Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Conduct of the inquiry

1.1 The Trade Practices Amendment (Liability for Recreational Services) Bill 2002 was introduced into the House of Representatives on 27 June 2002 and passed on 28 August. The Senate referred it for inquiry by the Economics Legislation Committee on 23 October, on the recommendation of the Senate Selection of Bills Committee. The Selection of Bills Committee noted as issues for consideration:

- the role of the *Trade Practices Act 1974* in personal injury claims;
- the definition of recreational services; and
- waiver of gross negligence.[1]

1.2 The Committee advertised the inquiry on its website and in *The Australian and Financial Review*, and wrote to many peak bodies inviting submissions. The Committee received 17 submissions (see Appendix 1). Submissions received electronically are published on the Internet under the Committee's homepage at http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

1.3 The Committee held a public hearing on 27 November (see Appendix 2). The transcript of the hearing is at http://www.aph.gov.au/hansard/senate/commttee/s-econ.htm

1.4 The Australian Competition and Consumer Commission (ACCC) did not make a submission and indicated that its representatives were unable to attend the hearing because of commitments in Melbourne. However, the ACCC indicated that the views expressed in its submission to the Principles Based Review of the Law of Negligence, commissioned by the Government in July 2002 (the Ipp Inquiry) were relevant to the Committee's inquiry.

The Bill

1.5 Before discussing the Bill under the terms of reference cited above, the Committee will look at its provisions and objectives.

1.6 The Bill seeks to modify the application of section 68 to section 74 of the *Trade Practices Act 1974* (TPA) within certain parameters. In doing so, and to adopt the terminology commonly used to describe its operation, the Bill will provide for self-assumption of risk by consumers who participate in certain recreational activities.

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1 *Senate Hansard,* 23 October 2002, p. 5235, Selection of Bills Committee report.

1.7 Sections 68 and 74 appear in the consumer protection provisions of Part V of the TPA.

1.8 Subsection 74(1) implies into every contract for the supply by a corporation to consumers a warranty that:

- services supplied will be rendered with due care and skill; and
- any material supplied in connection with the services will be reasonably fit for the purpose for which they are supplied.

1.9 Subsection 74(2) implies the same warranty as above except that the services and materials supplied must be reasonably fit for a stipulated purpose unless the consumer is not relying, or it would be unreasonable for the consumer to rely, on the corporation's skill or judgment in deciding fitness for the stipulated purpose.

1.10 Section 68 has the effect that the warranties implied by the provisions in Division 2 of Part V, of which section 74 is one, cannot be contracted out of. The section highlights the importance the Act attaches to the consumer-protection warranties involved.

1.11 The Bill will insert section 68B into the TPA to render section 68 of no effect:

- in relation to warranties implied by section 74 to contracts for the supply of recreational services; and
- provided that any exclusion, restriction or modification is limited to liability for death or personal injury.

1.12 The Bill will not *of itself* take away consumers' rights conferred by section 74. However, it will permit the use of waivers to extinguish consumer's rights to the remedies implied by section 74 within the limits mentioned above.

The Bill's objectives

1.13 The Explanatory Memorandum for the Bill takes as its premise that the consumer-protection provisions in Part V of the TPA were not intended to be used to found damages actions for personal injuries or death caused by a breach of the provisions. In this regard, it states that:

> The contractual rights which consumers have by virtue of the TPA were not enacted with any specific intention that they might be used to provide remedies where consumers died or were injured as a result of a breach of a condition or warranty implied by the Act. The purpose of this bill is to ensure that the object of the TPA is not subverted for an improper purpose.[2]

2 House of Representatives Trade Practices Amendment (Liability for Recreational Services) Bill 2002, Explanatory Memorandum, p. 1.

1.14 However, pronouncements by the Government both in Parliament and in press releases, indicate that the Bill has further purposes.

