Australian
Competition &
Consumer
Commission

SECOND SUBMISSION

TO THE

PRINCIPLES BASED REVIEW OF THE

LAW OF NEGLIGENCE

AUGUST 2002

INTRODUCTION

On 5 August 2002 the Australian Competition and Consumer Commission ("the Commission") provided its first submission to the Principles Based Review of the Law of Negligence ("the Review"). A copy of the Commission's 5 August submission (the "first submission") is available on the Commission's website at accc.gov.au

On 6 August 2002, representatives of the Commission met with the Review Panel to discuss the Commission's first submission and the Panel's terms of reference generally.

Subsequent to that meeting, the Commission was asked by the Panel to provide a further submission to the Review. This second submission addresses items 3(f), 4, 4(a), 4(b), 5 of the Review's terms of reference, and discusses various options to amend the *Trade Practices Act 1974* ("the Act").

1. PART 1
Executive Summary

The Review has been established in response to problems associated with the availability and pricing of certain types of insurance. It is said that these problems have been contributed to by unsustainable awards of personal injury damages.

The Commission is most concerned that any legislative response to these problems be carefully considered. There is a real risk that some of the far-reaching changes to the law now being considered may be rushed through as quick-fix re-active measures with inadequate attention being paid to their long term effects.

In the Commission's view law reform should be driven by policy which has the potential to promote the welfare of all Australians. In the case of negligence law reform, that policy should be focussed on reducing the number of accidents and the costs of the resulting injuries. As a general rule, potential liability is best placed on the person best able to avoid the accident most easily and cheaply in the first place. This is both sensible and fair.

Many of the proposals being put before the Review for consideration will not promote the welfare of all Australians.

While there are winners and losers as a result of any reform process, the Commission believes that most (if not all) of the Act reform options being considered will involve many more losers than winners. These "losers" need to be clearly considered in the Panel's evaluation and identified in the Panel's report.

So far as the Commission is aware, there is no evidence to suggest that awards of personal injury damages under the Act have caused or contributed to the current insurance problems. The fact that the Act itself is not the cause of the current insurance problems is one reason for exercising caution with respect to any reform of the Act.

The Commission understands that the primary objective of any reform of the Act would be to:

(a) reduce or eliminate Act based claims seeking damages for personal injury that could have been brought in negligence; and thereby
(b) prevent people from "subverting" broader reforms.

The Commission has been asked to consider options for reform of the Act which are consistent with this objective.

The Commission's current view is that none of the Act reforms will benefit consumers. The Commission opposes any watering down of the rights of consumers under the Act. Notwithstanding this, the Commission believes it is important to comment on a number of the Act reform options being canvassed.

The Commission wishes to make it clear that its discussion of these options should in no way be construed as an endorsement of these options.

The Commission's analysis of the options is set out below. In the Commission's view, the first two are the "least harmful" options, and the latter three options are ones which the Commission considers will result in significant harm. The options follow.

1. Minimise the "incentives" which might otherwise exist to bring personal injury based claims for damage caused by a contravention of provisions of Parts IVA and V by:
   (a) restricting (for example, using thresholds and caps) the damages recoverable for personal injuries in a manner which is broadly consistent with restrictions applicable under State and Territory personal injury law regimes; and
   (b) requiring "contributory" conduct, especially on the part of an applicant, to be factored in to awards of damages awarded under the Act[1].

2. Permit the contractual exclusion of the section 74 statutory warranty for high risk recreational services by means of a provision akin to the proposed section 68B[2], where the supplier of the high risk recreational service has:
   (a) met a basic standard of care;
   (b) submitted to an enhanced safety regime; and
   (c) made appropriate disclosure of the risks of the service to the consumer.
   Permitting the contractual exclusion of the section 74 warranty in respect of all recreational services or in respect of all types of services is opposed by the Commission.

3. The Commission notes that one of the broad reform proposals being considered by the Panel is a lowering of the "duty of care" standard under the law of negligence. While the Commission does not agree there is a case for reducing the duty of care standard, if such changes are made to the law of negligence, complementary changes may need to be made to section 74 of the Act.

4. Exclude personal injury and death from the definition of loss or damage in section 4K at least for the purposes of sections 82 and awards of compensation under section 87. This would preclude the recovery of damages under the Act for personal injury or death caused the breach of provisions in Part IVA or Part V but allow persons including the Commission to seek all other forms of relief for contravening conduct.

