



Submission on the Statutes Amendment Repeal (Fair Trading) Bill 2008

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Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

ALA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a President-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by twelve paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2009. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for educational activities, exchanging information, developing materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for keeping lawyers and other professionals up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Introduction

The Australian Lawyers Alliance would like to thank the government for the opportunity to comment on the Statutes Amendment Repeal (Fair Trading) Bill 2008.

The Australian Lawyers Alliance is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual and is the peak legal body representing the rights of injured people who suffer loss as a result of another's negligence. This submission is drafted by the South Australian branch of the Australian Lawyers Alliance.

Executive Summary

The Lawyers Alliance main conclusions regarding this Bill are as follows:

1. The proposed Bill will not help recreational service-providers to obtain insurance.
2. The legislation at both a state and a federal level is extremely disadvantageous to those who are injured in the course of recreational pursuits.
3. The law of negligence can adequately cover the situation of recreational service-providers, as it did prior to the IPP reforms to the laws of negligence. A number of reports have subsequently highlighted that the basis of the IPP recommendations to reform the law of negligence were ill-founded.
4. It is not surprising that such legislative attempts have failed to address the problems with public liability insurance, which sparked the reforms to the laws of negligence, because they are based on a false premise. The Lawyers Alliance submits that it is unfair that the Commonwealth Act essentially excludes all claims for personal injuries arising from recreational services, which would obviously negate the need for specific insurance in relation to

- them.
5. The real issue confronting the community is the provision and availability of insurance, an issue that is not caused by the incidence of claims, but by the difficulties experienced in the insurance industry. In the view of the Lawyers Alliance, there has never been a demonstrable basis proving the existence or prevalence of claims as a cause for the unavailability of insurance.
 6. In its report on public liability, the Parliamentary Economic and Finance Committee accepted¹ that the wave of tort law reform could not be said to have impacted directly on premium levels and that, despite the legislative changes as per the terms of reference, the effectiveness of such measures in reducing the magnitude of the problem remains unclear at best and irrelevant at worst.
 7. The Lawyers Alliance recommends that the recreational services be treated like any other activity within the community, to be governed by the law of negligence and the *Civil Liability Act 1936*.
 8. The Lawyers Alliance has not seen any insurance industry views on this legislation, and would be very interested to comment on same should it become available.

¹ At pages 45 and 46.

Introduction

1. In late 2008, the current government in South Australia introduced the Statutes Amendment Repeal (Fair Trading) Bill 2008, which purported to amend a number of pieces of legislation. This submission deals with specifically with amendments to the *Fair Trading Act 1987*, which appears in Part 5 of the Bill (Clause 35).
2. Part 3 is also relevant in that 38(2)(b)(ii) of the *Civil Liability Act 1936* is to be repealed, given that it refers to *Recreational Services (Limitations of Liability) Act 2002*. Part 12 of the amending Bill repeals the *Recreational Services (Limitations of Liability) Act 2002*.
3. The South Australian Branch of the Lawyers Alliance has not had the opportunity to consider any other provisions of the Bill.
4. The repeal of the *Recreational Services (Limitation of Liability) Act 2002* appears to have widespread support. The Lawyers Alliance certainly supports its repeal, as do most recreational service-providers. In relation to this, the Lawyers Alliance submits that:
 - The *Recreational Services (Limitation of Liability) Act 2002* was impractical;
 - There was no justification for enacting the legislation in the first place, which is one of the reasons the legislation failed to meet its ultimate objective;
 - Registering a code was a convoluted and unnecessarily bureaucratic process for all concerned and the costs were also prohibitive, making protection from civil liability far too expensive for service-providers.

5. The Lawyers Alliance understands that only one code was ever registered and that only a few others were even contemplated, given the prohibitive cost. Failing to enable recreational services to have public liability insurance not only reduces their capacity to provide services to the public, but also undermines the rights to sue of various persons who suffer injury as a result of the negligence of another.
6. We therefore contend that the repeal of the *Recreational Services (Limitation of Liability) Act 2002* is in the best interests of the community of South Australia.

