

## 5. Trade Practices

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### *Term of Reference*

4. ***Review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2000 ('the Bill') 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 1974 to prevent individuals commencing actions in reliance on the 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 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 Act.***

5.1 The Panel understands Term of Reference 4 as instructing it:

- (a) To review the interaction of the *Trade Practices Act 1974* (Cwth) ('the TPA'), generally, with common law principles of negligence in so far as they apply to claims for personal injury and death;
- (b) To develop and evaluate options for amending the TPA so as to restrict claims for personal injury and death that may be based thereon;
- (c) To comment generally on the Bill and in this respect have regard to the common law principles relating to waivers and voluntary assumption of risk;
- (d) In carrying out (b), to have regard to the need for appropriate consumer protection consistently with the overall intent of the TPA and, particularly, the Bill.

## The Interaction between the Trade Practices Act and the law of negligence

5.2 In considering the interaction between the TPA and common law principles of negligence relating to claims for personal injury and death, it is first necessary to identify the potential bases for such claims under the TPA. It is also necessary to bear in mind that each State and Territory has legislation that is equivalent to or mirrors some of the relevant provisions of the TPA (most importantly, the 'Fair Trading Acts').

5.3 The TPA applies generally to the business and commercial activities of:

- (a) most corporations;
- (b) sole traders or partnerships whose activities:
  - i) cross State boundaries; or
  - ii) take place within a Territory; or
  - iii) are conducted by telephone or post, or use radio or television (Parts IVA and V only).

It also applies to commercial activities of the Commonwealth.

5.4 The Fair Trading Acts apply generally to business and commercial activities of any person.

5.5 Under the TPA the potential bases of claims for personal injury and death are:

- (a) Part IVA (which concerns unconscionable conduct) particularly ss 51AA, 51AB and 51AC;
- (b) Part V Div 1 (which concerns misleading or deceptive conduct) particularly ss 52 and 53;
- (c) Part V Div 1A (which concerns product safety and product information) particularly ss 65C and 65D;
- (d) Part V Div 2A (which concerns liability of manufacturers and importers of goods) particularly ss 74B, 74C and 74D; and

- (e) Part VA (which concerns liability for defective products) particularly ss 75AD and 75AE.

5.6 Under the Fair Trading Acts, potential bases for claims for personal injury and death are found in unconscionable and misleading or deceptive conduct provisions that are equivalent to or mirror provisions of the TPA. There are other Commonwealth statutes that contain similar provisions relating to unconscionable and misleading or deceptive conduct. These include the *Australian Securities and Investment Commission Act 2001 (Cwth)* and the *Corporations Act 2001 (Cwth)*. There are also certain State and Territory Acts that contain provisions that are equivalent to or mirror certain provisions of Part V Div 1A and Part V Div 2A of the TPA.

5.7 For the sake of clarity and simplicity, the discussion and recommendations in this Chapter generally will refer only to relevant provisions of the TPA. However, references to provisions of the TPA should be read (subject to any necessary adjustments) as incorporating references to State and Territory provisions that are equivalent to or mirror what seem to the Panel to be the most relevant provisions of the TPA. The appendix to this chapter contains tables of such equivalent or mirror provisions. References in this Chapter to the Australian Competition and Consumer Commission (ACCC) should be read as incorporating a reference to enforcement authorities in the States and Territories to the extent that they perform similar functions under the relevant local legislation. The appendix to this Chapter contains a list of such authorities.

5.8 Plainly, if it is thought necessary that legislative changes be made to limit potential use of these various bases for claims (as the Panel recommends), the changes should be made nationally in a uniform and consistent way. All jurisdictions will need to act co-operatively to ensure that this occurs.

5.9 Parliament intended the provisions that relate to product safety and product information, claims against manufacturers and importers of goods, and product liability (that is the relevant provisions in Part V Div 1A, Part V Div 2A and Part VA) to provide causes of action to individuals who suffer personal injury and death.

5.10 On the other hand, it is open to serious question whether Parliament intended those provisions that relate to unconscionable and misleading or deceptive conduct (ie the relevant provisions in Part IVA and Part V Div 1) to provide causes of action to individuals who suffer personal injury and death. We deal with this more fully below.

