AUSTRALIAN PLAINTIFF LAWYERS ASSOCIATION
LAWYERS FOR THE PEOPLE

99–101 Buckingham St, Surry Hills NSW 2010
PO Box 2348 Strawberry Hills, NSW 2012 Australia
DX 22515 Surry Hills | ABN 96 086 880 499
Phone (02) 9698 1700 Fax (02) 9698 1744
Email info@apla.com.au www.apla.com.au

Senate Economics Legislation Committee Inquiry into the *Trade Practices Amendment (Personal Injuries and Death) Bill* 2003

APLA Submission

18 July 2003

CONTACT:

John Gordon
National President
Mobile: 0408 945 928
j.Gordon@seabrookchambers.com.au

lawyers for the people

Contents

Introduction

The Australian Plaintiff Lawyers Association (APLA) welcomes the opportunity to comment on the *Trade Practices Amendment (Personal Injuries and Death) Bill* 2003.

The clear effect of the Bill will be to remove completely the right to bring an action for damages for personal injury or death where such an injury or death has resulted from a contravention of Division 1 of Part V of the *Trade Practices Act* 1974 (*"*TPA"). APLA opposes the Bill and considers it to be unnecessary.

The TPA provides important, and now well understood, restraints on those providing services to consumers. It plays an important role in ensuring that services provided to consumers are safe. The Act also provides important rights and protections for consumers.

APLA notes that the introduction of this Bill was motivated by a fear that the failure to pass this amendment may in some way undermine the state and territory civil liability reforms which have been made, or are proposed, around the country. It is well known that APLA opposed, and continues to oppose, these changes as they are unnecessary and as they will have an unfair impact on injured people and consumers.

The issues upon which we comment are:

a) any possible impacts on consumers as a result of the interaction of the proposed amendments with other recent reforms; and

b) amendments to the Bill that limit rather than prevent action being taken for personal injury or death under Division 1 of Part V of the TPA; and

c) the fact that the pretext for such changes has now been established, on any reasonable view of the evidence, to be without merit.

Possible impacts of the Bill

The most commonly used and best known part of Part V is section 52, which proscribes misleading or deceptive conduct by a corporation where such conduct occurs in the course of trade or commerce. Section 53 makes provision in relation to specific instances of false representations by corporations. These provisions are an important way of providing rights to consumers in their dealings with corporations.

There is no reason in logic or in fairness why there should be any distinction between a consumer who suffers property damage as a result of such conduct and a consumer who suffers an injury as a result of the conduct. Even more significant, perhaps, is the message sent by the Federal government in making these changes, that where misleading and deceptive conduct has occurred that results in monetary loss to corporations and personal injury to consumers (the Pan Pharmaceuticals case is an example), section 52 is available to the corporations to recover their lost dollars but not to consumers to compensate their lost health, or a lost life.

Is that the sort of society we wish to propagate?

Response to Outline and Regulation Impact Statement

The Outline and Regulation Impact Statement accompanying the Bill are as unimpressive as they are deceptive and it is a matter of the gravest concern that they form the basis of important Commonwealth legislation such as this, which removes important consumer rights. We consider some of the worst examples hereunder.

The Outline recites the pretext for last year's Commonwealth Review of Negligence, that the award of damages for personal injuries had become unaffordable and unsustainable.[1] APLA demonstrated convincingly last year, drawing upon the Commonwealth's own Productivity Commission data, and data from Court Registries that this statement was untrue. More compellingly, there was demonstrated no connection between awards of damages and premiums for insurance policies.

Since then the evidence in support of APLA's proposition, and belying the Commonwealth's position has become stronger. The states have, nonetheless all acted to effect wholesale removal of the right of people to claim damages and to reduce the damages available to the injured. Insurance company reports now demonstrate insurers returning to (record) profitability.[2]

Whatever case may have existed for the Commonwealth to pass this Bill is now gone. It should be placed on hold to see if there is, as is glibly asserted without the slightest cogent evidence, a rush to use section 52 to undermine the changes enacted by the states and territories. There will be no such rush. Section 52 has always been limited in its utility to a few certain classes of cases (which we give examples of below) where the right should be retained as providing the only available remedy in certain circumstances.

[1] Explanatory Memorandum, Outline, p.1 at paragraph 2.
[2] See, for example: Insurance Australia Group Ltd, Half Year Financial Report – 31 December 2002; QBE Insurance Group, Annual Report, December 2002; Suncorp-Metway Ltd, Announcement of Consolidated Financial Results for the Half-year Ended 31 December 2002, Release Date 28 February 2003.