1.15 In his Second Reading Speech for the Bill, for example, the Parliamentary Secretary to the Minister for Finance and Administration, the Hon. Peter Slipper MP, stated that:

> [the bill] is an important government initiative which will assist in ensuring available and affordable public liability insurance for the Australian community.
>
> …[at the ministerial meeting on public liability insurance on 30 May 2002]…the Commonwealth agreed to legislate to allow self-assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports.

and further that:

> …our courts have moved from simply providing compensation for loss in circumstances of negligence to a position of strict liability for injury…not only [are] the courts to blame; legislators also have some responsibility for having moved the position at law too far towards the rights of consumers, without consideration of the flow-through effect on insurance…Governments do have a responsibility to ensure that the balance between the rights of consumers and those of business in obtaining affordable insurance is appropriate…This bill goes towards correcting that balance.[3]

1.16 As indicated by Mr Ray Temperley from the Department of the Treasury at the Committee's hearing on 27 November 2002, the Bill will also close off a potential loophole provided by section 74 of the TPA to plaintiffs no longer able to avail themselves of a common law action in negligence as a result of State and Territory tort law reform.[4]

1.17 As such, the Bill is part of a coordinated approach by the Commonwealth and the States and Territories to tort law reform with one objective being the alleviation of problems associated with public liability insurance. The first of a series of ministerial meetings in this regard between the Commonwealth and State and Territory Governments took place in March 2002 and was followed up by a second meeting in May 2002.

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3 *House Hansard*, 28 August 2002, pp. 5935 and 5937.

4 The Department referred to the case of Wallis v Downard-Pickford (North Queensland) Pty Ltd (1994) 179 CLR 388, to illustrate that section 74 of the TPA had been used successfully to circumvent an obstacle in Queensland law. Although the case concerned damage to property, there appears to be no reason in principle why section 74 could not be used to found a personal injuries action in contract.

1.18 Following this second meeting, the Minister for Revenue and Assistant Treasurer, Senator the Hon. Helen Coonan, announced a package of measures to stabilise public liability insurance premiums. These included:

- the examination, in conjunction with the States and Territories, of costs and benefits of exempting not-for-profit organisations from common law damages claims for death or personal injury and the development of options;
- legislation to allow for self-assumption of risk for people participating in inherently risky activities such as adventure tourism and sports 'subject to preserving adequate protection for consumers under the Trade Practices Act 1974';
- a benchmarking study to be conducted by the Productivity Commission into Australian insurers' claims management against world standards;
- bi-annual reviews by the ACCC of insurance industry prices over the next two years;
- a requirement for authorised insurers to provide comprehensive claims data under the *Financial Sector (Collection of Data) Act 2001*; and
- the introduction of legislation to provide for structured settlements.[5]

1.19 Another initiative agreed to at this meeting was the establishment of an expert panel to examine the law of negligence. This had been prompted by the Government's view that in balancing the interests of injured plaintiffs and operators, the balance had swung too far in favour of plaintiffs:

> The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.[6]

1.20 As well, the Government wishes to prevent actions under the Trade Practices Act being used to bypass limitations on plaintiffs' opportunities to sue for personal injuries at common law which are now being enacted by the States and Territories. According to Senator the Hon. Helen Coonan:

> There is a widespread community perception that litigants have abused their common law rights to sue for negligence and related causes of action, and that this is a significant factor in the current public liability insurance crisis. The Commonwealth recognises the primary role of the State and Territories in improving the law in this area, and the proposed section 68B is designed

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5 Senator the Hon. Helen Coonan, press release, *Liability meeting makes significant progress*, 30 May 2002, (C64/02), http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/064.asp.

6 Terms of Reference for the Review of the Law of Negligence commissioned by the Commonwealth, 2002.

> merely to underpin State and Territory reforms and ensure just outcomes for the community at large.[7]

1.21 The composition of the panel and its terms of reference were announced on 2 July 2002, following the introduction of the Bill into the Parliament on 27 June 2002.

