The Senate

Economics Legislation Committee

Provisions of the Trade Practices Amendment (Personal Injuries and Death) Bill 2003

August 2003

© Commonwealth of Australia 2003

ISBN 0 642 71280 8

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Economics Legislation Committee

Core Members

Senator George Brandis, Chair	(Queensland, LP)
Senator Ursula Stephens, Deputy Chair	(New South Wales, CL)
Senator Grant Chapman	(South Australia, LP)
Senator Andrew Murray	(Western Australia, AD)
Senator John Watson	(Tasmania, LP)
Senator Ruth Webber	(Western Australia, ALP)

Subsitute Member

Senator Allison to replace Senator Murray for matters relating to the Resources portfolio

Subsitute Members

Senator Allison to replace Senator Murray for matters relating to the Resources portfolio

Senator Ridgeway to replace Senator Murray for the committee's inquiry into the provisions of the ACIS Administration Amendment Bill 2003 and the Customs Tariff Amendment (ACIS) Bill 2003

Participating Members

Senator the Hon Eric Abetz	(Tasmania, LP)
Senator the Hon Ronald Boswell	(Queensland, NPA)
Senator Geoffrey Buckland	(South Australia, ALP)
Senator George Campbell	(New South Wales, ALP)
Senator Kim Carr	(Victoria, ALP)
Senator John Cherry	(Queensland, AD)
Senator Stephen Conroy	(Victoria, ALP)
Senator the Hon Peter Cook	(Western Australia, ALP)
Senator the Hon Helen Coonan	(New South Wales, LP)
Senator Alan Eggleston	(Western Australia, LP)
Senator Christopher Evans	(Western Australia, ALP)
Senator the Hon John Faulkner	(New South Wales, ALP)
Senator Alan Ferguson	(South Australia, LP)
Senator Jeannie Ferris	(South Australia, LP)
Senator Michael Forshaw	(New South Wales, ALP)
Senator Brian Harradine	(Tasmania, Ind)
Senator Leonard Harris	(Queensland, PHON)
Senator Linda Kirk	(South Australia, ALP)
Senator Susan Knowles	(Western Australia, LP)
Senator Meg Lees	(South Australia, Ind)
Senator Ross Lightfoot	(Western Australia, LP)
Senator Joseph Ludwig	(Queensland, ALP)

Senator Kate Lundy	(Australian Capital Territory, ALP)
Senator Gavin Marshall	(Victoria, ALP)
Senator Brett Mason	(Queensland, LP)
Senator Julian McGauran	(Victoria, NPA)
Senator Shayne Murphy	(Tasmania, Ind)
Senator Marise Payne	(New South Wales, LP)
Senator Aden Ridgeway	(New South Wales, AD)
Senator the Hon Nick Sherry	(Tasmania, ALP)
Senator Natasha Stott Despoja	(South Australia, AD)
Senator Tsebin Tchen	(Victoria, LP)
Senator John Tierney	(New South Wales, LP)

Secretariat
Dr Sarah Bachelard, Acting Secretary
Mr Phillip Bailey, Acting Principal Research Officer
Mr Matthew Lemm, Research Officer
Ms Judith Wuest, Executive Assistant

Suite SG.64
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

TABLE OF CONTENTS

Membership of Committee iii

CHAPTER 1 **1**

TRADE PRACTICES AMENDMENT (PERSONAL INJURIES AND DEATH) BILL 2003 **1**

Reference of the Bill 1

The Committee's Inquiry 1

Acknowledgment 1

CHAPTER 2 **3**

EVIDENCE PRESENTED TO THE INQUIRY **3**

The Bill 3

Rationale for the Bill 4

Finding of Fault 4

Forum Shopping 5

The scope of section 52 6

Other Issues 8

Section 52 as an incentive to maintain safety standards 8

Representative Actions 9

Cole Royal Commission 10

Financial Impact Statement 10

Suggested Alternatives 11

MINORITY REPORT BY LABOR SENATORS **13**

AUSTRALIAN DEMOCRATS MINORITY REPORT **19**

APPENDIX 1 **33**
Submissions and additional information received

CHAPTER 1

TRADE PRACTICES AMENDMENT (PERSONAL INJURIES AND DEATH) BILL 2003

Reference of the Bill

1.1 The Trade Practices Amendment (Personal Injuries and Death) Bill 2003 was introduced into the House of Representatives on 27 March 2003 and passed that house without amendment on 25 June 2003. The Bill was introduced into the Senate on 25 June 2003 and is currently at the second reading adjourned stage.

1.2 Provisions of the Bill were referred to the Economics Legislation Committee as a result of a Selection of Bills Committee report adopted by the Senate on 18 June 2003, with a reporting date of 20 August 2003.

The Committee's Inquiry

1.3 The Committee invited a number of interested parties to make submissions on the Bill. Additionally, the Committee's inquiry was advertised on the Parliament website and in *The Australian* on 2 July 2003.

1.4 The Committee held public hearings into the provisions of the Bill at Parliament House, Canberra on 30 July and 12 August 2003. It took evidence from a number of individuals and organisations representing consumers, the insurance industry and the Treasury.

Acknowledgment

1.5 The Committee is grateful to, and wishes to thank, all those who assisted with its inquiry.

CHAPTER 2

EVIDENCE PRESENTED TO THE INQUIRY

The Bill

2.1 The aim of the Bill is to amend the *Trade Practices Act 1974* (TPA) to remove the ability for claims to be made under Division 1 of Part V of the TPA for personal injury or death.[1]

2.2 Division 1 of Part V of the TPA contains key consumer protection measures such as the prohibition of misleading and deceptive conduct (section 52) and false and misleading representations (section 53). Division 1 of Part V also includes sections regarding bait advertising and pyramid selling.[2]

2.3 However, the majority of submissions specifically discuss section 52 and to a lesser extent section 53 on issues relating to personal injury and death. The Committee has accordingly focused on these sections.

2.4 Currently, individuals are able to access Division 1 of Part V of the TPA in actions for personal injury or death, specifically sections 52 and 53. These sections do not directly offer a cause of action; the remedies for a breach are contained elsewhere in the TPA.[3] In particular section 4K applies to Division 1 of Part V. This section states that the TPA defines the term 'loss or damage' to include injury. Remedies for a breach of Division 1 of Part V are found in sections such as 80, 82 and 87. These sections contain a number of powers including the power to seek an injunction, damages for any loss or damage and the power for the court to make orders it thinks appropriate against the person or persons who engaged in the conduct that contravened the Act.

2.5 The proposed amendments to the Act are based on recommendations 19 and 20 of the Government's Review of the Law of Negligence (the Review), chaired by the Honorable Justice David Ipp.[4] The purpose of the Review was to assist governments to address the issue of increasing premiums for, and reduced availability of, public liability insurance.[5] The two recommendations from the Review contained in the Bill are that:

---

1 Explanatory Memorandum, p. 1.

2 Bill Digest No. 180 2002-03, p. 5.

3 ACCC, Submission to the Principles Based Review of the Law of Negligence, August 2002, p 26.

4 Explanatory Memorandum, p. 2.

5 Explanatory Memorandum, p. 2.

> The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.[6]
>
> The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div I.[7]

2.6 There are several objectives in implementing recommendations 19 and 20 of the Review. Firstly, the Bill aims to assist a move towards the implementation of a nationally consistent reform of the law of negligence by State and Territory governments.[8] This, in combination with State and Territory measures, is intended to lead to the containment of costs flowing from personal injury and death claims and to promote the availability of affordable and sustainable public liability insurance.[9]

Rationale for the Bill[10]

2.7 The Review expressed reservations about whether the original purpose of Division 1 of Part V was to provide a cause of action for personal injury or death.[11]

2.8 The Review cited two further issues justifying the removal of rights to pursue actions for personal injury or death under Division 1 of Part V. First, under the common law there is a requirement to establish negligence in order to establish liability. However under Division 1 of Part V there is no such requirement. Second, the Review was concerned that any inconsistencies between the Commonwealth and the State and Territory reforms would lead to 'forum shopping'.