We note a curious contradiction within the Regulation Impact Statement to the assertion that there will be a wholesale shift to the Commonwealth law unless these amendments are made. The notes in the Regulation Impact Statement which purport to assess the costs of the Bill suggest that the HIC will not suffer significant loss from the changes, "Having regard to current case law in relation to the common law and Division 1 of Part V, it seems unlikely that as a result of these reforms that plaintiffs will be left without an appropriate right of action."[3] If plaintiffs can maintain their rights without section 52, how is it contended that the failure to remove section 52 as a basis for claim will cause a flood of such claims? The logic of the Bill's proponents is fatally flawed.

The Regulation Impact Statement reports the Ipp Review Committee as noting that the potential use of section 52 in cases of negligently caused injury was "substantial".[4] This is unsubstantiated. The suggestion that by restricting people's rights to sue in negligence suddenly bestows the provision with an unrecognised potential is misconceived.

The suggested example repeated in the Statement of the surgeon not continuing with the operation is farcical.[5] If the doctor's statement was an honestly held opinion, where is the misleading or deceptive conduct? If he is correct in not proceeding, what recoverable loss or damage has been suffered by the patient?

The Statement then reports that the Ipp Committee says, “many cases of occupiers’ liability could potentially be framed to come within the requirements of a contravention of Division 1 of Part V.”[6] APLA strongly disputes this suggestion and submits that the example given of a child slipping at a resort that is advertised as “family friendly” is fanciful. The fact is, there would be very few occupier situations where either section 52 or section 53 could be relied upon. A review of the reported cases reveals very little use of these sections in personal injury claims. APLA submits that this is because there are very few situations where such claims could be made. In the vast bulk of occupier liability claims the injury does not in any sense result from any misleading or deceptive conduct by the defendant.

The fact that these examples are relied upon to underpin the changes betrays a lack of understanding of how the section works in practice and is a matter of great concern to APLA.

The claim that, absent the changes, there will be a massive shift of cases to Commonwealth law is repeated, as is the assertion that failure to enact the changes will undermine the state reforms. The state reforms, particularly those in NSW and Victoria, will dramatically reduce the number of people making claims. The few added claims that the Commonwealth will remove by enacting this Bill will not constitute a justified response, especially when there is an absence of credible evidence supporting the need for any change. Furthermore, the beneficiaries of the changes, insurers, have failed to offer any indication that they will pass on the benefits in the form of lower premiums. Premiums may come down, but it will be because the investment market improves, not because the Commonwealth has disarmed important consumer protections, as APLA has always contended.

[3] Explanatory Memorandum, Regulation Impact Statement, p. 5.
[4] Explanatory Memorandum, Regulation Impact Statement, p.3.
[5] Explanatory Memorandum, Regulation Impact Statement, p.4.
[6] Explanatory Memorandum, Regulation Impact Statement, p.4.

Costs of the Bill

In the Bill's Impact Assessment Notes under the "Costs" heading are some important points.[7] However the Notes fail to come to grips with some of the most important costs, both to government and the community. We detail some of them here.

a) Medicare and Centrelink

The health budget in Australia is already stretched to breaking point. Hospitals and health services are underfunded. Indigenous health, especially in remote areas, is a national disgrace. Governments refuse to pursue tobacco companies for any of the costs, when so much of health care in Australia involves the treatment of tobacco-related illnesses. The health budget needs every cent it can get.

When someone sues for an injury caused by another, the state will pay the health costs up front and if the damages claim is successful, the Commonwealth HIC recovers the full amount spent on the care of that person. The same with private health insurers.

If the person's right to sue is excluded by legislation as has now occurred for so many throughout Australia, then governments pay the costs and do not recover them. Thus there is a reduction in recovered funds going into the health coffers. Demand does not decrease, so all Australians suffer with higher taxes or decreased services.

The same applies to Centrelink. Recovery of damages meant that Centrelink recovered benefits paid to injured people and the person was precluded from receiving benefits for a specified period. Now, Centrelink benefits will be all that many injured people will receive, without the right to claim compensation, and there will be substantially less recovery for the Commonwealth. Once again taxpayers will be the losers.

We query whether any proper assessment of these costs has been made by the government.

b) Loss of common law and TPA as a regulatory mechanism

The assessment of "Costs for the Community" is equally flawed as it fails to recognise the cost caused by the removal of the need of corporations to act reasonably or with regard to the truth of what they say or do.