1.22 One of the panel's terms of reference was to review the interaction of the TPA, as proposed to be amended by the Bill, with the common law principles of negligence particularly with respect to waivers and the voluntary assumption of risk and to:

> …develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death.[8]

1.23 The panel's report, *Review of the Law of Negligence, Final Report, September 2002* (Ipp Report) proposed a number of measures to limit liability and damages for negligence at common law. When considering the effect of these proposed changes, the report commented on the possibility that the TPA would be used to found alternative causes of action. In this regard, the report said:

> If reforms that we are proposing in this Report are adopted, it will become more difficult for plaintiffs to succeed in claims based on negligence. Some may not succeed at all and others may only succeed to a less extent. Lawyers will inevitably search for different causes of action on which to base the same claims. Provisions of the TPA will provide an obvious target for this search. What has so far been a rarity may become commonplace, unless steps are taken to prevent this from occurring.[9]

1.24 Before turning to an examination of the Bill, the Committee notes that the Senate Standing Committee for the Scrutiny of Bills raised concerns about the Bill in its *Alert Digest* No. 9 of 2002. The Minister's reply, and the Committee's further comments, are in its Thirteenth Report of 2002. In this Report, the Committee stated:

> Firstly, it is possible that the bill may result in uncertainty, particularly in relation to exclusion clauses which will be included in consumer contracts in reliance on the new provision. It is likely that this will result in lengthy legal challenges to test the extent of the power…

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7 Senator the Hon. Helen Coonan, Minister and Assistance Treasurer, reported in Senate Standing Committee for the Scrutiny of Bills, Thirteenth Report of 2002, 23 October 2002, p. 449.

8 Terms of Reference for the Review of the Law of Negligence commissioned by the Commonwealth, 2002, para. 4(a), p. x.

9 Ipp Report, para. 5.12.

> …the Committee accepts that it may be appropriate for consumers to take more personal responsibility for their actions. However, this should be accompanied by appropriate safeguards. For instance, earlier proposals provided that exclusion clauses could not limit liability for gross negligence. In addition, limiting liability was to be subject to the corporation having a reasonable risk management strategy. The present bill does not include either of these protections. [10]

1.25 The reservations about the Bill expressed by the Scrutiny of Bills Committee are highly relevant to this Committee's review. Indeed, most of the criticisms levelled at the Bill in submissions and evidence to this Committee, were that:

- the Bill would subvert consumers' rights to the delivery of recreational services with 'due care and skill' with no assurance that safety standards would be maintained. Indeed, it was claimed that the Bill had the potential to remove any incentive to suppliers of recreational services to comply with the standards set out in section 74;
- there was no protection against what submitters referred to as 'gross negligence' by recreational service providers;
- from a legal viewpoint, waivers were notoriously difficult to enforce; and
- from a practical viewpoint, waivers were incapable of application across all the recreational activities encompassed by the Bill.

1.26 In its submission to the Ipp Inquiry, the ACCC argued that the Bill 'will result in the risks of recreational and other activities being inappropriately allocated to consumers'. The ACCC said that in economic terms it was more efficient for suppliers to bear the risk of their activities because they had better information about risk and were better placed to control it. 'Transaction costs and informational problems are sufficiently high', it suggested, 'that if the relevant parties were free to bargain about how to allocate risk, risk would not be appropriately allocated to the supplier as it should be'.

1.27 The ACCC contended that the Bill would probably cause:

- an increased incidence of accidents because of the removal of incentives for suppliers to control risks; and
- overproduction of the affected recreational services relative to other goods and services in the economy. This is because the affected services would receive an implicit subsidy, in the form of public welfare support of injured customers who cannot sue the operator, which is not available to other industries.[11]

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10 Senate Standing Committee for the Scrutiny of Bills, Thirteenth Report of 2002, 23 October 2002, p. 446.

11 'Overproduction' in economic theory means production beyond the point at which further production yields no further net benefits to society.

