# Freehills

24 July 2003

Our ref Peter Holloway
Phone 03 9288 1688
Email peter.holloway@freehills.com

Doc no Melbourne\004335538

Attention: Mr Matthew Lemm

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

Dear Sir

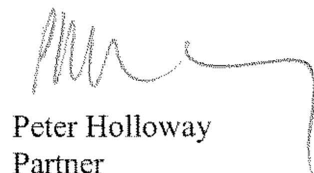
**Trade Practices Amendment (Personal Injuries & Death) Bill 2003**

We refer to your letter dated 1 July 2003 addressed to Athena Tashevska of the National Product Liability Association inviting NPLA to make submissions concerning the above Bill.

Last NPLA made a submission to the IPP Inquiry concerning similar issues. Rather than making a separate submission in relation to the Bill, we thought it appropriate to provide to you a copy of the submission that was made to the IPP Inquiry. A copy is attached.

Please let me know if you have any questions arising out of this.

Yours faithfully
Freehills



Peter Holloway
Partner

# NEGLIGENCE REVIEW PANEL

## A PRINCIPLES BASED REVIEW OF THE LAW OF NEGLIGENCE BY A PANEL OF EMINENT PERSONS ESTABLISHED BY THE COMMONWEALTH GOVERNMENT UNDER TERMS OF REFERENCE DATED 2 JULY 2002

# SUBMISSION BY THE

# NATIONAL PRODUCT LIABILITY ASSOCIATION INC.

**8 August 2002**

# SUBMISSION TO THE NEGLIGENCE REVIEW PANEL

## BY THE NATIONAL PRODUCT LIABILITY ASSOCIATION INC.

## 8 August 2002

1. This submission is made in response to the invitation by the Negligence Review Panel (the "**Panel**") concerning paragraphs 3(d), 3(f), 4 and 5 of the Panel's Terms of Reference, being to:

   3(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;

   3(f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts);

   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)

   5 develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disables persons.

2. This contents of this submission include:

   (a) What is the National Product Liability Association ("**NPLA**")?

   (b) NPLA's approach to this submission.

   (c) Preliminary comment: Changing the law of negligence is a multi-jurisdictional task.

(d) Preliminary comment: The law of negligence in Australia directly impacts on the availability of insurance.

(e) What are the issues of importance to NPLA members?

(f) Classes of potential claimants.

(g) Limitation periods generally.

(h) Interaction between the law of negligence and the *Trade Practices Act.*

(i) Limitation periods under the *Trade Practices Act.*

(j) Standard of care for professional negligence claims.

(k) Limiting or exempting liability for eligible not for profit organisations.

(l) Waivers and the voluntary assumption of risk: stopping the blame game.

**What is the National Product Liability Association Inc?**

3. The **National Product Liability Association Inc** ("**NPLA**") is an organisation which represents the interests of members, all of whom have an interest in product liability issues.

4. Members include:

- product manufacturers, retailers, wholesalers and distributors,
- participants in the insurance industry
- and those who advise them, including
- risk managers,
- insurance brokers; and
- legal practitioners

**What are the objectives of the NPLA?**

5. NPLA's objectives include:

- promoting a better understanding of the potential costs of product liability and measures to minimise those costs, including insurance, liability prevention, recovery and risk management;
- evaluating current and proposed Australian and international product liability laws and regulation; and
- making representations to other associations, government and semi-government bodies and other persons to further the common business interests of members.
- It is in this context that NPLA makes the following submission in relation to the terms of reference relating to the Panel's Review

**Approach taken in this submission**

6. In the limited time available, NPLA does not propose to make any detailed submission concerning particular amendments which it considers should be made to the law of negligence.

7. Rather, the approach taken is one of identifying particular issues that are of concern to NPLA members and which NPLA considers ought be taken into account by the Panel in determining the appropriate response to the issues that have emerged in recent times concerning tort law reform in the context of the so-called insurance and public liability crisis.

8. NPLA notes the reference to professional negligence matters in paragraph 3(d) of the Terms of Reference and the particular reference to medical negligence. NPLA members are not often directly involved in claims that concern medical negligence. However, any reform to the laws relating to negligence in that context is likely to have an impact on the potential rights and liabilities of NPLA members in circumstances where a claim for compensation arises out of an injury said to have been caused by an allegedly defective product.

9. Similarly, any reform that concerns not-for-profit organisations may impact on NPLA members.

10. Paragraphs 4 and 5 of the Terms of Reference are clearly matters that concern NPLA members.

**Changing the law of negligence is a multi-jurisdictional task**

11. It is notable, and of some concern, that an issue as important as the one under review by the Panel has not to date seen an overtly co-ordinated legislative approach amongst the Commonwealth and the States.

