SUBMISSION

CIVIL LIABILITY BILL 2002

TORT REFORM INSTITUTE

24 January 2003

Tort Reform Institute
PO Box 826
Spring Hill QLD 4004
(07) 3216 1222
www.tortreforminstitute.com.au
mailbox@tortreforminstitute.com.au

Contents

About the Institute

Tort Reform Institute Pty Ltd is a consumer activist body that aims to stem the tide sweeping away civil rights from Australian consumers and to return those rights that have already been taken away.

The Institute has recently been incorporated and a national advisory board is being established. It will consist of academic, professional, consumer and corporate representatives.

What does the Institute do?

Governments throughout Australia have since the early 1990s focused attention on looking after big business rather than the well being of ordinary individuals. What began as a trickle is now a flood of legislation that is aimed at improving the profit position of business at the expense of the citizen.

- New South Wales: workplace and motor accident victims have virtually no injury compensation rights except in catastrophic cases. Since 2002, this now also applies to injuries inflicted by doctors and hospitals. The Civil Liability Act NSW 2002 is the height of anti-citizenry leglislation unequalled in any OECD country.
- Victoria: workplace and motor accident victims have virtually no injury compensation rights except in catastrophic cases. In 2001 through the efforts of organisations like the Tort Reform Institute some workers' rights were restored by the Bracks labor government.
- Queensland: the rights of motor accident victims and workers have been under steady attack since 1994. In 2001, through the efforts of organisations like the Tort Reform Institute, some workers rights were restored by the Beattie labor government. The anti-citizen focus of this government has however been underscored by the Personal Injuries Proceedings Act 2002 which contains trip-wire provisions that allow insurance companies to prevent consumers receiving fair compensation.
- South Australia: workplace and motor accident victims have virtually no injury compensation rights except in catastrophic cases.
- Western Australia: workplace accident victims have virtually no injury compensation rights except in catastrophic cases.

The tort reform institute campaigns for the restoration of all rights stripped away from citizens by these laws.

What is "tort reform"?

Unfortunately, in the United States in the 1980s, public relations firms acting on behalf of large corporations and insurance interests began to use the term "tort reform" in a perverse way to confuse the public as to the nature of their agenda.

Such interests seek to change the civil justice system by frustrating the administration of justice and advocating the removal or restriction of the public's access to courts in areas principally relating to compensation for dangerous conduct.

On the other hand, various organisations like ours have for a long time been engaged in activism seeking to improve the rights of consumers in this area through law reform principally in the area of consumer torts, as follows:–

- the winding back of draconian workplace injury compensation laws which were introduced in various Australian states in the 1990s.
- the review of the law relating to limitations of actions which imposes time limits on the commencement of legal claims in the case of personal injury and death.
- campaigning for the removal of provisions of the Trade Practices Act that have the effect of preventing workers relying on the product liability provisions of that Act if they are able to receive any WorkCover benefits.
- reform in some states to allow for dependency claims by de facto spouses and children of a relationship of a de facto spouse.

What is the law of 'torts'?

The law that pertains to the general duties owed by persons to others in the community is the law of torts. A tort is a civil wrong arising out of a breach of duty, whether intentional or not. Torts include defamation, trespass, nuisance, assault, deceit, intimidation and malicious prosecution. These torts have their origins in 17th and 18th century England.

Negligence is a further species of tort that was not developed to its modern form until the mid-1900s. The modern law of negligence was articulated in the "neighbour principle" as follows:-

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

This statement has been adopted throughout most of the English speaking world including Canada and Australia.

This legal duty to one's neighbour is nothing more than what ordinary Australians would expect and consider reasonable.

The tort system is also an efficient means of ensuring businesses have adequate incentive to avoid harm to others.

Businesses make day to day decisions as to whether to bear the costs of accident avoidance or take the risk in bearing the costs of injury if a tragedy occurs. The prospect of paying damages and the healthy fear of being sued acts as an economic incentive on employers to undertake accident avoidance.

