surveillance, USA

Containing liability insurance costs: Mr Simon Lotter, Underwriter Syndicate 2468 at Lloyd's, Marketform Managing Agency, UK

Your Honour, did I know the gun was loaded?: Mrs Alice Arnott Oppen, Consultant, Australian Institute of Company Directors, NSW

The value impact of off balance sheet financing: does litigation impact value?: Dr Deborah Pretty, Principal, Oxford Metrica, UK

Liability, legislation and litigation: a global perspective: Mr Chris Woodward, Risk & Insurance Manager - Asia Pacific & Middle East Shell International.

For more information, including an online registration facility, visit the ARIMA website at www.arima.com.au

Government Risk Management Initiatives for the Community

A number of initiatives have been undertaken by Government agencies to assist in raising the risk management awareness and understanding of various sectors of the community and to provide advice and assistance to those sectors in relation to the implementation of better risk management practices and procedures. Such initiatives should help to reduce the risks of those groups and bodies and the likelihood and severity of claims against them, which in turn should result in improved accessibility to affordable insurance protection.

Office for Volunteers

The Office for Volunteers has introduced a Risk Management Education Program for volunteer groups in South Australia. The goals of the program are to create awareness of the Volunteers Protection Act 2001, develop a comprehensive risk management education program and to deliver the program free of charge, across various mediums, and accessible to all South Australian communities.

The program includes the provision of appropriate tools to enable volunteer groups to assess their level of risk and to design their own risk management plans and the provision of information and advice as to how to manage and minimise these risks.

James Crown, Managing Director of the Strategic Planning Group was appointed to deliver the program which commenced on 14 October 2002.



Photo courtesy of Office for Volunteers

Thirty-five workshops will be conducted around the State.

South Australian Tourism Commission

The South Australian Tourism Commission works with a large number of volunteers,



Photo courtesy of South Australian Tourism Commission

particularly associated with major events. A volunteer strategy has been developed by Australian Major Events (AME), which includes developing a database of all volunteers, a volunteer handbook and a volunteer management program being tested at the 2002 Adelaide

Rose Festival and the 2002 Mitsubishi Adelaide International Horse Trials.

The volunteer management program will include such items as a risk management plan, volunteer policies and procedures, volunteer job descriptions, recruiting and training, supervision and evaluation and reward and recognition of volunteers. For specific events there will be training and education provided for volunteers.

In addition to the above, 14 Tourism Operator Seminars have been conducted in tourist regions of the State as part of a package of initiatives that the Commission has established to address increasing public liability insurance premiums.

These free workshops were available for all tourism operators and were primarily designed to assist operators in improving risk management practices.

The workshops formed an integral part of achieving the Commission's overall objectives.

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GOVT. RISK MANAGEMENT INITIATIVES (continued)

The workshop objectives were to educate and train operators to understand and implement better risk management practices, improve the quality of tourism products, reduce the risk of public liability claims against operators and provide advice to operators on the administrative and legal aspects of public liability insurance.

A total of 180 persons attended the workshops.

Office for Recreation and Sport



Image courtesy of Office for Recreation and Sport

The Office for Recreation and Sport (ORS) has developed a risk management resource for the sport and recreation industry. The resource aims to give sport and recreation organisations the basic information to help them understand the principles of risk management.

It is not a detailed "how to" manual, but rather an introductory guide with references to lots of other resources depending on the needs of the individual sport or recreation organisation.

The free ORS resource will be released in November 2002 and will be supported by a training program which will commence early in 2003.

Standards Australia has released a complementary document, HB 246-2002 – *Guidelines for Managing Risk in Sport and Recreation Activities*, which is aligned to the Australian standard for risk management AS/NZS 4360:1999.

This new guideline provides those involved in sport and recreation with guidance on risk management principles, process steps and applications. The handbook was produced with the endorsement of the Standing Committee on Recreation and Sport (SCORS). It offers an "overarching" national framework to guide the understanding and management of risk, and a common platform to support strategies and resources directed towards dealing with risk management issues.

