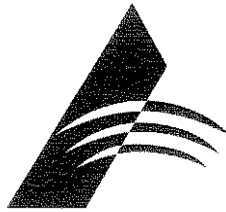

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10 July 2003

The Secretary
Senate Economics Legislation Committee
Room SG.64
Parliament House
CANBERRA ACT 2600

Dear Secretary

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

Thank you for your letter of 1 July 2003 seeking written submissions on the above Bill.

The views of the Australian Competition and Consumer Commission ("the Commission") on the issues the subject of the Bill are generally set out in the Commission's two submissions to the Ipp Review of the Law of Negligence undertaken in 2002. Copies of these submissions are attached.

If the Committee has further queries of the Commission arising from these submissions please contact me.

Yours faithfully

Robert Antich
General Manager
Compliance Strategies Branch

SUBMISSION

TO THE

PRINCIPLES BASED REVIEW OF THE

LAW OF NEGLIGENCE

AUGUST 2002

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INTRODUCTION

On 2 July 2002 the Commonwealth Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, announced a Panel to review the law of negligence and the Terms of Reference of the Review.

Items 4, 4(a) and 4(b) of the Terms of Reference require consideration of aspects of the Trade Practices Act 1974 ('the Act') and Item 5 deals with limitation periods.

The Commission's submission addresses matters relevant to Items 4, 4(a), 4(b) and 5 of the Terms of Reference.

PART 1: EXECUTIVE SUMMARY

The Commission is aware, through its recent work on the March 2002 and current Insurance Industry Market Pricing Reviews, and through matters being discussed in the public domain, of the current problems associated with the provision and pricing of certain insurance. Clearly, government and community initiatives are required.

However, the Commission is concerned that amending the Trade Practices Act 1974 ('the Act') either:

(a) in the manner currently proposed by the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 ('Recreational Services Bill'); or

(b) to limit the operation of other consumer protection provisions of the Act, particularly section 52;

will result in the risks of recreational and other activities being inappropriately allocated to consumers.

Recreational Services Bill

Section 68 of the Act currently renders void any contractual term (for the supply of goods and services to a consumer) that excludes, restricts or modifies the warranties implied by the Act. In the context of recreational services, these implied warranties allocate risk (to suppliers) in a manner that minimises the combined cost of 'accident' prevention and 'accidental' harm.

The proposed section 68B (in the absence of countervailing measures) may well increase these combined costs. This is because the effects of the proposed section 68B are likely to include:

- an increased incidence of accidents causing death and personal injury;
- related, foregone production; and
- an encouragement to overproduce recreational services covered by the amendment relative to other goods and services in the economy.

If an amendment substantially identical to section 68B is to be made, the Commission considers that an appropriate balance should be struck between consumer protection and supplier certainty. In the Commission's view, this balance could be achieved by allowing suppliers to avail themselves of the section 68B exclusion only if:

- suppliers are still required to exercise a basic level of skill or care in supplying recreational services;
- suppliers submit to a regime of enhanced safety regulation; and
- suppliers provide adequate disclosure to consumers of the risks associated with use of their services.

Clearly, adequate disclosure about all relevant risks is vital to allow consumers to make informed choices about risk.

Other changes

Of particular importance to the protection of consumers is section 52, which prohibits misleading or deceptive conduct by corporations in trade or commerce. Section 52 is not co-extensive with the law of negligence but is concerned with the conduct of a corporation towards persons with whom it has dealings of a trading or commercial character.[1] It is the Commission's view that the norm of commercial conduct espoused in section 52 should remain applicable to all situations and conduct currently covered, including those which result in personal injury and/or death.

In the context of inherently risky recreational activities, it is particularly important that section 52 be maintained in order to encourage truthful disclosure of risks. For example, misleading or deceptive advertising about the safety of a recreational service may contravene section 52.

A consumer who suffers personal injury caused by a breach of section 52 is able recover damages under section 82 of the Act. Further, the Court may make remedial orders under section 87. Both of these remedies are necessary components of a fully functioning consumer protection regime.

Limitation periods

In relation to time limits, the Commission takes the view that a limitation period of three years may be inadequate for claims for personal injury and / or death resulting from breaches of the consumer protection provisions of the Act. However, if a shorter limitation period is proposed for personal injury damages actions under section 82, so as to bring the applicable limitation period in to line with negligence-based state regimes, a facility for extension of that limitation period should also be proposed, in line with negligence-based state regimes.

---

1 *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) ATPR 41-022

PART 2: GENERAL AND ECONOMIC OVERVIEW OF THE TRADE PRACTICES ACT 1974

2.1 The Commission – its role and responsibilities

2.1.1 The Trade Practices Act 1974

The objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and protection of consumers.

2.1.2 The Commission

The Australian Competition and Consumer Commission is an independent statutory authority with responsibility for ensuring compliance with, and enforcement of, the Act.

The Commission was established in November 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority. The Commission has offices in all capital cities and in Townsville and Tamworth.

2.1.3 The Commission's role

The Commission has a significant role in the administration of competition and consumer protection policy in Australia.

The Commission is the only national agency dealing generally with competition matters and the only agency responsible for enforcing the Act and associated State and Territory legislation.

The Act applies to Australian businesses and regulates the conduct of Australian businesses by proscribing unacceptable conduct. Part V of the Act contains a number of important consumer protection provisions.

In fair trading and consumer protection the Commission's role complements the primary consumer protection role of state and territory consumer affairs agencies, which administer mirror legislation (Fair Trading legislation) in their jurisdictions.

2.1.4 The Commission's objectives

The Commission's objectives include:

- securing compliance with the Act by responding to complaints and inquiries and by observing market conduct and initiating action when appropriate;
- fostering competition, fair trading and protection of consumers by taking initiatives to overcome market problems; and
- informing the community at large about the Act and its specific implications for business and consumers.

The functions conferred on the Commission under section 28 of the Act include examining and reporting on Australia's consumer protection laws. The Commission also has the function to conduct research in relation to matters affecting the interests of consumers and to make known, for the guidance of consumers, the rights and obligations of persons under Australian consumer protection laws.

This review provides an important opportunity for the Commission to comment on aspects of Australian consumer protection law and its interaction with the law of negligence.

2.1.5 The Commission's powers

A key role of the Commission under the Act is as an enforcement agency.

