Australian Democrats Minority Report

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

INTRODUCTION

1.1 This Bill is yet another attempt by the Government to solve the problems faced by the community with respect to rising insurance costs.

1.2 If we examine the track record of the Government so far on this issue, it is easy to see the pattern developing—all responsibility on the individual and no blame elsewhere.

1.3 The public have not only had their businesses, their services and events jeopardised by, among other things, an unfavourable insurance market, they have also borne the brunt of the cost of the reforms so far. The insurance industry has got off lightly.

1.4 On the one hand, when the Government has shown reluctance to intervene, it has argued that while the cost of claims is a driver, this is a market issue and the downturn in the international market for insurance has had a huge impact on the cost and availability of reinsurance.[1]

1.5 The rationale here must be that when there is an upturn in the market, the community can look forward to better pricing and more availability of insurance.

1.6 In relation to claims as a cost driver, with little hesitation, the Government has endorsed and facilitated a position whereby tort law reform restraining the rights of consumers should be implemented throughout the country.

1.7 This approach shows little regard for the way in which the courts have developed tort law over many decades, and little regard for those who rely on compensation to help with medical costs—sometimes long term. Nor does it show much regard for claimants who will depend on compensation to meet other expenses when they have been injured or suffered damage as a result of another person's negligence.

1.8 The Australian Democrats have stated previously there is a general consensus[2] that there is a lack of comprehensive data on claims costs. This is a significant

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1 *Senate Hansard* from 22 October 2002, some of Senator Coonan's comments following the tabling of the Senate Inquiries National Insurance Crisis Report.

2 Ministerial Communique on public liability held on 30 May 2002 and the Ipp Report on Negligence also noted the absence of empirical evidence.

constraint in the appropriate pricing of premiums by the insurance industry, and this is especially the case for sporting groups and adventure tourism operators.

1.9 The Australian Democrats believe it is also our responsibility to strike the appropriate balance so that whatever measures are put in place today, we also reaffirm and indeed strengthen, community safety and business responsibility. It would be wrong to throw the baby out with the bath water, so to speak, and this is what we think the Government is doing in this Bill if it remains in its current form.

BILL IN ITS CURRENT FORM

1.10 This Bill seeks to insert a new section—68B—into the *Trade Practices Act 1974*. This new section is intended to enable companies that supply recreational services to contract out of the obligations imposed by section 74 and so exclude, restrict or modify their liability for death or personal injury caused to a consumer engaging in the recreational services provided.

1.11 Currently, recreational service providers cannot contract out of their obligations under section 74 by virtue of section 68. Section 74 of the Trade Practices Act states that in a contract where a corporation supplies services to a consumer, there is an implied warranty that services will be rendered with due care and skill. So in the event that companies do not provide their services with due care and skill, they will be in breach of the warranty implied in the contracts.

1.12 A service is deemed to be provided with due care and skill if it is of a standard and quality that could reasonably be expected from a competent person in the particular trade or profession.[3]

1.13 While this may appear to be an appropriate safeguard for the protection of consumers, if service providers want to rely on waivers and disclaimers then there needs to be greater emphasis placed on the maintenance of high safety standards and minimising risk. The Australian Plaintiff Lawyers Association (APLA) in its evidence to the committee hearing stated that:

> …to limit the enforceability of waivers using a gross negligence threshold or industry standards of best practice or codes of conduct are impractical, difficult to legislate and ultimately unworkable.[4]

1.14 Recreational service providers should not be permitted to rely on contractual terms without ensuring that they have taken all steps within their control to minimise the risk of harm or injury. A loose acceptance of waivers and disclaimers for a seemingly endless variety of activities is neither desirable for consumers nor high-quality recreational service providers who take pride in their good safety record. APLA makes the statement that 'the Bill under consideration—probably goes too far

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3 ACCC, Warranties and Refunds, April 2000, p. 10.