Coordination by SAICORP

SAICORP has played a coordinating role in bringing the Government agencies together to discuss the implementation of the initiatives with a view to improving their effectiveness. It is also possible that the agencies will be able to link with Local Government Risk Services (LGRS) who act as the broker to the Local Government Association of South Australia and Scheme Manager of the LGA's Mutual Liability and Workers Compensation Schemes. This could provide an extended resource base to coordinate a state wide risk management project for community, volunteer and tourism organisations.

LGRS, through long-standing arrangements with underwriters, also provides comprehensive public liability cover at very competitive premiums to a large number of small community and sporting clubs.

Commonwealth Fraud Control Guidelines – **NEW!**

The Minister for Justice and Customs launched the Commonwealth Fraud Control Guidelines in May 2002. Although specifically developed for the Commonwealth Government they may have some application for your agency and assist you in developing a fraud control plan.

The guidelines may be accessed at:
<http://www.ag.gov.au/aghome/commprot/crjd/LECD/guidelinesmay.htm>

For any questions about the Commonwealth fraud control policy, email fraud@ag.gov.au or call Jacqueline Aumann on (02) 6250 6319.

Risks in Procurement and Contracts

An extract from a presentation by Mark Leggett, Director Strategic Procurement Unit, Department of Human Services, at the Government Risk Management Forum held on 25 September 2002



Photo courtesy Transport SA

Steps in a Service Acquisition Tender process

- ▶ Service Acquisition Planning
- ▶ Consultation – Internal / External (where appropriate)
- ▶ Various approvals – Cabinet, Minister, Divisional, APU & SSB
- ▶ Develop service specification
- ▶ Develop tender documentation
- ▶ Conduct tender process
- ▶ Undertake briefing session
- ▶ Evaluate responses
- ▶ Short-list
- ▶ Negotiate where appropriate
- ▶ Make recommendation
- ▶ Various approvals – Cabinet, Minister, Divisional, APU & SSB
- ▶ Sign Contract

Service Acquisition Planning

- ▶ Project justification and funding
- ▶ Detail specification
- ▶ Market or sector analysis
- ▶ Risk analysis
- ▶ Method of approaching service providers
- ▶ Evaluation (Assessment) methodology
- ▶ Contract management
- ▶ Compliance with government policy
- ▶ Approvals

Tender Logistical Arrangements

- ▶ Conduct a process which is timely – can vary
- ▶ Conduct a process which is fair and consistent with the tender document
- ▶ Keep question and answer register
- ▶ Records management
- ▶ Document security

- ▶ Establish single point of accountability (contact person)
- ▶ Method of approaching service providers (eg selective by invitation, advertise in media and list on Tenders SA website)

Assessment Process

- ▶ Establishment of evaluation panel - representative expertise from the service and commercial areas
- ▶ Complete response has been received - compliance
- ▶ Clarification of submission response
- ▶ Assessment is against the criteria - usually weighted
- ▶ Ranking of submissions and possible respondent presentations
- ▶ Possible site visits
- ▶ Value for money
- ▶ Report on the benefits of each of the submissions

Project / Process Management Risk

- ▶ No Project Plan
- ▶ No definition of procedures or roles
- ▶ No funding
- ▶ Outcomes and deliverables not clearly defined
- ▶ Poor skill / representation mix on the evaluation team
- ▶ Evaluation methodology not used
- ▶ Insufficient responses
- ▶ Poor allocation of resources to the project
- ▶ Poor or biased specification
- ▶ Breaches in probity

Operation Risk

- ▶ Failure to install and / commission equipment
- ▶ Equipment / Service failure
- ▶ No staff training
- ▶ No monitoring of performance
- ▶ No communication strategy developed
- ▶ No transition strategy developed
- ▶ For strategic critical products / service no contingency plan

(There will be another extract from Mark's presentation in the next Newsletter – Ed note)