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No. 180 2002–03

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

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Trade Practices Amendment (Personal Injuries and Death)
Bill 2003

Susan Dudley
Law and Bills Digest Group
24 June 2003

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Trade Practices Amendment (Personal Injuries and Death) Bill 2003

Date Introduced: 27 March 2003

House: Representatives

Portfolio: Treasury

Commencement: Sections 1-3 commence on the day that the Act receives Royal Assent and Schedule 1 commences 28 days after Royal Assent.

Purpose

The purpose of this Bill is to amend the *Trade Practices Act 1974* (TPA) to prevent individuals recovering damages for personal injury and death where there has been a contravention of Part V Division 1 of the TPA.

Background

A review of the law of negligence in Australia (chaired by Justice David Ipp) was announced by the Government on 30 May 2002.¹ The amendments contained within the Bill give effect to Recommendation 19 of the 'Review of the Law of Negligence Report' (Ipp Report) which states that:

The TPA should be amended to prevent individuals bringing action for damages for personal injury and death under Part V Div I.²

The review of the law of negligence was commissioned as a way of developing strategies to respond to the highly publicised 'insurance crisis' occurring in Australia. When announced, the review received widespread support due to the fact that it was imperative that action be taken to solve some of the problems plaguing the market for public liability insurance in Australia.

Public liability insurance is described by the Productivity Commission as insurance that:

protects individuals, businesses and organisations against financial risk of legal liability to third parties for death or injury, loss or damage to property, or pure

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economic loss, in areas not covered by workers' compensation, motor vehicle compulsory third party (CTP), professional indemnity or product liability. The situations where such liability can arise are many and varied.³

In March 2002, the Trowbridge consulting report noted that the insurance crisis was impacting most significantly on community events, sporting events, tourism and leisure operations, the retail industry and local non government community groups that operate under the umbrella of local government.⁴ The report stated that these groups were particularly experiencing problems in obtaining affordable public liability insurance.⁵ The report also stated that anecdotal evidence revealed that premium increases of 20% were routine, 100% not uncommon and 500-1000% had occurred.⁶

Much has been written regarding the source of the insurance market problems. The collapse of HIH insurance, terrorist bombings on 11 September 2001, unwise business practices by insurance companies and a poor investment environment have been just some of the identified causes of the crisis. An escalation in the number and size of personal injury claims have also been identified as key contributors to the problem.

Unfortunately, it has been difficult to fully understand the cause of the crisis due to shortages in the availability of accurate and comprehensive statistics on point. It could be suggested that the insurance market, like other markets, has peaks and troughs and that the current market conditions merely form a part of this cycle.

The Trowbridge consulting report however noted that:

The nature of the crisis is that there are fewer insurers than ever before accepting the business and these insurers are generally charging much higher prices than previously and are also being very selective in their acceptance of risks.

While this phenomenon can be regarded as the peak (or trough) of an insurance market cycle, it is nevertheless to persist for another year or two at least unless there is some external stimulus to or intervention in the market.⁷

Accordingly, the negligence review was announced. In a recent article published in the Australian Bar Review, the chair of the negligence review, Justice David Ipp, set out one of the key practical arguments as to why negligence laws needed to be reviewed:

There is no conclusive evidence that the state of the law of negligence bears any responsibility for this situation [the insurance crisis]. But the fact is that insurance companies are not prepared to provide the necessary insurance (or are only prepared to provide it at unaffordable rates), because of the unpredictability of the law, the ease with which plaintiffs succeed and the generosity of courts in awarding damages. There is evidence to suggest that the insurance crisis is at least partly attributable to the conduct of certain insurance companies but that is not to say that the state of the law of negligence has not contributed to the current state of affairs.⁸

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It is interesting to note that Justice Ipp acknowledged that insurance companies were at least partly to blame for the insurance crisis. Justice Ipp has also clearly stated that it was insurance company dissatisfaction with negligence laws that was one of the triggers for the review. Without intervention, the crisis would continue.

The Minister for Revenue and the Assistant Treasurer, Senator the Hon. Helen Coonan, has also drawn clear links between problems with the legal system, the insurance crisis and the need for Government intervention.

