

Appendix 3

Comment of Scrutiny of Bills Committee

[Extract from Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 9 of 2002, 18 September 2002, p. 12ff:]

...the Committee makes the following comments about the correct version of proposed new section 68B as a whole, being a provision which lessens the liability of corporations for death and personal injury.¹

While the original version of the bill would have prevented a corporation from excluding its liability for its own gross negligence, the current version of the bill would permit such an exclusion of liability. Under the Bill as passed by the House of Representatives, 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. Furthermore, while the original version of the bill made the ability to exclude, restrict or modify liability subject to the implementation by the corporation of a “reasonable risk management strategy”, this limitation has been omitted from the current version of the bill. Those corporations which provide recreational services may knowingly act in a way which is contrary to any reasonable means of managing the risks of the activity, but exclude their liability for any resultant death or personal injury suffered by their customers.

The one possible saving grace of the current version of the bill is that a corporation will still not be able to exclude its liability for death or personal injury suffered by a minor (ie, a person under eighteen years of age) to whom it provides recreational services. However, that saving grace is the product solely of common law principles of contract law, and not of the bill passed by the House of Representatives.

The Committee, therefore, **seeks the Treasurer’s advice** on these aspects of the bill.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

1 [Earlier the Scrutiny of Bills Committee had mistakenly been given a version of the bill different from that which was introduced into parliament, and had commented on that version in its Alert Digest No. 7 of 2002.]

[Extract from Senate Standing Committee for the Scrutiny of Bills, 13th Report of 2002:]

Relevant extract from the response from the Minister and Assistant Treasurer:

...As noted in the Bill's Explanatory Memorandum, the contractual rights which consumers have by virtue of the Trade Practices Act (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 the Bill is to ensure that the object of the TPA is not subverted for an improper purpose. There is scant evidence of the Act having been used in the past as a vehicle for seeking damages in cases of death or personal injury. However, there is nonetheless a legitimate concern that the rights conferred by the Act might be misused to undermine the significant law reforms currently being undertaken by State and Territory jurisdictions to rectify the defects which are apparent in existing common law regimes.

In particular, 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 merely to underpin State and Territory reforms and ensure just outcomes for the community at large.

Senators should also note that the Bill has been considered by the Review of the Law of Negligence, chaired by Justice Ipp.

The Final Report of the Review of the Law of Negligence found that the Bill was effective in removing the obstacle presented by section 68 to the exclusion of the warranties implied by section 74. However, the Review concluded that that the Bill 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.

The Committee thanks the Minister for this response, but raises the following matters in relation to it.

The Committee recognises that there are problems in this area which should be addressed and that the bill proposes to do this. The Committee agrees that it is necessary to balance consumer protection against allowing consumers to take responsibility for their own actions. Nevertheless, the Committee would appreciate further details of its intended operation.

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. These challenges will be complicated by State and Territory provisions which, as the Minister observes, have a significant role in this area. It is especially likely that difficulties will arise in relation to families, where one family member buys tickets for recreational services for the whole family, including minors. In any event, it appears that the bill will likely cause an increase in litigation, at least in the short term.

Next, the Committee would appreciate amplification of the Minister's advice that the Trade Practices Act (TPA) was not intended to provide remedies where consumers have died or were injured as a result of a breach of a condition or warranty implied by the TPA. Other provisions of the TPA provide for compensation for death or injury.

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.

As noted above, 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.

The Committee **seeks the Minister's further advice** on these aspects of the bill.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.