In this role, the Commission may bring civil proceedings for alleged contraventions of the Act, including proceedings in relation to a number of provisions in Part V. In doing so, the Commission can seek remedial orders such as injunctions, corrective advertising, community service and reimbursement for losses incurred. The Commission may also bring actions in the Federal Court for breaches of the provisions relating to safety standards, information standards and bans, and may seek injunctions and other orders.

The Commission may also bring representative actions (under section 87(1B)) for contraventions of the provisions of Parts IVA, IVB, V and VC of the Act, seeking compensation for persons identified as having suffered damage as a result of the breach and who would otherwise have had to bring action on their own behalf.

In respect of most of the provisions referred to, the Commission shares its right to take legal action under the Act with private parties. However, the Commission may not bring actions, representative or otherwise, for consumers in contract disputes involving implied conditions and warranties (Divisions 2 and 2A of Part V). Proceedings in reliance on these provisions must be brought by the consumers themselves.

2.2 Provisions of the Act covered by Items 4 & 5

Items 4, 4(a), 4(b) & 5 of the Terms of Reference focus on the consumer protection provisions found in Part V of the Act and the Enforcement and Remedies provisions found in Part VI of the Act. In particular: sections 68, 68A and 74 (Part V, Div 2); sections 52 and 53 (Part V, Div 1); and sections 82 and/or 87 (Part VI) are relevant to these Items.

Set out below is a summary of the above-mentioned provisions.

2.2.1 Sections 68, 68A & 74

- Part V Division 2 implies certain conditions and warranties into consumer contracts. Most relevant here are the warranties implied (via section 74) into a contract for the supply of services, that those services will be rendered with due care and skill and that they be fit for their purpose.

- 'Services' are defined in section 4 to include 'a contract for or in relation to … the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction'.

- 'Consumer' is defined in section 4B. A consumer, who can be either an individual or a business, includes someone who acquires goods or services or a type normally bought for personal or household use, whatever they cost, or any other type of good or service costing $40,000 or less.

- Under section 68 a supplier may not exclude, restrict or modify the statutory conditions and warranties (other than in the limited way permitted by section 68A). Any term of a contract which attempts to do so will be void.

- Under section 68A, a supplier may limit its liability to, for example, repair or replacement or the value of supplied goods or services, in certain circumstances. However, liability cannot be limited in relation to goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. Also, section 68A(1) will 'not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract' (section 68A(2)). Section 68A(3) provides criteria for the Court to consider in determining what is 'fair and reasonable', including the strength of the bargaining positions of the parties and whether the buyer knew of or ought reasonably to have known of the existence or extent of the term.

- Remedies for breach of an implied condition or warranty include private actions by a consumer in a court of competent jurisdiction. Damages under the Act can not be claimed in relation to a breach of these provisions.

- The Commission does not 'enforce' Division 2 Part V . However, the Commission can institute proceedings for 'misleading and deceptive conduct' and/ or 'false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy', where such conduct or representations are capable of contravening sections 52 or 53(g) of the Act.

2.2.2 Section 52 & 53 (and 51A)

- Section 52 generally proscribes misleading conduct in a commercial context.

- In order to establish a section 52 contravention, elements that ordinarily need to be shown are:
  - a corporation;
  - engaging in conduct;
  - in trade or commerce;
  - that is misleading or deceptive.

- In some circumstances silence can amount to misleading or deceptive conduct. While 'mere silence' cannot amount to misleading or deceptive conduct, once all

the relevant circumstances are analysed, the 'silence of the alleged contravener may be the critical matter upon which reliance is placed to establish misleading or deceptive conduct' (*Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) ATPR 46-010 at 53,048).

- Generally, if a corporation has engaged in misleading or deceptive conduct, a disclaimer or liability exclusion clause will not effectively limit a corporation's liability. This is particularly the case in relation to misleading or deceptive conduct which precedes the signing of a contract containing such a clause.

- The parameters of section 52 mean that it is not unduly favourable to bringing actions for damages for personal injuries, and this appears to be borne out by the Commission's experience and that of private litigants. Section 52 is confined in its operation (*Concrete Constructions (NSW) Pty Limited v Nelson* (1990) ATPR 41-022).

- Section 53 prohibits corporations from making in trade or commerce, in connection with the supply or possible supply of goods or services, false or misleading representations concerning, for example, the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy (section 53(g)).

- Interpretations of 'false' have included 'purposely untrue' and 'contrary to fact'.

- Section 51A states that where a corporation makes a representation (in this case of a kind likely to contravene sections 52 and 53) with respect to any future matter and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading. The corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation. An example of the application of the NSW Fair Trading Act's section 51A equivalent can be found in *Northern Riverina Council v Petts* (No 2) (2002) NSWCA 89 (7 March 2002).

2.2.3 Sections 82 & 87

- A person may recover damages under section 82 of the Act if it is proved that the person's loss or damage was 'by' conduct of another person in breach of the Act, for example, sections 52 or 53.

- Under section 87 the Court may make remedial orders if it finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person in breach of the Act.

- Under section 87(1A) the Court may make remedial orders on the application of a person who has suffered or is likely to suffer loss or damage by conduct of another person in contravention of the Act, or on the application of the Commission in accordance with section 87(1B).

- Section 4K of the Act states that a reference to 'loss or damage' includes a 'reference to an injury' and that a reference to an amount for any loss or damage includes a reference to damages in respect of an injury.

- An applicant's loss or damages will not be reduced because the loss or damage could have been avoided by the exercise of reasonable care on the applicant's part (*Henville v Walker* (2001) ATPR 41-481). It is not necessary that a contravention of the Act be the sole cause of an applicant's loss or damage. As long as the respondent's breach materially contributed to the loss or damage suffered, it will be regarded as the cause of the loss or damage suffered even if other factors or considerations having played a more significant role in producing the loss or damage.

- A claim for damages may also be brought against any person 'involved in the contravention' in the sense described in section 75B of the Act.

- An extension of the time limit for bringing an action for damages under section 82 for a contravention of Parts IV, IVA, IVB and V to six years after the day on which the cause of action has accrued, became effective in December 2001. Under section 87(1CA) a six year time limit also governs applications for orders under section 87(1A) for a contravention of Parts IVA, IVB, V or VC.

- The cause of action established by section 82 will accrue when loss or damage is suffered as a result of the breach of the Act.

2.3 Economics of consumer protection and negligence law

Society has an interest in the proper management of risk. Proper management of risk will occur when responsibility for risk is allocated in a manner that minimises the combined costs of accident prevention and harm. The latter costs can, in the context of the provision of recreational services, take the form of a higher incidence of (supplier preventable) death and personal injury. It is the minimisation of the combined costs that ultimately matters to society because these costs detract from efficiency and welfare.

