

# Report by Labor Members

The Trade Practices Amendment (Liability for Recreational Services) Bill (the **Bill**) allows individuals to assume the risks in participating in recreational activity. This is achieved by amending the Trade Practices Act (**TPA**) to allow waivers or exclusion clauses not to be subject to the implied conditions in section 74 of the TPA.

Section 74 of the TPA implies into every contract for a service that the services will be rendered with due care and skill, and that any material supplied in connection with those services will be reasonably fit for its intended purpose.

The Labor members of the Committee support the principle that individuals should be able to assume the risk in participating in recreational activity, when those risks are known and understood.

## Background to the Bill

This Bill was introduced amidst spiralling insurance premiums for providers of recreational services.

Public liability premiums have increased dramatically in the last 12 months and have affected many community and sporting organisations, as well as small business operators. Recreational services providers were especially affected.

Many organisations also found that they were unable to obtain insurance.

The objectives of this Bill then have been stated to include:

- “...implement[ing] a commitment of the Commonwealth government announced after a meeting of state and territory ministers and chaired by the Minister for Revenue and Assistant Treasurer on 30 May 2002”;<sup>1</sup> and
- that “[t]he measures ...are concrete ways of addressing the public liability insurance issue which is having such a significant impact on our community...”.<sup>2</sup>

The Committee also received evidence from Dr O’Callaghan of the Australian Horse Industry Council on the incidence of litigation for personal injury in the horse-riding. He told the Committee:

“But there is a perception out there that if you go to a commercial operation, ride a horse and fall off, the chances are that, regardless of the circumstances, you will be able to sue the operator. What also happens is that if you are suing

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1 Mr R. Temperley (Treasury), *Committee Hansard*, 27 November 2002, p. 22.

2 Senator the Hon. H. Coonan, Minister for Revenue & Assistant Treasurer, *Liability Meeting Makes Significant Progress*, media release 30 May 2002.

for a small amount, often the claim will not even be contested and it will be paid out. That is a significant perception that may be right or wrong, but certainly some of the facts support that a large number of claims are very small...So they [insurance companies] are often not going to court, they are settling out of court and that is leading to more and more claims.”<sup>3</sup>

It can be inferred from the comments of Dr O’Callaghan that it is also hoped that the Bill will reduce the number of claims and litigation, and the perception that a service provider is liable for any injury howsoever arising.

Other submissions to the Committee supported the Bill if it ensures that waivers are enforceable.

### **State Reforms**

The Committee sought to obtain information on what the States and Territories have done in relation to allowing the voluntary assumption of risk in recreational services.

It is not clear that all the States are adopting the same approach.

For example, NSW has passed legislation which limits liability for damages for personal injury arising from recreational activities in the following way:

- there is no liability for harm as a result of a materialisation of an obvious risk of a dangerous recreational activity;
- there is no liability arising from a risk of an activity in respect of which a risk warning has been given;
- a participant in a recreational activity is able to waive the requirement that services be provided with due care and skill.<sup>4</sup>

In South Australia, the legislation provides for the establishment of a system of registered codes governing the provision of recreational services. Where a code is registered and a service provider has registered an undertaking to comply with the registered code, the service provider can enter into a contract with a consumer modifying the duty of care owed to the consumer. The service provider is then only liable for damages if the consumer establishes that a failure to comply with the code caused or contributed to the injury.<sup>5</sup>

In Victoria, legislation has been passed which is similar to this Bill but includes provisions which:

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3 *Committee Hansard*, 27 November 2002, p. 2.

4 *Civil Liability Act 2002* as amended by the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

5 *Recreational Services (Limitation of Liability) Act 2002*.

- make provision for prescribing the form of the waiver and what particulars must be included in the waiver;
- require that the waiver is signed by the consumer;
- require that no false or misleading statements are made in relation to the waiver; and
- provide that the waiver is ineffective if an act or omission causing injury was done with reckless disregard.<sup>6</sup>

This suggests that there is a difference of opinion as to how the TPA, and the equivalent State legislation, should be amended to achieve the same stated objectives.

### **Consumer Protection**

A number of submissions to the Committee expressed a concern to ensure that consumers were protected under any new arrangements. The Labor members too, are concerned to ensure that this Bill does not unfairly impact on the rights of consumers.

In light of these concerns, the Bill was examined by the Expert Panel on the Law of Negligence. The Expert Panel made the following conclusion on the Bill:

“In summary, the Bill removes the obstacle presented by s. 68 to the exclusion of warranties implied by s. 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.”<sup>7</sup>

The obstacles that the Expert Panel refers to included:

- that the exclusion of implied warranties will be subject to the ordinary rules of contract law, which are “stringent”;
- the exclusion clause must be effectively “incorporated into the contract”, and in cases where there is doubt about whether the rules about incorporation have been met, “the doubt will be resolved in favour of the consumer”;
- that in order to be effective, the words of the exclusion clause must be clear and unambiguous and again, “[a]ny doubts about the precise meaning of the clause will be resolved in favour of the consumer”; and
- that a contractual exclusion, if effective, will only be effective against the other party to the contract. Thus, if one person enters a contract for the supply of services to a group, the other members of the group may not be bound by the terms of the contract. Also, the Ipp report asserts that many people who participate in recreational services do not do so pursuant to contracts.<sup>8</sup>

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6 *Goods Act 1958*, new section 97A inserted by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002*.