1.28 The ACCC suggested that if an amendment along the lines of the Bill were to be made, an appropriate balance between consumer protection and supplier certainty could only be achieved if:

- suppliers were still required to exercise a basic level of skill or care;
- suppliers submitted to a regime of enhanced safety regulation;
- suppliers provided adequate disclosure to consumers of the risks associated with the service.[12]

1.29 The Committee will now turn to an examination of the Bill within the terms of reference.

Examination of the Bill

The role of the Trade Practices Act in personal injuries claims

1.30 The Second Reading Speech for the Trade Practices Bill 1974 suggests that the Bill's architects had not intended the use of its provisions as a source for personal injuries actions. The following excerpts are typical of the general tenor of the Second Reading Speech:

> The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices…
>
> …The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.
>
> … Legislation of this kind is concerned with economic considerations.[13]

1.31 However, the Committee notes the comments made by the Scrutiny of Bills Committee that:

> The Committee also would be grateful for additional advice as to why the Minister describes taking action under the TPA as improper subversion and abuse of common law rights. It may be that the TPA was not intended to be used to facilitate such actions, but that is not the effect of the way it is drafted.[14]

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12 ACCC, first submission to the Ipp Inquiry, pp. 2, 16 and 22.

13 Attorney-General and Minister for Customs and Excise, *Senate Hansard*, 30 July 1974, pp. 540-2.

14 Senate Standing Committee for the Scrutiny of Bills, Thirteenth Report of 2002, 23 October 2002, p. 450.

Definition of recreational services

1.32 Proposed section 68B provides that a term in a contract for recreational services that operates to exclude, restrict or modify section 74 will not be void in relation to liability for death or personal injury.

1.33 Apart from more general concerns about the difficulties involved in enforcing exclusion clauses or waivers, more specific comments were made about their scope under the Bill. For instance, instead of applying to risks at large, should it apply only to personal injuries or death arising from 'inherent risks' or 'obvious risks'?

1.34 Proposed subsection 68B(2) of the Bill defines 'recreational services' as services consisting of participation in:

- a sporting activity or a similar leisure-time pursuit; or
- any other activity that:
  - involves a significant degree of physical exertion or physical risk; and
  - is undertaken for the purposes of recreation, enjoyment or leisure.

1.35 It is clear that this definition is very broadly framed and could cover a range of sporting activities from very low risk to extremely high. The Committee notes that in her press statement, the Minister for Revenue and the Assistant Treasurer stated that the Government would:

> …legislate to allow self-assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports…[15]

1.36 The Ipp Report noted that the Bill would allow the exclusion of liability for any risks and recommended that the exclusion should only apply to the materialisation of risks that were obvious to a reasonable person in the participant's position. The Report suggested that its recommendation would have the effect of relieving 'a person of liability for failure to remove or avoid a risk that could have been removed or avoided by the exercise of reasonable care on their part'.[16]

1.37 The Report commented that the Bill's definition of 'recreational services' was 'too wide' because it could cover 'activities that do not involve any significant degree of physical risk'. It proposed the adoption of a definition identifying 'activities that

15 Senator the Hon. Helen Coonan, press release, *Liability meeting makes significant progress*, 30 May 2002, (C64/02), http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/064.asp.

16 Hon. D. Ipp & others ('Panel of Eminent Persons'), *Review of the Law of Negligence, Final Report*, September 2002, paras. 5.54-5.61.

involve significant risks of physical harm…because such activities are the sort that people often participate in partly for the enjoyment to be derived from risk-taking'.[17]

1.38 At the hearing the Australian Plaintiff Lawyers Association (APLA) indicated that it had adopted the definition of 'inherent risk' contained in the Ipp Report. It described this as:

> …essentially a risk that cannot be avoided by the exercise of reasonable care, otherwise than by giving a warning. This is contrasted with 'avoidable risk' which is risk that can be avoided or reduced by the exercise of reasonable care in ways other than by merely giving a warning.[18]

1.39 APLA considered that, by limiting liability to personal injuries caused by inherent risks only, difficulties involved in narrowing the scope of a generally framed waiver—and, indeed, in defining some of the desired exclusions such as 'gross negligence'—could be avoided.