Finding of Fault

2.9 The Review considered it inappropriate for liability to arise in the absence of any finding of fault.[12] To this end many of the Review's findings have sought to ensure that fault is a key element when finding liability.

2.10 The Insurance Council of Australia (ICA), in strongly supporting the Bill, also discussed the issue of fault. It notes that Division 1 of Part V operates in addition to rights at common law. However, unlike tort law it does not require the plaintiff to prove fault.[13] On this basis a breach of Division 1 of Part V can be made out even if

---

6 Review of the Law of Negligence, August 2002, p. 64.

7 Review of the Law of Negligence, August 2002, p. 65.

8 Explanatory Memorandum, p. 11.

9 Treasury submission, p. 1.

10 Treasury submission p. 4.

11 Treasury submission, p. 4

12 Treasury submission, p. 1

13 Insurance Council of Australia, submission, p. 2.

the corporation acted honestly and reasonably without the intention to mislead or deceive.[14]

2.11 A number of criticisms were made of this kind of argument. The ACCC noted that a party making representations that lead to personal injury are better positioned to control how the representations are made, and so should be accountable. Commissioner McNeill of the ACCC stated:

> In a situation where a business misleads or deceives a consumer and the consumer suffers damage – in this case, personal injury – as a result, the commission thinks that, as a matter of principle, they should be held accountable and liable for that damage, irrespective of intention. In part, that is because it is much more within the control of the business involved whether and how the representations are made; it is not within the control of the consumer whether and how the representations are made.[15]

2.12 Additionally, the Australian Plaintiff Lawyers Association (APLA) notes that there are a variety of situations that lead to personal injury or death that would leave the party responsible for misleading and deceptive conduct free from liability.[16]

2.13 The Law Council of Australia (LCA) objected to the characterisation of the TPA as undermining the law of negligence. The Secretary-General of the LCA, Mr Lavarch, stated that:

> If it were easier to use the Trade Practices Act then there would have already been some sort of attempt to use that. There is no evidence of that. There are very few cases to date in which it has been used. The Trade Practices Act does not develop some sort of strict liability; it is not like there is no fault or other element involved. It is based on the idea that loss has flown from false and misleading conduct on behalf of the defendant. It is not a no-fault or a strict liability system.[17]

Forum Shopping

2.14 The Review highlighted its concerns regarding the possibility of forum shopping by potential plaintiffs. It noted that inconsistencies between the Commonwealth, State and Territory governments may give rise to forum shopping leading to an undermining of the reform process currently being undertaken by the States and Territories.

---

14 Treasury submission, p. 1.

15 Committee Hansard, 12 August 2003, p. 2.

16 Australian Plaintiff Lawyers Association, submission, p. 9.

17 Committee Hansard, 30 July 2003, p. 3.

2.15 The Treasury's submission supports the Review's position on the issue of forum shopping.[18] The Insurance Council of Australia saw the need for the Bill in such terms, saying:

> …the continuing availability of a right of action under Division 1 of Part V in cases of personal injury and death will substantially undermine action currently being taken by State and Territory governments to limit the number of claims of that nature.[19]

2.16 By contrast however the APLA maintained that there has not been a wholesale shift to actions under the Commonwealth jurisdiction under the TPA.[20] This is despite some of the State and Territory changes to the law of negligence being in place for some time.[21]

2.17 The question of whether the danger of forum shopping justifies the removal of Division 1 of Part V turns largely on judgments about the scope of section 52.

The scope of section 52

2.18 The Review's Final Report conceded that section 52 has yet to become a significant influence on the law of negligence.[22] It attributes this to the current state of the common law which is considered an adequate source of compensation.[23]

2.19 However, the Review maintained that there are still various areas of everyday life that are likely to give rise to claims for personal injury and death under Division 1 of Part V. In particular it pointed to the provision of services and the occupation of land.[24]

2.20 The Review also noted a variety of situations where professionals may be liable under Division 1 of Part V. The majority of these situations focus on the advice given by professionals in the course of trade and commerce. This would include health care professionals, engineers, architects or any profession whose advice may be relied on by consumers.[25]

2.21 In addition the Review argued that several of its recommendations propose a number of reforms limiting liability and damages to the law of negligence. The implementation of these will result in claims based on negligence becoming more

---

18 Treasury submission, p. 4.

19 Insurance Council of Australia submission, p. 2.

20 Committee Hansard, 30 July 2003, p. 15.

21 Committee Hansard, 30 July 2003, p. 25.

22 Review of the Law of Negligence, September 2002, p. 76.

23 Review of the Law of Negligence, September 2002, p. 74.

24 Review of the Law of Negligence, August 2002, 63.

25 Ipp Review, September 2002, p. 77.

difficult to succeed.[26] The Review anticipated that the outcome of such a comprehensive set of reforms will change the current environment in which the law of negligence operates. The new environment will be reflected in actions under Division 1 of Part V becoming commonplace as plaintiffs look for other avenues for their claims.[27]

2.22 The potential impact of this new environment was also of concern to the ICA. They noted that an important factor to be considered from the perspective of the insurance industry is the latent impact that section 52 has as a potential avenue for litigation. Mr Lever of the ICA noted that:

> Our own expert legal advice says that the latent capacity to develop claims under this legislation is there and will remain there. That is a risk factor that has to be taken into account in pricing.[28]

2.23 The ACCC noted that it is common practice among legal practitioners to plead section 52 as an alternative claim to their primary pleading of negligence. However if the court decides the case on the negligence claim it will not rule on the alternative pleading of the section 52 claim. The result of this practice is that section 52 is pleaded regularly but is not reflected in the statistics, because it is not a factor that influences the final decision.[29]

2.24 However, in a submission to the Ipp Review, the ACCC noted that the application of section 52 was not unduly favourable for the purposes of personal injury claims.[30] This view is based on High Court decisions such as *Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594* that have confined the operation of section 52 of the TPA. The High Court held in Concrete Constructions that a representation made by an employer to employee was not in trade or commerce.

2.25 Likewise the LCA noted that the Concrete Constructions case is the leading case in this area and is one where the plaintiff was unsuccessful on the grounds that the injury suffered was not in the course of trade or commerce.[31] The LCA stated that, as a result of this legislative test restricting the application of the TPA, it would be premature to remove access to Division 1 of Part V because it is not acting as a substitute for the law of negligence.[32]

---

26 Review of the Law of Negligence, September 2002, p. 74.

27 Review of the Law of Negligence, September 2002, p. 74.

28 Committee Hansard, 30 July 2003, p. 22.

29 Committee Hansard, 12 August 2003, p. 4.

30 ACCC, Submission to the Principles Based Review of the Law of Negligence, August 2002.

31 Committee Hansard, 30 July 2003, p. 8.

32 Committee Hansard, 30 July 2003, p. 8.

2.26 The Committee notes that different issues must be established in order to bring successful claims under the TPA and the law of negligence. Mr Lavarch of the LCA said:

> The elements of common law negligence, in terms of duty of care and breach of duty and causation of the damage, are different from the notion of loss occasioned by false and misleading conduct, but just because they are different does not mean that, in terms of the Trade Practices Act, somehow it is easier or simpler or that there is no fault or wrong involved. It is based on false and misleading conduct, and that itself has to be established.[33]

2.27 The APLA also pointed to the required elements and the context in which a successful section 52 action can be brought, and highlighted the requirement that it involve corporations acting in trade or commerce.[34]

2.28 The ACCC noted that the number of cases of personal injury or death that would contain the elements of both trade or commerce and misleading and deceptive conduct would be relatively small.[35]

Other Issues

A number of other issues were raised during the inquiry. These were:

- role of section 52 as an incentive to maintain safety standards;
- role of representative action;
- Cole Royal Commission;
- financial impact of the Bill; and
- suggested alternatives.