In the University of New South Wales Law Journal, Senator Coonan wrote that:

There is a widely held view that the current problems in the insurance market are due in large part to the operation of the legal system. It is clear that the broader community is dissatisfied with the seemingly random nature of court awards. There is also a strong perception that an increasing culture of blame has emerged within our society. This has led individuals to seek redress through the legal system where in similar circumstances in the past, the individual would have been more prepared to assume responsibility for the consequences of their own actions.⁹

Prior to this, Senator Coonan issued a press release stating that:

There is strong community support for actions by Governments at all levels to ensure our system of compensating injuries is balanced and does not contribute to a culture of blame.¹⁰

Negligence review

When the negligence review was announced it was given the express task of analysing the current legal arrangements and developing a method for limiting awards of damages for personal injury. The review's terms of reference stated that:

It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.¹¹

It was considered that this would go towards easing the pressure on insurance companies to charge excessive premiums for public liability insurance.

The outcomes of the negligence review were drawn together in the Ipp Report and this report recommended significant changes to the law of negligence in Australia. The Ipp Report suggested that the rules relating to key areas of negligence law, namely standard of care, causation and remoteness of damage, should be amended, the effect being to make it more difficult to establish negligence.¹² The report also recommended that rules relating to damages awards needed to be modified, and for example suggested that a cap on general damages be put in place.¹³

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Responses to the Ipp Report vary. Mr Henry Ergas, from Network Economic Consulting Group, in an article in the Australian Financial Review wrote that:

it [the Ipp report] remains a firmly fact-free document, failing to establish whether a problem exists and if so what it is.....

The Ipp Committee's own explanation is an astonishing admission of hubris in the face of ignorance: that due to a "dearth of hard evidence" its recommendations are "based primarily on the collective sense of fairness of its members."¹⁴

Despite this criticism, all States and Territories have seen the need for law reform and have enacted legislation implementing a range of the recommendations contained within the Ipp report.

When implementing reforms consistent with those set down in the Ipp report, the media release for the Premier of New South Wales, stated the following:

A diverse range of community groups, charities and organisation from across NSW including Coffs Harbour's Big Banana, the Cobar pool and the NSW Farmers Association have endorsed the State Government's public liability reforms.

The Premier of NSW, Mr Bob Carr – in a major address to the State Parliament – outlined the overwhelming community support for reforms announced yesterday.

These reforms will reinstate personal responsibility, reduce the culture of blame and avoid the 'Americanisation' of the NSW Legal system.

Our reforms mean we can all continue to enjoy the simple pleasures such as swimming at the beach and community shows and fairs.¹⁵

More recently, the Premier of Victoria, clearly demonstrated his Government's support for the recommendations when he made the following statement regarding legislation introduced into the Victorian Parliament giving effect to some of the Ipp report's recommendations:

Rising payouts and worldwide pressure on the insurance industry have created an environment of unaffordable premiums which all states have had to address.

These premiums are becoming unaffordable not just for doctors, but for tourism operators, small business and community and sporting associations like pony clubs and local football clubs.....

We have a responsibility to strike the right balance between protecting people's rights and ensuring a viable insurance industry.¹⁶

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Part V Division I Trade Practices Act 1974

Part V Division 1 of the TPA contains key consumer protection measures, the most commonly used ones being those that deal with misleading and deceptive conduct (section 52) and false and misleading representations (section 53). Examples of other provisions in Part V Division 1 of the TPA include those provisions that deal with bait advertising (section 56), harassment and coercion (section 60) and pyramid selling (section 61).

Where provisions in Part V Division 1 of the Act are breached, a person may recover damages for any loss they have suffered as a result of a contravention of the provision.¹⁷ In addition, consumers may seek injunctive relief,¹⁸ non-punitive orders,¹⁹ punitive orders,²⁰ and remedial orders.²¹

The Australian Competition and Consumer Commission (ACCC) may take legal proceedings (representative actions) on behalf of a person who has suffered loss where any of the provisions in Part V Division 1 are breached.²²

Criminal proceedings may also be brought against persons who have breached any of the requirements (other than section 52) in Part V Division 1 of the Act. Section 52 is not a criminal offence.