Contracting mechanisms alone may not be sufficient in ensuring that risk gets properly allocated to the party or parties that are best able manage the risk and in the process minimise costs.

These considerations provide a strong justification for section 68 of the Act, which renders void any term of a contract of supply that excludes, restricts or modifies the warranties implied by virtue of the Act.

What follows is a basic introduction to some fundamental concepts in economics that are relevant to consumer protection law and develop in greater detail the ideas summarised here. An understanding of these concepts is necessary in order to be able assess the proposed section 68B in terms of efficiency considerations and whether the proposed amendment will or can lead to an efficient allocation of risk between the parties to a contract for the supply of recreational services.

2.3.1 *The Coase theorem*

The Coase theorem has proven particularly useful in analysis of issues relating to the allocation of risk under tort or contract. Though there has been a lively debate on how the Coase theorem should best be interpreted[2], for present purposes the theorem can be summarised as follows[3]:

> *'the initial allocation of legal entitlements does not matter from an efficiency perspective as long as transaction costs are negligible.'*

What is meant by 'legal entitlements' in this case can be anything from a property right or a right to sue in tort to whatever risks and responsibilities are conferred by a contract. 'Transaction costs' is interpreted broadly to encompass all the costs associated with a transaction, including costs associated with writing contracts, obtaining information, and engaging in exchange. Imperfect information on the part of one of the parties may inhibit the formation of transactions and therefore should also be placed under the heading of transaction costs.

The Coase theorem holds that if transaction costs are negligible, then regardless of how legal entitlements are allocated, parties can bargain over these legal entitlements just as they can bargain over any other goods and services to arrive at a mutually beneficial outcome. Under such ideal conditions, the initial allocation of legal entitlements does not matter, other than by means of its impact on the starting distribution of wealth. The principle can be seen as an extension of the basic principle in economics that if there are mutually beneficial gains from trade to be made, then they will be made. The concept, in other words, centres on the ability of the parties to whom initial bundles of wealth (including opening legal entitlements) have been allocated, to trade their way to a re-allocation of assets, including entitlements, which leaves no scope for further gains from trade – that is, what economists refer to as an exchange equilibrium.

Though arguably a tautology, the Coase theorem is a very useful tautology because of what it has to say when its conditions for efficiency are violated, that is, when transaction costs are not negligible and as consequence mutually beneficial bargains are likely to be inhibited. In such cases, the initial allocation of legal entitlements *does* matter. This finding is of direct relevance to the design of tort and contract law.

2.3.2 The economics of accidents and the optimal allocation of risk

From an economic perspective, the importance of tort and contract law lies in the way that these laws allocate risk between parties. The resulting allocations of risk may have enormous consequences for welfare and efficiency, in many cases precisely because transaction costs are far from negligible.

A pre-eminent illustration of these considerations can be found by examining the law of negligence as restated by Judge Learned Hand[4]. As usually understood, a party in an

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[2] The idea behind the Coase theorem was first set out in Coase, R. 1960, 'The problem of social cost', *Journal of Law and Economics* 3: 1-44.

[3] See *The New Palgrave Dictionary of Economics*, Stockton Press, New York, 1998, Volume 1, p. 457.

[4] United States vs Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947).

accident is found to be negligent if his or her conduct does not meet a 'reasonable person' standard. Justice Learned Hand restated the negligence rule using the following now famous formula[5]:

> *'A party is negligent if there is a precaution he could have taken to reduce the probability of the accident such that the cost of the precaution was less than the reduction in probability times the cost of the accident.'*

Posner notes that what is important in this formulation is the way in which it allocates liability for the accident to the party that, according to the inquiry set out above, can be shown to be the party that could have most efficiently avoided the accident[6].

Calabresi, another pioneer in the economics of accidents, argued that liability should be determined by examining[7]

> *'... which of the parties to the accident... is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. The question to the court reduces to a search for the cheapest cost avoider.'*

According to the Coase theorum, the initial allocations of legal entitlements (or legal burdens[8]), have no consequences for efficiency where transaction costs are negligible. However in the situation of negligence, the initial allocations matter precisely because it is not meaningful to talk about efficient bargaining between parties to an accident before any accidents occur. Instead what happens under a negligence rule, for instance, is that the legal system holds liable for damages payable to the injured party, the party that is found to be the most efficient avoider of the accident that has occurred.

The aim is to prevent such accidents occurring in the first place by providing incentives for each person, to invest, according to the specific costs and benefits he or she faces, in precautions up to the point where the marginal benefits from such investment in reducing the incidence and costs of possible accidents equal the marginal costs.

In other words, precautions are the inputs that can be employed ex ante to avoid accidents or to minimise the impacts of an accident. Thus, one can speak of efficient precautions as the level of expenditure on accident prevention and/or impact reduction that minimises the summed costs of prevention and harm.

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[5] As restated at p. 198 of Friedman, D. 2000, *Law's order: What economics has to do with laws and why it matters*, Princeton University Press.

[6] See p. 180 of Posner, R. 1998, *Economic analysis of law*, 5th edition, Aspen Law & Business.

[7] Calabresi, G. and J.T. Hirshoff 1972, 'Towards a test for strict liability in torts', *Yale Law Journal*, 81(6): 1060.

[8] For each legal entitlement there is a corresponding legal burden.

It is this minimisation of the summed costs of accident prevention and resulting harm from accidents that occur that ultimately matters to society because these costs detract from efficiency and welfare.

It is because of these costs that society has an interest in the proper management of risk including by means of allocating responsibility for risk in a way that minimises its costs[9]. Negligence law and product liability law are both different ways of achieving this aim in different contexts. Yet another is through the insertion and entrenchment of implied warranties into contracts between consumers and suppliers of goods and services through such means as section 68 of the Act. This is the subject of Part 3 of this submission.

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[9] Efficient risk management can take four forms – avoidance of the risk inducing activity; prevention of the risk by devoting more resources to safety devices and precautions; shifting the risk by paying someone else to assume it; and distributing the risk, for instance by embedding it into the production costs of the relevant good or service. See p. 231 of Moss, D. 2002, *When all else fails: Government as the ultimate risk manager*, Harvard University Press.