5. The Commission is strongly opposed to any reforms to the product liability regime in Part VA of the Act. This part establishes a strict liability regime for defective products, conferring rights that are quite distinct from the common law. Part VA was introduced after considered debate, to overcome deficiencies in the protections afforded consumers by the common law.

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1 Thereby overcoming the perceived problems with *Henville v Walker* (2001) 182 ALR 37

2 As set out in the Trade Practices Amendment (Liability for Recreational Services) Bill 2002

6. The Commission is also strongly opposed to any relaxation of the norms of commercial conduct specified in Parts IVA and V generally and in section 52 specifically. The Commission can conceive of no circumstance in which it is or should be acceptable for a supplier to mislead or deceive a consumer or to behave unconscionably.

The Commission sees no case for excluding particular community organisations or professional groups from the operation of the Act or other liability laws.

In response to a query from the Panel, the Commission would also not consider it appropriate if the Act was amended such that only the Commission could bring actions under the Act (on behalf of others) claiming damages for personal injury or death.

2. PART 2

Economic comment on aspects of reform options

The Commission considers it important to set out the broad framework which, in its view, should inform the interpretation of the Review Panel's Terms of Reference.

2.1 Premises of the Commission's approach

The Commission starts from the premise that the Panel has been asked to develop and evaluate options in respect of the issues referred to it. It is therefore entirely open to the Panel to find that particular options, for example those that would have the effect of unduly restricting recourse to compensation, are inappropriate and undesirable.

The Commission believes that in evaluating options, the Panel should start from the key principle that society has an interest in the efficient management of risk. Efficient management of risk minimises the aggregate cost society incurs from:

(a) preventing risk-related losses; and
(b) those risk-related losses that do occur.

In adopting this approach, the Commission is not suggesting that fairness is an insignificant consideration. Rather, as exemplified below, the Commission notes that the policy imperatives that may arise from considerations of fairness align well with those that follow from an over-arching goal of efficient risk management.

As a result, the Commission does not believe there is any convincing reason to depart from that over-arching goal in examining the issues that have been referred to the Panel.

2.2 Limiting liability & damages

The Commission notes that the options the Panel has been asked to develop and evaluate, under item 2 of its Terms of Reference, relate to *"limiting"* liability and quantum. They do not relate to *"reducing"* liability and quantum relative to any given level or point of reference. The Commission therefore believes that it is quite inappropriate to suggest that the Panel has been directed to find that the desirable level of liability and quantum is necessarily lower than that which currently prevails. Any such approach would prejudge the matters the Panel ought to consider.

The Commission understands that Panel members are concerned that if there is scope for parties to seek damages under the Act which will not be available to them under reformed State and Territory laws:

(a) State and Territory based reforms will be subverted; and
(b) there will be a "flood" of Act based litigation.

In the Commission's view, the goal of the Act, and of the statutory rights it confers, are separate and distinct from the goal of and the rights conferred by the common law. The Act is concerned with economic considerations[3]. In the economic sense, welfare or public interest is closely associated with market efficiency[4].

The Commission therefore believes it is appropriate to consider the remedies available under and in connection with the Act on their own merits.

The Commission does not accept that there is any evidence that the remedies parties are able to obtain under the Act are inappropriate. Indeed, in the Commission's view, there is more reason to believe that existing remedies have been too weak to provide as strong an incentive as is needed to deter conduct breaching the Act.

In addition, the Commission does not believe that ordinary concepts of fairness would support reducing the scope parties have to seek remedies and compensation for harm caused to them by breaches of the Act. In general, these harms follow from conduct which falls short of basic standards consumers are reasonably entitled to expect, and which are widely recognised as being essential to an effective, competitive, market-place. Limiting the remedies available for these breaches will:

(a) prevent individuals from being compensated for harm improperly caused to them;
(b) erode the confidence consumers have in the goods and services offered to them; and
(c) ultimately, reduce the efficiency of Australia's market economy.

2.3 Wide-ranging contracting out ("self-assumption") of risk

In its first submission, the Commission commented on the economic issues involved in allowing self-assumption of risk in the context of high-risk recreational activities.

