

House of Assembly—No 138

As laid on the table and read a first time, 19 June 2008

South Australia

**Civil Liability (Recreational Services) Amendment
Bill 2008**

A BILL FOR

An Act to amend the *Civil Liability Act 1936*; and to repeal the *Recreational Services (Limitation of Liability) Act 2002*.

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Schedule 1—Repeal of *Recreational Services (Limitation of Liability) Act 2002*

- 1 Repeal of Act
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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Civil Liability (Recreational Services) Amendment Act 2008*.

5 2—Commencement

This Act will come into operation 2 months after the date of assent.

Part 2—Amendment of *Civil Liability Act 1936*

3—Insertion of Part 6 Division 3A

After Part 6 Division 3 insert:

10 **Division 3A—Recreational activities**

39A—Application of Division

- (1) This Division applies only in respect of liability in negligence for harm to a person (the *plaintiff*) resulting from a recreational activity engaged in by the plaintiff.
- 15 (2) This Division does not limit the operation of Division 3 in respect of a recreational activity.

39B—Interpretation

In this Division—

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm;

obvious risk has the same meaning as it has in Division 3;

recreational activity includes—

- (a) any sport (whether or not the sport is an organised activity); and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

39C—No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person (the *defendant*) is not liable in negligence for harm suffered by another person (the *plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

39D—No duty of care for recreational activity where risk warning

- (1) A person (the *defendant*) does not owe a duty of care to another person who engages in a recreational activity (the *plaintiff*) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if—
 - (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person; or
 - (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).
- (3) For the purposes of subsections (1) and (2), a *risk warning* to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.

(4) The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(5) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(6) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(7) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(8) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(9) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(10) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(11) The fact that a risk is the subject of a risk warning does not of itself mean—

(a) that the risk is not an obvious or inherent risk of an activity;
or

(b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(12) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(13) In this section—

incapable person means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning;

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

39E—Waiver of contractual duty of care for recreational activities

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- (1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
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- (2) Nothing in the written law of the State renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.
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- (3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
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- (4) In this section, *recreation services* means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.
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- (5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

30 **Schedule 1—Repeal of *Recreational Services (Limitation of Liability) Act 2002***

1—Repeal of Act

The *Recreational Services (Limitation of Liability) Act 2002* is repealed.