PART 3 ADDRESSING ITEMS 4, 4(a), 4(b) AND 5 OF THE TERMS OF REFERENCE

Items 4, 4(a), 4(b) and 5 of the terms of reference are as follows:

> '4. *Review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2002) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk).*
>
> *In conducting this inquiry, the Panel must:*
>
> *(a) 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; and*
>
> *(b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.*
>
> 5. *Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons.*
>
> *In developing options the panel must consider:*
>
> *(a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and*
>
> *(b) establishing the appropriate date when the limitation period commences.'*

This submission addresses Items 4, 4(a), 4(b) and 5 of the terms of reference as follows.

- Section 3.1 outlines the Recreational Services Bill and the law of negligence.
- Section 3.2 considers whether the Bill contains appropriate consumer protection provisions, and if not, the extent to which the Act should be further amended.
- Section 3.3 considers the extent to which further amendments are required to prevent individuals commencing actions in reliance on the Act to recover compensation for personal injury and death.
- Section 3.4 considers the issue of 3 year limitation periods.

3.1 Section 68, the Recreational Services Bill and the law of negligence

3.1.1 Section 68 and the Recreational Services Bill

Section 68 provides that any clause purporting to exclude, restrict or modify the operation of certain warranties or accrual of certain rights conferred by the Act, is void. Section 68A restricts the operation of section 68 in very limited circumstances.

On 28 June 2002 the Government introduced into the House of Representatives the Recreational Services Bill which will effect the operation of section 68 of the Act by introducing a new section 68B.

The proposed section 68B allows corporations supplying 'recreational services' to exclude, restrict or modify the extent of their liability for breach of warranties implied by section 74 of the Act, in so far as the exclusion, restriction or modification limits liability for personal injury or death. The proposed section will apply to contracts entered into after the commencement of section 68B.

The Explanatory Memorandum which accompanies the Recreational Services Bill states:

> *'The amendment contained in this Bill will permit self assumption of risk by individuals who choose to participate in inherently risky activities, and will allow them to waive their right under the TPA to sue the business providing the activity, should they suffer personal injury as a consequence of the service provider's failure to supply the services with due care and skill.'*

However, the definition of 'recreational services' in the Recreational Services Bill would appear to encompass activities other than those which would commonly be regarded as 'inherently risky'.

The proposed section defines 'recreational services' as follows:

> *'recreational services means services that consist of participation in:*
> *(a) a sporting activity or a similar leisure-time pursuit; or*
> *(b) any other activity that:*
> *(i) involves a significant degree of physical exertion or physical risk; and*
> *(ii) is undertaken for the purposes of recreation, enjoyment or leisure.'*

The definition of 'recreational services' is therefore very broad and covers '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'. Arguably, it would cover activities as diverse as parachuting, skiing, horse-riding, aerobics, swimming and dancing.

3.1.2 The law of negligence and corresponding Trade Practices Act provisions

Item 4 of the terms of reference requires the Panel to review the interaction between the Act (in particular the Recreational Services Bill) and the common law principles applied in negligence, particularly with respect to waivers and voluntary assumption of risk.

The following is an overview of the principles of negligence and the various provisions of the Act, with particular reference to the position of voluntary assumption of risk and waivers.

The law of negligence applies to everyone and all almost activities but lacks uniformity across Australia. Conversely, the application of the Act is restricted (for example, section 52 can only regulate conduct in trade or commerce) but applies uniformly across Australia.

Liability in negligence depends on the circumstances giving rise to a duty of care and a failure to exercise reasonable care. Liability for breach of sections 52 and 53 does not require these elements. Proof of a contravention of those provisions generally requires a finding that a corporation, in trade or commerce, engaged in misleading or deceptive conduct or made false or misleading representations.

Contributory negligence reduces damages for negligence. Generally, there is no such reduction available for damages payable for contravention of the Act.

Voluntary assumption of risk is a complete defence to an action for damages in negligence. For a defence of voluntary assumption of risk to succeed, a defendant must show that the plaintiff consented to the risk of harm which did in fact occur. The defence consists of three elements:

- precise knowledge of the risk by the plaintiff;
- proper understanding and appreciation of the risk by the plaintiff; and
- voluntary participation by the plaintiff in the 'risky' activity.

However there is no equivalent concept in respect of contraventions of the Act. Consumers do not 'voluntarily' assume the risk that they will be misled by corporations. Nor currently can they 'voluntarily' assume the risk that they will be supplied with defective goods or services.

Liability in negligence can be avoided by waivers or disclaimers in contracts or otherwise. A disclaimer may be effective in limiting or excluding liability for negligence:

- by rendering it unreasonable for a party to rely on information given to that party;
- by showing that the party voluntarily assumed the risk of undertaking a particular activity.

A disclaimer will only be effective to limit or exclude liability to a party where the party is aware of the disclaimer or where the disclaimer is sufficiently prominent that the party should reasonably have been aware of it. The more prominent the disclaimer and the more clearly it conveys the limitation or exclusion of liability, the more likely it is to be effective. In some circumstances a disclaimer might need to be given in a language or languages other than English.

In the law of negligence, a disclaimer will not generally be effective in relation to children or to persons who have no effective choice in relation to the matter covered by the disclaimer. Also, the scope of a disclaimer will be construed by the courts as narrowly as the terms of the disclaimer permit.

By way of contrast, disclaimers are rarely used effectively with respect to liability under the Act. See also the comments regarding the use of disclaimers in relation to the Act in section 2.2.2 of this submission.

3.2 Commission concerns about adequacy of consumer protection measures in Recreational Services Bill

This section draws upon the economic analysis of consumer protection law and the comparison of the Act with the law of negligence, to evaluate the respective merits of section 68 and the proposed amendment. A number of recommendations are then made.

3.2.1 Section 68 and the proposed amendment

In its present form, section 68 is a statutory interposition into bargaining between the consumer and supplier so as to make the supplier liable for any costs to the consumer arising from a breach of the implied warranties[10]. It is important to note that section 68 effectively prevents consumers from surrendering the protection given by the implied warranty in return for a lower price for the service[11].

To use the language and concepts introduced in Part 2 of this submission, section 68 reflects a judgement that the supplier of recreational (and other) services is the one best placed to manage the risks arising from the supply of those services to the consumer and in so doing minimise the costs of accidents arising from participation in recreational services.

By contrast, the effect of the proposed section 68B is to allow suppliers and consumers to agree terms in contracts for recreational services that alter or exclude the implied warranties.

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10 These warranties include warranties to supply with due care and skill, and that the services are reasonably fit for the purpose.

11 One exception to the rule is s. 68A which allows corporations to limit liability in certain ways for particular goods and services. Otherwise there is a general entrenchment of implied terms and warranties into contracts for the provision of goods and services.

