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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**

I refer to the Senate Economics Legislation Committee's (the Committee) proposed consideration of the Trade Practices Amendment (Personal Injuries and Death) Bill 2003 (the Bill). The Insurance Council of Australia (ICA) would like to provide the following submissions for consideration by the Committee. We would be pleased to elaborate on the matters covered in this submission at a meeting with the Committee.

#### **The Bill**

The objectives of the Bill, and the reasons for its introduction into the Parliament, are set out in the Explanatory Memorandum circulated by the Minister for Revenue and Assistant Treasurer.

As has been outlined in the Explanatory Memorandum, the Bill implements recommendations 19 and 20 of the Review of the Law of Negligence<sup>1</sup>, which was chaired by the Hon. Justice David Ipp. ICA fully supports recommendations 19 and 20 of the Review, and therefore fully supports the proposals contained within the Bill.

#### **Reform of the Laws of Negligence**

The ICA notes that the Ministerial Meeting on Public Liability Insurance held in Brisbane on 15 November 2002 agreed on a package of reforms implementing key recommendations of the Review. Ministers also agreed that key recommendations that go to establishing liability should be implemented on a nationally consistent basis and each jurisdiction agreed to introduce the necessary legislation as a matter of priority<sup>2</sup>.

The package of reforms agreed by the Ministerial Meeting are designed to –

- Limit the number of claims for damages for personal injury by altering the laws of negligence, on a nationally consistent basis; and
- Reduce the cost of claims for damages for personal injury by altering the rules for calculating damages.

<sup>1</sup> Review of the Laws of Negligence, September 2002, Ausinfo, Canberra

<sup>2</sup> The Joint Communiqué issued following the Brisbane Ministerial Meeting is available at:  
[http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115\\_2.asp](http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115_2.asp)

ICA submits that the passage of the Bill is necessary to provide support to the public liability insurance tort reform program currently being implemented by State and Territory Governments. In particular, the ICA submits that passage of the Bill is vital to ensure the effective implementation of the goal to limit the number of claims by altering the laws of negligence. The reasons for this are as follows:

The Review noted<sup>3</sup> that “[s]ection 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault”. In other words, Part V Division 1 of the Trade Practices Act (the Act) operates in addition to any rights that may exist at common law. The Review was convinced “that the potential of Part V, Div[ision] 1 as a basis for claims for negligently-caused personal injury and death remains substantial”<sup>4</sup>.

The States and Territories are currently legislating to implement the key recommendations of the Review. Those recommendations, and the legislation currently being enacted by the States and Territories, deal with duty of care, obvious risk, contributory negligence, assumption of risk, and a range of other measures relating to the operation of the common law rules for determining whether a party is liable in negligence to another party.

Because Part V Division 1 provides a remedy that does not require the need to prove fault, it operates independently of the rules for determining liability in negligence. ICA submits, therefore, that the continuing availability of a right of action under Part V Division 1 in cases of personal injury and death will substantially undermine action currently being taken by State and Territory Governments to limit the number of claims of that nature. We respectfully draw the Committee’s attention to the following comments by the Review:

“The circumstances under which claims for personal injury and death could be made under Part V Div[ision] 1, and the range of potential defendants who would be susceptible to such claims, are infinite.”<sup>5</sup>

The “infinite” range of circumstances where a claim under Part V Division 1 might be pursued, as an alternative to newly limited rights to claim at common law, will place the reforms to the rules of negligence at great risk.

ICA therefore submits that the most appropriate course of action is to implement the recommendation to prevent individuals bringing actions for damages for personal injury and death under Part V Division 1.

### **Contributory Negligence**

There is a further important reason why the removal of the right to pursue personal injury and death claims under Part V Division 1 must be enacted.

The Review made a number of recommendations dealing with contributory negligence, apportionment and assumption of risk<sup>6</sup>. These recommendations essentially ensure that “for

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<sup>3</sup> Paragraph 5.24, p.76

<sup>4</sup> Paragraph 5.26, p.77

<sup>5</sup> Paragraph 5.28, p.77

<sup>6</sup> Recommendations 30, 31, 32, pp.12-14

the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence”<sup>7</sup>.

The recent case of *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*<sup>8</sup> was determined by a full bench of the High Court of Australia after the completion of the Review of the Laws of Negligence<sup>9</sup>. In this important case, the High Court held that in proceedings for damages under section 82 of the Act, there could be no reduction of damages for contributory negligence. This means that if the plaintiff proves a breach of a statutory duty imposed by the Act (for example a duty imposed by Part V Division 1), the full loss suffered by the plaintiff can be claimed regardless of any contributory negligence, assumption of risk or other rule which would ordinarily be available at common law.