Waiver of gross negligence

1.40 The Bill's reliance on waivers to exclude the rights conferred by section 74 was the primary focus of most submissions to this inquiry. While submitters were concerned that the Bill failed to protect consumers against 'gross negligence', this issue was merely a sub-set of broader and equally significant issues raised with regard to waivers.

Waivers and safety standards

1.41 Among detractors and supporters of the Bill alike, there was universal support for the Bill's aims to facilitate self-assumption of risk by individuals participating in risky activities.

1.42 In this regard, the Royal Life Saving Society commented that:

> When the public participates in sport and recreation surely they can accept the fact that there is a possibility that they may be injured. They are voluntarily placing themselves in a position where accidents and subsequent injuries have been observed in the past, so why would they consider that there is no possibility of an accident occurring again in the future.[19]

1.43 Likewise, in evidence to the Committee on 27 November 2002, Dr Paul O'Callaghan, President, Australian Horse Industry Council Inc (AHIC), said:

> The common position in the horse industry is that people who undertake a risk activity such as horse riding should be willing to accept that, despite all

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17 Hon. D. Ipp & others ('Panel of Eminent Persons'), *Review of the Law of Negligence, Final Report*, September 2002, paras. 4.18-4.19.

18 *Committee Hansard*, 27 November 2002, E4.

19 Submission 1, p. 2.

> good intentions and good measures, accidents will occur and, when they do occur, one should not expect to sue one's provider.[20]

1.44 However, almost all submitters to the inquiry representing a range of interests from recreational services providers themselves to consumer groups such as the Australian Consumers' Association (ACA), were unanimous in their concerns that the Bill should not achieve its objectives at the expense of acceptable standards being maintained within the recreational services industry. In this regard, the Australian Plaintiff Lawyers Association (APLA) stated:

> Most businesses that have lobbied for this type of protection acknowledge that they do not seek protection against their obligation to ensure facilities are properly designed, operated or maintained.[21]

1.45 Some proposed that the Bill should only allow waivers subject to the accreditation of service providers or evidence that they followed some sort of industry-approved risk management strategy.

1.46 For example, the comments of the Australian Amusement Leisure and Recreation Association Inc (AALRA) were typical of those expressed by industry bodies:

> …responsible conduct by operators in [recreational services] industries must be paramount…and consideration [should] be given to ensuring that operators…operate [at] a standard that will ensure that risk is managed and minimised.[22]

1.47 Similarly, another industry body, Sport Industry Australia, considered that:

> Any amendments…should…encourage the implementation of Best Practice in risk management, and not remove any obligation by organisations to be responsible for the quality and level of care they exercise.[23]

1.48 While the ACA supported reform allowing for the assumption of risk by 'consumers able to do so', it opposed the Bill. A major concern was that the Bill would have a deleterious effect on safety standards:

> …providers should still be subject to a basic requirement to exercise skill and care in supplying recreational services, unable to be waived even by informed consumers. If this is not to be protected by the injured person's right to claim compensation, it should be governed by a regime of safety

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20 *Committee Hansard*, 27 November 2002, p. E1.

21 Submission 9, p. 8.

22 Submission 4.

23 Submission 12, p. 2.

> regulation. To do less is to place insurance industry profitability ahead of basic safety standards. [24]

1.49 At the hearing, Ms Catherine Wolthuizen, Senior Policy Officer, Financial Services, ACA, highlighted her organisation's concern when she commented:

> …if [the Bill] did pass through in its current form, ACA would have to issue an alert to consumers to be extremely wary when engaging in recreational activities.[25]

1.50 From a broader perspective, APLA considered that the Bill's potential to jeopardise proper risk management standards had serious implications for Australia's adventure tourism industry and cautioned that:

> The adventure tourism and amateur sporting operators who are covered by [the Bill's] waivers must meet certain standards of safety. This is vital as exclusion of liability is only one policy consideration…
>
> …in 1998, Tom and Eileen Lonergan, both US citizens visiting Australia for a holiday, drowned after being abandoned on the outer edge of the Great Barrier Reef…
>
> …The negative publicity surrounding the Lonergan inquest resulted in massive damage to the recreation diving industry's reputation for safety. The dive operator concerned went out of business…but many others almost suffered the same fate while they waited for the confidence of foreign tourists to recover…
>
> …Legal changes that insulate against liability per se, yet encourage negligent conduct by loss of the deterrent effect of the law, will result in greater problems and costs over time.[26]

Waivers—legal and practical difficulties

1.51 The Ipp Report adverted to the uncertainties regarding the enforcement of waivers when it commented that the Bill would not significantly reduce consumer protection because 'it is notoriously difficult for parties relying on contractual exclusions of the kind contemplated [by the Bill] to succeed'. The Report referred to 'two principal hurdles' to be overcome:

> First, the exclusion clause must be effectively 'incorporated into the contract'. The rules about incorporation are complex, and in cases where there is doubt…the doubt will be resolved in favour of the consumer.
>
> Secondly…the words of the exclusion clause must be clear and unambiguous. Any doubts…will be resolved in favour of the consumer.[27]

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24 Submission 16, p. 1.

25 *Committee Hansard,* 27 November 2002, p. E16.

26 Submission 9.

1.52 These particular difficulties were not raised in the evidence to this Committee's inquiry.

1.53 However, many submissions were critical that the Bill did not expressly exempt minors and other vulnerable parties from its operation. There were also suggestions that the Bill should prescribe what constituted adequate disclosure so there could be some certainty about the enforceability of waivers entered into. The practical difficulties involved in applying waivers across all recreational activities was another issue raised.

Minors and other vulnerable parties

1.54 Most submitters to this inquiry commented that the Bill did not appropriately delineate the circumstances within which the proposed exclusion or waiver could operate. Among the most cited objections was that the Bill did not expressly exclude children and the intellectually disabled or other similarly vulnerable consumers from the operation of waivers. APLA commented that:

> …children do not have the capacity to comprehend the significance of a waiver and as such we strongly recommend against waivers being applicable to children.[28]

1.55 In a similar vein, the Consumer Law Centre Victoria (CLCV) argued:

> …it must be recognised that individual consumers, particularly minors or those with an intellectual or physical disability, or those from culturally or linguistically diverse backgrounds, will have even more difficulty appreciating the nature of the risk they are assuming by waiving their rights…[29]

and the ACA raised concerns about:

> …the capacity of vulnerable consumers, such as minors or those operating under a disability, to assume that risk and forgo their protection under the Act;[30]

1.56 However, while the Committee considers it would be desirable for the Bill to expressly exclude minors and vulnerable individuals from its ambit, it notes that there are quite clear protections at common law for minors and other vulnerable individuals.

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27 Hon. D. Ipp & others ('Panel of Eminent Persons'), *Review of the Law of Negligence, Final Report*, September 2002, para. 5.51.

28 Submission 9, p. 5.

29 Submission 14, p. 2.

30 Submission 16, p. 4.

Disclosure and section 52 of the TPA

1.57 Apart from failing to specify that its provisions should only apply to adults capable of understanding the full consequences of signing a waiver, submissions argued that the Bill should make provision for adequate disclosure. For example, APLA stated that:

> Participants…. should be properly informed of the risk they are assuming. The disclaimers must be developed in a prescribed form, specific to the particular activity undertaken…[31]

1.58 The CLCV argued that a waiver should apply 'only in circumstances where the consumer is able to fully appreciate the consequences of the waiver, and the supplier has…made all necessary disclosures…'[32]

1.59 The Country Women's Association of New South Wales stressed the need to allow consumers 'adequate time to digest the information given.'[33] Similarly, the Law Council of Australia recommended a provision requiring that the effect of a waiver must be disclosed to the consumer 'in such a manner that he or she should be aware of it; and the consumer is given a reasonable opportunity to consider whether or not to enter into the contract'.[34]

1.60 Not unexpectedly, discussions regarding disclosure raised the question of whether section 52 could be an avenue for redress where disclosure in relation to a waiver constitutes misleading and deceptive conduct. In particular, the issue arose whether the exclusion of section 74 from the provisions of section 68 notwithstanding, an action could be framed in reliance upon section 52, thus defeating the purpose of the Bill in preventing the Trade Practices Act from being used as a means of circumventing State and Territory laws limiting personal injuries claims arising from recreational activities.