12. The speedy enactment of the *Civil Liability Act* 2002 (NSW) exemplifies this concern. That Act represents a reflexive response to the issues under debate, rather than a co-ordinated approach which produces consistency and predictability for business in Australia. In contrast, other States still have Bills pending. Others are yet to exhibit interest in any legislative response.

13. At a time when demands for a response to a perceived crisis in the availability of (affordable) public liability and professional indemnity insurance is fuelling demands for changes in the law of negligence, such an ad hoc approach is regrettable.

14. The Commonwealth Government has taken the role of establishing the Panel under given terms of reference. Accordingly, it might be expected that the outcome of this review will impact directly on those matters within the area of federal legislative competence. Potential amendments to the *Trade Practices Act*, particularly the consumer protection provisions of Part V and VA and relief available under Part VI, are concrete steps which could be taken to ameliorate the upwards pressure on civil judgments for damages.

15. However, it is the impact of this review on the various executive governments and legislatures within the Australian federation which will be needed to produce more fundamental and lasting outcomes. In the event that the Panel recommends measures that will require modification of the common law, then it will primarily fall to the States to embrace those suggestions. That is a more diffuse, and difficult, expectation to achieve.

16. In these circumstances, it falls to this Panel to identify the principled need and then call, loudly, for a joint approach between the Commonwealth and State governments. The Panel seemingly has the platform from which to make this call, being a Panel jointly established by the Commonwealth, State and Territory governments.

17. Unless there is some clear statement and understanding about the difficulties of implementing changes such as those under consideration in a federal system, then

there is a real risk that any changes will, at best, be piecemeal, and, at worst, inconsistent across jurisdictions. Harmonisation between jurisdictions in a federation is an important key to business efficiency. That is no less the case when addressing the way in which the law of negligence, both in its statutory and common law guises, is applied across the country

**The law of negligence in Australia directly impacts on the availability of insurance**

18. There are traditionally a number of responses to the risk to business of claims for damages in negligence or for breaches of statutory duties of care :

- traditional risk management, which requires the potential insured to undertake basic risk reduction techniques. This may involve, for example, the insured in undertaking a review of the design of a product to ensure that, so far as possible, risks are "designed out" of the product;
- transferring risk by contract, including where possible potential liability for tortious acts such as negligence, including limiting or excluding potential liability to identified categories of claimants; and
- risk financing through insurance, the availability of which is affected by the above.

19. It is well established that the risk presented by a potential insured directly affects the availability and cost of insurance. Furthermore, the industry or business segment in which the potential insured operates will also impact on the assessment of the risk.

**Risk financing**

20. Liability insurance comes in various commercial and professional forms, but all provide certain essential functions, namely, risk financing, business continuity and social responsibility

21. Liability insurance is the most popular and effective method available to finance third party risk. It provides business organisations and professional persons with the financial means to meet their legal obligations to customers and other relevant third parties who have suffered loss or incurred liability as a result of acts committed by, or on behalf of, such organisations or persons in the conduct of their business or profession. Other methods of risk financing, such as self-insurance or capital market financing, are not as cost effective, and may represent a significant opportunity cost to the relevant organisation or person.

**Business continuity**

22. Liability insurance is an essential ingredient in any business continuity plan. Typically, governments and large corporations require their suppliers of products and services to maintain current liability insurance arrangements to protect the suppliers from the threat of insolvency from third party liability, and in doing so maintain the continuity of the source of supply. The reason for this requirement is that most small-to-medium size enterprises do not have a balance sheet of sufficient strength to meet the consequences of an adverse legal finding. Any prospective supplier who cannot provide evidence of current liability insurance could not hope to be successful in any open tender bid exercise conducted by a government or large corporation.

**Social responsibility**

23. Liability insurance provides the means by which the social responsibility of a business organisation or professional person to customers and the broader community is underwritten. It provides the financial basis for consumer protection. For this reason, governments have legislated in certain areas of commercial and professional enterprise to require the participants in those enterprises to maintain current liability insurance arrangements. In addition, the rules of self-regulated industries often require the same discipline. An inability to obtain current liability insurance in such circumstances may prevent or otherwise disqualify a participant from engaging in the occupation.

24. Presently, the efficient operation of commercial and professional life in the Australian economy is under serious threat due to the inability of those engaged in these fields to obtain adequate liability insurance coverage. Insurers are not only requiring substantially increased premiums in order to profitably underwrite this class of insurance, but are also applying increasingly stringent underwriting guidelines to the liability business they choose to accept. The effect of these concurrent impacts of cost increase and decreased availability is being widely felt throughout the economy, with some extensively publicised disastrous corporate and individual consequences.