Part V Division 1 of the TPA is also replicated by all the States and Territories in their own consumer protection legislation.

Proposed amendments

This Bill gives effect to Recommendation 19 of the Ipp report which states that:

The TPA should be amended to prevent individuals bringing action for damages for personal injury and death under Part V Div I.

The Ipp Report has argued that Part V Division 1 of the TPA must be amended to prevent individuals bringing actions for personal injury and death under this part of the Act. The report argues that this change is necessary so that one of the key objectives of the negligence review (that is to limit liability and quantum of damages pay outs), is not undermined by plaintiffs relying on the TPA to recover damages where damages could not be recovered in negligence.

The Ipp Report explained the need for legislative change to the TPA in the following way:

If reforms that we are proposing in this Report are adopted, it will become more difficult for plaintiffs to succeed in claims based on negligence. Some may not succeed at all and others may only succeed to a lesser extent. Lawyers will inevitably search for different causes of action on which to base the same claims. Provisions of the TPA will provide an obvious target for this search. What has so far been a rarity may become commonplace, unless steps are taken to prevent this from occurring.²³

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Accordingly, the Bill proposes to amend the TPA so that individuals will be unable to recover damages under the TPA from a defendant whose conduct breaches Part V Division 1 of the TPA and causes personal injury or death. The Bill also proposes that the ACCC's powers to bring representative actions on behalf of individuals to recover damages for personal injury and death be removed.

Despite these amendments, consumers will still have a range of remedies for breaches of Part V Division 1. An individual will still be able to recover damages for economic loss suffered as a result of conduct that breaches Part V Division 1 of the Act. Similarly the ACCC will be able to bring representative actions on behalf of individuals to recover damages for economic loss.

In addition, criminal proceedings may be brought if a person suffers personal injury or dies as a result of conduct in breach of Part V Division 1 (other than section 52) of the TPA. A court may also issue an injunction, or make punitive or non-punitive orders where the provisions have been breached and this leads to personal injury or death.

Ipp Report justification for the legislative amendments

Apart from the need to ensure that the Ipp Report objectives are not undermined, the Ipp Report has also argued that it is not appropriate to recover damages for personal injury and death under Part V Division 1 of the Act as fault is not an element in the provisions in this part of the Act. In relation to section 52 the report has stated that:

Under s52, however, the plaintiff can succeed merely by proving that the statement was misleading or deceptive, even if the defendant made the statement with the utmost care and with complete honesty.²⁴

The Ipp Report has suggested that a party should have to prove fault on the part of the defendant before being able to receive compensation.

The Ipp Report also argued that when Parliament enacted Part V Division 1, it did not envisage that plaintiffs would institute proceedings, under that part, to recover damages for personal injury or death.²⁵ Therefore implementation of Recommendation 19 of the Ipp report would not alter the policy objective of Part V Division 1 of the Act.

Possible criticisms of the proposed amendments

It would seem that the proposed amendments to Part V Division 1 do reduce the level of protection to consumers. Part V Division 1 sets down standards of conduct that the legislature has considered must be adhered to by corporations that engage in trading and commercial activities with consumers. For example, in relation to section 52 the Federal Court has stated that:

Section 52 is a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create liability at all; rather it establishes a norm of conduct²⁶

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Where those standards of conduct are not adhered to and an individual suffers loss, a corporation will be required to compensate the individual consumer who has suffered the loss. If the amendments proposed in this Bill proceed and Part V Division 1 of the TPA is breached, consumers will be unable to recover damages for personal injury and death under the TPA. The Ipp Report does point to the fact that plaintiffs have ‘rarely relied’ upon Part V Division 1 to recover damages²⁷ but does acknowledge that it is a possible avenue for redress. Clearly therefore consumers rights to seek protection and redress under the TPA are reduced.

From a policy perspective, the Bill also raises interesting questions about having different standards in place for different forms of loss under the TPA (ie economic loss versus loss for personal injury or death).