The Amending Legislation

7. To address the concerns of those critical of the 2002 legislation, the South Australian government released a discussion paper in September 2008 seeking comment on new statutory provisions that would limit the liability of recreational service-providers arising from death and personal injuries. In short, the new law proposed to repeal the *Limitation of Liability (Recreational Services) Act 2002* and the *Consumer Transactions Act*. It also amended the *Fair Trading Act* to include statutory conditions and warranties and a provision that enables users of recreational services to sign a waiver to exclude, restrict or modify certain implied conditions and warranties, except in cases of reckless conduct.
8. Both the existing legislation and the proposed legislation were introduced to overcome the difficulty of obtaining public liability insurance (see 2.3, discussion paper). The government noted, in particular, that groups providing recreational services were experiencing significant difficulty in obtaining insurance. As of September 2008, it was suggested that while public liability insurance is much

more readily available, some recreational service providers were still experiencing difficulty in obtaining it.

9. The government proposes to incorporate the repealed *Consumer Transaction Acts* and implied warranties in the *Fair Trading Act* (see section 35 of the Amending Bill). Consequential amendments to a number of other pieces of legislation have also been necessary (see the Bill).
10. The government justifies its position on incorporating these provisions into the *Fair Trading Act* because other jurisdictions have done it.
11. The new Bill allows recreational service-providers to exclude, restrict or modify certain statutory implied conditions and warranties, including assurances that services will be rendered with due care and skill and are reasonably fit for purpose. However, these important conditions can only be excluded, restricted or modified if the consumer agrees in writing. The restriction or modification can only exclude the service-provider's liability for death or personal injury except in circumstances of reckless conduct, defined as the provider having reckless disregard for the consequences of the Act or omission. Only in circumstances of gross negligence/reckless conduct would a recreational service-provider remain liable for damages for death or personal injury. The Bill does not change the definition of recreational services .

Goods

- This clause inserts provision 2A of the current *Fair Trading Act* at Part 10 and deals with conditions and warranties in consumer transactions. The proposed section 74A defines 'quality of goods', what 'negotiations'

involve and what goods are of 'merchantable quality' and when they are considered fit for the purpose for which they are going to be used.

- These amendments do not affect the operation of the *Sales of Goods Act* 1995 and the clauses contained therein.
- Provision 74B is a new provision that nullifies any provision of a contract that attempts to exclude or modify conditions other than in accordance with the new section.
- The proposed section 74C creates an offence if a contract for supply of goods or services by a person contains such a provision other than in accordance with 74I.
- The proposed section 74D implies conditions in the sale and supply of goods. The right to enjoy quiet possession and the implied warranty the goods are free to pass in title and will remain free until the time property passes.
- 74E deals with the supply of goods by description.
- 74F talks about implied undertakings and consumer transactions for supply of goods as to quality of fitness, and section 74G imposes conditions of supply by sample.

Services

- Section 74H imports warranties in relation to the supply of services and holds that they will be rendered with due care and skill and the material supplied in connection with those services will be reasonably fit for the purpose for which they are supplied (74H(1)) (except in the case of engineers and architects). The supply of services also implies a warranty that the services and materials supplied in connection therewith will be

reasonably fit for the purpose for which they are intended (subsection 2) but building domestic building work is not covered by the provision.

The Critical Provision

- 74I – this section allows the supplier of recreational services to exclude, restrict or modify any warranty implied by subsection 74H or any similar provision existing in the Commonwealth level; that is, provisions within the *Trade Practices Act*.
- Such exclusion, restriction or modification is limited to excluding restriction or modifying liability for the supply for any personal injuries suffered by a consumer or another person for whom or on whose behalf the consumer is acquiring the services (the third party) if:
 - the consumer has full legal capacity.
 - the terms are contained in the prescribed particulars in the prescribed form.
 - the term was brought to the attention of the consumer prior to the supply and the consumer has agreed to the terms of the prescribed manner.

12. Subsection 3 excludes operation of such restriction and the exclusion, restriction or modification for the liability of the supplier for damages for any significant personal injury suffered by the consumer, or any third party consumer, if it is established that reckless conduct of the supply caused the injury.