25. As the risk of claims in negligence or for breaches of statutory duties of care rises, together with the direct and indirect cost of those claims, it is doubtless that the cost and availability of insurance is affected. That impact operates inversely. The cost of insurance rises, whereas its availability falls. Perversely, this has the capacity to leave

more consumers more exposed in respect of products and services claims because the manufacturer or distributor holds no insurance.

26. It follows that any proposals for reform which increase the prospect that insurance will become less costly and, hence, more widely available, carries with it an increased prospect that where claims are made then the injured consumer will have an improved prospect of recovering appropriate compensation.

**What are the issues of importance to NPLA members?**

27. As indicated above, the approach taken in this submission is to identify the issues of concern to NPLA members and which it is considered should be given significant weight by the Panel in determining an appropriate response to tort law reform, specifically in the context of the areas identified by the Terms of Reference.

28. In identifying a number of such issues below, NPLA also makes the observation that the current laws of negligence have evolved over a substantial period of English and Australian jurisprudence. Before fundamental changes are made to these laws, NPLA considers that there should be a period of public comment and debate concerning the specific aspects of any changes to the law that are recommended by the Panel.

29. Issues of concern to NPLA members include:

- It is often the case that the categories or classes of persons to whom they may be potentially liable has become indeterminate.
- The period of time between when they have been involved in one way or another in the release of a product to the market, and when a claim is made, has become unmanageably long.
- The approach taken by courts is seemingly to allow claimants their "day in court" rather than to shut out a potential claim, no matter how unmeritorious that claim might be.
- The ability to exclude or limit liability by contract or similar means has been practically eliminated.
- The *Trade Practices Act* has become a predominant driver of potential liability, with the result that any amendment to the common law would be ineffectual unless there is also reform of the Act.

30. The following comments are provided concerning each of these issues:

**Classes of potential claimant**

31. The approach traditionally adopted by courts to avoid "indeterminate liability to an indeterminate class of persons" has been through the device of reasonable foreseeability, both in terms of establishing a duty of care and in the regulation of damages claimable as a result of a breach of that duty.

32. However, the experience of NPLA members has been that the application of this device has become less and less robust, with the result that there has been an enlargement of the number of claims against them and the impact of those claims has become increasingly unpredictable.

33. It is not to the point that these claims may or may not be successful; the increased incidence of itself impacts on the assessment of the insurance risk presented or the cost of the insurance.

34. It is submitted that one area for potential reform is to strengthen the reasonable foreseeability threshold.

**Limitations periods**

35. One of the primary objectives of business is certainty.

36. Uncertainty creates an environment which stifles risk taking (because the risk is less able to be evaluated) which in turn stifles business activity.

37. Uncertainty concerning whether claims might be made is one aspect of uncertainty which is particularly troublesome to managers.

38. Accordingly, it is submitted that another area which should be the subject of close scrutiny for reform is the area of limitations periods.

39. The law as it currently stands in relation to limitation periods is in need of significant review. Whilst limitation periods for claims in negligence are prescribed by statute in each State, experience reveals that these periods are not as finite as intended and, accordingly, provide manufacturers and other commercial entities with little comfort. The discretion vested in courts to extend the limitation period on application by a

plaintiff results in a situation where defendant companies have little or no assurance that claims arising out of a particular event will not continue indefinitely.

40. It is in the interests of both the public and commercial defendants that claims be resolved without delay. This interest is not necessarily cultivated under the current limitations regime. For example, Part VA of the *Trade Practices Act 1974* (Cth) provides that personal injury claims for defective products must be made within three years after discovery of the loss, the defect and the identity of the manufacturer, but the level of certainty which this might at first glance provide to manufacturers is diminished by the further proviso that claims be made no later than ten years after the supply by the manufacturer of the allegedly defective goods.

41. In addition, it should be noted that there is no specified limitation period applicable to section 87(1) of the TPA. On the basis of current judicial authority, section 87(1) is only subject to any limitation period that affects the primary proceeding[1]. Thus, as section 87(1) empowers the court to award damages, it is open to a plaintiff to seek damages under section 87(1) as ancillary relief to an application for an injunction under section 80 TPA[2] in circumstances where that action for damages is barred under section 82 TPA, and argue that there is no applicable limitation period. This ability to 'shop' for avenues of relief undermines the policy underlying limitation periods.

42. The proposal for limiting claims to within three years of an event is likely to be welcomed by traditional defendant bodies for whom a level of 'certainty of liability' is a paramount consideration. This is not to say that appropriate protections for minors and persons under a disability should not be maintained.

