



Law Council  
OF AUSTRALIA

Ref: JGW.LCA1811

5 August 2003

The Secretary  
Senate Economics  
Legislation Committee  
Parliament House  
Canberra ACT 2600

Dear Sir

### **Trade Practices Amendment (Personal Injuries and Death) Bill 2003**

I am writing to you to follow up requests for information made by Senators when the Hon Michael Lavarch and I appeared for the Law Council at the Committee's hearing on 30 July 2003 in relation to the above Bill. The requests made were:

(a) by Senator Stephen Conroy for comments in relation to the Negligence Review Panel's discussion of cases concerning personal injury and death under Part V Division 1 of the *Trade Practices Act 1974* (the "TPA"); and

(b) by Senator Andrew Murray, which I will quote:

*"The Cole royal commission has reported.... There are many sections of that report which have widespread political, industrial and union support. I will highlight one of them, which is the intention to reform and improve occupational health and safety provisions. It would seem to me that right at the heart of industry, commerce and TPA interest in this area is the link to occupational health and safety.... if the Law Council were able to come back to us and say that they had any views on those linkages I think it would be helpful."*<sup>1</sup>

### **Request by Senator Conroy**

The request by Senator Conroy<sup>2</sup> followed discussion between the Acting Chair, Senator John Watson, and myself as follows:

*"Acting Chair – Do you know of any cases where it [a claim for personal injuries or death under section 52 of the TPA] was successful?"*

<sup>1</sup> Proof *Hansard*, Economics Legislation Committee, Wednesday 30 July 2003, pages E9-10.

<sup>2</sup> *Ibid* at page E8.

JGW

*Mr Greentree-White – The Ipp report [the Negligence Review Panel's Review of the Law of Negligence Final Report] discussed this and refers to a small number of other cases where this has been raised. I would simply refer to the discussion of the issue in the Ipp report.*<sup>3</sup>

I wish to correct that statement, and I apologise for mistakenly providing incorrect information to the Senate. I have looked again at the relevant part of the *Review of the Law of Negligence Final Report* (pages 76-79) and can say that the personal injury and death cases discussed in the *Review of the Law of Negligence Final Report* at paragraphs 5.28-5.32 (at pages 77-78) are hypothetical.

I have contacted the Chairs of Law Council specialist committees, the Chair of the Trade Practices Committee of the Business Law Section, Ms Louise Castle, and the Chair of the Australian Consumer Law Group of the Legal Practice Section, Mr Damian Scattini, to discuss with them the use of TPA section 52, and Division V Part 1 more generally, in claims for personal injury or death.

The Chairs were aware of some pleading of the remedies in personal injury or death cases, however it did not appear to have been the subject of great attention compared with the attention to remedies under specific motor accident and workers compensation statutory schemes, or under tort or contract generally.

The Law Council identified nine examples of cases where plaintiffs have tried to recover damages for personal injury or death relying on Part V Division 1 as one of the bases of their claim. In some cases damages were not awarded. However this was not because damages were not available on this basis but because the claim failed for other reasons, for example no trade and commerce or the representation was not made out:

- *Concrete Constructions v Nelson* (1990) 169 CLR 594 – representation by employer to employee not in trade or commerce;
- *Hampic Pty Ltd v Adams* (2000) ATPR 41-737 (NSW Court of Appeal) - damages were recovered on the basis of section 52;
- *Glendale Chemical Products v ACCC* (1998) 90 FCR 40 (Full Court) - damages were recovered under Part VA;
- *Pritchard v Racecage Pty Ltd Pty Ltd* (1997) 72 FCR 203 (Full Court) - widow brought section 52 claim against race organisers for death of husband who was a race official - appeal specifically on widow's right to bring claim for death under TPA – the Full Federal Court said she could;

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<sup>3</sup> Ibid at page E3.

- *Trade Practices Commission v Collings Construction* (Supreme Court of NSW, 10 December 1996) – section 52 proceedings initiated by the forerunner of the Australian Competition and Consumer Commission on behalf of customers of a builder, the damages awarded included damages for stress caused by the intimidating behaviour of the builder;
- *Graham Barclay Oysters v Ryan* [2002] HCA 54 - High Court confirms successful section 52 claim against oyster companies for plaintiff contracting Hepatitis A through contaminated oyster consumption;
- *Ryan v Great Lakes Council* (1999) ATPR 41-667 (Wallace Lake Oysters) - damages awarded under Div 2A (not of merchantable quality);
- *Wright v TNT Management* (1989) 85 ALR 442 (NSW Court of Appeal) - plaintiff lost on section 52 point but not because could not recover damages; and
- *Beare v Slattery* [2002] SASC 76 (SA Court of Appeal) - damages awarded on the basis of section 52.

None of these cases would appear to be frivolous. And the Law Council notes that the apparent volume of claims overall in this area could not be described as excessive given that the TPA has been in force for almost thirty years.

#### **Request by Senator Murray**

The Law Council considers that the relevant recommendation of the Royal Commission into the Building and Construction Industry ("Cole Royal Commission") is recommendation 17 (at page 41 of the Commission's *Final Report*), which is as follows:

*"The Commonwealth foster a new paradigm in the building and construction industry. Work must be performed safely, as well as on budget and on time."*

It is difficult to answer Senator Murray's question on linkages between the TPA and occupational health and safety in the building and construction industry given the level of information available to the Law Council.

However, speaking more generally in relation to the law of negligence the Law Council has said that:

*"1.38 The multiple aims of negligence law indicate a complex set of needs and rights which should not be lightly swept aside. The Law Council emphasises the objectives of:*

- (a) *fair and just recompense for injured persons;*

*juw*

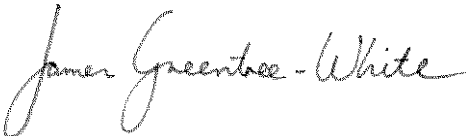
- (b) *the encouragement of the highest standards in safety and risk management; and*
- (c) *a just allocation among wrongdoers of responsibility for compensation.*<sup>4</sup>

These comments also apply to the TPA in so far as it applies to personal injury and death, and the Law Council draws particular attention here to paragraph (b), encouraging the highest standards in safety and risk management.

To answer Senator Murraray's question, if the relaxing of legal standards in the TPA would have any effect (which the Law Council does not know) in relation to fostering a new paradigm of safety in the building and construction industry, the Law Council would expect that effect to be a negative one.

The Law Council would be pleased to provide any further information that would be of assistance to the Committee. Please contact me on 6246 3715 if there are any further queries requests.

Yours faithfully



James Greentree-White  
Lawyer, Legal & Policy

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<sup>4</sup> *Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence, 2 August 2002, paragraph 1.38 at page 9.*