Section 52 as an incentive to maintain safety standards

2.29 In its submission, the ACCC stated that consumers are entitled to expect an established standard from commercial suppliers of recreational services. To this end they noted the importance of Division 1 of Part V as an incentive for corporations to maintain an appropriate standard of behaviour. They argue that the removal of rights under Division 1 of Part V may lead to a break down in the standard that is currently expected regarding the safety of or risks involved with a service.[36]

---

33 Committee Hansard, 30 July 2003, p. 8.

34 Committee Hansard, 30 July 2003, p. 15.

35 Committee Hansard, 12 August 2003, p. 4.

36 ACCC, Submission to the Principles Based Review of the Law of Negligence, August 2002, p. 26.

2.30 The view is supported by the LCA who maintain that the TPA legislation has improved the standards of behaviour across the corporate world. This includes economic behaviour, product safety and actions by corporations that may cause physical harm to individuals. However, the LCA noted that it could not simply be presumed that standards of behaviour by corporations would fall as a result of the proposed removal of rights under Division 1 of Part V.[37]

2.31 The APLA also supports the view that the TPA is an important and now well understood incentive for ensuring that services provided to consumers are safe.[38]

2.32 The APLA also expressed concerns that the removal of Division 1 of Part V will result in the loss of an ability to found an action in the Commonwealth jurisdiction or to bring an action under the Federal Court Act. They note that this will potentially preclude groups from accessing a federal jurisdiction. Additionally it blocks individuals with similar claims bringing those claims together in the one action resulting in a reduction in the cost of litigation.[39]

Representative Actions

2.33 In addition to removing individuals' rights under Division 1 of Part V the Bill also intends to remove the powers of the ACCC to commence representative actions. The Committee notes the importance of representative actions under the TPA as a possible method of monitoring and shaping business behaviour.[40]

2.34 The LCA noted that this issue is best addressed by the ACCC, but provided a number of examples where representative action was an effective tool. These examples included matters of public interest and clarification of the operation of areas of the law.[41]

2.35 The ACCC noted that it has only brought a representative action in regard to Division 1 of Part V on one occasion. The ACCC stated that before it commences a representative action in this area, a number of factors need to be considered including public interest, the number of consumers affected, the need to clarify the law and the type of damage involved.[42] The Committee notes the potential value of representative action as a function of the ACCC in clarifying aspects of the TPA.

---

37 Committee Hansard, 30 July 2003, p. 7.

38 Australian Plaintiff Lawyers Association submission p, 3.

39 Committee Hansard, 30 July 2003, p. 15.

40 Committee Hansard, 30 July 2003, p. 9.

41 Committee Hansard, 30 July 2003, p. 9.

42 Committee Hansard, 12 August2003, p. 1.

Cole Royal Commission

2.36 The Committee noted that the main conclusions of the Royal Commission into the Building and Construction Industry (Cole Royal Commission) included recommendations to provide for the prevention of occupational health and safety problems through better processes, procedures and practices, and to enhance the punishment framework for breaches.[43]

2.37 The LCA particularly drew the Committee's attention to recommendation 17 of the Cole Royal Commission which encourages the Commonwealth to foster a new paradigm in the building and construction industry in terms of work being performed safely and on time.[44]

2.38 Although noting the importance of having a system offering fair and just recompense to injured persons it was difficult for the LCA to draw connections between the TPA and the Cole Royal Commission.[45]

Financial Impact Statement

2.39 At the hearings the Committee noted the financial impact statement (FIS) in the explanatory memorandum to the Bill. The FIS states that the proposed legislation will have no significant financial impact. The Committee questioned the Treasury in respect of this matter, noting that the removal of an individual's ability to seek damages under Division 1 of Part V would potentially result in a cost shift from the private sector to the Commonwealth.[46]

2.40 In other words, if there were to be successful legal proceedings brought under Part V Division 1 of the Trade Practices Act, the consequent compensation would be recovered from the private insurer, to cover health costs and income support. If legal proceedings are prevented from being brought, monies required to cover health costs and income support would instead have to come from the public sector in the form of, for example, Disability Support Pensions, Carers' Pensions, public health treatment, respite care and so on.

2.41 The Treasury reiterated the view that, although Division 1 of Part V is not currently being used for personal injury and death cases, the threat of negligence cases being diverted into the Commonwealth jurisdiction is a concern.[47] When pressed on the possibility of cost shifting the Treasury undertook to respond in more detail.

2.42 At the time of printing this information was not available.

---

43 Committee Hansard, 30 July 2003, p. 14.

44 Law Council of Australia additional information, p. 3.

45 Law Council of Australia additional information, p. 3.

46 Committee Hansard, 30 July 2003, p. 32.

47 Committee Hansard, 30 July 2003, p. 32.

2.43 In considering the possible financial impact of the legislation, the Committee also took note of the guidelines provided by the Department of the Prime Minister and Cabinet concerning the preparation of a financial impact statement. The *Legislation Handbook* states that a financial impact statement:

> describes both the direct and indirect financial impact for the Commonwealth of the proposed bill including any savings, expenses, revenue losses or gains, or changes in net asset position or the fiscal balance resulting from the proposal[s].[48]

2.44 The explanatory memorandum to the bill states that there will be no *significant* financial impact from the legislation, but does not explain the reasoning which supports this claim. The Committee notes, however, that the *Legislation Handbook* requires that if it is not possible to provide precise figures or even an estimate of the impacts, 'the statement should give a broad outline of the expected financial impacts and reasons why it is not possible to provide figures'.[49]

2.45 The Committee considers that a fuller discussion of the question of any financial impact of the bill in the explanatory memorandum would have been useful.

Suggested Alternatives

2.46 Several groups, who do not support the Bill, maintain that the total removal of access to Division 1 of Part V is not required to avoid potential forum shopping. They also conceded that a compromise position might be possible.

2.47 For example, the LCA proposed a model that retains section 52 but amends the TPA to establish consistency in respect of procedural matters such as standing, the application of limitation periods[50] and the calculation of damages in a manner consistent with the regime in place in the relevant state. [51]

2.48 Significantly the LCA model proposes the application of an apportionment system that takes into consideration the degree to which a plaintiff contributes to any personal injury when considering the quantum of damages that are awarded.[52] This aspect of the LCA model shares similarities with the concept of contributory negligence found in the law of negligence.

2.49 The ACA and APLA do not support the Bill. They acknowledge however that the amendments proposed by the LCA are a compromise position. The ACA said:

---

48 Department of the Prime Minister and Cabinet, *Legislation Handbook*, p.41.

49 Department of the Prime Minister and Cabinet, *Legislation Handbook*, p.42.

50 Committee Hansard, 30 July 2003, p. 3.

51 Committee Hansard, 30 July 2003, p. 6.

52 Law Council of Australia submission, p. 1.

> …if we are going to try to achieve some consistency between state and federal regimes in this area, there is a compromise position which would be more acceptable to the Consumer Association than the amendment that this bill proposes, which is removing the right altogether; that is, aligning the compensation or redress available to claimants with those available at state level and therefore removing any incentive to pursue a claim at the Commonwealth level and making sure there is no real incentive for forum shopping, which is ultimately the danger that Justice Ipp sought to avoid and what this bill seeks to avoid as well.[53]

2.50 However, the Committee notes that there is a potential danger in linking the TPA to state provisions in this area in cases where state provisions are made much more restrictive than the current Commonwealth provisions.[54]

RECOMMENDATION

The Committee recommends that the Bill be passed.

