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Trade Practices Amendment (Liability for Recreational Services) Bill 2002

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INFORMATION AND RESEARCH SERVICES

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Trade Practices Amendment (Liability for Recreational Services) Bill 2002

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Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Date Introduced: 27 June 2002

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Purpose

To amend the Trade Practices Act to permit companies who supply recreational services to consumers to exclude their implied contractual liability for death or personal injury where services are supplied without due care and skill.

Background

The Implied Warranty Of Due Care And Skill Under The Trade Practices Act

Section 74 of the *Trade Practices Act 1974 (TPA)* states that in a contract where a corporation supplies services to a consumer there is an implied warranty that services will be rendered with due care and skill and that material supplied in connexion with the services will be reasonably fit for the purpose. The remedy for a breach of the implied warranty is for the consumer to bring an action to recover damages for breach of contract.

By virtue of section 68 of the TPA, a provision in a contract that seeks to exclude the warranty implied by section 74 (such clauses are commonly referred to as waivers) will be rendered void.

This Bill is intended to permit companies that supply recreational services to enforce contractual terms which seek to exclude the warranty of due care and skill implied by section 74.

Public Liability Crisis

This legislation is but one measure that has been proposed to address the rapid increase in public liability insurance premiums. It has been forecast that premiums will increase on

average by around 30 per cent in 2002 following from rises of 15-20 per cent in 2000 and 2001.[1] This average masks some even higher rises for particular businesses including those supplying adventure tourism services.[2]

In response to growing public concern about the impact of rising premiums and the need for a coordinated response to the problem, Commonwealth, State and Territory Ministers met in March 2002 and May 2002 to consider options to deal with the problem. These meetings received evidence that one of the factors contributing to the increase in premiums has been the growth in negligence claims. Negligence is a tort, that is, a civil wrong. At common law, a person may be liable to pay damages for negligence if it can be shown that they owed the plaintiff a duty of care, the duty was breached and injury or damages was caused as a result. The rapid increase in public liability premiums has generated considerable pressure from insurance companies and community groups for 'tort law reform' to restrict both the number and quantum of negligence claims.[3]

One measure that has been endorsed by New South Wales, Victoria, Queensland and Western Australia is to legislate to give effect to waivers or disclaimers[4] signed by people proposing to engage in an inherently hazardous activity. It has been proposed that a waiver signed in such circumstances would operate as a good defence against personal injury claims, including actions based in negligence, where the supplier of such a service has complied with the relevant safety requirements.[5]

Self-Assumption of Risk and the Common Law

In proceedings involving a claim for negligence the defence may allege that the plaintiff voluntarily assumed the risks involved in the activity. This defence is often expressed in the latin maxim '*volenti non fit injuria*' –to a willing person no injury is done.

The presence of consent document in the form of a waiver will naturally assist such a defence, however it is not essential. The notion of inherent risk recognises that some hazards are a characteristic of a particular sport. For example, the risk of injury in a legal tackle in football is a characteristic of a body contact sport and participants have been found to have accepted this risk.[6]

A waiver will be necessary if the defendant is to be excused of negligence. The courts will not exclude liability for negligence simply because an activity involved inherent risks. In *Rootes v Shelton*[7] the High Court considered the case of a water skier injured by a collision with a stationary boat. The skier sued the driver of the towing boat for negligence. The Court held that the risks of the driver failing to control the boat with due care and failing to warn the skier were not inherent in the sport. Chief Justice Barwick stated:

> No doubt there are risks inherent in the nature of water skiing, which because they are inherent may be regarded as accepted by those who engage in the sport. The risk of a skier running into an obstruction which, because submerged or partially submerged or for some other reason, is unlikely to be seen by the driver or observer of the towing

> boat, may well be regarded as inherent in the pastime. …But neither the possibility that the driver may fail to avoid, if practicable, or, if not, to signal the presence of an observed or observable obstruction nor that the driver will tow the skier dangerously close to such an obstruction is, in my opinion, a risk inherent in the nature of the sport.[8]

At common law people can sign waivers excusing service suppliers of negligence but the courts will carefully scrutinise them particularly in situations where there is an inequality in bargaining power. One text writer has written of a 'judicial bias against disclaimers'. This 'bias' manifests itself in a reluctance to find that adequate notice has been given to the party bound and by construing the terms strictly against the beneficiary of the waiver or disclaimer. Courts have required evidence that suppliers have done everything reasonable to bring a waiver to a party's attention. In addition, if liability for negligence is to be excluded this must be made explicit.[9]

Details of the measures proposed by state governments are not publicly available. Nevertheless the context of comments made by various governments seems to indicate that it is intended to legislate to strengthen the effectiveness of waivers by protecting them from judicial scrutiny if they relate to inherently hazardous activities.