5.11 Until now plaintiffs have rarely relied on the unconscionable and misleading or deceptive conduct provisions in order to bring claims for personal injury and death. This state of affairs is to a significant extent a product of the prevailing legal culture. There has been no need to rely on those provisions because the common law of negligence has been seen as an adequate source of compensation. However, if personal injury law is changed in ways that the Panel recommends by limiting liability and damages, this situation is also likely to change.

5.12 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.

5.13 We will discuss each of the bases of claims for personal injury and death that have been identified in the TPA, and we will point out how each could attract claims for damages for personal injury and death if reforms to the law of negligence are adopted and implemented.

## Part IVA

5.14 Part IVA is based on principles of equity. This gives a key to its underlying intent. Equity is primarily concerned with commercial and financial transactions. In Australian law, equitable principles have not been used to provide a basis for liability for personal injuries and death.

5.15 The paramount object of the unconscionable conduct provisions of the TPA was to extend certain rules of equity to afford protection to consumers. The Panel accepts that the intent of the legislature was to extend the scope of Part IVA beyond the common law doctrine of unconscionability. But, in the Panel's view, the unconscionability provisions of Part IVA were originally intended to apply only to commercial and financial transactions, not to claims for personal injury and death.

5.16 Nevertheless, there has been judicial recognition that the unconscionable conduct provisions can be used to found claims for personal injury and death.

5.17 In *Pritchard v Racecase Pty Ltd* (1997) 72 FCR 203 a claim for damages was brought by the widow of a man who died after being struck by a motor vehicle that was being driven in a race. An issue was whether such a claim could be brought under s 51AA of the TPA. In submitting that such a claim should be recognised, counsel for the plaintiff referred to the vulnerability of the deceased to exploitation by the organisers of the race. The statement of claim asserted that the organisers knew that persons in the class to which the deceased belonged trusted and relied upon them as to important matters, and the organisers acted in disregard of such trust and reliance. The Full Court of the Federal Court decided that it was open to argument that a claim for damages in respect of the death could be brought under s 51AA in such circumstances.

5.18 The important point to note about this decision is that the argument advanced on behalf of the plaintiff in *Pritchard* was based on elements that are now recognised at the highest judicial level as elements of claims based on negligence. Moreover, the facts of *Pritchard* were the kind of facts that classically give rise to claims for negligence. *Pritchard* demonstrates the potential of s 51AA to provide a basis for claims for personal injury and death.

5.19 However, unlike liability under the misleading or deceptive conduct provisions in Part V Div 1, liability for unconscionable conduct depends upon the plaintiff establishing fault on the part of the defendant (ie unconscionable conduct as defined). This requirement of fault limits the potential of Part IVA as a basis for claims for personal injury and death.

5.20 For this reason, the Panel considers that it is not necessary to prevent claims for personal injury and death being brought under Part IVA. The requirement of fault will limit the type of claim for personal injury and death for which Part IVA can provide a basis.

5.21 On the other hand, because of the potential of Part IVA to provide a basis for claims for negligently-caused personal injury and death, we think it desirable that the regime of rules about limitation of actions that we recommend in this Report, and the recommendations that we will make in our second report about quantum of damages should be explicitly expressed to apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

5.22 We also think it desirable that as a general principle, other limitations on liability that we recommend in this Report should apply, to the extent that they are relevant and appropriate, to any claim for negligently-caused personal

injury and death that is brought under Part IVA in the form of an unconscionable conduct claim.

#### **Recommendation 17**

**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 18**

**The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability 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.**

## **Part V Div 1**

5.23 Section 52 of the TPA has had a vast influence on the law of contract. The section is a major source of litigation in Australia. It has yet to be a significant influence on the law of negligence but, once avenues for plaintiffs under the law of negligence are blocked or made less attractive by reforms, this is likely to change.

5.24 Section 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault. Often, a plaintiff will plead, as an alternative to a claim under s 52, a claim for negligent misrepresentation or deceit. In order for such common law claims to succeed it would be necessary for the plaintiff to prove not only that the defendant made a false representation, but also that he or she did so negligently or dishonestly (as the case may be). Under s 52, 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.