SENATOR GEORGE BRANDIS
Chairman

53 Committee Hansard, 30 July 2003, p. 25.

54 Committee Hansard, 30 July 2003, p. 13.

MINORITY REPORT BY LABOR SENATORS

Background to the Bill

This Bill seeks to remove the ability of consumers and the ACCC to recover damages for personal injury and death sustained by consumers as a result of conduct which breaches the unfair practices provisions of the Trade Practices Act (Part V, Division 1). Key provisions of Part V Division 1 include section 52, which prohibits corporations from engaging in misleading and deceptive conduct and section 53, which prohibits false representations that goods or services are of a particular standard, quality or grade.

These reforms are said to be necessary to support State and Territory tort law reforms including caps on general damages and thresholds to prevent the commencement of actions in relation to minor injuries which were introduced in response to rapid increases in public liability insurance premiums over the last few years.

Specifically, the Bill is intended to address a concern about forum shopping. That is, that plaintiffs faced with tougher negligence laws will seek to craft their action to bring it within the Trade Practices Act (TPA) and avoid restrictions imposed under State and Territory Law.

The Bill implements recommendations of the Review of the Law Negligence chaired by Justice Ipp in 2002. The terms of reference for the inquiry included an instruction to review the interaction of the TPA with common law principles of negligence. In particular the Review was asked 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.

The Ipp Review found that a number of provisions of the TPA could found an action for personal injury damages. This Bill deals only with recommendations in relation to Part V Division 1.

The Justification for the Bill

Labor Senators believe that the evidence that litigation under Part V Division 1 of the TPA has the potential to undermine State and Territory law tort law reforms is unconvincing.

All witnesses accepted the proposition that, to date, the TPA has not been widely used as the basis for bringing personal injury claims. The Law Council identified only 9 examples of cases between 1989 and 2002 where plaintiffs had tried to recover

personal injury damages based on Part V Division 1 and in a number of these cases damages were not recovered.[1]

The ACCC reported that it had run only one representative action seeking to recover damages on behalf of consumers who had suffered personal injury as a result of a breach of Part V Division 1.[2]

It is therefore clear that the litigation under the TPA is not responsible for any increase in claims costs for public liability insurance that have occurred in recent years.

The Bill is premised on the belief however that the TPA will be 'discovered' by plaintiffs now that the States and Territories have tightened their civil liability laws. For reasons outlined below, Labor Senators do not find this argument persuasive.

Labor Senators note that no evidence was submitted to the Committee indicating that the number of personal injury claims being brought under the TPA has increased since the State reforms were enacted. Given that some of these reforms have now been in operation for over 12 months[3] any trend towards the increased use of the TPA should have become evident by now.

The Ipp Review, Treasury and the Insurance Council of Australia place much emphasis on the fact that section 52 of the Act is a strict liability provision. This means that the intent of a company that misleads and deceives is not relevant in determining liability under the Act. They argue that it is easier to bring an action under the TPA since there is no requirement to prove fault as in negligence cases.

Labor Senators note that section 52 of the TPA has been a strict liability provision since 1974. Labor Senators endorse the view of the Law Council that if it were significantly easier to bring an action under section 52 for personal injury than in negligence, then it would have been used in many more cases. The Law Council stated:

> The elements of common law negligence, in terms of duty of care and breach of duty and causation of the damage, are different from the notion of loss occasioned by false and misleading conduct, but just because they are different does not mean that, in terms of the Trade Practices Act, somehow it is easier or simpler or that there is no fault or wrong involved. It is based on false and misleading conduct, and that itself has to be established. If somehow that was an easier way of making claims, we would have the balance of claims being made under the Trade Practices Act. That is simply not happening. The changes in the state law are not of a nature that will drive people to the Trade Practices Act, in

---

[1] Law Council, Letter to the Senate Economics Committee, 5 August 2003, p.2.

[2] Ms McNeill, Committee Hansard, 12 August 2003, p.2 ,

[3] For example, the Civil Liability Act 2002 (NSW) was passed in June 2002.

> our view, because the substantive facts of what has to have occurred and the circumstances in which it has to have occurred are quite different.[4]

In short, there is no evidence that forum shopping is currently occurring nor that the State and Territory reforms make it more likely.

Consumer Protection

Labor Senators also believe that the Bill carries the danger of undermining the 'culture of care' that has developed in Australia since the enactment of the TPA and may consequently expose consumers to a greater risk of injury. While few cases for personal injury have been brought under Part V Division 1, the potential for liability under the Act has encouraged companies to put an emphasis on consumer safety.

The Law Council noted the positive effect of the TPA in its evidence to the Committee:

> One of the consequences of that legislation, I think, has been that it has significantly improved the standards of behaviour that we have seen across the whole corporate world ….., in terms of product safety and the actions of corporations in terms of their potential to cause physical harm to individuals, there has been this strong benchmarked potential liability imposed upon them. On the whole, I would say that it has led to general improvements and one should be loath to go down a path of in a wholesale way taking out whole areas of action. [5]

In its submission to the Ipp Review, the ACCC strongly opposed amending the TPA to remove liability for personal injury. The ACCC's argument was principally based on literature known as the 'economics of accidents'.[6] Simply stated, this body of work suggests that liability for the cost of accidents should be assigned to the party that could most easily and cheaply take the actions needed to minimise the risk of accident. Some significant points made by the ACCC include that:

- Section 52 in particular provides an important incentive for businesses to behave fairly and have regard for consumers' safety. Without the availability of this important remedy, the standard of behaviour that consumers are entitled to expect may break down;

- limiting the scope of Part V is economically inefficient in that it forces consumers to incur greater search costs to determine which suppliers are reliable;

---

[4] Mr Lavarch, Committee Hansard, 30 July 2003, p.8.

[5] Mr Lavarch, Committee Hansard, 30 July 2003, p. 6/7.

[6] ACCC, Submission to the Principles Based Review of the Law of Negligence, August 2002.

- such a limitation also undermines the competitive process by allowing firms that engage in misleading and deceptive practices to win customers at the expense of those that do not.

Labor Senators believe that these arguments are particularly persuasive. Labor Senators note that Treasury essentially refused to address these issues at the hearing and instead directed the Committee to the findings of the Ipp Review.

The Ipp Review accepted that the propositions put by the ACCC were 'valid considerations' but argued that they had to be balanced against 'the inherent value of personal autonomy and the desirability of persons taking responsibility for their own actions and safety'.[7] The Panel also noted that its terms of reference required it to 'propose reforms that will meet the objective of limiting liability and the quantum of damages arising from personal injury and death.'

Labor Senators do not accept that these factors justify removing liability from companies who cause personal injury through misleading and deceptive conduct.

Impact on Insurance Premiums

In considering the impact of this legislation on consumers, Labor Senators note that the tort reforms have so far failed to generate savings to consumers in the form of reduced premiums and that there is no guarantee that the passage of the Bill will alter that situation.

Despite evidence that tort reforms are lowering public liability claims costs[8], the recent ACCC report on public liability insurance pricing[9] indicates a reluctance in the industry to pass on the benefit of reductions in claims. Companies surveyed by the ACCC forecast that premiums would rise by up 20 per cent this year and that at best tort reform will only moderate the increase by 3 per cent.