The effect of the Trade Practices Act

While responsibility for tort law rests overwhelmingly with the States, proponents of reform have argued that Commonwealth action is necessary to support the process.

In March 2002 the NSW Treasurer Mr Egan said that the NSW Government had obtained legal advice 'indicating that any change made by the States to tort law for personal injury cases would have only a limited effect unless the Commonwealth amends the Trade Practices Act'. He suggested that the warranty of due care and skill implied into consumer contracts with corporations by section 74 of the TPA could allow plaintiff lawyers to frustrate State tort law reform by pursuing a personal injury damages claim under contract law rather than through an action in negligence.[10]

Any state law that sought to make waivers enforceable under contact law for a corporation supplying services to consumers would be inconsistent with the TPA and therefore invalid under section 109 of the Constitution.[11]

At the meeting of Ministers in May, the Commonwealth announced that it would legislate to allow self assumption of risk for people who choose to participate in inherently risky activities such as adventure tourism and sports, but would ensure that consumers retained adequate protection under the TPA.[12] The States also undertook to introduce mirror legislation where required.[13]

Advantages and Disadvantages of allowing the enforcement of waivers[14]

Advantages

- Proponents of the use of waivers argue their case on the principle of freedom of contract. They assert that sellers of goods and services should have the right to stipulate the terms on which they trade. Customers are free to decide whether to purchase or not.

- Waivers help to control the cost of insurance which would otherwise be incorporated into the price of goods and services.

- In adventure sports and adventure tourism the risks involved are very unpredictable. It is unfair for service suppliers to be exposed to liability in such circumstances. While the courts may eventually rule in favour of a service supplier and hold that an incident was not foreseeable, there are substantial costs involved in defending claims. The resultant uncertainty is also disruptive to business and indeed may deter business activity in the sport and tourism industry.

- If they are properly administered, waivers can draw the potential customers attention to the risks involved in a particular activity and thus help them to look after their own interests.

- Some commentators have argued that the courts do not consistently apply the law of negligence. Suppliers of services may feel that there is no recognised standard of care on which they can base their compliance policies. One option may be to allow a waiver conditional on compliance with an industry code of safe practice.

- At present the approach of the law to the enforcement of waivers is inconsistent. Except in Western Australia and the Northern Territory an unincorporated entity, such as a sole trader or partnership, may take the benefit of a waiver clause in a contract with a consumer[15] however identical terms in a contract entered into by a corporation with a consumer will be rendered void because of section 68 of the TPA. The basis of this distinction in public policy would seem to be open to debate.

- In other jurisdictions (eg the Canadian provinces) it is common for waivers to be enforceable but also subject to consumer protection provisions in statute and under the common law. For example, such clauses could not be enforced if they involved unconscionable conduct or if the terms of the waiver were not drawn to the attention of the consumer. Under such a regime some of the benefits that accrue to suppliers and the community from waivers could be obtained while still protecting the consumer.

Disadvantages

- Waivers are often expressed in a legalistic form. Consumers may not understand the terms and effect of such a provision or alternatively may not take the time to read it.

- It is reasonable that where a person provides an activity, for example adventure sport, for profit that they do what they can to limit the danger to users. A provision excluding liability for negligence may undermine the incentives for service suppliers to maintain safety standards so as to avoid liability.

- Waivers impose costs on society. Where an injury is negligently inflicted, the effect of a waiver may often be to transfer the cost associated with the treatment onto the community at large through the social security system.

- Waivers ignore that fact that there is an informational imbalance between the parties. The supplier is almost always in a better position to understand the risks and take the necessary precautions. The law of negligence encourages suppliers to do so.

- Freedom of contract is often a fiction. Contractual terms for consumer products and services are largely not negotiable. Instead goods and services are offered on a take it or leave basis.

Main Provisions

The Bill inserts a **new section 68B** into the TPA with the intention of permitting companies who supply recreational services to give effect to contractual terms limiting their liability for death or personal injury caused by their failure to provide services with due care and skill.