A few weeks ago, Kraft and McDonalds announced that they were changing the way they were going to do business.[8] Consumers were going to be better informed, products were going to be healthier, portions smaller. All in all, a great result for individual consumers, a terrific benefit to society generally. And what was it that drove these welcome changes? It was the perceived threat of lawsuits.

It is the same reason we don't have asbestos in our workplaces any more, why drugs are put through rigorous testing and review before humans can consume them and why churches are facing up to issues of sexual abuse of children which have remained hidden for years. It is the reason why Australian mining companies in third world nations are suddenly giving some thought to the environments in which they work, why our children play in playgrounds where they fall on woodchips or rubber rather than tar

[7] Explanatory Memorandum, Regulation Impact Statement, p.5.
[8] See, for example Gotting, P. “Kraft cuts the fat as lawyers eye the cream”, *The Age,* 3 July 2003.

and cement and why doctors have to tell you about some of the risks you face before they operate.

Take away the common law and provisions like section 52, and you take away those controls, that incentive to do things better. All you have left are the blunt and cumbersome instruments of government control and the criminal law. And to be effective, those tools depend on recognition of the problem and a willingness to do something about it, free from political pressure.

An individual who is injured by negligence, or misleading and deceptive conduct, feels no such encumbrance. He or she sees a defective and unreasonable product or system and forges ahead, with incentive to see it through. The product or system is held up to public scrutiny and if the individual proves their case (or negligence is accepted), the product or system is improved or removed.

In the absence of such a powerful agency for change compare trying to get government action on a system or product, particularly in an industry with political clout and power.

Or, supplanting the criminal law as the regulatory mechanism. For big businesses, fines mean nothing. They become another budgeted cost of doing business. In New Zealand in 1997, it became necessary (in the wake of the Women's Hospital debacle) to introduce a crime of clinical manslaughter in order to provide some incentive for the avoidance of negligent behaviour in a no-fault system. But of course, convictions depend on proving a case to the criminal standard, beyond reasonable doubt, rather than the civil, balance of probabilities.

With the removal of the ability to sue for "minor" claims (which can produce very serious injuries), as many states have done, or very serious injuries caused by the amendments proposed in this Bill, together with the sanctioning of the ability to contract out of liability in certain recreational pursuits as discussed below, we have already become a more dangerous society. The incentive to act to reduce the risk of those "minor" injuries is now gone. The incentive to avoid any injury caused by misleading or deceptive conduct soon will be gone if this Bill is passed.

The further the right to sue is pushed back or removed, the less safe a society we become. The less incentive there is to act or speak with reasonable care. The more injuries there will be.

Benefits for business

The Impact Assessment is certainly correct when it suggests there will be benefit for business. But it will not be because the changes reduce premiums because the threat of "an alternative right if action " under the TPA is removed. That supposition, as we have indicated (and as the note regarding recovery of HIC costs implicitly accepts), is nonsensical. The benefit lies in the Commonwealth's gift to business that permits them acting in a misleading and deceptive way that harms people, whilst preserving the right of business to recover monetary losses if corporations are themselves deceived.

The Impact Assessment's tortured logic on the impact on premiums from state based changes is both irrelevant to this debate (either the changes have those effects or not) and now shown to be wrong due to the failure of insurers to undertake to pass on the benefits. This discussion should be ignored.

Consultation process

The Assessment says that the Insurance Council of Australia (ICA) supports the changes. The ICA repeat the unfounded assertions regarding the potential for use of the TPA in lieu of negligence rights now removed. Repetition of the claim does not make it better. A look at the recent Insurance Company half-year and full-year profit data gives some indication why the ICA believes these changes are a good idea.[9]

Cases where section 52 might be used as the only basis for claim (and thus should be preserved)

- A drug company markets a drug to women to safely ease the effects of morning sickness during pregnancy. In fact, as is known to the drug company, tests have shown that the drug results in horrendous birth defects in a significant number of cases. The test results are destroyed. A woman takes the drug, and gives birth to a child with no arms.

- A tobacco company says that there is no proof that smoking its cigarettes causes lung cancer. The tobacco company has known for years that proof of the association between smoking and lung cancer was compelling, but has destroyed the documents by which negligence might be proved. A concerned smoker reassured by the tobacco company's statement, opts to continue smoking until the evidence is more certain. He contracts lung cancer.

- A person purchases a unit in a new development. The promotional material put forward by the agent (who has a share in the development) asserts that the units are constructed to the highest specifications and standards. In the contracts for purchase of the units, there is a waiver of liability for negligence on the part of the corporate developer, who, in any event, has gone into liquidation and it appears that its insurer is denying indemnity for fraud. Four years after purchasing the unit, whilst the owner is entertaining half a dozen people on the balcony of the unit, the balcony collapses killing one person and seriously injuring two others. The owner himself suffers serious spinal injuries, which confine him to a wheel chair for the rest of his life.