Labor Senators once again call on the Government to give the ACCC the capacity to ensure that insurance companies pass on savings from tort law reform.

Amendments to Limit Liability

As the majority report notes, several groups opposed to the Bill nevertheless expressed support for alternative arrangements in the event that the Parliament

[7] Review of the Law of Negligence, September 2002, p. 81.

[8] Recently the Attorney-General's Department in NSW estimated that the number of public risk actions, including personal injury matters, in the District Court had fallen by 25 per cent in the last 12 months. See The Hon. Bob Carr, 'Premier Carr release data on Government's public liability and insurance reforms', *News Release*, August 12 2003.

[9] ACCC, *Public liability and Professional Indemnity Insurance: Monitoring Report*, July 2003

believes that some amendment to TPA is necessary to deal with the potential for forum shopping.

While these proposals differed in some aspects, a principle common to all was that the TPA could be amended so that damages for personal injury for breach of Part V Division 1 could be harmonised with those available under the relevant State or Territory civil liability laws.

Labor Senators accept that these proposals have the attraction of reducing the motivation for plaintiffs to seek to evade restrictions under State law while still providing consumers with a measure of protection under the TPA and maintaining incentives for companies to minimise risks.

Labor Senators are concerned however that tying remedies under the TPA to those available under State law could have adverse consequences in the future. It is possible that a future conservative State or Territory government could reduce damages for personal injury to an unacceptably low level. In such circumstances it would be undesirable to lock damages under the TPA into an unfair regime.

Labor Senators will continue to explore whether amendments to bring damages for personal injury caused by contravention of Part V Division 1 of the TPA into line with those available under State and Territory law are feasible or desirable.

RECOMMENDATION
Labor Senators recommend that the Bill should be rejected in its current form.

Part V Division 1 of the TPA has played an important role in promoting consumer safety and the removal of the ability of consumers and the ACCC to recover personal injury damages for breach of these provisions has the potential to expose consumers to increased risk.

The evidence that Part V Division 1 will be exploited by plaintiffs seeking to engage in forum shopping is unconvincing. Labor Senators believe that if fundamental consumer protections such as those contained in Part V Division 1 are to be removed the case for change must be substantial. That case has simply not been made out.

Labor Senators will continue to explore whether the Bill can be improved by amendments aligning damages under the TPA with those prevailing under State and Territory law.

Senator Ursula Stephens
Deputy Chair

AUSTRALIAN DEMOCRATS

MINORITY REPORT

Senate Inquiry

Trade Practices Amendment (Personal Injury and Death) Bill 2003

August 2003

1.0 Introduction

1.1 This Bill was introduced as part of the government's response to the recommendations of the Review of the Law of Negligence chaired by Justice Ipp. In particular, this Bill implements recommendations 19 and 20 of the Ipp Report where the panel recommended that:

> The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div 1[1].
>
> The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1[2].

2.0 Background to the insurance crisis

2.1 As many would be aware, the price of insurance premiums has escalated in recent years, especially since the terrorist attacks of 11 September 2001 after which time the reinsurance market sustained losses of over $2 billion. Not only have prices risen during this time, some classes of insurance such as professional indemnity and public liability have been unavailable, causing great concern to many professions and threatening many community events.

2.2 By far the most widely held belief is that the rising number and cost of claims is the primary driver behind the cost of insurance. This belief is not grounded in any hard evidence regarding claims costs, but is based on the media hype created by a handful of cases that appear to be offensive to our sense of what is required of justice in particular circumstances. While consumer advocates have challenged state and commonwealth governments reforms on this issue, the insurance industry has perpetuated the myth that claims costs are out of control. Other significant causes of the current crisis whose effects have been wrongly overlooked include:

---

[1] Review of the Law of Negligence, August 2002, p64.

[2] Review of the Law of Negligence, August 2002, p65.

- the aggressive market growth strategy employed by the insurance industry over recent years, offering unsustainable ‘cut-price’ premiums,
- poor returns on investments and a more strict risk assessment of policyholders
- the subsequent collapse of HIH: the largest underwriter of public liability policies[3];
- the provisional liquidation of UMP: with coverage of approximately 60% of medical practitioners nationally and 90% in NSW; and
- the cyclical fluctuations of the insurance market: caused by changes in supply and demand, commonly experienced in other markets.

2.3 It is a widely held fact that there are competing statistics regarding claims size and number. For example, according to Insurance Statistics Australia[4], the overall frequency of claims has been fairly flat and there have been some reductions in 1999 and 2000. According to Insurance Statistics Australia, there have been no overall increase in claim numbers and perhaps some reductions in recent years[5].

2.4 The Ministerial meeting on public liability[6] has even stated that there was widespread agreement that the lack of comprehensive data on claims costs was a significant constraint in the appropriate pricing of premiums by the insurance industry for not-for-profit, adventure tourism and sporting groups. The Ipp Report on Negligence also noted that there was a lack of empirical evidence in relation to claims costs[7].

2.5 Despite this lack of data, state and federal governments have been prepared to endorse tort law reform as the solution to the public liability crisis on the assumption that it is the cause of the problem. The absence of solid claims data means that not only is it impossible to be sure that tort law is the cause of the current crisis but it will also be difficult to assess the effectiveness of the reform process.

2.6 The insurance industry itself has even stated that there is no guarantee that tort law reforms will result in reductions in premiums. The insurance industry have made this clear in the Senate inquiry into the national insurance crisis in 2002, and they have made their position clear in the current inquiry. That is, consumers should not expect a reduction in insurance premium costs.

2.7 While no time has been wasted on limiting individual rights, regardless of the lack of claims data, the community have not been guaranteed anything in return - in particular – whether medical costs and financial needs will be met in the event of serious injury. Nor has there been any discussion on what measures should be put in

[3] According to Mr Jones, ICA (Hansard 8 July 2002), at the Senate Inquiry into the National Insurance Crisis, HIH was writing anywhere between 30-50% of policies for public liability insurance.

[4] Use of statistics from ISA was strongly promoted by the ICA, see Hansard 8 July 2002 at the hearing of the Senate Inquiry into the National Insurance Crisis

[5] For instance, in 1996 there were approximately 10 claims per $100,000 dollar premium and in 2000, approximately 8 claims per $100,000 dollar premium.

[6] Ministerial Communiqué held 30 May 2002

[7] Review of the Law of Negligence, September 2002, p32.

place to ensure that individuals are encouraged to provide a safer community[8], or action to assist individuals in the event that they are the victim of serious injury so that their medical and financial needs will be addressed and that the party responsible for their injury will be deterred from future negligent acts or omissions.

2.8 The insurance industry's attitude towards delivering lower premiums was demonstrated when the Insurance Council of Australia attended the Senate Inquiry hearings into the National Insurance Crisis. Frustratingly, while many of the industry's wishes had been met, including state tort law reform and amendment to the Trade Practices Act to ensure that individuals take responsibilities for their own action, there was little indication that this would guarantee a reduction in premiums. To quote the ICA on this matter – 'it may slow them down – but it will not reduce them'[9].

2.9 The Australian Democrats believe that the great danger that we face is that the tort law reforms that have been implemented will have a major impact on the ability of the injured to realise their long-term financial and medical needs. While tort reform across the country has gone about targeting the victims of these accidents, our fear is that we may be confusing the symptom from the cause. As the Australian Democrats have stated on other occasions, by targeting the victims of accidents and negligent acts, we are in effect targeting the most vulnerable in our society.