The new section states that a term in a contract to supply recreational service which operates to exclude, restrict or modify the:

- application of section 74 (which implies a warranty of due care and skill)

- exercise of rights conferred by section 74 (the right to sue for breach of contract where services are provided without the required care and skill)

- liability of a company for a breach of warranty implied by section 74

is not void under section 68 provided that the contract was entered into after the commencement of this amendment and provided that it relates to liability for death or personal injury. **New section 68B** will not, for example, permit suppliers to limit their liability in relation to property damage incurred as a result of a breach of the warranty implied by section 74.

What are recreational services?

New subsection 68B(2) defines recreational services as a sporting activity or a similar leisure time pursuit or any other activity that involves:

- significant degree of physical exertion or risk;
- and is undertaken for the purposes of recreation, enjoyment or leisure.

Contrary to claims of the Minister that these measures are limited to 'risky activities'[16] and press reports that this measure would be limited to 'adventure sports' or high risk sports such as white water rafting, it can be seen the definition is broad enough to cover all sporting and leisure activity. This approach differs from that proposed by Trowbridge Consulting in its report delivered to the Ministerial Summit in May 2002. Trowbridge proposed that 'inherently risky activities' should be listed individually in the regulations.

Concluding Comments

Are consumers adequately protected?

There appears to be broad support in the community for the notion that the TPA should be amended to allow people to assume greater responsibility for engaging in inherently risky activities. This proposition which is embodied in the Bill has the support of State and Territory Governments as well as the Opposition and the Australian Democrats. Nevertheless it may also be acknowledged that the possibility of liability for negligence acts as a discipline on the suppliers of recreational services to ensure that high standards of safety apply. By allowing operators of recreational facilities to exclude their liability for negligence how can consumers be assured that operators will still take all reasonable care to protect their safety? While it may be accepted that skydiving is a risky activity, should an operator who fails to pack the parachute correctly be excused from liability if a person is killed or injured as a result?

The report by Trowbridge Consulting that was presented at the May meeting of Ministers recommended that any protection from liability for operators of inherently risky activities should not include 'gross negligence'. This term is not recognised in Australian tort law[17] and consequently the following definitions were suggested:

- an unjustifiable and flagrant failure to observe the standard of care that a reasonable person would have observed in all the circumstances; or
- conduct amounting to a reckless disregard for or creation of a serious risk to the plaintiff.[18]

Trowbridge also stated that operators should not be protected from liability for negligence unless they have adopted risk management practices approved by the government or a relevant industry body.

In advocating amendment to the TPA, the Government promised that the measures to allow the voluntary assumption of risk would contain safeguards to protect consumers. In particular it stated that:

- 'the amendments will allow consumers to sue if they are the victims of gross negligence,'[19] and
- 'that businesses will be required to have in place reasonable risk management plans in respect of any activity to which a waiver can apply'.[20]

Neither of these consumer protection safeguards is contained in the Bill. It is not clear whether this is because of a drafting oversight or a policy change on behalf of the Government.

It may be that the Government will introduce these measures as amendments during the second reading debate following the report of the Panel reviewing the law of negligence (see below). In his second reading speech, the Hon. Peter Slipper stated that 'the Commonwealth will further consider whether any measures need to be adopted to ensure appropriate consumer protection. '[21]

In its submission to the Review Panel the Australian Competition and Consumer Commission (ACCC) expressed concern that proposed section 68B will actually increase the cost of accidents to society by distorting incentives to minimise risk. The ACCC stated that in order to ensure that an appropriate balance was achieved between consumer protection and supplier certainty the legislation needed to be amended to ensure that:

- suppliers are still required to exercise a basic level of skill or care in supplying recreational services;
- suppliers submit to a regime of enhanced safety regulation; and
- suppliers provide adequate disclosure to consumers of the risks associated with use of their services.[22]

Will the measure reduce premiums?

In the situation where the rights of consumers are being curtailed the Parliament may wish to seek an assurance that insurance companies will pass on savings to the community.

The writer is not aware of any attempt to quantify the extent to which the measure proposed in this Bill will lead to a reduction in premiums however there has been some debate about the impact of other reform proposals.