5.25 In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 a worker was seriously injured, allegedly as a result of a misleading statement made to him by a foreman about a grate that he was instructed to remove from an air-conditioning shaft. The worker brought an action for personal injuries under s 52 of the TPA. A majority of the High Court held that s 52 was not intended to extend to all conduct, regardless of its nature, in which a

corporation might engage in the course of, or for the purpose of, its overall trading or commercial business. The majority held that s 52 was concerned only with conduct in the course of activities which, of their nature, bore a trading or commercial character and thus were 'in' trade or commerce. It was held that the foreman's statement was not made 'in trade or commerce'. The limitation of the application of s 52 to conduct 'in trade or commerce' restricts the potential of Part V Div 1 to provide a basis for claims for negligently-caused personal injury and death.

5.26 Nevertheless, the Panel considers that the potential of Part V, Div I as a basis for claims for negligently-caused personal injury and death remains substantial. There are various areas of everyday life that are likely to give rise to claims for personal injury and death that could (despite *Concrete Constructions (NSW) Pty Ltd v Nelson*) be made under Part V Div 1. The most obvious are claims arising out of the provision of professional services and the occupation of land.

5.27 Much advice given (or not given) by professionals in the course of practising their professions is advice given (or not given) in trade or commerce (*Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215) and, hence, is capable of giving rise to claims for misleading or deceptive conduct. This applies to persons such as health-care professionals, engineers, architects and, indeed, all occupational groups whose advice might be relied on by consumers.

5.28 The circumstances under which claims for personal injury and death could be made under Part V Div 1, and the range of potential defendants who would be susceptible to such claims, are infinite. It is not required that the plaintiff was acting as a consumer when injured or killed. The majority in *Concrete Constructions (NSW) Pty Ltd v Nelson* made it clear that the only requirement is that the relevant conduct was 'in' trade or commerce.

5.29 It is appropriate to give some examples of claims for negligently-caused personal injury and death that might be brought against professionals under Part V Div 1 or its equivalent or mirror provisions in State and Territory legislation.

5.30 As regards architects and engineers, incorrect advice leading to the collapse of a structure, with the result that a bystander is killed or injured, could ground such a claim.

5.31 Medical practitioners are also at risk. The following scenario is but one of an infinite variety of circumstances that could give rise to claims against

such practitioners. Assume that a surgeon informs a patient that a certain operation would improve a patient's state of health. Assume further that this advice is given after all reasonable care has been taken in recommending the treatment. Assume that in the course of the operation the surgeon decides — as a result of unforeseeable circumstances undetected by the previous tests — that the operation should not proceed further and was, in effect, not necessary. The patient might then be able to claim damages in respect of the unnecessary operation on the ground that the surgeon was guilty of misleading conduct in advising that the operation should take place.

5.32 Many cases of occupier's liability could be brought as cases of misleading conduct. Take a corporation that advertises a particular area in the country as being attractive for camping, or advertises a hotel as being suitable for families. Assume that there is a muddy patch in the camping area and someone slips, or that there are uneven stairs in the hotel on which a child or elderly person trips. At present claims arising out of these circumstances would ordinarily be brought on the basis that the injuries arose from failures to take reasonable care. Any competent lawyer, however, would be able to frame such claims so that they come within the requirements of misleading or deceptive conduct under Part V Div 1.

5.33 For the reasons we have given, the possibility of making claims for damages for negligently-caused personal injury and death under Part V Div 1 and similar legislation could have an adverse effect on the reforms recommended in this Report. Accordingly, the Panel is of the view that the possibility of basing claims for personal injury and death on such provisions should be removed.

### **Recommendation 19**

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

5.34 Following on from Recommendation 17, the Panel also considers that the power of the ACCC to bring representative actions for damages for personal injury and death under Part V, Div 1 (see s 87(1A), s 87 (1B) of the TPA) should also be removed. (It is to be noted that the ACCC has no power to bring representative actions for breaches of the statutory warranties under Part V Div 2 and Div 2A).