The Commission believes that the same principles as those articulated in that first submission apply generally with respect to more wide-ranging self-assumption of risk.

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3 See the Second Reading Speech in relation to the Trade Practices Bill, 1974, Senate Hansard, 30 July 1974, per Senator Murphy, Attorney-General at 540.

4 *"Efficiency is ideally a distributive or relational concept, which embraces the whole economy. Essentially, it is a state in which no rearrangement of outputs among products and no redistribution of inputs among firms could increase consumer satisfaction."*
Kaysen and Turner, Antitrust Policy: An economic and legal analysis, Harvard University Press, Cambridge, 1965.
Efficient markets are associated with consumer welfare in terms of increasing production and employment opportunities, and providing access to innovative new products over time at the lowest cost. Inefficient market performance or market failure is associated with higher prices, higher costs and a reduction in output.

The Commission does not believe that consumers are as well-placed as suppliers of services (and goods) to:

(a) gauge the extent of the risks to which they could be exposed; or
(b) insure against the consequences of those risks.

In the Commission's view, allowing self-assumption of risk to over-ride statutory rights is likely to result both in an inefficient low level of care being adopted by suppliers and in too high costs being borne by consumers (both in the form of risk avoidance and in risk mitigation). This will be harmful to overall efficiency, and will improperly and unnecessarily disadvantage consumers.

The Commission believes that any contrary conclusion must be based on false assumptions which, once made explicit, will be seen to be false. Economic analysis suggests that if self-assumption of risk is to be efficient, it must be no more difficult for consumers than it is for suppliers to:

(a) gauge the extent of the risks to which they may be exposed; and
(b) insure (be it through third party insurance or by means of self-insurance) against those risks.

The Commission is unaware of any study that comes to the conclusion that these propositions are true for the Australian situation.

The Commission also notes that creating scope for greater self-assumption of risk, where that self-assumption of risk is likely to lead to increased costs of risk to consumers and to society, offends ordinary concepts of fairness.

If the Panel considers that particular reform options will benefit society, the Commission would expect there to be solid and quantified evidence that the benefits of recommended changes exceed the costs. The Commission would also expect that evidence to be subjected to full public scrutiny.

2.4 Strict liability and statutory warranties

The Commission is of the view that a regime of strict product liability for defective goods and warranty based liability regimes for producers of goods and services is most closely consistent with efficiency and fairness considerations.

This is because such a regime allocates the responsibility for risk prevention to the party best placed to gauge its costs and benefits – that is, the manufacturer or supplier. This in turn reflects the limited scope most individual consumers have to properly assess the risks associated with the use of individual goods and services, and the very high – and from a social viewpoint, wasteful – costs that would be incurred were responsibility for that assessment to be placed on consumers' shoulders. At the same time, manufacturers and suppliers are generally far better placed to insure the risks at issue than are consumers. Efficient risk allocation therefore requires that the residual risk – that is, the risk that remains once an appropriate standard of care has been exercised – should sit with the supplier, who can then cover that risk at least cost.

The Commission believes that the general validity of this proposition is well accepted in the extensive economic analyses that have been carried out of the appropriate allocation of risk[5]. Obviously, cases can be constructed in which alternative regimes (such as one based purely on negligence or even on no liability) appear superior, but these usually rest on assumptions that are of limited validity and are more helpful as ways of understanding the underlying theory than as means of securing sensible policy guidance.

The Commission believes that the strong long term trend, apparent in statute law, to hold manufacturers and suppliers liable for defective goods and to force corporations to bear warranty based liability, reflects and confirms the underlying efficiency of thus allocating risk. The Commission is unaware of any evidence put to the Panel that would warrant altering this assessment.

The Commission is concerned that any derogation from the broad scheme, even if the derogation is intended merely to deal with consequences of other changes the Panel is intending to recommend, would impose costs far in excess of their benefits. It is very likely that any such derogation would be simply inconsistent with the efficient management of risk in society, disadvantaging consumers while creating windfall gains to suppliers.

In the Commission's view, any derogation from the general scheme may undermine the effectiveness of the product liability regime as a whole. Given this, the Commission does not believe that the Review can properly recommend any changes to the existing strict liability or warranty based liability regimes unless there is a substantial body of analysis demonstrating that the benefits that would flow from such a change would outweigh the costs. The Commission would expect any such evidence to be made available for careful and independent scrutiny, especially since it would be inconsistent with the mass of evidence that has been collected in other jurisdictions.