2.10 The move to solve the insurance crisis in this way shifts all responsibility away from the negligent and towards the public purse and the community. In the submission by APLA to the Senate Inquiry, they highlight some of the hidden public costs associated with the insurance reforms.

2.11 For instance, the Heath Insurance Commission, whose Compensation Recovery Program ensures that there is no 'double dipping' and compensation recipients repay the full amount of money spent on health care, collected $42 million dollars in 2001-2002. Also, the equivalent Centrelink program, the Compensation Recovery Team, collected $418.5 million in 2001-2002. These figures are not insignificant and arguably, these costs in the future are not going to be met by the negligent and their insurers, but will be borne by the rest of the community, principally the Commonwealth.

2.12 Without necessary protection and safety standards for the community, insurance pricing could be the least of our problems. We must ensure that we have mechanisms in place that encourage people to minimise the risk of accidents and that those who are injured are properly cared for. Shifting the blame to the individual so that the insurance industry is better off does not address the real causes and problems that are currently facing the community.

[8] The federal government is going to introduce professional standards legislation for some professions capable of causing economic loss.

[9] Mr Jones, ICA, Senate Inquiry Hearing of 8 July 2003 into National Insurance Crisis

2.13 If we accept, which many people do, that market forces, unprecedented events and corporate failures 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. After all, underwriting public liability policies only accounts for around 5% of all underwriting. The profitability of the industry is no longer an issue and the insurance industry will not bounce back at some stage soon with record profits[10].

3.0 *Trade Practices Amendment (Personal Injury and Death) Bill 2003*

3.1 In relation to the Bill that is the focus of the current inquiry, its purpose is to amend the *Trade Practices Act 1974* (TPA) to prevent individuals recovering damages for personal injury and death where there has been a contravention of Part V Division 1 of the TPA.

3.2 Part V Division 1 of the TPA contains key consumer protection measures. The most commonly used ones being those that deal with misleading and deceptive conduct (s52) and false and misleading representations (s53). Currently, where provisions in Part V Division 1 of the Act are breached, a person may recover damages for any loss they have suffered as a result of a contravention of the provision. The ACCC may also bring representative actions on behalf of a person who has suffered loss where any of the provisions in Part V Division 1 are breached.

3.3 The amendments contained in this Bill will prevent actions for damages under Part V Division 1 where the damage results in personal injury and death, while economic loss will still provide the basis for a claim under this section.

4.0 Preliminary comments

4.1 Consumer rights have rapidly diminished since the backlash began against high insurance premium costs. The insurance industry have used this opportunity to mount a campaign to cap damages claiming that this will solve the problem. Fortunately for the insurance industry the media has highlighted a few negligence cases that have added fuel to the fire and given the industry the ammunition it needed to maintain its argument. This, coupled with the public outcry surrounding premium prices has given the government the imprimatur to meet industry demands.

4.2 Apart from the various tort law reforms enacted at the state level, consumer rights have also been challenged through the *Trade Practices (Liability for Recreational Services) Act 2002*. While the Australian Democrats did support the principle that individuals should take responsibility for their own actions, we could see the harm to consumers of a blanket acceptance of waivers if there were no corresponding assurances regarding the safety standards employed by recreational service providers.

---

[10] See the ACCC Monitoring Report: Public Liability and Professional Indemnity, July 2003 for details about the recent performance of the insurance industry, which shows that insurers have returned to profitability.

4.3 The passage and effect of the TPA amendment in 2002 makes it all the more important that under the current bill we do not close the door completely on the rights of consumers to sue for redress for personal injury and death under the TPA – which is what the government and others are attempting to do.

4.4 As the Ipp Report highlighted, this section of the TPA is rarely used in order to claim damages for personal injury and death. It would be premature to simply abolish consumer rights in this way where there is no evidence that it is necessary. As some of the inquiry submissions highlight[11], there may be situations identifiable in the future where failure to access provisions of the TPA for personal injury and death may amount to a terrible injustice far more serious than the wailing of the insurance industry about profits.

5.0 Senate Inquiry Terms of Reference

5.1 It should be noted that the consequence of removing the opportunity to pursue legal action under Division 1 of Part V of the TPA in regard to personal injury and death is that individuals must pursue any actions under common law rather than the TPA.

6.0 Submissions

6.1 As the majority report has failed to address key points raised by groups most affected by the current Bill, the Australian Democrats believe that it is necessary to emphasise in more detail the evidence provided to this inquiry. In particular, evidence from the Australian Consumers Association, the Australian Competition and Consumer Commission and the Australian Plaintiff Lawyers Association.

6.2 <u>Australian Plaintiff Lawyers Association</u>

6.2.1 As with their submission to the Senate Inquiry in 2002 into the National Insurance Crisis, APLA believes that there has been no justification for the sorts of changes that were being proposed and discussed by the states and the Commonwealth to remove a person's right to sue[12]. When asked whether APLA would prefer the Senate to reject the bill outright, APLA believe that there is no basis for amending the Trade Practices Act[13].

6.3 <u>Insurance Council of Australia</u>

6.3.1 The ICA were very supportive of the legislation. This Bill was introduced with the aim of reducing damages claims and insurance premiums, however, the ICA were unable to provide any detail about the possibility of reductions in insurance premiums

[11] See Australian Plaintiff Lawyers Association submission, p11.

[12] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E11.

[13] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E13.

as a result of the reform process. The ICA believes it is the inflation in claims costs above ordinary community inflation that will, if not checked, drive premiums in public liability insurance[14]. Data from APRA and the ACCC show that the insurance industry has sustained losses in public liability and professional indemnity insurance in recent years[15].

6.4 Australian Consumers Association

6.4.1 From the outset, the ACA has always had concern with the validity of the agenda of this bill[16], especially since there has not been a rush to lodge claims for personal injury and death under the TPA. The ACA view is that the bill in its current form is unacceptable[17]. The ACA believe there are dangers in undermining the strict liability consumer protection regime in the TPA, which seeks to allocate risk to the party in the best position to assess the magnitude of that risk and take the appropriate steps to reduce it or avoid it altogether.

6.4.2 The ACA also stressed that this Bill follows the amendment to the TPA made last year that would allow recreational service providers to enforce waivers that have been accepted by consumers. This situation makes it even more important that consumers are able to rely on information and for them not to be misled or deceived as to the veracity of that information[18].

6.4.3 Another matter of concern to the ACA was the fact that there will be a further cost shifting to the public for injuries. Rather than the provider of the services through their insurer covering the cost of those injuries, it will be the public health system that will end up bearing the cost.

6.4.4 The ACA was also concerned that the Bill, if passed in its current form would prevent the ACCC from taking representative actions. The ACCC will only take actions in the public interest and for public policy purposes and their ability to take action should not be removed. The ACA rejected the bill but as a fallback position recommended adopting consistent damages payouts across Commonwealth and state regimes.

6.4.5 In the ACA's view, this Bill threatens fundamental consumer protections - indeed, the cornerstone of consumer protection in this country, section 52 of the Trade Practices Act. The ACA therefore urge the Committee to reject, rather than amend it. It is an unnecessary erosion of consumer rights on the basis of unsubstantiated claims.

---

[14] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E18.

[15] However, given the latest ACCC Monitoring Report into Public Liability and Professional Indemnity, released in July 2003, this position has changed and these classes of insurance are now profitable. In addition, public liability only accounts for around 5% of all policies underwritten by insurance companies.

[16] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E25.

[17] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E25.

[18] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003, E25.

In the view of the ACA, any difficulty presented by a compromise option of aligning State and Federal damages caps should be resolved by a rejection of the Bill, rather than its passage[19].