4 Hansard Senate Economics Legislation Committee hearing Wednesday 27th November 2002, page E4.

in this regard'[5] and a significant number of groups 'oppose the notion that a waiver should exclude liability for personal injury in all cases'.[6]

1.15 Opening up the operation of waivers and disclaimers in this way creates a real risk that less than scrupulous operators will be able to enter the market and skimp on safety in order to undercut safety-conscious, more legitimate competitors.

1.16 That is why a more stringent standard must be applicable to service providers in circumstances where a waiver is to apply. The Australian Democrats believe, and we are sure it would be generally agreed, that a 'near enough's good enough' attitude to community safety is unacceptable and so there should be no leeway for the recreational services environment to diminish in any way its responsibility to safety and to the consumer.

1.17 The provisions of the Bill do not take into consideration the power imbalance between those who provide the service and seek to rely on the contract, and those who use the services.

1.18 Consumers who knowingly and honestly enter into contracts with recreational service providers do so under the impression that the service provider has gone to reasonable lengths to ensure that the service is safe and reliable. Mere competence may not be an appropriate standard to ensure the safety of the community in these circumstances. Dr Paul O'Callaghan from the Australian Horse Industry Council gave evidence that:

> …I think everyone wants people to accept the normal risks of any activity, but they do not want a position where a provider can be negligent to a high degree and can have that signed off on.[7]

1.19 Dr O'Callaghan recommended that 'to encourage better provision of services, we would also like there to be a minimum operating standard introduced, especially for commercial providers…'[8]

1.20 In relation to what activities are potentially captured by this Bill, the new subsection 68B(2) of the Trade Practices Act defines recreational services. While the Government stated that this Bill was originally intended to allow providers of 'inherently risky activities' to contract out of the implied warranties in the Trade Practices Act, in fact, the proposed definition is broad enough to capture all companies that supply recreational services. The definition of 'recreational services' is simply too broad.

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5 Ibid.

6 Ibid.

7 Ibid page E2.

8 Ibid page E1.

Recommendation

The definition of 'recreational services' should be amended. The suggested definition by APLA[9] should be considered as part of this amendment.

1.21 Even the Negligence Review Panel, whose members were appointed by the Assistant Treasurer, recommended a narrower definition of 'recreational services' than what is provided in the Bill. Leaving aside the definition of recreational services, Recommendation 12 states that a 'recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure, *which involves a significant degree of physical risk*.

1.22 The definition in the Bill captures all sporting and leisure activities regardless of whether they involve *any* degree of physical risk, let alone activities that could be considered 'inherently risky'. The only risk that the consumer should be assuming are the ones that are intrinsic to the type of activity in which they are taking part.

1.23 Without greater protections for consumers and fine-tuning of the definition of 'recreational services', more uncertainty will be generated as to the effect of waivers and disclaimers rather than clarification on the issue.

PROPOSED DEMOCRATS AMENDMENTS

Recommendation

Recreational service providers should not escape the implied warranty contained in section 74 of the Trade Practices Act where service providers have engaged in conduct that is below the standard that would be reasonably expected in the circumstances and in terms of the particular activity.

Recommendation

In no circumstances should the new section 68B apply to persons 18 years and under. By codifying the common law position with respect to minors, this will make it abundantly clear that children's rights will not be diminished in any way.

1.24 The same principles apply to the intellectually disabled and as with minors, the ability for their rights should not be allowed to be waived without obtaining a reasonable amount of understanding of the consequence of such a waiver.

Recommendation

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9 Recreational services means services that consist or participation in:
(a) a sporting activity or similar leisure time pursuit; and
(b) that activity involves a significant degree of physical risk; and
(c) is undertaken for the purpose of recreation.

Only recreational activities that can be regarded as *inherently risky activities* should be covered by this legislation. It follows that the types of inherently risky activities should be prescribed in the regulations.

1.25 Currently, the activities that are subject to the Bill are those that are sporting or leisure time pursuits or activities that involve a *significant degree of physical exertion or physical risk*. This is a very broad definition. As I have already mentioned, the definition is broad enough to capture those activities that can be considered 'inherently risky', which was the original intent of the Bill—but it also could capture activities that bear no real risks at all.