2.5 Misleading and deceptive conduct

The Commission believes that serious economic harm would flow from any proposal that narrowed the scope of the provisions that prohibit misleading and deceptive conduct.

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5 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. See also the discussion of products liability at pp. 197-199 of Posner, R. 1998, *Economic analysis of* law, 5th edition, Aspen Law and Business; Hans-Bernd Schäfer and Andreas Schönenberger 1999, 'Strict liability versus negligence', available at http://encyclo.findlaw.com/3100book.pdf and the references therein; Calabresi, G. and J.T. Hirshoff 1972, 'Towards a test for strict liability in torts', *Yale Law Journal*, 81(6): 1060; Calabresi, G. 1970, *The cost of accidents: A legal and economic analysis*, Yale University Press

In essence, a market economy can only work efficiently if consumers can have confidence in the claims that are made by suppliers. It is widely recognised in economics that when misleading or deceptive claims are permitted in commerce, the consequence is to increase the long run cost of supply, as consumers seek to protect themselves from transactions that, given fuller information, they would not have entered into. To these direct costs must be added the costs that come from the fact that – in any environment where poorly based claims can be made – the competitive mechanism cannot work as effectively as it otherwise would to ensure that less efficient suppliers are displaced by more efficient suppliers.

The ultimate consequence of allowing conduct that is misleading or deceptive is not only to cause unfairness in commercial transactions, but also to degrade the overall functioning of markets. The Commission is not aware of any evidence or analysis which suggests that there would be net gains in any area of trade or commerce from allowing conduct that is misleading or deceptive. Indeed, the Commission asserts with confidence that no such evidence or analysis exists.[6]

Equally, the Commission does not accept that there can be any net gains to society from allowing consumers to "contract out" of statutory protections against conduct that is misleading or deceptive[7]. Were it to be the case that a contract could allow for conduct that is misleading or deceptive, then the efficiency, from society's standpoint, of the contracting mechanism would be necessarily undermined, as consumers could no longer rely on the quality of the information provided to them in entering into, or under the terms of, contracts.

The Commission believes that the costs of not engaging in conduct that is misleading or deceptive are not high, relative to the resulting benefits. While there may be an element of inconvenience involved in ensuring that consumers are made aware of risks, that inconvenience must be small relative to the costs that would be caused were scope given for consumers to be misled or deceived.

Lastly, the Commission notes that the need to ensure that consumers are not misled or deceived will be all the greater should changes be made which would have the effect of exposing consumers to increased risk. For example, were it decided that consumers should be able to self-assume the risk associated with engaging in particular recreational activities, then it is surely vital that consumers be properly informed of that risk prior to accepting it. As a result, the Commission submits that any restrictions on consumers' ability to seek and secure remedies against the costs of risk bearing merely strengthen the case for retaining the current prohibitions against conduct that misleads or deceives consumers.

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6 The Commission notes that economic analysis suggests that allowing conduct that misleads or deceives consumers can under plausible conditions lead to a 'race to the bottom', in which the quality of all goods or services is decreased and the price increased. See, for example, Louis Kaplow and Steven Shavell *Fairness versus Welfare*, Harvard University Press, 2002, at page 216.

7 As a practical matter, if a contract is tainted by conduct that is misleading or deceptive, there must be a substantial risk that a consumer, had that conduct not occurred, would not have entered into that contract.

In the Commission's view, it would be both economically inefficient and morally unjustifiable to propose reforms which both:

(a) expose consumers to greater risk; and
(b) relieve suppliers of their existing obligation to fully inform consumers of those risks.

2.6 Exemptions for non-profit and community organisations

The Commission understands that proposals exist to exempt non-profit and community organisations engaged in particular types of activity from:

(a) particular standards of care or conduct; and / or
(b) liability for particular types of loss.

As a general matter, these organisations would not fall within the scope of the Act. For constitutional reasons, the Act is largely concerned with the conduct of corporations in trade and commerce.