## Interaction between the law of negligence and the *Trade Practices Act*

43. Legal experience shows that the majority of product related claims allege causes of action based upon common law and statute. In the case of product liability claims involving personal injury, the absence of a contractual nexus between claimant and manufacturer or importer has resulted in substantial reliance on the law of negligence,

[1] Section 87(1) TPA provides only for relief that is ancillary to a primary cause of action.

[2] Section 80 TPA is not subject to a limitation period.

which is on-going in its development, and, in more recent times, on the provisions of the *Trade Practices Act*.

44. It is now unusual to see claims pleaded other than alternatively in negligence and on the basis of alleged contraventions of Part V and VA of the *Trade Practices Act*.

45. In turn, it is not surprising that the jurisprudence which has informed the development of the common law of Australia in terms of products liability and personal injury claims has also played a significant role in the application and interpretation of the *Trade Practices Act* and the various State and Territory *Fair Trading Acts*.

46. However, there are aspects of the statutory scheme which are significantly different to the common law and which have and will continue to generate a jurisprudence of its own.

47. An obvious example is section 52 of the *Trade Practices Act* which deals with misleading and deceptive conduct by corporations engaged in trade and commerce. In absence of any need to demonstrate intent and where the potential for a person to be misled or deceived is sufficient, this legislative provision has the requirement of reliance as its primary touchstone to found a contravention. This contrasts sharply with the requirements of a cause of action in negligence.

48. Section 52 cases have become the single most litigated type of claim under this Act. They are ubiquitous in products or services related cases. Perhaps most notably, as a provision which forms part of the consumer protection provisions of the *Trade Practices Act*, section 52 is actually most widely used in commercial claims, especially disputes between market competitors.

49. In products liability cases, where personal injury, financial loss or loss of property are the issues at stake, the presence of a section 52 claim adds an extra dimension to the claim. It is not at all unusual for the pleadings in such cases to distinguish between the claim in negligence, with concepts of duty, breach and damage, and the section 52 case on alleged misrepresentations. The defence of such claims may well overlap but is likely to involve substantively different evidence and issues.

50. Another example is the provisions of Part VA of the Trade Practices Act, which, since 1992, have effected a regime in respect of manufacturers' (as broadly defined) liability

for defective products. In this setting the principal issue is whether the product is defective or not. This is determined by reference to a consumer expectation test. Subject to certain defences, manufacturers are deemed liable for their defective products. Those defences, which include a state of art defence, are by their nature difficult to make out. Again, while there are significant points of connection between the law of negligence and this regime, the contrast is substantial.

51. It follows that measures which are proposed to address perceived problems in the application of the law of negligence in this country will only do part of the work if the broad reaching nature and effect of provisions such as section 52 or those under Part VA are overlooked.

52. The reverse is also true. If the Panel limits itself to addressing only those things which the Commonwealth has legislative competence to address then the common law will remain unaffected.

**Limitation of liability under the *Trade Practices Act***

53. The issue which is raised squarely by the operation of many of the consumer protection provisions of the *Trade Practices Act* is the inability of business to exclude, limit or otherwise regulate their potential exposure to liability.

54. Under Division 2A of Part V and Part VA of the *Trade Practices Act*, it is not possible to exclude or modify provisions which fix manufacturers and importers with particular obligations in respect of goods and services or liability in respect of defective products. Those mandatory provisions clearly have an important role to play as they give efficacy to the underlying consumer protection measures. However, their inflexible application places no obligation on consumers, who may have been properly informed about the characteristics and risks associated with a product and, in fact, assumed some part of that risk in choosing to use that product.

55. Recent proposed amendments to the *Trade Practices Act* are designed to enable those involved in the provision of certain recreational activities to limit or exclude liability in respect of the product or service they provide to consumers. These amendments reflect a willingness to require a particular class of consumer to take personal or legal responsibility should they choose to engage in a particular activity. That risk will

generally be borne by the consumer in the event that they have been reasonably informed as to the risks which they are assuming in undertaking the activity.

56. There is no logical reason why the application of that concept of personal autonomy[3] to the potential liability of service providers should be limited to a class of services where the businesses concerned are unable to obtain adequate insurance. Without derogating from the substantial obligations on manufacturers and importers to provide products which are generally free from defect, this response to a perceived crisis in the availability of insurance should not be determined as a matter of ad hoc expediency and, hence, limited to certain recreational activities. If certain classes of consumers are to be expected to take legal responsibility for the services they use, then that criterion should apply uniformly in respect of the limitation of liability provisions under the *Trade Practices Act.*

**Standard of care for professional negligence claims**

57. Paragraph 3(d) of the Panel's terms of reference requires the Panel to consider the appropriate standard of care in professional negligence matters. When considering this issue regard should be had to the fact that many professions act as intermediaries between the manufacturer and distributor of a product and the ultimate end consumer. That intermediary is often an important source of product information for the consumer, and is relied on by the manufacturer and distributor to communicate that information to the consumer. For example, doctors provide important information to their patients about drugs that are being prescribed.