1.61 The Ipp Report recommended that, in relation to negligently caused death or injury, misleading and deceptive conduct actions should be prevented. The Report commented that misleading and deceptive conduct actions were popular with plaintiffs because it was not necessary to prove that the defendant acted dishonestly. The Report argued that:

> …it is open to serious question whether Parliament intended those provisions that relate to unconscionable and misleading or deceptive

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31 Submission 9, p. 6.

32 Submission 14, p. 2.

33 Submission 11, p. 3.

34 Submission 15, p. 19.

> conduct… to provide causes of action to individuals who suffer personal injury and death.[35]

1.62 The ACA took a different view and argued that if waivers were to be allowed, the protection afforded by section 52 was all the more important in preventing misleading and deceptive conduct in relation to disclosing risks:

> This section must not be watered down to allow providers to misrepresent the nature of risks associated with an activity to induce a consumer to waive his or her rights.[36]

1.63 Similarly, the ACCC stated:

> …it is important that corporations that make false or misleading representations about the safety or risks involved in recreational services remain subject to section 52. For example, a corporation may misleadingly advertise that a recreational activity will be safe and that the corporation takes all precautions to ensure the safety of the activity. A consumer who purchases the services and suffers injuries as a result of relying on these representations, should also be able to apply for damages and other orders.[37]

Practical difficulties

1.64 In the recreational services industry, there are practical difficulties involved in applying waivers to all consumers. The Ipp Report detailed the problems thus:

> …a contractual exclusion clause, even if effective in other respects, may only be effective against the other party to the contract. For instance, if one person enters a contract for the supply of recreational services to a group, the other members of the group may not be bound by the terms of the contract. Moreover, many people who participate in recreational services do not do so pursuant to contracts. The very nature of recreational activities is such that people often take part in them spontaneously, without any thought of entering into a contract with the person organising the activity. The Bill will have no impacts on the rights of such people.[38]

1.65 AALRA commented on the obstacles to obtaining waivers from people attending shows or fairs:

> …it is inappropriate to consider that waivers should have to be signed for large-scale recreational activities such as…theme parks and agricultural

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35 Hon. D. Ipp & others ('Panel of Eminent Persons'), *Review of the Law of Negligence - Final Report*, September 2002, para. 5.10.

36 Submission 16, p. 4.

37 ACCC, first submission to the Ipp Inquiry, p. 26.

38 Ipp Report, para. 5.51(d).

> shows. The practicalities of such a requirement would be completely unworkable.[39]

1.66 Instances of these practical difficulties are many and varied. How, for example, would the Royal Life Saving Society obtain waivers from beach goers, or tour group operators from non-English speaking tourists?

1.67 APLA commented that on normal contractual principles, waivers did not have to be in writing to be effective. It commented that the terms of a waiver only had to be drawn to the attention of the consumer at the time of disclosure of risks and before the consumer's transaction was finalised. It also adverted to the possibility that signs could be incorporated into a contract provided certain principles were followed.[40]

1.68 While the Committee accepts APLA's comments, it considers that reliance on unwritten waivers and signs could present quite substantial problems of proof. Furthermore, these would not resolve problems arising, for example, with non-English speaking consumers or consumers whose use of the recreational services is not governed by contract.

1.69 It is arguable that the Bill would only partially close off the loophole to prevent the use of section 74 by personal injuries litigants precluded by State tort law reform from launching negligence actions.

