Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004
Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004

Susan Dudley
Law and Bills Digest Group
31 March 2004
Contents

Purpose ................................................................................................................. 1

Background .......................................................................................................... 1

Implementation of the Ipp Report recommendations in relation to the TPA .......... 2

Part IVA, Part V Division 1A, 2A and VA of the Trade Practices Act 1974 ......... 3

Part IVA – Unconscionable conduct ................................................................. 3

Part V Division 1A ............................................................................................ 4

Part V Division 2A ............................................................................................ 4

Part VA ............................................................................................................... 4

Legal Remedies ................................................................................................. 5

Main Provisions ................................................................................................. 5

Personal Injury Damages .................................................................................. 5

Damages for non-economic loss - general damages ........................................ 6

Damages for loss of earning capacity ............................................................. 6

Personal injury damages where gratuitous attendant care services are provided. 6
Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004

Date Introduced: 19 February 2004
House: House of Representatives
Portfolio: The Treasury
Commencement: The day on which the Act receives Royal Assent

Purpose

The purpose of this Bill is to amend the Trade Practices Act 1974 (TPA) to implement recommendations 17 and 21 of the Review of the Law of Negligence Final Report (Ipp Report).

Background

The insurance crisis in Australia, characterised by rising premiums and unavailability of cover, reached crisis point 2001, following the collapse of HIH insurance.

In response to the insurance crisis, the Federal Government, in May 2002, appointed an expert panel of persons to review the operation of the laws of negligence and related provisions in the TPA and state and territory fair trading legislation. The expert panel was directed to recommend changes to personal injury law to solve the insurance crisis.

The terms of reference for the expert panel included the following statement:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. 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.¹

From this statement it can be shown that the panel took as a given that the frequency and size of personal injury damages payouts was too large and so changes needed to be made to personal injury laws to wind this back.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
There has been debate as to whether or not the expert panel should have started from this point. It has been argued that the limited range of claims statistics that were available at the time the review was being conducted meant that it would have been difficult to draw any conclusions about trends in personal injury claims and hence the appropriateness of the law. Despite this, the expert panel made 61 recommendations which are set out in the Ipp Report, targeted at reforming personal injury laws.

These recommendations are largely targeted at reforming personal injury law at the state and territory level. The recommendations follow the expert panel’s terms of reference and suggest changes to the laws of negligence which would make it more difficult for plaintiffs to bring successful legal proceedings and which would decrease the size of damages payouts for successful plaintiffs.

The Ipp Report also recommended that changes should be made to the TPA, so that the reforms to negligence laws making it harder for a person to claim damages in negligence, would not be undermined by a plaintiff bringing a legal proceeding under the TPA.

**Implementation of the Ipp Report recommendations in relation to the TPA**

In 2003 the Government introduced the first of its Bills to give effect to the Ipp Report’s recommendations in relation to the TPA. This Bill, titled the Trade Practices Amendment (Personal Injury and Death) Bill 2003, was to implement recommendations 19 and 20 of the Ipp Report. These recommendations proposed that the TPA should be changed to prevent a person from recovering damages for personal injury and death where Part V Division 1 of the TPA has been contravened. The key provisions in Part V Division 1 are section 52 (misleading and deceptive conduct) and section 53 (false and misleading representations). Further information on the Trade Practices Amendment (Personal Injury and Death) Bill 2003 can be found in the Bills Digest which analyses the Bill.

The Trade Practices Amendment (Personal Injury and Death) Bill 2003, as introduced by the Government, has been opposed by both the Australian Labor Party and the Australian Democrats in the Senate. Both parties consider that a person should be able to recover damages for personal injury and death where Part V Division 1 of the TPA has been breached. Both parties also consider that tort law reform should not be undermined and hence they have argued that a cap should be placed on the level of damages that may be recovered by a plaintiff under Part V Division 1 TPA, in line with State and Territory tort law reforms. At this point in time, the Government has not accepted the opposition’s suggested changes to the Bill.

The Trade Practices Amendment (Personal Injury and Death) Bill (No. 2) 2004 is the second Bill that has been introduced by the Government, to implement the Ipp Report’s recommendations regarding amendments to the TPA. The Bill proposes to implement recommendations 17 and 21 of the Ipp Report.

Recommendation 17 of the Ipp Report reads as follows:

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Recommendation 21 of the Ipp Report reads as follows:

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Part IVA, Part V Division 1A, 2A and VA of the Trade Practices Act 1974

As noted above, recommendations 17 and 21 of the Ipp Report considered that the TPA should be changed to limit the quantum of damages and the time period for commencing action under Parts IVA, Part V Division 1A, 2A and VA of the TPA.