However, the Commission is concerned that provisions which give specific exemptions to a particular type of service provider will advantage that type of provider relative to non-exempt service providers. It is also likely that advantaged non-profit providers will expand their share in the supply of the designated services relative to the share of the non-exempt providers, which remain subject to the Act[8]. This would happen even if the costs to society of supply by non-profits exceed the costs of obtaining the services through for-profit, non-exempt providers. Hence, it is likely that exempting non-profits will adversely narrow the practical value of the provisions of the Act to consumers.

The Commission does not know of any reason to believe that the benefits associated with thus distorting the pattern of supply would outweigh the costs. Accepted economic analysis suggests that any such inference would be incorrect, and that the result of thus distorting the pattern of supply would be to reduce welfare and make consumers worse off. The Commission does not accept that short-term pressures from particular groups in the community ought to be used to recast public policy in a direction that cannot be supported by objective analysis of costs and benefits.

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8 Indeed, current for-profit suppliers would have strong incentives to convert themselves into non-profits, or to act as contracted service providers to non-profits, thus escaping obligations that they now bear.

3. PART 3
Legal comment on aspects of the current Act

Modern Australian consumer protection legislation began with the *Trade Practices Act 1974*. The stated object of the Act, in section 2:

> *"...is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."*

In any consideration of options to reform the Act or restrict its operation in any way, this purpose and the "greater good" served by the Act should be borne in mind.

3.1. Public interest

Despite the fact that much of the litigation brought in reliance on the Act is brought by individuals pursuing their own interests, the Act has a clear public interest dimension.

Commenting on the public interest nature of the consumer protection and remedies provisions of the Act in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* Gleeson CJ and McHugh J of the High Court[9] said:

> *"... the purpose of s 52 is to protect the public from being misled or deceived. An application for injunctive relief under s 80 is, in its nature, one for the protection of the public interest...Any public protection of the applicant's own business or other interests is incidental or collateral."*

In the same case, Gummow J[10] cited with approval the following passage from the judgment of the Full Court of the Federal Court [11]:

> *"Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 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." [Brown v Jam Factory Pty Ltd (1981) ATPR 40-213 at 42,928]*

Justice Gaudron said:

> *"Section 52 thus 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."*

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9 (2000) 169 ALR 616 at 619

10 ibid at 635-636

11 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc(1988) ALR 337 at 342*

In the Commission's view, Part V Division 1 of the Act generally, and section 52 in particular, contain well established, clear and guiding standards of market conduct. Each time an individual proves a breach of section 52, a public purpose is served. Part V Division 1 should not be prevented, directly or indirectly, from applying to any sphere of business activity. Nor should the standard of conduct prescribed be diminished by being overlaid by notions of fault, however described.

3.2. Parts VA and IVA of the Act

While the focus of item 4(a) of the Review's Terms of Reference may be actions based on certain provisions of Part V, Division 1 of the Act, it is also appropriate to consider Parts IVA and VA of the Act. These Parts were not addressed in any detail in the first submission. Like Part V Division 1, they have an unambiguous public interest dimension.

3.2.1. Part VA - strict liability for defective products

In 1992, the Bill containing what was to become Part VA of the Act was introduced into Parliament. The Second Reading Speech for the Bill stated that Part VA was needed to impose a strict liability system that promoted economic efficiency whilst providing access to justice for consumers who suffered loss caused by defective products[12].

Part VA was the culmination of a long considered and widely debated reform process.[13] It also brought Australia generally into line with the rights available to consumers in the European Union (pursuant to the 1985 European Directive[14]).

Part VA:

(a) confers a statutory right of action on any individual who suffers loss, injury, or damage as a result of defective goods "manufactured" by a corporation;
(b) imposes strict liability (subject to limited, specified defences) on the corporate "manufacturer" to pay compensation;
(c) allows account to be taken of an individual's "contributory" conduct;
(d) provides that injured individuals have three years from the date the individual ought reasonably to have become aware of their loss, the defect in the goods and the identity of the "manufacturer", to bring their claim;
(e) provides a mechanism by which the "manufacturer" can be promptly and inexpensively identified; and

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12 Senate Hansard 26 May 1992 p 2661

13 Senate Hansard 4 June 1992 – pages 3666-3669. The second reading speech Minister for Consumer Affairs on Trade Practices Amendment Bill 1992 records that Reports from the Law Reform Commission, the National Consumer Affairs Advisory Council and the Industry Commission had all recommended a comprehensive review of Australia's product liability regime.