- A company sets up a bungee-jumping operation on the Sunshine Coast. "Safest bungee in Australia" asserts the promotional literature and signage around the site. Reassured, a nervous backpacker, goaded by her friends, opts to participate in the bungee jump. Taking advantage of new legislation, the corporation has the bungee jumper sign a waiver of any right to sue in negligence, and to voluntarily assume any risks associated with the jump. The bungee cord is due to be replaced after 500 jumps, but the operator left the replacement cord at his home that morning by mistake, and intended to go home at lunch time to get it. As the cord had only done 470 jumps, and the usual morning jumps averaged 20, he was not concerned. However, the backpacker group took the number of jumpers to 36 for the morning. Just before lunchtime, the reluctant jumper jumped, and the cord extended beyond its safety limit causing her to strike her head on the ground, resulting in head and spinal injuries.

[9] See, for example: Insurance Australia Group Ltd, Half Year Financial Report – 31 December 2002; QBE Insurance Group, Annual Report, December 2002; Suncorp-Metway Ltd, Announcement of Consolidated Financial Results for the Half-year Ended 31 December 2002, Release Date 28 February 2003.

- Ten children are seriously injured in similar circumstances by using a toy that was promoted as being safe to use in the manner which caused the injury. The company that promoted and sold the product was not aware of the danger as it had not carried out testing to determine whether there was risk associated with using the product in that way. Notwithstanding a ban on lawyer advertising, the children's parents managed to connect through a consumer group and as a result of their impecuniosity, the absence of legal aid, and the recent government ban on 'no-win, no-fee' arrangements, decide to pursue a representative proceeding in the Federal Court to minimise their costs and their costs exposure. They plead their claim for misleading and deceptive conduct, and negligence. The claim for misleading and deceptive conduct is struck out because the right to sue for personal injuries pursuant to section 52 of the TPA was abolished by Commonwealth legislation. This leaves a negligence action, which cannot be pursued in the Federal Jurisdiction. The claim is struck out. Costs are awarded against the lead applicant, and, unable to afford the costs and fees associated with each of the injured persons commencing their own action in State Courts, the injured children are left without a remedy. Several of the group are so severely injured that they are required to seek disability support benefits from Centrelink. Medicare pays the medical and surgery bills for all of the injured, unable to recover from the company that promoted the product as safe.

In all of the above cases, the proposed abolition of the right to pursue a claim pursuant to section 52 of the TPA for personal injuries will have dramatic consequences. Combined with other proposals such as the ability to contract out of liability for death or personal injury[10] and the restriction of the limitation period for negligence to 3 years, it is likely that all of the people injured in the above scenarios will be left without a remedy.

These are hardly extreme or unlikely scenarios, but who would gainsay that they are not worthy claims? Indeed the first two loosely refer to the facts in the thalidomide cases and tobacco cases.

The common theme in each of the examples is that the Commonwealth's amendment would ensure that the party responsible for misleading and deceptive conduct in each case would escape liability. In some of the examples, a case might be made in negligence but the requirements for proof of a claim for damages in negligence are significantly greater than in a claim where a person is induced to act in a certain way as a result of misleading and deceptive conduct (whether the reliance was intended by the maker of the statement or not).

In certain of the examples, however, negligence may not be an option. Moreover, the three year statute of limitations now implemented in most jurisdictions for actions in damages for negligence may preclude the action progressing.

In the last example, by removing an option for recovery based on Federal legislation, the Government would be removing the only recourse that many injured consumers may have to the representative proceedings provisions under Part IVA of the *Federal Court of Australia Act* 1976**.**

However, equally, it can be seen from these few examples that there will not be massive numbers of claims that could take advantage of the absence of the law of

[10] *Trade Practices Amendment (Liability for Recreational Services) Act* 2002.

negligence to pursue TPA claims and the preservation of the right to use the TPA in the above cases will not "undermine" the State changes.

Effect of amendments taken together with other changes

APLA notes at least one possible impact on consumers as a result of the interaction of the proposed amendments with other recent reforms, as follows. Section 52 of the TPA, together with section 82, provides a remedy to persons who suffer loss or damage caused by the misleading or deceptive conduct of corporations acting in trade or commerce. An advantage of section 52 over other remedies in tort and contract is that the corporation cannot contract out of liability.[11] Corporations supplying goods or services in trade or commerce are often in a superior position in terms of knowledge and bargaining power to consumers and other individuals. The inability of a corporation acting in trade or commerce to contract out of liability for misleading or deceptive conduct in these circumstances is an important protection for the rights of consumers.