Part IVA – Unconscionable conduct

The leading court case in Australian on unconscionable conduct, Commercial Bank of Australia Ltd v Amadio, described unconscionable conduct as follows:

Relief on the ground of ‘unconscionable conduct’ is usually taken to refer to the class of case in which a party makes an unconscientious use of his superior bargaining power to the detriment of the party who suffers from some special disability or is placed in some special situation of disadvantage.6

The TPA contains three provisions that prohibit unconscionable conduct.

- section 51AA, the statutory enactment of the traditional remedy against unconscionable conduct,
- section 51AB which contains a prohibition against unconscionable conduct in ‘consumer type’ transactions, and
- section 51AC which contains a prohibition against unconscionable conduct for small business.

If these sections are contravened, the aggrieved person can recover damages for the loss suffered under section 82 of the TPA.
Part V Division 1A

Part V Division 1A contains a comprehensive set of product safety provisions dealing with the:

- production of goods that are in compliance with prescribed product safety standards,
- banning of goods which do not comply with prescribed product safety standards,
- banning of unsafe goods from sale, and
- production of goods in compliance with consumer product information standards.

An individual can claim compensation for loss or damage suffered as a result of the production of goods that do not comply with product safety or information standards, or the sale of goods declared to be unsafe or permanently banned from sale.

Part V Division 2A

Division 2A of the TPA imposes an obligation on manufacturers to produce:

- goods which correspond with their description,
- goods that are of merchantable quality,
- goods which conform to the sample of the good,
- goods that are fit for their stated purpose, and
- compliance with any express warranties (for example a 2 year warranty) give in relation to the goods.

Where a manufacturer does not meet these obligations, a consumer can sue to recover damages under this Division.

Part VA

Part VA of the TPA imposes an obligation on manufacturers and importers of goods to supply goods that are not ‘defective’. A good is regarded as being ‘defective’ if its safety is not such as persons generally are entitled to expect.

Where manufacturers and importers of goods supply ‘defective’ goods, and a person suffers injuries, the person can sue to recover that amount from the manufacturer or importer.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Legal Remedies

Where provisions in Part IVA, Part V Division 1A and 2A and Part VA are breached and a person has suffered loss the person can claim damages. Damages include damages for pure economic loss brought about as a result of a breach of the provisions and loss suffered as a result of a personal injury.

Main Provisions

Currently, the TPA does not contain provisions for calculating how damages should be assessed. The provisions in the Bill contain amendments that set down rules for assessing the amount of damages that can be awarded where Part IVA, Part V Division 1A and 2A and Part VA has been breached and a person has suffered personal injury or has died as a result of the breach. The Bill does not set down rules for calculating damages awards where Part IVA, Part V Division 1A and 2A and Part VA have been breached and this contravention has led to pure economic loss. The Bill also puts in place new arrangements for assessing the period of time within which legal proceedings for a contravention of Part IVA, Part V Division 1A and 2A and Part VA may be commenced where the legal proceedings are to recover damages for personal injury or death.

Personal Injury Damages

Damages awards in personal injury cases are normally regarded as falling into one of two categories; economic loss and non-economic loss. Generally speaking, damages for economic loss include damages for lost earning capacity and needs created as a result of the injury (such as medical, nursing and hospital needs). Non-economic heads of damage (otherwise referred to as general damages) include:

- pain and suffering,
- loss of amenities of life (which compensates for the plaintiff’s inability to participate in the enjoyment of life to the full),
- loss of expectation of life (whether the plaintiff has a shortened life expectancy), and
- disfigurement.

Currently, the TPA does not contain provisions that limit the size of damages payouts, nor are there instructions for calculating how damages should be assessed.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Damages for non-economic loss - general damages

In relation to general damages, the Ipp Report recommended that a cap of $250,000 should be placed on general damages.\(^{18}\)

The Bill, in proposed section 87M places a cap on general damages awarded for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA leading to personal injury and death, of $250,000. The cap on damages is also linked to the Consumer Price Index so that the level of the cap will increase with inflation.

Damages for loss of earning capacity

Where a plaintiff’s ability to earn has been diminished or removed by the defendant’s wrong, they are entitled to receive damages which represent the value of that lost earning capacity.

In relation to damages for loss of earning capacity, the Ipp Panel recommended that a cap be placed on damages for loss of earning capacity of twice average full-time adult ordinary time earnings.\(^{19}\)

The Bill, in proposed section 87U places a cap on damages for loss of earning capacity awarded for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA leading to personal injury or death, at twice the average weekly earnings.

Personal injury damages where gratuitous attendant care services are provided

Compensation may be awarded in respect of an injured person’s need for care and assistance such as nursing care and domestic assistance. In Griffiths v Kerkemeyer the High Court held that compensation may be awarded even though the care may be provided gratuitously by a friend or relative. This is because damages are being awarded for loss of the capacity to care for oneself and the consequent need to be cared for by others.\(^{20}\) In relation to Griffiths v Kerkemeyer damages, the Ipp Report recommended the following changes to the way that these damages are assessed:

(a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.