14 OJ 1985 L 210/29. For earlier drafts, see OJ 1976 C 241 (First Draft): OJ 1979 C 271 (Second Draft)

(f) provides that the rights created cannot, by reason of section 75AP, be restricted, excluded or modified by contract.

Part VA's strict liability regime means that applicants do not have to prove the elements of negligence (duty of care, breach and damage). It also means that consumers are not compelled to address the difficulties that the doctrine of privity presents in a contract-based action.

The statutory rights under Part VA are one means by which product safety and industry compliance with safety standards is encouraged. The public interest dimension in such litigation and its importance in protecting the public has been noted by the Courts[15]

When Part VA of the Act came into effect it was feared that a flood of litigation could result[16]. While comprehensive information is not available on the number of claims that have been made under Pt VA, the low level of reported decisions (only three as at August 2000[17]) suggests that where claims under Part VA are made, they are very likely to be settled.

McGarvie, in considering Australian product liability cases between 1992 and 1996, notes:

> *'The regime of openness required by the Trade Practices Act appears to have introduced a new climate of co-operation leading to the resolution of disputes."*[18]

McGarvie also cites eleven examples of settled personal injury cases and comments, that with one exception:

> *"[the] expectations of injured consumers are moderate and focused on speedy, inexpensive settlement of their compensation rights. The average time between a section 75AJ notice and a formal response providing the name of the manufacturer is 25 days. The average time between first notifying the defendant of a claim and settling a claim is 150 days...If this trend continues it will represent a remarkably successful legal process leading to minimal costs and minimal delays."*[19]

In the Commission's view, Part VA is a fundamental part of achieving a just, efficient and appropriate regime to protect consumers and at the same time provide suppliers with a level of certainty as to their obligations. To remove or amend Part VA so as to limit its application would distort this fundamental framework and lead to consumer detriment.

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15 See, for example, the very first decision dealing with section 75AC - *Brooks v R & C Products Pty Ltd*, (unrep). Federal Court of Australia, 11 October 1996).

16 O'Donahoo P, Young S "Product Liability Claims Explosion" 1995 5 TPLB 121

17 Stapleton, Jane. *Australian Product Liability Reporter* August 2000

18 McGarvie, M, *Australian Product Liability Reporter* Dec 1996 at 113

19 ibid at 116

3.2.2. Part IVA – unconscionable conduct

In short, the provisions of Part IVA proscribe unconscionable commercial conduct.

Sections in the Part not only proscribe *"conduct that is, in all the circumstances, unconscionable"* by reference to a non-exclusive broad list of factors suggesting a 'statutory unconscionable conduct' (sections 51AB and 51AC), but also "*conduct that is unconscionable within the meaning of the unwritten law, from time to time*" (section 51AA).

The structure of section 51AB and the relevant explanatory memoranda[20], indicate that it was the intention of the legislature that section 51AB should extend to conduct beyond the common law doctrine of unconscionability. Notably, the factors to be considered in 51AB include the relative bargaining strengths of the parties, whether the consumer understood any documentation used, the use of undue influence or pressure, or unfair tactics, the imposition of conditions not reasonably necessary to protect the supplier's legitimate interests; and how much the consumer would have to pay, and under what circumstances, to buy equivalent goods or services from another supplier.

The Full Federal Court[21] has recently expressed the view that section 51AA imports into the Act all of the equitable doctrines founded on the notion of unconscionability. In particular, the Court indicated that it may be willing to grant relief under section 51AA to:

(a) set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of the other;

(b) set aside as against third parties a transaction entered into as a result of the defective comprehension by a party to the transaction, the influence of another and the want of any independent explanation to the complaining party;

(c) prevent a party from exercising a legal right in a way that involves unconscionable departure from a representation relied upon by another to his or her detriment;

(d) relieve against forfeiture and penalty; and

(e) permit recision of contracts entered into under the influence of unilateral mistake.

There have been very few cases under Part IVA of the Act involving claims for damages for personal injury and death. The most notable is the 1997 case of *Pritchard v Race Cage Pty Ltd* (1997) 142 ALR 527. In the Commission's view, Part IVA is very unlikely to support a flood of personal injury litigation and there is no case for changing or watering down the provisions or the reach of the provisions in the Part.