58. Accordingly, limiting the standard of care required of certain professions has the real potential of transferring risk from the profession to other participants in the supply chain, such as the manufacturer or distributor. This potential for loss transfer should be carefully assessed when developing and evaluating options regarding the standard of care in professional negligence matters. Any loss transfer that is likely to occur should be an identified and acknowledged consequence of the recommendation, not an unintended by-product.

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[3] as to autonomy: cf. *Perre v Apand* (1999) 198 CLR 180 and the recent jurisprudence of the NSW Court of Appeal in *Reynolds v Katoomba RSL* [2001] NSWCA 234 and *South Tweed Heads Rugby League Football Club Limited v Cole & 1 Or* [2002] NSWCA 205.

## Exempting or limiting liability of eligible not-for profit organisations

59. The question of exempting or limiting the liability of eligible not-for-profit organisations from damages for death or personal injury does not directly relate to NPLA's members. However, such proposals may have the potential to transfer risk to others involved in the supply chain and, if so, that loss transfer potential should be considered when assessing any proposals.

60. Further, the potential impact of possible death or personal injury claims (or the cost of insuring against such claims) on the operations of not-for profit-operations are equally applicable to many businesses, particularly small business. Accordingly, the applicability and appropriateness to business of any proposals for managing the risk of death and personal injury claims for not-for-profit organisations should also be considered.

## Waivers and the voluntary assumption of risk: stopping the "Blame Game"

61. In the section above dealing with the interaction between the law of negligence and the *Trade Practices Act*, reference has been made to the importance for business of being able to exclude, limit or, at least, fix liability in respect of products related claims. It is submitted that the ability of certain businesses to limit or modify their exposure on the basis that consumers choose to engage in certain "risky" recreational activities is a doctrine which is capable of wider more uniform application.

62. Such an approach would not be intended to affect the substantial range of measures available for the protection of consumers who are injured as a result of matters which are truly within the manufacturer's control, such an identifiable manufacturing defect. Instead it would re-evaluate legal responsibility in situations where consumers elect to use certain products and services in the knowledge that, like recreational activities, those products and services provide a benefit but also carry risks.

63. The current political and economic concerns about the spiralling cost of personal injury claims together with the more limited availability of insurance for business and professional service providers has created a climate in which options for change in social responsibility must also focus the obligations of consumers. Measures, such as those recently introduced in New South Wales, which focus closely on the way in

`which the legal profession should now take responsibility for litigated claims, simply do not address this more fundamental concern.

64. In this country, the law of negligence and provisions of the *Trade Practices Act* offer plaintiffs a considerable level of protection, particularly in their ability to bring claims for personal injury associated with the use of products and services. However, in part, it is that legal environment which has prompted the review being conducted by this Panel. Accordingly, the Panel should consider the current balance in that legal environment. In practice, the ability of manufacturers and distributors to access waivers, warranties and disclaimers or rely on volenti defences is very limited.

65. The question remains as to why consumers making rational choices should not also be obliged to consider the risks and benefits and, where appropriate, assume responsibility for the choices they make to use products or services which, by their very nature, are not entirely free from risk.

66. Is there any reason why, with appropriate safeguards, a manufacturer should not be entitled to present a consumer with the option of agreeing to use a product or service subject to an enforceable waiver of statutory liability in respect of the risks that accompany that product or service?

67. Why should the law continue to maintain that consumers are not capable, or should not be obliged, to voluntarily assume the risk of their own actions?

68. Is it now the case that the price of legal paternalism is rising so rapidly that our legislature(s) should take steps to stop or break what the Chief Justice of Australia has so aptly described as "the blame game"? It is submitted that, while the answer to that question is yes, the response does not simply lie in making business and the legal profession more accountable for the high cost rise in personal injury and economic loss litigation.

**Further discussion**

69. NPLA would welcome the opportunity to discuss these issues and the concerns of its membership as raised in this Submission and generally under the Terms of Reference.

70. Please contact:

- Mr Andrew Morrison
  President, NPLA
  (03) 9286 6537
  amorrison@claytonutz.com

- Mr Peter Holloway
  Executive Committee Member
  (03) 9288 1234
  Peter_Holloway@freehills.com.au