The next section evaluates the regulatory regimes provided for in section 68 and under the proposed amendments.

3.2.2 Risk allocation, section 68 and the Recreational Services Bill

The efficiency, from a risk allocation perspective, of section 68 depends on the plausibility of the following assumptions:

- that the supplier of recreational services is the more efficient bearer and manager of risk; and
- that transaction costs and informational problems are sufficiently high 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.

Based on these assumptions, the current regime leads to an efficient allocation of risk because section 68 not only:

- imposes an implied warranty on the corporation supplying the services (reflecting the judgement that the supplier is best placed to bear risk) but;
- prevents any contracting out of the implied warranty.

The following discussion considers these assumptions.

<u>Supplier as efficient bearer of risk</u>

This assumption holds true for the vast majority of cases where recreational services are provided. Even if it does not hold true for a minority of cases[12], the benefits from making exceptions for these cases may be exceeded by the costs.

Suppliers of recreational services like equestrian facilities or indoor rock climbing are arguably better placed to manage the risks involved in these activities than their consumers. Information and control are important both from the perspective of efficient bearing of risk and achieving an efficient level of precaution because the greater one's information and/or control, the more efficient it is for one to bear risk and the responsibility for implementing precautions.[13]

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12 For instance extreme sports like rock climbing where some of the participants are highly experienced, and where exposure to risk occurs mainly under the direct control of the participant rather than of any supplier.

13 That the location of superior information matters is in fact the essence of transactions costs. In effect, were achieving and implementing agreements costless, information could always be shifted to the decision-maker. It would, in other words, be no more difficult to move information to decision-makers than to move responsibility for taking decisions to the holder of information. However, in the real world, the frictions associated with achieving and implementing agreements cannot be ignored, and securing truthful revelation of private information is crucial. This must generally be done by shifting the responsibility for taking decisions to those who are best informed as to their consequences.

Suppliers have advantages over consumers in terms of both information about and control over the circumstances encountered in provision of recreational services that lead to a heightened risk of accidents causing death or personal injury. For instance, many of these suppliers are themselves experienced in the recreational services they provide or employ people with such experience. Relevant too is the fact that they choose to provide the service – unlike many public utilities, there is no 'obligation to serve' that attaches to these services – and in considering whether to do so, they have both the opportunity and generally the means to carefully determine the risks involved. They can formulate procedures based on their experience and knowledge that provide for efficient levels of precaution and require consumers to abide by these procedures as a condition of service.

By contrast, some proportion (though not all) of the users of recreational services are likely to be beginners. There may be some more experienced users, some of whom may even be as experienced as the proprietor in the relevant activity such as canoeing or rock climbing. However, it is nonetheless valid to base rules on a general presumption that is not applicable all of the time if the associated costs of rules based on the alternative presumption[14] are too high.

In the case of beginners who use recreational services, even if they have well-defined ideas of preferred safety levels, because they have little knowledge of the activity involved they may not know how to adjust their behaviour accordingly to minimise the risk of accidents. Nor would they have a clear idea about how much risk the activity they are engaging in really involves in order to make the necessary calculations. In other words, they are not, from the perspective of social efficiency, the most efficient accident avoiders.

Many consumers of recreational services do not purchase these services on a frequent or regular basis. Instead, purchase is occasional and it is likely that purchases are not made often enough for the consumer's imperfect information about the risk characteristics of the service involved to be properly assimilated and assessed over time as would be the case with, for instance, common household products. Moreover, the services are likely to account for a very small share of any individual consumer's outlays, and hence few individuals would have an incentive to carefully evaluate the risks involved and consider the best means of responding to them.[15] Finally, even if each individual did have incentives to engage the costs involved in identifying and monitoring the risks involved, it does not follow that it would be efficient for them to do so – since this would require many individuals to duplicate these costs, whereas if they are engaged by the service supplier, cost duplication would be avoided.

The nature of the risks involved are particularly difficult for the user to assess properly because the relevant risk to be managed for the aim of efficiently avoiding accidents is generally one of extremely low probability (at least for any individual user), but with

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14 Namely that all users of the service are experienced.

15 Note that there is an obvious contrast here to the position of the supplier. For the supplier, the income associated with the service is of clear significance, so that the supplier will generally have an incentive to carefully assess the costs – including those arising from risk – that supply involves.

significant costs to the user if it eventuates. For instance, the risk of someone being thrown from a horse at a particular angle and at a sufficiently high speed to have his or her neck broken may be extremely low but if it eventuates the accident victim suffers a very high cost in terms of reduced amenity of life and earning capacity. However exposure to 'low probability but high cost' risks may by their very nature be highly infrequent and such risks are not likely to be taken account of sufficiently by consumers[16].

Another important aspect of risk management is through the purchase of insurance services. The importance of insurance lies in the fact that it is essentially a means of:

- shifting some of the risk to third parties able to diversify this risk; and
- credibly committing to or being monitored by the insurer to ensure that the efficient level of precautions is adhered to.

Insurance sets explicit market prices on risk, and hence faces those who would engage in risky activities with an objective estimate of the risk-related costs those activities involve. It is therefore a crucial element in providing individuals with market signals for efficient decisions about the level of exposure to risk.

If, as is suggested above, efficient management of the risks associated with supply of recreational services to the general public involves some optimal mix of efficient precautions taken by the participating parties (which is essentially a form of self-insurance) and purchase of insurance services which offload some of these risks onto third parties, then the superiority of the supplier as efficient risk manager and accident avoider is even more manifest. The supplier's superiority in risk management extends to the greater incentive of the supplier to purchase efficient levels of insurance to manage risks.

This is because not only is the consumer not likely to take the efficient level of precautions for the reasons already discussed, but for much the same reasons the consumer may have little or no incentive to take out insurance to manage some of the associated risks. More specifically, the infrequent nature of the use and the very low probability of the risk eventuating will mean that, for any single consumer, the premium loading[17] built into the price of insurance will be high relative to the

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16 Calabresi argues that even if consumers had the data needed to evaluate risk, they might be psychologically unable to do so and cannot estimate rationally their chances of suffering death or catastrophic injury – see pp. 56-57 of Calabresi, G. 1970, *The cost of accidents: A legal and economic analysis*, Yale University Press. An early theoretical study of the tendency of consumers to underestimate risk in the case of product defects can be found in Spence, M. 1977, 'Consumer misperceptions, product failure and product liability', *Review of economic studies*, 44(3): 561-72. Some groundbreaking works that demonstrate peoples' tendencies to wrongly estimate risk and more specifically to either ignore altogether or overweight extremely low probability events are Tversky, A. and D. Kahneman 1974, 'Judgement under uncertainty: Heuristics and biases', *Science* 185 and Tversky, A. and D. Kahneman 1981, 'The framing of decisions and the psychology of choice', *Science* 211.