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20 Explanatory memorandum to the *Trade Practices Revision Bill 1986*, paragraph 19.

21 *ACCC v Samton (2000) FCA 1725*

3.3 Exemptions for professions

The implied warranties in section 74 are incorporated into every almost every contract for the supply of services entered into between a corporation and a consumer. This was not always so. It was only in 1986 that the definition of "services" for the purposes of the section was given its current breadth.

In *Bond Corporation Pty Ltd v Theiss Contractors Pty Ltd & Ors* (1987) ATPR. 40-771 it was argued that the services provided by a member of a profession did not comprise conduct in trade or commerce for the purposes of section 52(1) of the Act and that a professional is engaged in what is *"essentially an intellectual activity and not an activity of a commercial or mercantile kind"*.

Having considered this argument, however, French J[22] concluded that:

> *"where the conduct of a professional involves the provision of services for reward then in my opinion, even allowing for widely differing approaches to definition, there is no conceivable attribute of that aspect of professional activity which will take it outside the class of conduct falling within the description of 'trade and commerce'."*

The Commission agrees with this approach. There is no principled case for exempting particular professions, including the medical professional, from provisions of the Act to which they are currently subject.

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22 *Bond Corporation Pty Ltd v. Theiss Contractors Pty Ltd* (1987) ATPR 40-771 at 48,386.

4. PART 4
OPTIONS FOR REFORM OF THE TRADE PRACTICES ACT

The Commission has been asked by the Review Panel to submit options for reform of the Act. The Commission understands that these reforms would be intended to complement broader reforms such as those mooted publicly for some time, for example, changes to the principles governing:

(a) the law of negligence; and

(b) the recovery of damages for personal injury and death[23].

The Commission understands that the proposed changes would be intended to minimise the extent to which the Act could be relied on by injured persons to "get around" those broader reforms.

4.1. Options

The Commission's analysis of the options is set out below. In the Commission's view, the first two are the "least harmful" options, and the latter three options are ones which the Commission considers will result in significant harm and should be opposed in any form.

The inclusion of these options in the Commission's submission should not be construed as an endorsement by the Commission of these options.

4.1.1. Limit the extent of damages recoverable for personal injury and death for contraventions of provisions in Part IVA, Part V Division 1, and breach of the implied warranties in section 74

Limiting damages recoverable for personal injury and death caused by breach of such provisions would remove the incentives that might otherwise exist for litigants to pursue their claims under the Act rather than at common law. Reforms of this type would address the Panel's concern that broad amendments to State and Territory regimes – not complemented by Act amendments - would result in a "flood" of litigation relying on provisions of the Act.

The Commission makes no specific recommendation as to the formulae for damages thresholds, damages caps or liability apportionment provisions. It simply observes that if the objective is to make proceedings under the Act no more attractive than proceedings under common law of State and Territory regimes, these formulae would need to be broadly consistent with those State and Territory regimes.

Some degree of "forum shopping" is likely to occur unless steps are taken at State and Territory levels (and to the Act itself[24]) to ensure that the same result is achievable for actions based on Part V, Division 2 of the Act (notably s.74).

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23 See, for example, the *Report to the Insurance Issues Working Group of Heads of Treasuries 30 May* 2002 prepared by Trowbridge Consulting.

4.1.2. Allowing corporations to contract out of Act implied warranties for high risk recreational activities

The Commission's views on an amendment substantially identical to that proposed in the Recreational Services Bill are set out in its first submission. If such reform is to proceed, it should be tempered by requirements that:

- service suppliers be subject to a basic standard of care;
- service suppliers submit to an enhanced safety regulation regime; and
- service suppliers make appropriate disclosure of risks to consumers.

The Commission is opposed to broader "contracting out" being allowed, either for "all recreational services" or for "all services". As a matter of principle, however, if reform of this kind is proposed, the inefficiencies and adverse consequences for consumers should be tempered to the extent possible by enhanced safety and disclosure regimes.

The Commission also notes that, while the terms of reference, and the resultant discussion in relation to implied warranties, has focussed on section 74, there remains the possibility that the reforms suggested may seek to also encompass the implied terms in section 71. This would be of considerable concern to the Commission, and if such reforms were proposed, the Commission would wish to provide further submissions on that specific issue.