## Recommendation 20

**The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.**

5.35 Under Part VI of the TPA various actions can be taken, and various remedies can be sought, by the ACCC and persons who have suffered or are likely to suffer loss or damage as a result of conduct of another person in contravention of the TPA. The remedies include injunctive relief (s 80), non-punitive orders (s 86C), punitive orders (s 86D), orders to pay pecuniary penalties (s 76) and range of other orders (s 87 and 87A).<sup>1</sup> The ACCC can also accept written undertakings in connection with matters under the TPA (s 87B). Criminal proceedings can be brought under Part VC. Recommendations 19 and 20 are not intended to affect any of these actions or powers in any way. Both recommendations are concerned only with actions for damages.

## Part V Div 1A, Part V Div 2A and Part VA

5.36 We repeat that these provisions are specifically intended to give protection to persons who suffer personal injury and death as a result of defects in goods. If the law of negligence is reformed in ways that the Panel recommends in this Report, greater attention may be paid to them by claimants as possible bases for personal injury claims.

5.37 In the Panel's opinion, the potential of these provisions to undermine reforms of personal injury law is not as great as that of Part V Div 1.

5.38 First, they are limited to harm resulting from defects in products.

5.39 Secondly, fault will arguably be an element of many, if not all claims under these provisions. For this reason, such claims may fall within the terms of Recommendation 1. That is, they may fall within the description of actions for negligently-caused personal injury and death.

5.40 Notwithstanding what is said in paragraph 5.39, the Panel thinks that for the sake of clarity and certainty, it would be desirable that the rules about limitation of actions and quantum of damages that are recommended in this Report should be explicitly expressed to apply to any claim for

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<sup>1</sup> The ACCC also has power to seek declarations under s 163A(1) of the TPA.

negligently-caused personal injury and death that is brought under these provisions in the form of an unconscionable conduct claim.

5.41 We also think it would be desirable, and we recommend, that as a general principle, claims for negligently-caused personal injury and death that are brought under these provisions should be subject to the other limitations of liability that the Panel is recommending in this Report to the extent that they are relevant and appropriate.

#### **Recommendation 21**

**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.**

#### **Recommendation 22**

**The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability 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.**

### Consumer protection

5.42 It is our considered opinion that implementation of Recommendations 19 and 20 (preventing actions for damages for personal injury and death being brought under Part V Div 1 of the TPA) will not unacceptably reduce legal protection of consumers. Its main effect will be to remove a basis of strict liability for personal injury and death resulting from misleading or deceptive conduct. It will not prevent claims, in respect of the sorts of conduct covered by Part V Div 1, being brought as negligence claims.

5.43 In any event, the actions that can be taken and the remedies that can be sought under Part VI of the TPA afford considerable protection to consumers. As stated in paragraph 5.35, these include injunctive relief, non-punitive orders, punitive orders, orders to pay pecuniary penalties, and other orders, as well as the bringing of criminal proceedings. This is a formidable armoury for individuals and the ACCC.

5.44 As regards Part IVA, Parts V Div 1A, Part V Div 2A and Part VA, our view is that although our recommendations may reduce the level of consumer

protection currently provided under the TPA (and equivalent or mirror legislation in the States and Territories) they do so consistently with the objectives underlying our Terms of Reference.

5.45 The ACCC opposes any reduction of the level of consumer protection provided by the TPA. Its opposition is based on concepts such as 'the economics of accidents', 'the optimal allocation of risk', and 'efficient management of risk'. The Panel accepts that all these are valid considerations. But we do not view personal injury law solely as a regulatory mechanism or a risk-management tool. The Panel believes that, consistently with its Terms of Reference, other considerations of importance need to be taken into account. These include the inherent value of personal autonomy, and the desirability of persons taking responsibility for their own actions and safety.

5.46 The Panel is also required by its Terms of Reference to assume that the award of damages has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another, and to propose reforms that will meet the objective of limiting liability and the quantum of damages arising from personal injury and death.

5.47 Taking a global view, the Panel does not consider that the reforms it proposes will reduce consumer protection unacceptably.

## Section 74, s 68 and the Bill

5.48 Section 74(1) implies into contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be rendered with due care and skill. Section 74(2) implies into certain contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be reasonably fit for their intended purpose.