17 Premium loading is the mark-up in the price of insurance required to reflect the administrative costs involved in insurance provision. A policy that has zero premium loading is one in which the expected payout is no less than the premiums collected. For low probability, low exposure

perceived value of the cover. The fact that social insurance provides de facto universal cover (albeit with low replacement rates[18]) for disability, further reduces individuals' incentives to obtain coverage. At the same time, adverse selection[19] and moral hazard[20] problems are likely to undermine, if not completely rule out, efficient provision of individual cover, further reducing the level of cover individuals will ultimately contract for. As a result, the efficient mix of self insurance and purchase of insurance services is unlikely to be attained if the consumer is made responsible for managing the risk.

None of the above considerations mean that suppliers' incentives to take up insurance are perfect. Rather they suggest that compared to consumers, suppliers will face better incentives to purchase insurance services where the optimal risk management involves a mix of self insurance by efficient precautions and purchase of insurance.

Insurance, it is noted, provides additional incentives for risk management activity. Insurance premiums and ratings provide incentives to ensure that efficient levels of precaution are taken, so as to reduce the number of accidents and thereby benefit from favourable experience rating[21]. Hence, insurance, combined with the efficient precautions taken by the supplier itself as self-insurance, would make for more optimal risk management and accident avoidance.

Transaction costs and information problems frustrate efficient allocation of risk in the absence of entrenched statutory allocation

This section examines the basis upon which the second of the assumptions is founded. The Commission's view is that as transaction costs and informational problems are high, even if the relevant parties were free to bargain about how to allocate risk, risk is unlikely to be appropriately allocated to the supplier.

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events, the premium loading will be high relative to the individual level of expected loss. As a result, even quite risk-averse individuals will forego insurance.

18 Replacement rates are the ratio of cover to loss. In the context of social insurance, these are measured as the expected value of payouts relative to the expected value of foregone income, where foregone income includes the loss of non-monetary welfare associated with the loss.

19 Adverse selection refers to the tendency of high risk individuals to expand their cover, and low risk individuals to reduce their cover, when the two are faced with a common price for insurance. When it is not possible for insurers to distinguish individuals by the degree of risk they face, adverse selection can make it unprofitable for insurance coverage to be made available.

20 Moral hazard refers to the risk that arises from the incentives insured individuals have to increase their exposure to risk. This incentive occurs when the insurer is not in a position to readily (or at manageable cost) monitor that increase in exposure and increase the insurance premium accordingly. This unremunerated increase in risk is referred to as moral hazard (a 19th century term), in contrast to the natural hazard associated with the underlying risk against which coverage is being sought. When moral hazard is high, the equilibrium level of coverage against risks will be low, at least in terms of coverage by third party insurers.

21 As used here, the term 'experience rating' refers not solely to formalised schemes that link premiums to experienced loss rates but more generally for situations where the insurance premium payable varies with loss rate.

At the outset, the Commission recognises the cumulative relationship of the arguments in previous sections to the arguments presented here. If the conditions for efficient bargaining set out under the Coase theorem were met, it would not matter where the allocation of risk was initially located so long as parties are not prohibited from contracting out of this initial allocation. But by the same token, if the supplier is the most efficient bearer of risk because of the reasons discussed above, it would be equally problematic whether:

(a) the initial starting point was to allocate risk to the most efficient bearer but allow users to contract out of this (which essentially would be the effect of the proposed section 68B amendment on current implied warranties), or
(b) if the default were to assume that consumers bore the risk the moment they entered into contracts with the supplier but parties could bargain to introduce warranties.

Accordingly no distinction will be made between these two cases in the rest of the discussion.

Absent statutory entrenchment of the responsibility of managing risk on suppliers, there are numerous informational[22] and incentive problems that may impede efficient bargaining resulting in the allocation of risk to suppliers where it belongs.

There are numerous problems faced by consumers in assessing the risks associated with provision of recreational services, as discussed in relation to the first assumption. These risk perception problems lead to situations where, even if consumers and suppliers were free to bargain over the allocation of this risk, the risk would likely be shifted to consumers rather than suppliers. Following is a concrete example of the transaction costs faced by each party if bargaining occurs under the proposed section 68B amendment.

On the supplier's side, the supplier may incur some transaction costs from inserting a new term into its contract to the effect that in engaging its service the consumer has waived the implied warranties provided by section 74 the Act, thereby foregoing the right to sue. Against this transaction cost, the supplier derives the benefit of no longer needing to set aside resources to manage the risks of possible accidents to consumers in delivering its services even though it is better placed to do so than the consumer.

On the consumer side, while the user might prefer to continue to have the protection of implied warranties, the user also undervalues the risk involved and therefore undervalues the protection offered. Assume for the sake of argument that the transaction cost faced by the consumer in pressing for reinsertion of the protection is no different from that faced by the supplier in removing the protection from its contract. It is this perceived benefit, based on an undervaluation of the risks to be protected against, that matters to consumers when they bring their preferences to the 'bargaining

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22 As noted above, these informational problems are broadly classifiable under the heading of transaction costs.

table', not the actual benefit to them and ultimately to society of keeping the protection[23].

One can therefore expect the outcome of the bargaining between - suppliers on the one hand, who have strong incentives to shift risks back onto consumers, and consumers on the other, who undervalue the protection of the implied warranty - to be suboptimal. That is, the outcome will reflect the lower than optimal weighting placed by both parties on assigning the risk to suppliers and will thereby result in the allocation of risk management responsibilities not to the supplier but to the consumer.

There is an additional factor which may prove significant in its impact on the bargaining outcome. This is the 'externalisation' effect on consumers of social insurance payments provided by government such as disability pensions. Essentially, consumers know that if they are disabled as a result of accidents suffered in the course of using recreational services they can, as a last resort, access these social insurance payments. Because consumers can externalise some of the resulting costs of accidents onto taxpayers in this way if accidents occur, they will have little incentive to 'invest' in bargaining to ensure that responsibility for risk is correctly allocated to suppliers through warranties[24].