4.1.3. Amend section 74 to reflect the common law

While the Commission does not agree there is a case for reducing the standard of care required under the law of negligence, it notes that if such a change is made to the law of negligence, then complementary changes to section 74 of the Act may be considered necessary.

The Commission would be strongly opposed to such a significant erosion of consumer rights. The Commission believes that consumers should be entitled to expect services which they purchase to be rendered with due care and skill.

4.1.4. Modify or remove the right to bring actions under the Act claiming damages for personal injury or death

The Commission notes a reform proposal to the effect that section 4K of the Act be amended so as to exclude personal injury or death from the definition of "loss or damage" at least for the purposes of compensation under sections 82 and 87. The object of such a change (whether by amending section 4K or otherwise) would be to stop entirely actions for personal injury or death being brought in reliance on a breach of provisions of Part IVA or Part V Division 1 of the Act.

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24 Noting the outcome in *Wallis v. Downard-Pickford (North Queensland) Pty Ltd (1994) 179 CLR 388*

The Commission considers that such extreme reform is unnecessary, on any view, if the quantum based "attractions" of the Act are removed (see Part 4.1.1 of this submission).

4.1.5. Remove or limit the product liability regime contained in Part VA

For the reasons set out in Parts 2.4 and 3.2.1 of this submission, the Commission is concerned to ensure that Part VA is retained in its present form. Part VA, in establishing a strict liability scheme for defective products, confers rights on consumers which are quite distinct from, and overcome some difficulties with, the common law.

4.1.6. Remove or amend key provisions in Part IVA and Part V Division 1 so as to reduce the standard of conduct expected of corporations in their commercial dealings

For the reasons addressed at some length in this submission, the Commission does not regard this as a real option for reform. The objectives of the reforms being contemplated by the Review Panel, consistent with the Review's Terms of Reference, do not require it to consider such extreme and injurious alternatives.

The Commission cannot conceive of circumstance in which it is or should be acceptable for corporations to:

- mislead or deceive others in their commercial dealings (section 52);or
- behave unconscionably when supplying goods or services (section 51AB)

The behavioural norms set by such provisions should be retained unchanged. The Commission would be gravely concerned about any proposal to amend the terms of these core provisions.

The Commission also believes there should not be any "general exemptions" for the application of these provisions, for example, to community organisations or professional groups whose conduct is regulated by the Act.

Lastly, the Commission notes that the current form of provisions such as section 52 are potentially an important "balancing" mechanism if a regime which permits waiver of statutory warranties is enacted

4.2. Not for profit and community organisations

The Commission understands that proposals have been made to exempt, from certain standards or liability regimes, non-profit and community organisations engaged in particular types of activity.

As indicated in the body of this submission (see Part 2.6), the Commission is concerned that provisions which gave specific exemptions to a particular type of service provider would advantage that type of provider relative to other providers and distort the pattern of supply for those services.

Accepted economic analysis holds that distorting the pattern of supply would lead to a reduction in welfare and make consumers worse off.

The Commission does not accept that short-term pressures from particular groups in the community ought to be used to recast public policy in a direction that cannot be supported by objective analysis of costs and benefits.

4.3. Limitation periods

The Commission's position on limitation periods remains unchanged. In response to a matter raised by the Review Panel, the Commission notes that the (damages) limitation period already runs against minors with no provision for suspension or extension[25].

4.4 The Commission as only claimant of damages

Finally, one possibility flagged by the Panel was that of legislative change:

- depriving individuals of the right to claim damages for personal injury caused by a breach of the Act; but
- conferring on the Commission the sole right to bring such claims on behalf on injured individuals.

The Commission rejects any proposal for change to this effect.

The Commission's primary role is to seek compliance with the objectives and norms of conduct stipulated in the Act, thereby protecting consumers and fostering competitive market behaviour. The Commission conducts this role as an enforcement and regulatory agency. However, this role should not extend to acting on behalf of all individuals injured by breaches of the Act in order to collect compensation on behalf of them. It would be inappropriate to delegate such a welfare related function to the Commission, and additionally, it would have significant funding and resource implications and may even distract from or even impede the Commission's primary role under the Act.

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25 *Vinke v Schering Pty Limited* (1991) ATPR 41-064