The NSW Premier Mr Carr, has cited a study undertaken by PricewaterhouseCoopers (PwC) suggesting that premiums could fall by 12 per cent as a result his Government's civil liability reforms.[23] Industry representatives have however presented a less optimistic outlook. In evidence to the Senate Economics Committee Inquiry into public liability and

professional indemnity insurance, the President of the Insurance Council of Australia, Mr Jones, observed that the PwC forecast was made on the basis that insurance companies were adequately pricing their premiums now. Mr Jones also expressed the view that 'the general belief is that it [the Carr Government's tort law reforms] will slow price increases down but will not deliver major savings'.[24]

The ALP has stated that the ACCC should be given powers similar to those that it exercised in the transition to the new tax system[25] to prevent 'price exploitation' by insurance companies. The Opposition argues that these measures are necessary to address the 'serious risk' that the reforms will result only 'in higher insurance company profits rather than reduced premiums for community organisations and small business.'[26] This call was supported by all State and Territory Attorneys-General.

The Attorney-General rejected the proposal arguing that it was an attempt to avoid responsibility for the lack of tort law reform in some states. The Government has responded to this call stating that it has asked the ACCC to update its "Insurance Industry Market Pricing Review" report on a six-monthly basis over the next two years. This monitoring would enable an assessment of whether cost savings are being passed on.[27]

It may be the case that despite the proposed reforms, premiums need to rise in order to bring stability back to insurance industry. In its first monitoring report in March 2002 the ACCC reported that the insurance industry has suffered underwriting losses[28] greater than $1 billion in financial years 1998-99–2000-01.[29] The ACCC also found that the profitability outlook for public liability insurance was very low.

Will the legislation be effective?

While the legislation will prevent claims based on the implied warranties it will not prevent other claims based on other provisions the TPA.

In making his case for the TPA to be amended NSW Treasurer Egan[30] cited the NSW District Court case of *Griffin v Byron Bay Sky Diving Centre*[31] as an example of a situation where the TPA overrode an otherwise valid waiver.

In fact the case did not involve the TPA but rather the NSW *Fair Trading Act 1987* (FTA) which largely mirrors the consumer protection provisions of the TPA. The defendant was a partnership and hence not subject to the TPA.[32] Nevertheless the case does have implications for the effectiveness of this Bill.

The case concerned a sky diving student who was injured during a jump and brought a claim in negligence as well as under the FTA.[33] The District Court held that the waiver used by the defendant was effective to exclude liability in tort and contract. However, the Court found the defendant liable under the misleading and deceptive conduct provisions of the FTA (the equivalent of section 52 of the TPA) for a representation to the plaintiff that it was safe to jump and made a damages award in excess of $1 million.[34]

The Bill would only allow companies to exclude the implied warranty of due care and skill not any other liability that may arise under the consumer protection provisions of the TPA such as those relating to misleading and deceptive conduct, false representations or unconscionable conduct. In short, assuming that the TPA as amended by this Bill applied to the case, it would not, on the trial judge's reasoning, have prevented the plaintiff in the *Griffin* case from obtaining the damages that she received

The use of the TPA to recover compensation for personal injury is a matter that is being examined by the Government's negligence law review panel.

Is the Bill precipitate?

On 2 July 2002 the Minister, the Hon. Senator Coonan, announced that she had appointed a panel to review the law of negligence.[35] Relevantly for present purposes the panel has been asked to:

> 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).
>
> In conducting this inquiry, the Panel must:
>
> (a) develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and
>
> (b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.

The Panel has been asked to report on this aspect of its inquiry by the 30 August 2002. It could be argued that debate on this legislation should be delayed to allow consideration of the Panel's report.

Endnotes

1 The causes of this phenomenon have been the subject of much debate and a full analysis is beyond the scope of this Digest. The following papers are recommended for an analysis of the causes of the recent premium increases:

David Kehl, 'Liability Insurance Premium Increases: Causes and Possible Government Responses' Current Issues Brief No. 10, 2001–02, Department of the Parliamentary Library.

Roza Lozusic 'Public Liability', NSW Parliamentary Library Research Service, Briefing Paper No.7/02.

2 In its March 2002 report to Ministers, Trowbridge Consulting stated that premium increases of 50 to 100 per cent would not be uncommon and that some policyholders would be asked to pay increases of between 500 per cent and 1000 per cent. Trowbridge also reported that some businesses were unable to obtain public liability insurance at all.

See Trowbridge Consulting, *Public Liability: Analysis for Meeting of Ministers 27 March 2002*.