Section 68B of the TPA allows corporations supplying recreational services to contract out of liability for death or personal injury. Section 68B is a "recent reform". Where:

a) a corporation supplying recreational services engages in misleading or deceptive conduct; and

b) a consumer of the recreational services suffers personal injury as a result of the fault of the corporation; and

c) the consumer would not have used the recreational services but for the corporation's misleading or deceptive conduct; and

d) the consumer would not have agreed to the corporation contracting out of liability but for the corporation's misleading or deceptive conduct;

it would be unfair and unjust if the consumer was deprived of a remedy. The amendment proposed in the Bill would have this impact on consumers.

Division 1 of Part V provides an important safeguard for the rare situations where there has been misleading or deceptive conduct but where the person injured may have no remedy under state law.

Case example

A person of limited intellectual capacity and little education decides to go bungee jumping. The person is not significantly disabled but lacks any sophistication in business dealings. The bungee operator has the person sign a contract which contains an exemption clause of the kind now permitted by state legislation, such as section 5N of the *Civil Liability Act* 2002 (NSW). This section excludes any rights to have the contract set aside for reasons such as unfairness.

Before signing the contract the person asks the operator for an assurance that the bungee rope is always kept in good condition and receives an affirmative reply,

[11] See, for example *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 and *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535.

which is known to the operator to be false. The person relies upon that representation before signing the contract.

The rope breaks and the person receives severe spinal injuries. Unless the person can use sections 52 or 53 as a basis for a claim then he/she may have no remedy.

Thus APLA disagrees with the assertion in the impact statement that the amendments are not expected to cause significant hardship. The hardship may not be widespread but will be significant when it occurs.

APLA agrees that it is not possible to forecast with any great certainty the exact number of cases where Division 1 of Part V may be relied upon and therefore suggests that the proposed amendments are premature. APLA submits that the position should be reviewed, in perhaps two years, when meaningful figures may be available.

Alternative amendments

It is thought that a personal injury claim based upon a breach of section 52 which is brought because of the right given by section 82 of the TPA is not subject to the restrictions as to damages provided for by the state and territory civil liability legislation.[12] This question has not yet been decided by any superior court and it may yet be held that such restrictions do apply to claims under section 82 TPA.

Whilst APLA does not agree with those restrictions, it submits that the TPA could be amended so that rights under Division 1 of Part V are not removed but so that any damages arising are assessed in accordance with the law of the state where the injury occurs. Thus in the second bungee example given above, if the accident occurred in New South Wales then the damages would be assessed in accordance with the *Civil Liability Act* 2002 (NSW).

This is similar to what already happens with some claims based upon rights given by the TPA. For example, where a party sues for a breach of an implied condition as to the fitness of certain goods, such right being given by section 71 of the TPA, then the damages are assessed in accordance with state or territory law. This would mean that the obligations imposed by Part 1 of Division V would remain, but in a modified form consistent with the spirit and intent of the reforms.

[12] For example, the restrictions introduced by Part 2 of the *Civil Liability Act* 2002 (NSW).

Conclusion

APLA disagrees with the claim in the Regulation Impact Statement that, "having regard to current case law in relation to the common law and Division 1 of Part V, it seems unlikely that as a result of these reforms plaintiffs will be left without an appropriate right of action."[13] Some plaintiffs will be left without a cause of action. This will not affect a large number of people but those who are affected will suffer a significant disadvantage.

APLA believes that there is no logical reason why people who suffer economic loss as a result of misleading and deceptive conduct should be treated more favourably under Australian law than those who suffer physical injuries. APLA believes that physical injuries should be treated as more seriously than claims for economic loss.

Because the situations where claims can be made for personal injuries or death under Division 1 Part V are very limited, there is no chance of Division 1 of Part V being used in any widespread way to undermine the state and territory reforms. On the other hand, its retention in its present form may prevent some significant injustices.

APLA is also concerned that the Bill will remove an incentive for businesses to prevent injuries and will shift the cost of injuries incurred to Medicare and Centrelink.

If the Government wants to ensure that the TPA is not used as an avenue to avoid state and territory legislation governing personal injury, they should amend the Bill, so as to allow claims for personal injury and death to be brought under Division 1 Part V of the TPA, but require any damages awarded to be restricted as they would be if they were brought under the legislation in the state in which the injury occurred.

[13] Explanatory Memorandum, Regulation Impact Statement, p 5.