(b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.\(^{21}\)

(c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
(d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.\(^2\)

The Bill, in **proposed section 87W** implements the Ipp Report’s recommendation in relation to the calculation of damages for gratuitous attendant care services for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA leading to personal injury and death.

**Personal injury damages where the injured person provides gratuitous attendant care services**

An injured person who has lost the capacity to care for others is entitled to compensation for that loss even in relation to care provided gratuitously. The Ipp Report’s recommendations in relation to the provision of gratuitous attendant care services to another person mirrors the recommendations made regarding calculating *Griffiths v Kerkeymeyer* damages.\(^2\)

The Bill, in **proposed section 87X** implements the Ipp Report’s recommendations in relation to the plaintiff’s capacity to provide personal injury damages for gratuitous attendant care services for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA leading to personal injury and death.

**Damages for future economic loss – discount rate**

Where an award for compensation is made, the actual value of the lump sum amount to the plaintiff will be affected by the fact that:

- the lump sum will be invested and interest (or some other investment yield) will be paid on the investment
- the compensation payment will be affected by inflation, and
- income tax will be paid on the investment yield.

Lump sum payments for future economic loss are subject to a discount rate. A discount rate enables the court to factor into the compensation payment for future economic loss the fact that the economic value of the damages payout over time will be affected (and in particular increased) by the contingencies set out above.

The Ipp Report recommended that the discount rate of 3 per cent should be applied to damages for future economic loss.\(^2\)

**Proposed section 87Y** of the Bill provides that a discount rate of 5 percent should be applied to damages awarded for future economic loss for a contravention of Part IVA, Part

---

*Warning:*

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
V Division 1A and 2A and Part VA of the TPA leading to personal injury or death. The Bill also puts in place a regulation making power so that the discount rate may be varied.

**Damages for loss of superannuation entitlements**

Most employees receive benefits in the form of contributions by their employers to superannuation funds. These contributions may cease if the employee is unable to work as a result of the injury. Therefore compensation may be awarded for loss of future employer contributions in addition to damages for loss of future earning capacity.\(^{25}\) The Ipp Report noted that there is uncertainty regarding the appropriate method to be used for calculating the plaintiff’s loss of superannuation. The Ipp Report recommended the following:

- Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).

- The percentage should be the minimum level of compulsory employers’ contributions required under the Superannuation Guarantee (Administration) Act 1992 (Cth).\(^{26}\)

The Bill in **proposed section 87Z** implements the Ipp Report’s recommendation for calculating lost superannuation for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA.

**Interest on damages**

Damages awards may include a component of interest. Currently, some jurisdictions in Australia allow for payment of pre-judgement interest on damages for non-economic loss. Pre-judgement interest on damages for non-economic loss includes interest on damages paid for pain and suffering, loss of expectation of life, loss of amenities and disfigurement, for the period of time between the when the injury first occurred and when the legal judgement was handed down.

The Ipp Panel recommended that pre-judgement interest should not be paid on damages for non-economic loss.

**Proposed section 87ZA** of the Bill provides that a court must not award pre-judgement interest on damages for non-economic loss, gratuitous attendant care services for the plaintiff or loss of the plaintiff’s capacity to provide gratuitous attendant care services to other persons for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA.

The Bill in **proposed section 87ZA** also clarifies that where interest is payable on personal injury damages, the amount payable is either the rate set out in regulations or the ten year benchmark bond rate.

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Exemplary and aggravated damages

Exemplary damages are damages, over and above those necessary to compensate the plaintiff, that are awarded to punish the defendant and provide retribution, to act as a deterrent to the defendant and other minded to behave in a similar way, and to demonstrate the court’s disapproval of such conduct.\(^{27}\)

Aggravated damages are damages that are awarded to compensate the plaintiff for increased mental suffering due to the manner in which the defendant behaved in committing the wrong or thereafter.\(^{28}\)

The Ipp Report recommended that exemplary and aggravated damages for personal injury and death for a contravention of Part IVA, Part V Division 1A and 2A and Part VA of the TPA be abolished.

**Proposed section 87ZB** of the Bill provides that a court cannot award exemplary or aggravated damages where a person claims damages for personal injury and death. Exemplary and aggravated damages will continue to be payable for damages that are not for personal injury and death.

Structured settlements

A structured settlement is a settlement agreement between a plaintiff and a defendant pursuant to which the defendant is required to pay at least part of the agreed damages periodically rather than in a single lump sum.\(^{29}\)

The Bill, in **proposed section 87ZC** makes it clear that structured settlement damages awards may be made under the TPA.