6.5 Australian Competition and Consumer Commission

6.5.1 In addition to ACCC submissions to the 2002 Senate inquiry into the insurance crisis and the Review of the Law of Negligence, the ACCC gave evidence that the commission has only brought one representative action on Part V Division 1 of the TPA. In deciding whether to take representative actions the Commission has regard to the public interest, whether the conduct is of consequence, whether it is affecting a lot of consumers, what the kind of damage might be and whether the law needs to be clarified.

6.5.2 The ACCC was of the view that there could be situations where a consumer might be exposed to damage that might be captured by Part V Division 1, but fail the requirements for negligence that are more appropriately dealt with under the TPA. The ACCC also stressed the point that the TPA, as well as having fines, injunctions, criminal offences etc, has the advantage of being more prospective and forward-looking in terms of further conduct or a declaration that they (corporations) have done something wrong.

6.6 Department of Treasury

6.6.1 In their submission, Treasury provided a background on the current reforms to solve the insurance crisis, the operation of the TPA and devoted much attention to the conduct and findings of the Ipp Review.

6.6.2 Treasury stressed that a corporation can engage in misleading or deceptive conduct even though it acted honestly and reasonably and did not intend to mislead or deceive.[20] Other provisions relating to misleading conduct may also be breached without any finding of dishonesty or unreasonableness. In addition, Treasury was concerned that Division 1 of Part V prohibits unfair practices by corporations, however, liability may also extend to any person knowingly concerned in, or party to, such practices (section 75B).[21]

[19] Comments received on 19/08/03 from Catherine Wolthuizen of the Australian Consumers Association responding to questions raised by Senator Murray at the hearing of 30 July 2003.

[20] See *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1998) 88 FCR 354 at 362 per the Full Court. Future representations can only be misleading if the corporation does not have reasonable grounds for making the representation (section 51A). Intention is required in some cases, for example, where the contravening conduct involves a refusing or refraining to do an act: *Costa Vraca Pty Ltd V Berrigan Weed & Pest Control Pty Ltd* (1999) ATPR ¶41-694 at 42,879.

[21] Note also that section 6 of the TPA enables the prohibitions in Division 1 of Part V to apply directly to a natural person where constitutional limitations allow, for example, where the conduct involves trade and commerce among the States

6.7 Law Council of Australia

6.7.1 The LCA do not believe that the bill should be passed in its current form. The LCA believe that there are a range of sensible and worthwhile reforms that should be made to the laws dealing with the recovery of damages and loss for negligence resulting in personal injury and death, but it is unnecessary and undesirable to close down entire fields of obligation which is what the bill purports to do[22].

6.7.2 Division 1, Part V, is important in fostering higher standards of corporate behaviour and is vital for the protection of consumers. The LCA are also of the view that the TPA has not been used as a de facto means of recovering loss instead of the law of negligence and that in order to satisfy the Ipp report's concern for forum shopping, damages under the TPA should be consistent with tort law[23]. The LCA recommended that Division 1, Part 5 be modified by the use of an apportionment system, similar to contributory negligence under tort law.

6.6.3 In their submission to the Ipp Review, the ACCC suggested that a measure that would prevent forum shopping would remove incentives to bring actions under the TPA by restricting damages so that they were broadly consistent with state laws.

6.7 Response to the majority report

6.7.1 The majority report failed to highlight to any significant degree, the effects on consumers of this particular Bill and devoted considerable attention to the findings of the Ipp Review. While the findings of the Ipp Review are significant in that their recommendations are the focus of the current Bill, further emphasis should be given to the fact that there has been no 'forum shopping' by individuals.

6.7.2 In addition, it needs to be emphasised that the TPA is not a substitute for the law of negligence and was established with completely separate aims to the law of negligence. Since the TPA was passed, individuals have always had the opportunity to use the TPA for personal injury claims but evidence shows that this has not been the case. This has not changed regardless of the changes that have been made to tort law at the state level.

6.7.3 In relation to actions undertaken by the ACCC, few would argue that the ACCC would act without good cause. Indeed, given the resources of the ACCC and their approach to administering the TPA, actions would only be pursued in exceptional circumstances. The submission by the ACCC is evidence of this view and their role in maintaining high standards of corporate conduct cannot be overstated. Therefore, the fact that the ACCC has only pursued an action for personal injury and death under the TPA on one occasion highlights that there is no need at all to prevent forum shopping

[22] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003.

[23] See Proof Committee Hansard, Economics Legislation Committee, Wednesday 30 July 2003

and certainly no necessity to abolish an individuals' right to action for personal injury and death through this Bill.

7.0 Safety Standards

7.1 A matter highlighted by Senator Murray during the hearings was the issue of safety standards as they apply to the TPA and to other areas of government involvement, such as the building and construction industry. For example, Recommendation 17 of the Royal Commission into the Building and Construction Industry (Cole Royal Commission) is as follows:

> The Commonwealth foster a new paradigm in the building and construction industry. Work must be performed safely, as well as on budget and on time.

7.2 The Australian Democrats raised concern over the apparent inconsistency between the aims of the government in relation to safety. On the one hand, the government claims to seek to improve and maintain safety standards in, what is arguably, one of the most hazardous industries in Australia. On the other hand, this Bill seeks to cut off individual rights to redress for personal injury and death under the TPA. The TPA is the very legislation that ensures that corporations, who provide goods and services, maintain particular standards of conduct. These standards are often relied upon by industries, such as building and construction, when purchasing products designed to protect workers and ensure their safety.

7.3 In response to Senator Murray's question to the Law Council of Australia regarding linkages between the TPA and occupational health and safety, the Law Council of Australia were of the view that if the relaxing of legal standards in the TPA would have any effect (which the Law Council does not know) in relation to fostering a new paradigm of safety in the building and construction industry, the Law Council would expect that effect to be a negative one[24].

8.0 Financial implications of the *Trade Practices Amendment (Personal Injuries and Death) Bill 2003*

8.1 The Explanatory Memorandum to the Bill states that:

> This Bill will have no significant financial impact.

8.2 The view of the Australian Democrats is that this statement is demonstrably improbable. This view was highlighted in the majority report and the Australian Democrats are pleased that the Chair has included this point in the final report.

---

[24] Letter dated 5 August 2003 from James Greentree-White, Law Council of Australia to Senate Economics Legislation Committee.

8.3 There have not been many successful legal proceedings[25] brought under Part V Division 1 of the Trade Practices Act to recover damages for personal injury and death. This is due to the fact that individuals normally rely upon the law of negligence to recover damages for personal injury.

8.4 Section 51 of the Constitution does not specify that workers illness/injury compensation is a matter for jurisdiction by the Commonwealth. Therefore, as with other residual responsibilities not specified in Section 51, compensation jurisdiction and control as a general principle falls to the States/Territories.

8.5 Accordingly, the provision of adequate or appropriate levels of compensation is a matter for the States/Territories, and flowing from this successive Commonwealth governments have been careful to ensure that income support payments do not subsidise or replace inadequate compensation.

8.6 It is not possible to give an estimate of the level of compensation that a court will award to a person in a negligence action. The size of the damages pay out will depend on the nature of the injury sustained. A vast range of personal injuries may be covered by negligence laws, ranging from for example, a back injury to quadriplegia. Hence the amount of compensation paid per claim will vary greatly.

8.7 The States/Territories will close off the avenues for legal proceedings to recover damages for personal injury and death. The assumption is that litigants will instead use the hitherto unused provisions of the TPA, a Commonwealth jurisdiction. On the back of this assumption, the Bill therefore seeks to close off the TPA avenues of litigation to stop that happening. As mentioned previously, there have not been any successful legal proceedings brought under Part V Division 1 of the Trade Practices Act to recover damages for personal injury and death.