Another factor relates to the difference in scale and in stakes between consumers and the supplier. As emphasised above, each individual consumer is likely to only make occasional use of the relevant services, and to have a very low total level of exposure to the risks the activity involves. As a result, each such individual will rationally devote few resources to assessing proposed contract terms.[25] Even if generally available monitoring reports became available (say from consumer associations), there must be questions about how great their take-up would be. As a result, even optimally informed consumers may not pay the requisite degree of care in deciding whether to accept contracts which shift risk on to them. The consequence will be that suppliers will shift risk to consumers, even though doing so causes efficiency losses.

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23 It is not necessary to think of the likely bargaining process in this case as literally a face to face bargain. Most business terms and conditions do not really arise as a result of direct bargaining. Rather there is implicit bargaining, for instance on a take it or leave it basis. Thinking of the likely bargain along these lines yields the same result. For instance, while some businesses would regard the transaction costs of removing section 74 protection from their contracts as minuscule compared to the implicit savings they get via the resulting limitation of liability, would they be out-competed by firms that keep such protections and win over more risk-averse consumers? If, as has been argued, consumers undervalue the risks involved in engaging in recreational services then the answer is no. Because these risks are undervalued even by the risk-averse consumers, there will be no incentives for businesses to adopt the latter strategy (which also involves charging higher prices relative than businesses that no longer need to make provision for liability claims) or no prospect that businesses adopting such a strategy would either survive or persist in such a strategy. The equilibrium outcome will be for all businesses not to offer contracts with warranties.

24 This is even more so because these warranties are possibly at the expense of paying substantially higher prices for recreational services.

25 Moreover, from an efficiency perspective, it would be undesirable for there to be widespread duplication of monitoring costs, when placing responsibility for risk on the supplier would allow that duplication to be avoided.

3.2.3 *Welfare effects of amended regulatory regime*

Previous sub-sections suggested that the removal of the statutory entrenchment of implied warranties to consumers of recreational services facilitated by the proposed section 68B amendment will tend to result in the allocation of risk back to consumers. Given that consumers are less efficient risk-bearers than suppliers, this may lead to the following adverse welfare effects.

(i) It may lead to a higher level of accidents causing death or personal injury. Because suppliers might no longer face liability for death or personal injury, assuming that the consumer has also waived rights in negligence, and the responsibility for managing risks associated with recreational services falls onto consumers, suppliers will have less incentive than at present to minimise the risk of accidents occurring at their establishments. At the same time, because suppliers might not be liable for accidents leading to death or personal injury, some of the expenditure on personal injury that, under the current system, can be covered by damages payments will be covered by social insurance payments instead. In other words the amendment may lead to:

- an increase in the occurrence of accidents resulting from risky activity (due to a lower level of appropriate precautions being taken where costs are borne by consumers who underestimate risk) with the resulting cost increase borne by social insurance; and
- a transfer of certain accident costs (for example, costs of treatment and lost earnings) resulting from accidents from damages awarded to the social insurance system.

(ii) The outcome as described above also represents an implicit subsidy of the covered industries (in this case recreational service industries) by social insurance payments. This is because the provision these industries would otherwise have had to make for possible liability claims would now be covered by claims made by accident victims on the social insurance system. This subsidy has flow-on effects because other industries do not enjoy the same advantages. This situation will encourage production of services in the industries covered by the section 68B amendment above the level that would yield further benefits to society. In other words, there is likely to result an overproduction of recreational services relative to production in other industries where the additional resources that have been allocated to production of recreational services would have yielded higher valued uses.

(iii) The incidence of accidents which could have been prevented if appropriate levels of precaution were taken by the parties best placed to manage these risks are likely to increase above efficient levels. The result is a loss of surplus to society through foregone production resulting from the death and personal injury of accident victims.

3.2.4 Recommendations

The Commission understands current concerns regarding the potential anomalies between consumers being able to waive their right to sue suppliers in negligence while on the other hand having a continued availability of the right to sue in contract relying on the terms implied by section 74 of the Act. However, an amendment which allows consumers to waive their rights under section 74 should also ensure an appropriate balance between the safety of consumers and legal certainty for suppliers.

If the decision is made to proceed with the section 68B amendment, then measures should be taken to mitigate some of the likely adverse consequences for individual and societal welfare discussed in this submission. These consequences predominantly arise from the inadequate incentives on the part of suppliers to take precautions if risks are allocated to consumers who undervalue the risks associated with the use of recreational services.

The Commission considers that a better balance would be achieved between consumers and suppliers by incorporating the following three measures:

(i) ensuring that suppliers must exercise a basic level of skill or care in supplying recreational services;
(ii) ensuring suppliers submit to an appropriate level of safety regulation; and
(iii) requiring that suppliers provide adequate disclosure of the risks of undertaking the recreational activity.

(i) Basic level of skill or care

Most suppliers will want to provide their recreational services in a way which minimises the possibility of injury to consumers. Even though their liability for breach of the section 74 warranty may be restricted and/or prevented, there is the possibility that suppliers will continue to be liable in negligence under State regimes. For example, the South Australian Recreational Service (Limitation of Liability Bill) 2002 states that a provider will be liable to a consumer if the consumer establishes that a negligent failure to comply with a registered code caused or contributed to an injury.

If, then, there is to be the continued possibility of liability for negligence, the Commission believes that there should continue to be liability under section 74 of the Act for those suppliers who fail to supply their services with a basic level of skill or care. Consumers should not be placed in the position of having to check whether the supplier is going to follow basic safety precautions. The practical difficulties in consumers having to make such checks will be great. Although consumers may assume they are aware of the full extent of the risks involved in an activity, it is likely that consumers will assume that the supplier will supply the services with basic skill and care. Although most suppliers will take such precautions, it is possible that there are some who will not, either through inexperience or, for a small minority, through total disregard for consumers' safety.

The Commission therefore believes that section 68B should not operate where a consumer is injured due to a supplier's failure to provide the most basic level of skill and care in the provision of recreational services.

(ii) Increased safety regulation

Safety regulations should be increased up to the levels needed to 'take up the slack' of reduced incentives to suppliers to appropriately manage risk. For instance, safety regulations should take the form of compulsory standards to be met by a supplier who chooses to exclude, restrict or modify liability in accordance with the proposed amendment. Additionally, means would need to be provided of monitoring compliance with these regulations and imposing penalties for breaches that are sufficient to result in an efficient level of deterrence. However, the Commission appreciates the costs and difficulties associated with establishing and maintaining such a system and monitoring compliance.