13. In respect of proposed 74I(3), two comments immediately arise:

1. What constitutes a significant personal injury? The term is not used in subsection 2(a) where it says 'any personal injury'.
2. How is the word 'reckless' to be interpreted? What might that mean in practical terms?
3. Subsection 4 says that any contract is void if it purports to indemnify or has the effect of indemnifying a person who supplies recreational services in relation to any liability that may not be excluded, restricted or modified under the section, but not in respect of contracts of insurance.
4. Subsection 6 defines various issues, the most pertinent ones for the current submission are:
 - (a) 'conduct' – includes any act or omission;
 - (b) 'personal injury' means bodily injury and includes mental and nervous shock and death;
 - (c) 'reckless' – a person's conduct is reckless if the person :
 - (i) is aware or should reasonably have been aware of the significant risk that his or her conduct could result in personal injury to another; and
 - (ii) engages in the conduct despite the risk and without adequate justification.
 - (d) 'recreational services' has a similar definition to the 2002 Act and could mean that any activity undertaken for recreation, enjoyment or leisure;
 - (e) 'significant' means not nominal, trivial or minor.

14. 74J deals with representations made by agents of suppliers.
15. 74K deals with rescission of a contract and gives a right to a consumer the right to rescind a contract where there is a breach of implied conditions and the procedure to be adopted in the course of doing so by serving notices in a prescribed fashion deals with the supply of goods.
16. The critical amendment for comment is section 74I.

'Reckless conduct'

17. The use of the term 'reckless conduct' poses a significant obstacle to the effectiveness of this piece of legislation. If the purpose of the legislation is to make it easier for recreational service-providers to access insurance, use of the term 'reckless conduct' is problematic. Recklessness in the law of torts is a concept related to intention. Recklessness exists where the consequence of the defendant's act is not so substantially certain that he or she must be taken to have intended them, but where a person has been so indifferent to the likely consequence of that act that he or she must be taken to have foreseen them. Recklessness figures very sparingly in the law of torts, and the main point of attempting to establish it is in order to found a claim for aggravated or exemplary damages.²
18. Of concern, however, is that recklessness and intention would in many insurance contracts enable the insurer to avoid its policy coming into operation. A standard clause in a number of insurance contracts exclude reckless, wilful or

² Torts – The Laws of Australia 2nd Edition at p478.

intentional acts. This provision has been the standard for many years. Most contracts of insurance will indemnify in the context of public liability where the acts are negligent, but not where the acts are 'reckless'. The Lawyers Alliance submits that the use of the term 'reckless conduct' in the proposed 74I(3) will not assist at all in providing indemnity insurance in public liability situations for recreational service-providers.

19. This would mean that recreational service-providers will be forced to defend claims against them, having been exposed to liability for significant damages. If an injured person is unable to take action against a recreational service-provider who is fully insured, then that injured person will rely on Medicare and Centrelink; that is, at the expense of the taxpayer and the public purse.
20. The ability to exclude, restrict or modify any of the warranties contained in 74H is limited to excluding, restricting or modifying the liability of the supply for any personal injuries suffered by the consumer (or a third-party consumer) who is of age and has legal capacity and has in writing completed prescribed particulars. The specific term needs to have been brought to the attention of the consumer before the supply and been agreed by the consumer. Subsection (3) does not operate to exclude, restrict or modify any significant personal injury suffered by the consumer if it is established that the reckless conduct caused the injury. Significant means not nominal, trivia or minor.
21. Further opportunity for argument will occur in respect of as to what is the meaning of significant personal injury, and the Lawyers Alliance submits this could be avoided if the definition were simply left at 'personal injury'. The law of

damages considers the issue of significance in any event, and adequately deals with trivial, nominal or minor matters. Adding an additional requirement that the injury be significant complicates the concept and gives a further basis for dispute among various parties, including insurers.

22. The definition of recklessness clearly places it at the same level as intention and/or wilful conduct and, in the view of the Lawyers Alliance, will be used by insurers to avoid the operation of any public liability insurance.
23. The Lawyers Alliance understands that initially the term 'gross negligence' was used rather than the term 'reckless conduct'.
24. It is submitted that incorporating the term 'gross negligence' simply unnecessarily complicates the area further and, again, creates an area of dispute that may enable insurance policies to avoid liability to indemnify. 'Gross negligence' is of no better use than 'reckless conduct', in our view.
25. The *Civil Liability Act* 1936 was amended substantially as a result of the reforms and came into operation in May 2004.
26. Essentially it codified and defined negligence and circumstances of liability.
27. By introducing a further concept of gross negligence or reckless conduct under the *Fair Trading Act*, parallel scenarios of liability will complicate the area unnecessarily. It would clearly be more efficient to have the exclusionary

provisions restrictions or modifications to civil liability placed in the *Civil Liability Act*.