Gross negligence

1.70 The Scrutiny of Bills Committee commented on the undesirable potential for the Bill to allow waivers for 'gross negligence':

> Under the Bill…a corporation which provides recreational services will be permitted to completely exclude any liability for death or personal injury which it might otherwise have been under to those to whom it provides such recreational services, even though the death or personal injury is caused by the gross and wilful lack of care of those acting for the corporation.[41]

1.71 A number of submitters to the Committee's inquiry also expressed concerns about this aspect of the Bill and urged amendments to close off this possibility.

1.72 For example, the Equestrian Federation of Australia reflected the concerns of all submitters who commented on the issue when it stated that:

> We do not believe that gross negligence on the part of 'operators'…should be able to be waived.[42]

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39 Submission 4, p. 1.

40 *Committee Hansard,* 27 November 2002, p. E5.

41 Senate Standing Committee for the Scrutiny of Bills, Thirteenth Report of 2002, 23 October 2002, p. 448.

42 Submission 7, p. 2.

1.73 The Country Women's Association of New South Wales was concerned about the wider consequences of such a waiver and argued that:

> No waiver should give a company the right to provide less than is currently provided for: due skill, materials supplied to be reasonably fit for their purpose. After all, these provisions appear hardly onerous. Above all, we feel concern that a provider feels him/herself relieved of responsibility in case of personal injury or death, even though he/she has been grossly negligent. If that is the reality of this legislation, the burden of providing for the badly injured will still sit with the taxpayer, through the Social Security and Health systems.[43]

1.74 At the Committee's hearing on 27 November 2002, Mr Ray Temperley from the Department of the Treasury adverted to the conceptual and technical difficulties involved in drafting the Bill so as to exclude 'gross negligence' given that contract law does not accommodate concepts of negligence or gross negligence.[44]

1.75 APLA had commented to the same effect when it said that 'gross negligence as a concept does not exist under our law'.[45]

1.76 At the hearing, there was some discussion between APLA and the Committee about narrowing the scope of the waiver so that it would not allow for gross negligence or its contractual equivalent. It was agreed that whatever the threshold chosen, there was a high likelihood that litigation would ensue to determine where the line should be drawn in individual circumstances.[46]

1.77 The Scrutiny of Bills Committee commented on the uncertainty that references to 'gross negligence' in the Bill would generate:

> The concept of "gross negligence" is one that the common law has never been asked to define, at least in relation to conduct causing death or personal injury. The Committee, therefore, brings to the attention of Senators the fact that this bill may be productive of considerable uncertainty for a number of years after it has been in force.[47]

Conclusion

1.78 The Committee notes that the Bill is part of a legislative package developed to promote a coordinated national approach with State and Territory governments to alleviate problems in public liability insurance.

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43 Submission 11, Country Women's Association of NSW, pp. 2-3

44 *Committee Hansard*, 27 November 2002, p. E26.

45 *Committee Hansard*, 27 November 2002, p. E8.

46 *Committee Hansard*, 27 November 2002, p. E8.

47 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2002, 21 August 2002, p. 47. The comment relates to an earlier version of the Bill which contained a reference to gross negligence.

1.79 The Committee further notes that complementary legislative reforms have been introduced in Victoria, South Australia, New South Wales and the Northern Territory.[48]

1.80 Consequently, notwithstanding questions raised about the Bill, the Committee considers the Government should honour its commitment to the State and Territory Governments and pass the Bill in its current form. It further accepts that the implementation of a national scheme along the lines agreed to by the Commonwealth with State and Territory Governments (of which this Bill forms part) is a matter of urgency.

1.81 However, the Committee suggests that a close watching brief be maintained in relation to the operation of the Act, when it becomes law, with a view to further amendment to meet the potential difficulties considered in this report, should the need arise.

Recommendation

The Committee reports to the Senate that it has considered the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 and recommends that the Bill proceed.

SENATOR GEORGE BRANDIS
Chairman

48 Both South Australia and Victoria have passed legislation while the New South Wales Bill is awaiting Royal assent.