Limitation Periods

The limitation period is the period of time within which an action to enforce a right must be commenced. Failure to commence proceedings within that time period will bar the action.

In relation to limitation periods, the Ipp Report recommended that the following changes be made to the limitation periods for personal injury law:

- The limitation period commences on the date of discoverability.
- The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:
  - (a) occurred; and

\footnotesize{Warning: This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.}
Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004

(b) was attributable to negligent conduct of the defendant; and

(c) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

The limitation period is 3 years from the date of discoverability.

Claims become statute-barred on the expiry of the earlier of:

(a) the limitation period; and

(b) a long stop period of 12 years after the events on which the claim is based.30

In essence under the Ipp Report’s recommendations, legal proceedings must be commenced within three years from the date of discoverability and no later than twelve years after the event on which the claim is based. The Ipp Report also recommended that a court be given discretion to extend the long stop period.31

The Bill, in proposed Division 2, sets down the arrangements for limitation periods. The Bill picks up the Ipp Report’s recommendations in relation to the date of discoverability, the long stop period and the discretion to extend the long stop period.

In relation to the Ipp Report’s recommendations regarding limitation periods, one commentator has noted that the expert panel:

Have been informed by and endorse the thinking of law reform bodies in three continents which conducted thoroughgoing inquiries conducted over periods of several years.32

He went on to argue that:

These changes may not necessarily be for the better, and they may or may not bring about the desired result. But the Ipp Panel’s limitation proposals offer a unique opportunity to bring uniformity to Australia’s limitation laws, modernising then in line with recent thinking, and replacing laws dating from the early 20th and in some cases the 19th century.33

One point that needs to be borne in mind however is that as a result of these amendments, two different sets of limitation periods will apply to legal proceedings brought by a private individual for a contravention of Part IVA, Division 1A or 2A of Part V and Part VA of the TPA. Where the legal proceedings are to recover damages for pure economic loss brought about as a result of a contravention, the limitation periods that are currently contained within the Act will apply. Where the legal proceedings are to recover damages for personal injury or death, the limitation periods, as set out in this Bill, will apply.
Commencement

The arrangements in the Bill will apply to contraventions of Part IVA, Division 1A or 2A of Part V and Part VA of the TPA that occur after the Bill commences operation (item 11 of Schedule 1).

Concluding Comments

The amendments contained within this Bill are part of the Government’s package of legislative measures which are designed to ease the upward pressure on insurance premiums. They implement recommendations 19 and 21 of the Ipp Report (Review of the Law of Negligence Final Report).

Part V Division 1A and 2A and Part VA provide individuals with a legal remedy to recover damages for personal injury and death where goods do not meet the standards prescribed by regulation or are unsafe. Part IVA provides individuals with a legal remedy to recover damages where unconscionable conduct has led to either personal injury or death.

The amendments proposed in this Bill will impose a series of limits on the amount of damages that a person or a party acting on their behalf may recover under these provisions of TPA if that person suffers personal injury or dies as a result of the contravening conduct. The Bill also puts in place new arrangements for setting time limits within which a person can commence legal proceedings.

The amendments in this Bill can be contrasted with the amendments contained within the Trade Practices Amendment (Personal Injury and Death) Bill 2003 which proposes to completely remove the right to recover damages for personal injury and death where Part V Division 1 of the TPA is breached. The Trade Practices (Personal Injury and Death) Bill 2003 is opposed by both the Australian Labor Party and the Australian Democrats.

The Explanatory Memorandum to the Trade Practices Amendment (Personal Injury and Death) Bill (No.2) argues that the difference between the two bills is justified on the following grounds:

By contrast to Division 1 of Part V, the Review noted that Parliament had intended that these Parts of the Act were intended to give protection to individuals who suffer personal injury and death.34

Endnotes

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
3 Ipp Report, op cit., p. 74.
4 Part V Division 1 TPA contains other prohibited practices such as pyramid selling, bait advertising and harassment and coercion.
7 TPA, section 65C.
8 TPA, section 65C.
9 TPA, section 65C.
10 TPA, section 65D.
11 TPA, section 74C.
12 TPA, section 74D.
13 TPA, section 74E.
14 TPA, section 74B.
15 TPA, section 74G.
16 TPA, section 75C.
17 TPA, section 75AD.
18 Ipp, op cit., p. 195
19 ibid., p. 198.
20 ibid., p. 200.
21 Full time adult ordinary time earnings.
23 ibid., p. 206-207
24 ibid., p. 211.
25 ibid., p. 217.
26 ibid., p. 218.
28 ibid.
29 ibid., p. 215.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
31  ibid., p. 94.
33  ibid., p. 875.
34  Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004.