28. The Lawyers Alliance has been provided with information that says that reasonably aware and reckless conduct may provide a basis for insurers to avoid responding to claims until courts determine there was no reckless conduct or that someone was reasonably aware of their actions. The Lawyers Alliance submits that this is not a preferable outcome. It is far more preferable to have insurers involved from the outset of any claim. This could occur if the common issue of negligence remains, which of course does away with the need for any exclusionary provision at all (see below).

Waiver

29. Concern has been expressed about the ability of parties to waive their rights in various publications.
30. Unless the prescribed manner and form has been completed, no exclusion will be applicable.
31. The consumer needs to have had this waiver brought to his attention directly and evidence of that will need to be obtained. The consumer will also need to have agreed to the term in the prescribed manner, no doubt to be prescribed by regulation.

32. Waiver means the unilateral abandonment or renunciation of a right, claims contention or remedy. A party can waive any right to sue, which is essentially the process required by section 74I. A waiver (as distinct from variation to the contract) needs to be unequivocal. Signing prescribed forms would no doubt assist such a conclusion. Consumers are required to waive their right to sue unless reckless conduct by the supplier has occurred. To consent to a waiver, a person must have the requisite capacity. An effective consent may be given by a person who has not yet reached the age of majority, provided that person is capable of understanding the issue to which the consent relates (see *Secretary of Department of Health and Community Services v JWB (Marion's case)* 1992 175 CLR 218). In the case of young children, who are incapable of giving a binding consent, it seems that parents or guardians may consent on their behalf, for example, to normal surgical procedures performed for their benefit, even in the case of non-therapeutic procedures such as cosmetic surgery or an appendectomy (see *Marion's case*). On the other hand, the High Court has held in certain circumstances that it would be inappropriate to allow a minor to give a binding consent where they clearly do not understand the nature of the operation (see *Marion's case*). The issue of parents waiving on minors' behalf can occur in circumstances of necessity, which are not relevant to the current context.

33. Waiver of children's right will potentially create issues between the child and the parent in circumstances of negligent conduct by the parent. Arguably, a parent could be sued for negligently giving a waiver in relation to his or her child.

The Commonwealth Provision

34. Section 68(B) of the *Trade Practices Act 1974*, amended in 2002, applies restrictions and modifications to the terms of a contract (otherwise implied by the *Trade Practices Act*) in relation to the supply of recreational services, so long as the restriction is limited to death and personal injury entered into after the commencement of the Act. 'Recreational services' is defined similarly to the proposed South Australian legislation. 'Personal injury' under the *Trade Practices Act* means an injury of an individual including aggravations, exacerbations, recurrences, disease, an injury to an individual or the contraction aggravation of the acceleration of a disease in an individual or the coming into existence of the aggravation, exhilaration or occurrence of any other conditions, circumstances or occurrence or activity, form of behaviour, course of conduct, the state of affairs in relation to the individual that is or may be harmed or disadvantageous to or result in harm or disadvantage to the individual or the community. Essentially this means that any injury resulting from recreational services will be excluded from coverage.

35. The Lawyers Alliance submits that this was a knee jerk reaction in 2002 to an alleged insurance crisis for which damages awards for personal injuries cases were said to be responsible.

36. The Lawyers Alliance is significantly concerned that a consumer has no protection for injuries caused through any negligence in certain circumstances under the *Trade Practices Act*.

Conclusion

The Lawyers Alliance submits that while the repeal of the *Recreational Services (Limitation of Liability) Act 2002* is a step in the right direction, due to the cost prohibitive and cumbersome nature on the Act, the Alliance holds significant concerns about the drafting of the proposed Bill and the consequential effect on the ability of injured persons who suffer negligence to access appropriate compensation.

Representations that the occurrence of insurance claims were the cause of the alleged 'public liability insurance crisis' have been subsequently revealed to be unfounded and unwarranted. It is critical that any scheme strikes the right balance between allowing recreational service-providers to operate with effective insurance, while still allowing those who suffer injury or loss as a result of negligence to receive effective and adequate redress, rather than relying on taxpayer-funded services.

The Alliance is willing to discuss this matter further and is happy to inform the government on any aspect of the proposals where assistance is needed. Should further information be required, please do not hesitate to contact our Legal and Policy Officer, Tilda Hum, on tilda@lawyersalliance.com.au or 02 9258 7700.