7 Hon. D. Ipp & others, *Review of the Law of Negligence*, September 2002, par. 5.52.

8 Hon. D. Ipp & others, *Review of the Law of Negligence*, September 2002, par. 5.51.

The difficulty in enforcing a waiver was confirmed by Mr Vandervord of the Law Council of Australia who, when asked in what circumstances a waiver is currently enforceable, replied:

“Very rarely, indeed, because it is not just knowledge of the risk – that does not get you off the path – you have to have accepted it.”<sup>9</sup>

Nevertheless, a number of submissions to the Committee indicated concerns with the Bill. The Australian Horse Industry Council in particular, stated that “[t]he Bill as tabled would ... lead to an unreasonable impact on the rights of individuals.”<sup>10</sup>

The Minister in her press release on 27 June 2002 also indicated that in allowing people to voluntarily waive their right to sue, it was important to achieve a balance between protecting consumers and allowing them to take responsibility for themselves. It was stated in the Minister’s press release that the amendments to the TPA will still allow injured consumers to sue if they are the victims of gross negligence on the part of the operator.<sup>11</sup>

This has been proven not to be the case and evidence to the Committee is that the Government does not intend making any amendments to the Bill to prohibit the waiver of gross negligence.<sup>12</sup>

Other submissions were concerned that the Bill as currently drafted would not offer sufficient protection to consumers in a vulnerable position, or unable to appreciate the consequences of such a waiver.

To overcome some of these problems, it was suggested to the Committee that a waiver should not be effective to waive liability for personal injury or death caused by gross negligence. However, it was generally agreed that the term “gross negligence” was not a term defined in tort law and not easily defined.<sup>13</sup>

Treasury submitted to the Committee that:

“A major part of it is defining what really does constitute gross negligence – or, in the case of the Trade Practices Act, an equivalent of gross negligence – because negligence, in one sense, is a different concept when you are dealing with an action for breach of contract. So there are these difficulties which you add when you are adding the complexity of having the additional requirements.

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9 *Committee Hansard*, 27 November 2002, p. 11.

10 Submission 8, Australian Horse Industry Council, p. 1.

11 Senator the Hon. H. Coonan, Minister for Revenue & Assistant Treasurer, *Trade Practices Amendments Will Assist Sport and Tourism*, press release 27 June 2002.

12 Mr R. Temperley (Treasury), *Committee Hansard*, 27 November 2002, p. 26-7.

13 For example, Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2002, 21 August 2002, p. 47. Mr R. Davis (Australian Plaintiff Lawyers Association), *Committee Hansard*, 27 November 2002, p. 8.

Effectively, it is a question at the end of the day of whether it is worth adding in these additional elements. In terms of the ultimate outcome, the decision was taken to introduce the bill in the form in which it was introduced.”<sup>14</sup>

Another suggestion was to allow the provider of recreational services only to be able to contract out of liability for “inherent risks”, and not risks over which they exercise control, such as risks arising from poor system design, unsafe operation or inadequate maintenance.<sup>15</sup>

However, evidence to the Committee suggested that a concept of “inherent risk” would also be difficult to define and had the potential to increase litigation, not decrease it.

Other submissions suggested that the ability to agree a waiver should be balanced by an “assurance that such activities are being conducted with a view to the adoption and maintenance of appropriate basic safety standards.”<sup>16</sup> This was seen as important both to protect consumers, and to retain an incentive to provide services in a safe manner.

The suggestion, however, raised questions as to what are appropriate safety standards and how they would be developed – by a government body or by the relevant industry.

### **Impact on Insurance Premiums**

The Labor members support appropriate measures to reduce insurance premiums. Community and sporting organisations and small business make a significant contribution to the Australian community and it is not acceptable that insurance premiums make it prohibitive for them to operate.

This Bill should assist to reduce insurance premiums for recreational service providers.

The Labor members note however, that the Insurance Council – and any insurer – has declined to make a submission to the Committee, preferring to comment only when the entire package of reforms to the Trade Practices Act is known.

The Labor members are disappointed that the Insurance Council did not see fit to make a submission, but are of the view that the initiative in the Bill will assist resolve the current insurance crisis.

The Labor members however, want to be sure that the potential savings that will arise from this Bill will be passed on, and again call on the Government to give the ACCC powers to ensure that savings are passed on by insurance companies.

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14 Mr R. Temperley (Treasury), *Committee Hansard*, 27 November 2002, p. 26.

15 Submission 9, Australian Plaintiff Lawyers Association, p. 1.

16 Submission 15, Law Council of Australia, p.10.

### **Further Reforms to the Trade Practices Act**

Evidence to the Committee also indicated that further amendments to the TPA are being contemplated by the Government. These amendments would seek to amend the TPA to prevent individuals commencing actions in reliance on the TPA, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death.<sup>17</sup>

These have not been considered by the Labor members of the Committee. The Labor members however, believe that any further changes to the TPA must be subject to proper parliamentary scrutiny to ensure that they do not unfairly impact on the rights of injured persons and will reduce liability insurance premiums.

### **Recommendation**

The submissions provided to the Committee raise a number of concerns to the Labor members of the Committee.

The Labor members wish to support measures which will address the current crisis in the insurance market, but this must be balanced against the rights of those who are injured.

In all reforms it is essential that the rights of the injured be adequately protected, but also that there is a balance in the system so that organisations and businesses can continue to operate.

The balance between consumer rights and business continuity will obviously differ between people, as evidenced by the fact that the reforms introduced in each State also are not identical.

Nevertheless, the Labor members of the Committee recommend that the Government re-examine the Bill to see if there are any amendments which can be made which will improve the consumer protections in the Bill without unduly compromising the objectives of the Bill.

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Labor Senator for Victoria

SENATOR RUTH WEBBER  
Labor Senator for Western Australia

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17 Mr R. Temperley (Treasury), *Committee Hansard*, 27 November 2002, p. 25.