This important new case therefore means that failure to remove personal injury and death claims from the ambit of Part V Division 1 will not only result in the reforms of the laws of negligence not having any impact, but any rules requiring the reduction of damages for contributory negligence, assumption of risk, etc. will also not apply. This will make proceedings under Part V Division 1 even more attractive to the “infinite” range of cases that can potentially be brought under those provisions.

## Conclusion

ICA strongly submits that for the reasons set out in the Review, and because of the implications of the decision of the High Court of Australia in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*, the only feasible means of ensuring the effective implementation of the reforms to the rules of negligence agreed to by the Ministerial Meeting is to remove the ability to pursue claims for personal injury and death under Part V Division 1 of the Act. The Bill achieves the outcomes sought by Ministers, and deals effectively with the contributory negligence issue, by requiring claims for damages for personal injury and death to be dealt with under State and Territory laws.

In addition to the foregoing, a number of matters have been raised in the terms of reference to the Committee, and ICA wishes to offer the following comments on those issues.

## Impact on Consumers

ICA notes that the Information Package circulated for the Committee’s inquiry has a misleading statement on the first page. The Package states that “the consequence of removing the opportunity to pursue legal action under Division 1 of Part V of the TPA in regard to personal injury and death is that individuals must pursue any actions under common law rather than the TPA”. ICA would like the Committee to note that a wide range of remedies for breach of Part V Division 1 will remain if this Bill is enacted. This is specifically acknowledged by the Review<sup>10</sup> and in the report by the Parliamentary Library<sup>11</sup>. Indeed, the Review noted that [t]his is a formidable armoury for individuals and the ACCC.”<sup>12</sup>

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<sup>7</sup> Recommendation 30(b), p.12

<sup>8</sup> [2002] HCA 41

<sup>9</sup> The Date of Judgment was 2 October 2002

<sup>10</sup> Paragraph 5.35, p.79

<sup>11</sup> Bills Digest No. 180 2002-03, at pages 5 and 6

<sup>12</sup> Paragraph 5.43, p.80

In relation to the broader impact on consumers, ICA notes that there are two groups of “consumers” likely to be affected by the passage of, or the failure to pass, this legislation.

Firstly, failure to pass the legislation will ensure that purchasers of public liability insurance (not for profit community groups, sporting and other clubs, small businesses, professionals, medium and large companies) are unlikely to gain the benefits of the reforms to the laws of negligence recommended by the Review and agreed and accepted by the Ministerial Meeting on Public Liability Insurance. In fact, if there is a wholesale change in claiming behaviour from claims for negligence at common law (where reduction in damages for contributory negligence is available) to claims for damages under Part V Division 1 (where the revised rules for negligence will not apply and where there will be no reduction in damages for contributory negligence), there may well be a significant increase in the overall cost of claims for damages for personal injury and death.

The second group of “consumers” are those consumers of goods and services who seek damages for personal injury and death. If the legislation is not passed, these “consumers” are likely to pursue claims under the Act rather than seek damages for negligence at common law. If the legislation is passed, the rules for assessing damages for personal injury and death would be implemented in accordance with the reform program being implemented by Commonwealth, State and Territory Governments. Clearly, those Governments have determined that the reforms to the laws of negligence are necessary, reasonable and fair. ICA seeks a consistent body of law for the determination of liability for personal injury and death, and passage of this Bill will ensure that outcome.

### **Limit rather than Remove**

ICA notes the Committee wishes to explore the case for amendments to the Bill that limit rather than prevent action being taken for personal injury or death under Part V Division 1.

As has been noted above, the rights created under Part V Division 1, and the remedies available under subsequent provisions of the Act, are fundamentally different to common law rights to claim damages for negligence. The Review was clearly of the view that it was more appropriate to place claims for personal injury and death on a consistent basis with reforms to the laws of negligence, rather than maintain a separate class of rights under the Act.

ICA is not aware of any research or proposal for reform to the “strict liability” regime available under Part V Division 1 to bring those provisions more into line with claims for negligence at common law. ICA would be pleased to examine and assess any proposals that might be presented to the Committee in this area.

### **Overall Conclusion**

Australian Governments have committed to a major reform program aimed to make public liability insurance more available and more affordable than it has been in recent years. Community groups, small businesses and other sectors of the community have shown how they rely on public liability insurance to offer protection in the rare event that someone suffers personal injury or death.

The implementation of the Review recommendations will go a long way to achieving the outcomes being sought by Governments. Passage of this Bill is an important part of the overall package, and ICA respectfully urges the Committee to recommend passage of the Bill in its current form to the Senate.

It is also noted that the Review made a number of further recommendations for reforms to the TPA to ensure that other provisions of the Act are not used to undermine the intended impact of the State and Territory reforms to the laws of negligence. ICA looks forward to reviewing and commenting on those further changes, when they are presented to the Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Booth', written in a cursive style.

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