State and Territory response

New South Wales has amended its consumer protection legislation that replicates Part V Division 1, to implement Recommendation 19 of the Ipp Report. Some other jurisdictions (such as South Australian and Queensland) are looking to also implement this Recommendation and have indicated that they are waiting for the Commonwealth to pass the amendments in this Bill before proceeding with their amendments.

Main Provisions

The amendments to the TPA are contained within Schedule 1.

The main amendment is **item 2** of the Bill which inserts a proposed **sub-section 82(1A)** into the TPA which states that a person cannot recover damages for a contravention of Part V Division 1 where the loss or damage is or results from death or personal injury.

Sub-sections 87(1) and (1A) of the TPA give the court power to make remedial orders for conduct covered by several parts of the TPA including Part V, Consumer Protection. Existing sub-section 87(1B) gives the ACCC power to bring representative actions on behalf of individuals who have suffered loss or damage as a result of conduct in contravention of several parts of the TPA including Part V.

Items 3-5 amend sub-sections 87(1) and (1A) and insert proposed subsection 87(1AB) into the TPA to ensure that individuals cannot commence proceedings and the ACCC cannot bring representative actions to recover damages for loss due to personal injury or death under section 87 of the Act.

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Concluding Comments

The amendments in this Bill implement Recommendation 19 of the Ipp Report, so that individuals will be prevented from recovering damages for personal injury and death brought about by a breach of Part V Division 1 of the TPA.

Arguably these amendments reduce consumer rights to redress under the TPA. The amendments do, however, close a loophole in the law that has the potential to undermine the Ipp Report's recommendations and hence the Government's policy response to the insurance crisis.

Endnotes

- 1 'Liability Meeting Makes Significant Progress', *Media Release*, Senator the Hon. Helen Coonan, Minister for Revenue and Assistant Treasurer, 30 May 2002.
- 2 *Review of the Law of Negligence Final Report*, Canberra, September 2002, p.6
- 3 Productivity Commission, *Public Liability Claims Management Research Report*, December 2002, p. xiii.
- 4 Trowbridge Consulting, *Public Liability Insurance; Analysis for Meeting of Ministers 27 March 2002*, 26 March 2002, p. 30.
- 5 *Ibid* p. 30.
- 6 *Ibid* p. 28.
- 7 *Ibid* p. i.
- 8 Justice David Ipp, Negligence – Where lies the future? *Australian Bar Review* (2003) 23 p. 159.
- 9 Senator the Hon Helen Coonan, 'Insurance Premiums and Law Reform – Affordable Cover and the Role of Government', *The University of New South Wales Law Journal* vol 25, No 3 2002.
- 10 'Minister Welcomes Final Negligence Review Report', *Media Release*, Senator Hon Helen Coonan, Minister for Revenue and Assistant Treasurer, 2 October 2002.
- 11 *Review of the Law of Negligence Final Report*, *op cit.* ix.
- 12 Recommendations 28 and 29, *ibid.* p 10-12.
- 13 Recommendation 48, *ibid* p. 19.
- 14 'Ipp report: long on notions, short on facts', *The Australian Financial Review*, 11 October 2002.

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- 15 'Strong community response to public liability reforms', *News Release*, Premier of New South Wales Australia, September 4 2002.
- 16 'Government to protect access to insurance for all', *Medial Release*, the Hon. Steve Bracks, Premier of Victoria, [20 May 2003, http://www.premier.vic.gov.au/newsroom/news_item.asp?id=244] (23 June 2003)
- 17 section 82 TPA.
- 18 section 80 TPA.
- 19 section 86C TPA.
- 20 section 86D TPA.
- 21 section 87 TPA.
- 22 section 87 TPA.
- 23 *Review of the Law of Negligence Final Report*, op cit, p. 74.
- 24 Ibid, p. 76.
- 25 Ibid, p. 73.
- 26 *Brown v Jam Factory Pty Ltd* (1981) FLR 340 at 348.
- 27 *Review of the Law of Negligence*, op cit, p. 74; when making this assertion the report made particular reference to section 52 TPA.

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