3 NSW (see Civil Liability Act 2002 (NSW)) and Queensland (see Personal Injuries Proceedings Act 2002 (Qld)) have passed legislation that restricts damages awards.

4 'Waivers' and 'disclaimers' are intended to relinquish or extinguish a person's right to claim for personal injury. The terms are used interchangeably in this digest.

5 See Attachment A, Ministerial Meeting on Public Liability, *Joint Communique*, 30 May 2002. NSW Premier Carr has gone further and proposed that risk warnings should be a good defence against negligence actions in relation to risky entertainment. See The Hon. B. Carr MP, Civil Liability Bill, Second Reading Speech, Legislative Assembly, *Hansard*, 7 May 2002, p. 2085.

6 See discussion in Law Reform Commission of British Columbia, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, Consultation Paper No. 70, 1993 p. 16–19.

7 (1967) 116 CLR 383.

8 At p. 386.

9 John G Fleming, *The Law of Torts*, 9th Ed, 1998 p. 328–330

10 The Hon. Michael Egan, 'Public Liability Insurance', *Media Release*, 26 March 2002.

11 Section 109 of the Constitution provides that 'when a law of a State is inconsistent with a law of the Commonwealth the later shall prevail and, the former shall to the extent of inconsistency, be invalid.'

12 Ministerial Meeting on Public Liability, *Joint Communique*, 30 May 2002.

13 Western Australia (Section 40 *Fair Trading Act 1987 (WA))* and the Northern Territory (Section 66 *Consumer Affairs and Fair Trading Act 1997 (NT))* have legislation which is based on sections 68 and 74 of the TPA .

14 Many of these issues are discussed in greater depth in Law Reform Commission of British Columbia, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, Consultation Paper No. 70, 1993.

15 This is because other State and Territory fair trading legislation does not include provisions similar to sections 68 and 74 of the TPA.

16 Senator The Hon. Helen Coonan, "Trade Practices Act Amendments will assist sport and tourism providers', Press Release 71/02, 27 June 2002.

17 For a discussion of the concept see S Stuart Clark and Ross McInnes, *Gross Negligence*, Insurance Law Journal, vol 12, p. 250–255.

18 Trowbridge Consulting, *Public Liability Insurance: Practical Proposals for Reform*, Report to the Insurance Issues Working Group of the Heads of Treasuries, 30 May 2002, p. 5.

19 Senator The Hon. Helen Coonan, 'Trade Practices Act Amendments Will Assist Sport And Tourism Providers' *Media Release 71/02*, 27 June 2002.

20 Senator The Hon. Helen Coonan, Question without notice: Insurance, Senate, *Hansard*, 27 June 2002, p. 2557.

21 The Hon. Peter Slipper, "Trade Practices Amendment (Liability for Recreational Services) Bill 2002, Second Reading Speech, House of Representatives, *Hansard*, 27 June 2002, p. 4543.

22 ACCC, *Submission to the Principles Based Review of the Law of Negligence*, August 2002. This submission is available from the Commissions website www.accc.gov.au

23 PricewaterhouseCoopers, *On Tort Law Reforms in Public Liability Insurance*, 28 May 2002.

24 Mr Jones, Senate Economics References Committee, *Evidenc*e, 8 July 2002, p. 53.

25 See Part VB *Trade Practices Act 1974*.

26 The Hon Simon Crean, 'Premiums Warning Shows Need For Tougher ACCC Powers', *Press Release*, 31 May 2002.

27 The Hon. Daryl Williams MP, 'States and Territories pass the buck on public liability', *News Release*, 77/02, 26 July 2002.

28 This is a situation where claims paid out on policies exceed the premiums raised.

29 ACCC, *Insurance Industry Market Pricing Review*, March 2002.

30 The Hon. Michael Egan, 'Public Liability Insurance', *Media Release*, 26 March 2002.

31 Decision of Sorby DCJ, Unreported 24 August 2001.

32 While TPA generally applies to corporations, the FTA applies to persons.

33 The plaintiff alleged misleading and deceptive conduct (section 42), unconscionable conduct (section 43) and false representations (section 44).

34 This finding was overturned by the NSW Court of Appeal in April 2002 (*Palmer (trading as Byron Bay Skydiving Centre) v Griffin* [2002] NSWCA 100) on the basis that the plaintiff had not relied on the representation.

35 Senator The Hon. Helen Coonan, 'Minister Announces Review Panel' Press Release 76/02 2 July 2002