(iii) Disclosure of risks

Disclosure of the inherent risks of a service and the risks associated with a failure to exercise due care and skill by the supplier should be a condition of reliance on section 68B. The effect of such disclosure would be to increase the amount of information available to the consumer in order to assist the consumer in making an informed choice.

As noted in the comparison of the common law of negligence and the Act in section 3.1.2, in order for the defence of voluntary assumption of risk to operate at common law the plaintiff must be shown to have had a proper understanding and appreciation of the risk he or she is voluntarily assuming. The Commission also notes that if one of the intentions of the Recreational Services Bill is to allow consumers to voluntarily assume risk then the impact of the amendment extends significantly beyond a voluntary assumption of risk as applied in negligence. Under the amendment there is no requirement that consumers are made aware of the risks involved in the recreational services.

As discussed, the non-excludable implied rights under Division 2 Part V operate as a risk allocation mechanism. The risk is placed upon the party most able to manage the risk, the provider of services. The effect of the amendment is to shift this risk on to consumers. It is also possible that if the supplier is not made to assume these risks that there will be a decreased incentive for the supplier to manage the risks appropriately, which may in turn lead to the development of unsafe practices. The importance of a warranty in this respect should not be underestimated, as much as for its economic value as for its consumer protection value.

The Recreational Services Bill imposes no obligation and provides no incentive for suppliers of risky services to disclose risk. In this respect, the Commission does not believe that the Recreational Services Bill contains adequate consumer protection measures which are consistent with the desire to allow consumers to voluntarily assume risk.

If it is to be accepted that consumers should be able to voluntarily assume the risks created by suppliers who do not exercise due care and skill, a further measure of

protection would involve an amendment to section 68B(1) which states that the consumer must be informed by the supplier of the specifics risks and types of injury that could be sustained as a result of a supplier breaching section 74.

Further, general 'exclusion clauses' which allow suppliers to 'opt out' from liability, and which do not take into account the peculiarities and nature of different recreational services are highly undesirable. These clauses, without more, are unlikely to be clearly understood by consumers, and may result in consumers accepting to bear risks that they would not accept were they better informed.

As the Law Council indicated in its Submission to the Heads of Treasuries Insurance Issues Working Party, measures were recently introduced in British Colombia concerning adventure tourism to provide for forms of disclaimer appropriate to particular activities – the same disclaimer could not be used for white water rafting that was used for amateur basketball. The Law Council states:

> *'By recognising that appropriate wording had to be used for the particular activity to be offered, a useful form of consumer protection was provided. In other words, participants were told more about the risks than they might encounter than would otherwise have been the case.'*

The Law Council also suggested that there be accreditation for operators that undertake to observe certain standards of conduct either prescribed by a relevant authority or agreed by the relevant industry or sporting association. Another possibility is that registers of industries caused by failure to exercise due care and skill by the supplier be provided to consumers before they participate in recreational services.

The Commission therefore considers that suppliers of recreational services who wish to rely on section 68B should be able to demonstrate that they disclosed to consumers the nature of the risks of participation in the recreational services.

3.3 Considerations relating to whether it is appropriate to 'prevent' individuals commencing actions in reliance on the Act, including actions for misleading or deceptive conduct, to recover compensation for personal injury and death

The object of Part V of the Act is to protect consumers by eliminating unfair trade practices (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) ATPR 40-307), and the purpose of section 52 is to protect the public from being misled or deceived (*Truth About Motorways v Macquarie Infrastructure Investment Management Limited* (2000) ATPR 41-757 at 40,834 (*Truth About Motorways*)).

Section 52 prohibits corporations from engaging in conduct that is misleading or deceptive or likely to mislead or deceive. An outline of section 52 was provided in section 2.2.2 of this submission.

As the High Court decision in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) ATPR 41-022 makes clear, section 52 is not co-extensive with the law of negligence but is concerned with the conduct of a corporation towards persons with whom it has dealings of a trading or commercial character.

To be regulated by section 52, conduct, whether it is engaged in by a corporation or not, must be in trade or commerce.

It is of course possible that a person can apply for damages under section 82 for personal injury for breach of section 52 (or 53). Section 4K states that a reference to loss or damage includes a reference to injury.

Section 52 does not directly impose liability or vest a cause of action. Section 52 'establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act' (*Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1983) ATPR 40-916 at 49,846).

As Gummow J stated in *Truth About Motorways* (at 40,844), section 52 'is an exercise by the Parliament of its powers to create new norms of conduct and require their observance by specified sections of the community'. In the same decision, Gaudron J stated that sections 52 and 53 'impose a public duty on corporations not to engage in conduct of the kind proscribed by those sections. This is achieved by effecting a general prohibition upon that conduct, short, only, of rendering conduct in contravention of section 52 a criminal offence' (at 40,836-40,837).

The Commission considers that 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. As stated by His Honour Gleeson CJ in *Henville* (at 43,389) the 'purpose of the legislation was to establish a standard of behaviour in business by proscribing misleading or deceptive conduct and providing a remedy in damages'. Without the availability of this important remedy, the standard of behaviour that consumers are entitled to expect from commercial suppliers of recreational services may break down.

The Commission considers that it is important that corporations that make false or misleading misrepresentations which result in personal injury or death, be held accountable. Section 52 provides an important incentive for businesses to behave fairly and have regard for consumers' safety. Those suppliers of recreational services who might disregard the safety of their consumers should not be able to benefit from their behaviour to the detriment of consumers.

3.4 Limitation Periods

The Commission believes that a limitation period of three years is inadequate in relation to the consumer protection provisions of the Act. There are two reasons for this.

First, a limitation period of three years could create hardship and difficulties for some potential litigants. Often it may be some time before a person discovers that they have suffered an actionable loss or that they have been deceived. The fact that a person has

been misled or deceived may not be apparent to the victim of such conduct for some time.

Second, the limitation periods do not always provide the Commission with sufficient time to carry out a thorough and wide ranging investigation. Often complaints are made to the Commission a significant time after the harm has occurred, with the result that the Commission may have insufficient time to fully investigate the matter before a decision to litigate must be made.

In both these regards it is noteworthy that no discretionary extension of the limitation period is available in respect of actions brought under the Act. This is not the case with most personal injury claims brought under State laws.

If a reduction in the limitation period for damages for personal injury under the Act were contemplated, the Commission believes that it should be coupled with a provision for extension of the limitation period in appropriate cases such as, for example, latent injury or disabilities caused by misleading or deceptive conduct which was deliberately concealed by a potential respondent.