8.8 If there were to be successful legal proceedings brought under Part V Division 1 of the TPA, the consequent compensation would be recovered from the private insurer, to cover health costs and income support. If you prevent legal proceedings from being brought, those monies to cover health costs and income support will now instead have to come from the public sector. There is therefore a financial impact on the Commonwealth.

8.9 Financial impacts

8.9.1 There were three options for someone who had suffered personal injury:

[25] *Concrete Constructions v Nelson* (1990) 169 CLR 594; *Hampic Pty Ltd v Adams* (2000) ATPR 41-737 (NSWCA); *Glendale Chemical Products v ACCC* (1998) 90 FCR 40 (Full Court); *Pritchard v Racecage Pty Ltd* (1997) 72 FCR 203 (Full Court); Trade Practices Commission v Collings Construction (NSWSC); *Graham Barclay Oysters v Ryan* (2002) HCA 54; *Ryan v Great Lakes Council* (1999) ATPR 41-667; *Wright v TNT Management* (1989) 85 ALR 442 (NSWCA); *Beare v Slattery* (2002) SASC 76 (SACA).

- Successful legal proceedings in the state's jurisdiction to cover health costs and personal income needs
- Above, supplemented by state health services and commonwealth income support
- State health services and commonwealth income support

8.9.2 The first two options above are being cut off as options by state legislation and the current Bill. That leaves the third option as the most common future mechanism for meeting the needs of people who have suffered injury. This is a clear demonstration of cost shifting from private to public.

8.9.3 Contrary to the EM's claim, the effect of this Bill is that there must be a significant financial impact for the Commonwealth. Below are some estimates on the cost of government income support payments for a 25 year old person who is seriously injured and unable to work for the rest of their life (assuming life expectancy of 75 years). A $1.2 million estimate is at the lower end of the likely cost to the Commonwealth, a cost that could have been picked up by the private sector.

8.10 Cost of Income Support Benefits

8.11 Based on the following assumptions and figures:

- the person becomes a paraplegic at the age of 25 and lives until they are 75,
- the person cannot engage in paid work and is eligible for the single maximum rate of Disability Support Pension (DSP) of $440.30 per fortnight plus $5.80 per fortnight which is paid for pharmaceutical allowance (PA). This equates to $11 598.60 per year.
- 'someone' in their family cares for them full time who is eligible for a Carer payment (CP) commonly called a carer pension, which is available at the same rate as the DPS $440.30 per fortnight plus $5.80 per fortnight, which is paid for pharmaceutical allowance (PA). This totals $11 598.60 per year.
- the payments stay at the same level over the period in question (that is, no account is taken of any future potential increases in government income transfers through indexation or other measures)

8.12 We can estimate the minimum that they would receive from government payments over a 50 year period. The person who has the injury, would, over the 50 year period from the age of 25 to 75, get paid $579 930. The person (assuming it was the same person providing this care) would also be paid $579 930. Combined, these payments equal: $1 159 860. Recovery of such amounts from the private sector insurers is now being severely constrained through the current reform and will be further constrained if this Bill proceeded without amendment.

8.13 Clearly these figures represent an under-estimate of the likely cost to government of a person seriously injured (to the point where that person could not engage in paid work and could not care for themselves). Other payments and factors that would have to be taken into account are:

- the cost of benefits arising out of use of the Pensioner Concession Card (PCC) (both the DSP and the CP recipient would get a PCC). PCC holders are able to purchase PBS listed pharmaceuticals at concessional rates.
- the cost of respite care (which they would have access to)
- the cost of any on-going health treatment
- any rent assistance paid

9.0 Conclusions

9.1 This inquiry was charged with the responsibility of investigating the possible consumer effects of the proposed legislation and as the ACA, ACCC, APLA and LCA submissions and evidence highlights, the consumer effects are likely to be profound, especially given the scaling back of consumer rights that have already taken place in state tort reform and amendment to the TPA in 2002.

9.2 The purpose of the Bill was to implement recommendations 19 and 20 of the Ipp Report and if passed, will prevent any actions being taken or damages being awarded for personal injury and loss resulting from a contravention of Part V, Division 1 of the TPA.

9.3 As many participants of the inquiry highlighted, there is no evidence that the TPA has been used as an avenue to bypass existing tort law. However, evidence was put forward which highlighted occasions where consumers could be faced without any avenue for redress if the Bill proceeded to abolish a right of action completely under the TPA for personal injury and death.

9.4 The ACA and APLA were not supportive of the Bill and would prefer the Senate to reject the bill outright. However, as a fallback position, they suggested that in line with the ACCC submission in 2002, a more palatable approach would be to ensure that taking actions under the TPA was not a more attractive alternative than taking actions under state tort law.

9.5 The Australian Democrats understand this view and believe that the need to prevent 'forum shopping' is the most important part of the Ipp Review's recommendations. However, not only is there no evidence that forum shopping is a problem, there is a potential that devolving damages caps to the states could lead to further concern for consumers. As was highlighted in the inquiry, there is the danger that individuals in some states might be disadvantaged depending on the particular state that applies to their action.

9.6 While state and federal governments have convened numerous meetings to address the affordability and availability of insurance – with a view to a nationally consistent approach, the government has been unable to ensure that the end products were consistent. As a result, there is a patchwork quilt of reforms across the country, which the insurance industry is using as an excuse to justify their reluctance to reduce premiums. These inconsistencies will provide little insurance relief to the community, but also make the task of preventing any future 'forum shopping' more difficult.

9.7 The reason that the current reforms have been implemented or proposed is to encourage insurers to re-enter the market, acknowledging that in recent years the public liability and professional indemnity classes of insurance have been unprofitable at times.

9.8 The recent ACCC Monitoring Report: Public liability and professional indemnity insurance dated July 2003, provides an insight into the performance of the industry during the last year and while there are some limitations on the information that the report provides, it suggests that insurers have returned to profitability in both classes of insurance.

9.9 The ACCC report suggests that insurers typically earn substantial income from long-tail classes of insurance as premiums are invested before paying out claims. While noting that the ACCC monitoring did not look at future inflation of claims and investment returns or overall capital position of insurers, it estimates that the underwriting performance of public liability & professional indemnity insurance has improved in 2002. Both classes of insurance estimate a return to profitability.

9.10 In general, while the Australian Democrats do not believe that there has been sufficient justification for the large-scale limitations that have been placed on individuals' ability to take legal action, we understand the need to prevent forum shopping. The Bill in its current form will potentially have a huge impact on consumers and given there is no evidence that Part V Division 1 has been used to bypass tort law, actions would be best limited rather than abolished. Were the Bill to proceed unamended, there is the danger that the high standards and accountability that the TPA currently commands will be undermined and consumers, already unable to guarantee their long term financial and medical needs if injured, would be further and unnecessarily disadvantaged.

10.0 Recommendations

10.1 The Australian Democrats oppose the Bill in its current form.

Senator Aden Ridgeway **Senator Andrew Murray**

Appendix 1

Submissions Received

Submission Number	Submitter
1	Insurance Council of Australia
2	Australian Plaintiff Lawyers Association (APLA)
3	The Australian Consumers' Association (ACA) and The Consumer Law Centre Victoria (CLVC)
4	Law Council of Australia
5	The Treasury
6	Australian Medical Association Limited (AMA)

Additional information received

1. Additional information received from Law Council of Australia
2. Additional information received from National Product Liability Association (NPLA)
3. Additional information received from Australian Competition & Consumer Commission
4. Additional information received from Law Council of Australia