5.49 Section 68 provides that any term of a contract that purports to exclude or restrict the warranties implied by s 74 is void.

5.50 The Bill will prevent s 68 rendering void provisions in contracts for recreational services that purport to exclude, restrict or modify those implied warranties. In other words, the Bill will allow consumers to 'waive' the implied warranties in the case of contracts for the supply of recreational services, as defined in the Bill.

5.51 The Panel considers that the Bill will not significantly reduce consumer protection for the following reasons:

- (a) Exclusion of the implied warranties will be subject to the ordinary rules of contract law. These rules are stringent. It is notoriously difficult for parties relying on contractual exclusions of the kind contemplated to succeed.
- (b) There are two principal hurdles that must be overcome. First, the exclusion clause must be effectively 'incorporated into the contract'. The rules about incorporation are complex, and in cases where there is doubt about whether they have been met, the doubt will be resolved in favour of the consumer.
- (c) Secondly, to be effective, the words of the exclusion clause must be clear and unambiguous. Any doubts about the precise meaning of the clause will be resolved in favour of the consumer. For instance, clauses intended by the service-provider to exclude liability for negligence are often held ineffective to do so.
- (d) Finally, it should be emphasised that a contractual exclusion clause, even if effective in other respects, may only be effective against the other party to the contract. For instance, if one person enters a contract for the supply of recreational services to a group, the other members of the group may not be bound by the terms of the contract. Moreover, many people who participate in recreational services do not do so pursuant to contracts. The very nature of recreational activities is such that people often take part in them spontaneously, without any thought of entering into a contract with the person organising the activity. The Bill will have no impact on the rights of such people.

5.52 In summary, the Bill removes the obstacle presented by s 68 to the exclusion of the warranties implied by s 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

5.53 Even so, if it is desired to allow exclusions of the kind contemplated in the Bill, an amendment to the TPA of the kind contained in the Bill is necessary.

5.54 To the extent that the Bill facilitates assumption of risk by consumers of recreational services, it is consistent with the objectives of the Panel's Terms of Reference. In this context we would draw attention to Recommendation 11 to the effect that a provider of recreational services should not be liable to a voluntary participant in the recreational activity in respect of the materialisation of an obvious risk.

5.55 In certain respects, the recommended rule is narrower in scope than the Bill.

- (a) First, it covers only obvious risks, whereas the sort of clause permitted by the Bill could, in theory, exclude liability for any risk of the activity.
- (b) Secondly, the definition of 'recreational services' contained in Recommendation 12 is considerably narrower than that in the Bill.

5.56 On the other hand, the recommended rule has significantly wider effect than the Bill in the sense that it excludes liability for certain risks rather than simply allowing liability to be excluded by agreement. Also, it applies to all participants in recreational activities (as defined) whether or not they have a contract with the provider of the relevant recreational services.

5.57 Attention should also be drawn to Recommendation 14 to the effect that there can be no liability for failure to warn of a risk that would, in the circumstances, have been obvious to the reasonable person. This recommendation covers, but is not limited to, risks of recreational activities as defined in the Bill. It applies to any breach of an obligation to warn regardless of whether the obligation arises under a contract.

5.58 To the extent that the warranties implied by s 74 are warranties of due care and skill, they will fall within the terms of Recommendation 1. To that extent, Recommendations 11 and 14 will apply to claims for personal injury and death based on breaches of the s 74 warranties.

5.59 Together, these two recommendations afford significant protection, additional to that contemplated by the Bill, to providers of recreational services, and they make an important contribution to furthering the objectives underlying the Terms of Reference. At the same time, we consider that they strike a reasonable balance between the interests of providers and consumers of recreational services.

5.60 These two recommendations are consistent with and compliment the policy and terms of the Bill. The Panel sees no reason why they should not exist side-by-side.

5.61 Nevertheless, the Panel strongly suggests that paragraph (c) of the definition of 'personal injury' in clause (2) of the Bill be redrafted or, preferably, deleted . It is extremely (and, in our view, unacceptably) wide in its terms and very difficult to understand. We also suggest that consideration be given to narrowing the definition of 'recreational services' in the Bill to bring it into conformity with the definition in Recommendation 12.