The Senate

Economics Legislation Committee

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

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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.

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

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";[1] 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…".[2]

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."[3]

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.[4]

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.[5]

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.[6]

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."[7]

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.[8]

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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."[9]

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."[10]

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.[11]

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.[12]

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.[13]

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."[14]

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.[15]

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."[16] 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.[17]

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.

SENATOR JACINTA COLLINS
Labor Senator for Victoria

SENATOR RUTH WEBBER
Labor Senator for Western Australia

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

Appendix 1

List of public submissions and additional information

1. Royal Life Saving Society
2. Lake Macquarie Pack & Trail
3. Australian Swimming Inc.
4. Australian Amusement Leisure and Recreation Association Inc.
5. The Country Women's Association of Victoria Inc.
6. The South Australian Country Women's Association Incorporated
7. The Equestrian Federation of Australia
8. Australian Horse Industry Council
9. Australian Plantiff Lawyers Association
10. Model Aeronautical Association of Australia Inc.
11. Country Women's Association of New South Wales
12. Sport Industry Australia
13. Australian Sports Commission
14. Consumer Law Centre Victoria
15. Law Council of Australia

15A. Law Council of Australia

16. Australian Consumers' Association
17. Surf Life Saving Australia Limited

Additional information: Australian Plaintiff Lawyers Association

Oral submission by APLA (Trade Practices Act reference to Senate Economic References Committee), 27 November 2002

The tort reform crisis, Rob Davis

Letter from Insurance Australia Broking Pty Limited, dated 22 November 2002, to RJ & LA Davis

Law Council of Australia

Excerpt (pp. 30-46) from the submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence, 2 August 2002

Supplementary Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence, 20 August 2002

Department of the Treasury

Letter from the Department of the Treasury, dated 27 November 2002, to the Committee

Email from the Department of the Treasury, dated 29 November 2002, for distribution to the Committee

Insurance Council of Australia

Letter from the Insurance Council of Australia, dated 22 November 2002, to the Committee

Appendix 2

Hearing and witnesses

Wednesday, 27 November 2002

Australian Horse Industry Council
Dr Paul O'Callaghan, President

Australian Plaintiff Lawyers Association
Mr Rob Davis, President
Mr Jim Gibbons, Chief Executive Officer

Law Council of Australia
Mr Charles Vandervord, Member, Accident Compensation Committee
Mr James Greentree-White, Lawyer, Legal & Policy

Australian Consumers Association
Ms Catherine Wolthuizen, Senior Policy Officer, Financial Services

Sport Industry Australia
Ms Sarah Lucas, Chief Executive Officer

Department of the Treasury
Mr Ray Temperley, Specialist Adviser, Competition and Consumer Policy Division

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.

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