1.26 Even with the narrower definition provided by the Negligence Review Panel, there would still be a role for the courts in deciding if a particular activity fits within the definition. By highlighting in the regulations the particular activities where consumers could contract out of their right to sue under the Trade Practices Act, this would not only create greater certainty as to the applicability of the implied warranty, it would also overcome the safety concerns that I raised earlier.

Recommendation

In order for service providers to rely on the new section 68B, contracts seeking to limit liability must be:

- **written in clear and plain language,**
- **explained to the person assuming the risk, and**
- **signed by the person assuming the risk.**

1.27 Since I believe that only a very limited and particular brand of activity should be captured by this legislation, accordingly, there should be an obligation on the service provider to ensure that they have done all that they can to explain the nature of the rights that the consumer is contracting out of, if they choose to participate in the activity.

1.28 This would necessarily involve the service provider explaining the terms, having plain language explanations and acceptance of these terms in writing by the consumer.

Recommendation

Following on from the previous point, in order to emphasise the need to explain contract terms to the consumer, service providers who wish to rely on the new provisions are required to take all reasonable steps to ensure that the person engaging in the inherently risky activity is aware of the risks that they are assuming when signing a waiver or disclaimer.

1.29 In addition, in acknowledging the special vulnerability of people from non-English-speaking backgrounds, not only should care be taken in outlining the

effect of signing a waiver, where practicable, signage and waivers should also be available in languages other than English.

1.30 Given Australia's international appeal as a premiere adventure tourism destination – we can safely assume that many of the people wanting to engage in adventure tourism in this country will be from overseas, and as a consequence, not always proficient in English.

1.31 As we gain a stronger foothold in international markets such as South Korea and China, for example, we need to be catering to the needs and indeed the rights of tourists from these destinations.

1.32 Again, this 'near enough's good enough' attitude is simply not acceptable with international visitors who are engaging in potentially high risk activities.

1.33 During the Committee hearing, APLA through referring to the Lonergan incident made the point that this Bill potentially gave rise to the ability to not have appropriate risk management practices in place. The effect of this would be to see much more serious implications for the adventure tourism industry as a result of loss of confidence in the safe management of the risks involved.

CONCLUSION

1.34 This Bill was created in the hope—albeit vain—that it would produce a more favourable (and ultimately lower cost) insurance environment. Despite the fact that the Australian Democrats see the Government's assumption as to the effect of this Bill as mistaken, the Australian Democrats see no reason for not accepting, in principle, the notion that individuals sometimes do things at their own risk and should be responsible for their behaviour.

1.35 However, given the events of this year and the tort law reform taking place across the country that is causing severe erosion of individual rights to sue and receive damages, it would be wrong to further burden the community with more limitations of their rights without any corresponding responsibility being assumed elsewhere.

1.36 As mentioned earlier, the Government has used claims costs as a basis for recommending sweeping changes to tort law and has used market forces as a reason not to get involved when the situation calls for it.

1.37 If we accept, which many people do, that market forces are a major cause of the high price of insurance experienced recently, then we need to keep reform measures in perspective and avoid making large-scale changes that diminish consumer rights.

1.38 What we need to be doing is correcting the market through more careful regulation and monitoring to ensure that the peaks and troughs in the future are not as severe as they are today. The problems with taking a path to erode consumer rights is that it may become increasingly inappropriate when there is a change in market conditions.

1.39 It is important then to consider that when consumers contract to waive their rights, not only should they be well informed of the nature and effect of the terms which they are accepting, they must also be assured that the recreational service provider has acted with the utmost regard for their safety.

1.40 Rather than letting this Bill become another knee-jerk reaction to an insurance crisis, it needs to be a more careful and measured response to a principle that many Australians support.

1.41 The issue of consumer protection is simply too great to leave to chance.

Senator Andrew Murray
Australian Democrats