



Law Council
OF AUSTRALIA

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

Dear Sir,

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

I have pleasure in enclosing a submission which has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia to the Senate Economics Committee's inquiry into the *Trade Practices Amendment (Personal Injuries and Death) Bill 2003*.

Please note that the submission has been endorsed by the Business Law Section but has not been considered by the Council of the Law Council of Australia.

Yours faithfully,

Michael Lavarch
Secretary-General

18 July 2003

TRADE PRACTICES AMENDMENT (PERSONAL INJURIES AND DEATH) BILL 2003

SUBMISSION TO THE SENATE ECONOMIC LEGISLATION COMMITTEE

The Bill proposes to exempt conduct that contravenes a provision of Division 1 of Part V of the Trade Practices Act from any action for any resultant personal injury or death.

The rationale for this proposal is said to be prevention of the undermining of changes made to State and Territory law limiting the quantum of common law claims for personal injury or death. These changes, in turn, were premised on the view that public liability insurance would be unaffordable if not unobtainable if claims were not limited in this way.

The Trade Practices Committee of the Business Law Section of the Law Council of Australia ('the Committee') is concerned that the underlying concerns about the award of excessive damages to "undeserving" plaintiffs has given rise to changes in the law that have not addressed this concern in a focused way. Instead of limiting the amounts that can be claimed by all plaintiffs, whether deserving or not, the Committee recommends that a more stringent liability test be proposed so that people who genuinely suffer severe consequences of grossly negligent conduct are still able to obtain a fair award of damages. Furthermore, the culture of care stimulated by years of assumed liability exposure could be imperiled by removal of that exposure.

The Committee believes that the trend toward removing or severely limiting liability for negligent and misleading conduct that results in death or personal injury could lead to a perception that the duty of care that is essential in today's society is being abolished for all practical purposes.

What would be more appropriate, in the Committee's view, is a more considered apportionment of liability according to the degree to which various factors contributed to any result, so that, for example, a failure of the plaintiff to take due care or some other contributory factor, will be taken into account in the quantum of damages that might be awarded. Similarly, in relation to cases based on Part 1 of Division V of the Trade Practices Act, it would be quite appropriate to provide for the award of damages that might otherwise be made to be reduced so as to reflect only the degree to which the defendant was responsible for the result. The Law Council accepts that statutory amendment is required to achieve this result given the clear authority of cases such as *Henville v Walker* [2001] HCA 52 in which the unavailability of contributory negligence type principles was confirmed.

In specific terms, the Committee recommends that the total exemption comprised in subparagraphs (a) and (b) of proposed new subsections 82(1A) and 87(1AB) be qualified by adding the following subparagraph (c) as a cumulative requirement:

"(c) the death or personal injury is attributable to any act or omission of a person (including the [applicant]) for whose acts or omissions the [respondent] is not otherwise legally responsible."