The absence of injurer incentives to avoid injury risks where no fault compensation schemes apply, is recognised by economists. The New Zealand Accident Compensation Scheme, for example has resulted in an erosion of standards and an escalating injury rate.

The tort system also has features to ensure liability is moderated to reflect only the extent to which the enterprise was the injurer. By the mechanism of liability apportionment businesses are not required to pay damages to the extent of the victim's own negligence. Thus, there is an incentive both upon the enterprise and upon the victim to take reasonable avoidance precautions.

Review of the Law of Negligence

In March 2001, Australia's largest insurer HIH collapsed with 5.3billion debt as a result of board room dishonesty, corporate greed and sham re-insurance contracts.

HIH's strategy of aggressive premium discounting to win customers at almost any cost and the behaviour of its competitors saw premiums cut to unsustainable levels and ran down reserves. When HIH collapsed, its competitors immediately shot up premiums – well above fair rates and sparked an insurance premium 'crisis'.

The industry was poorly prepared for the events of September 11 and the resulting pressure on insurance assests that followed world wide and this aggravated the 'crisis' in terms of premium prices.

In early 2002 and as a consequence of the 'crisis', the right of consumers to claim compensation for damages arising from personal injury and death became a topic of great debate.

In June 2002, the federal government announced a "review" of the law of negligence with the "objective of limiting liability and quantum of damages arising from personal injury and death." The panel was required to complete part of its review by 30 August and the balance by 30 September.

The 'review' was told it must assume that it was "desirable" to limit the responsibility of people who behave recklessly and limit the amounts that their insurers should pay to those maimed by careless conduct. The panel was prevented from examining the true nature of the insurance market and the factors responsible for the insurance crisis.

The Ipp report displays an alarming lack of insight into the economic and social issues concerning legal liability for reckless conduct. Despite a horrifying injury rate from avoidable conduct, the report focuses on the claims made by the victims not the careless activities that cause them.

The annual cost of avoidable injuries in Australia is estimated at over $15 billion. This was not analysed or even discussed in the report. The cause of injuries must be addressed if the continual drain on resources including hospitals and social security is to be relieved.

There is a glaring absence of detail as to the management failures of insurance companies. The extent to which poor underwriting practices and the excesses of companies like HIH and FAI has contributed to the crisis, is omitted.

APRA is a federal body that has important functions to scrutinise and investigate the management and operation of financial bodies including insurers. The Ipp report fails to address the omissions of APRA in preventing the HIH and FAI disasters.

An enquiry has also taken place into the collapse of HIH and has confirmed the accounts of sham and shadowy deals endorsed by HIH management. It has also revealed accounts of stonewalling policy holders and third parties on legitimate claims as part of a raft of dirty tricks that are considered normal in the industry. Gross failures of regulatory and surveillance agencies have also been established.

It would be naive to assume that all other insurance players were lambs at the same time HIH was marauding as a wolf. The practices were probably not just confined to HIH.

Despite the devastating effect of the Insurance Crisis and the HIH collapse on small business and community groups, there has been no enquiry as to its cause or the role of insurance companies in bringing

it about nor industry-wide dirty tricks that are designed to defeat legitimate claims. Families continue to be stressed to breaking point while insurance executives indulge themselves with multi-million dollar salaries.

If APRA failed to adequately police HIH and FAI, the presumption is that they also failed in their duty to consumers as regards to the other insurance giants and that they too deserve scrutiny.

The further industry wide enquiry should also investigate premium pricing and claims processing.

So far the only attempt to deal with escalating premiums has been to reduce the exposure of insurance companies in the hope that this will reduce insurance costs. This is also the genesis of the Civil Liability Bill (Qld) 2002.

However the happenings at HIH show that the insurance companies can't be relied on to act in any one's best interest except their own.

A full and independent enquiry is needed into those matters Ipp was specifically prevented from examining: the true cause of the crisis, poor underwriting practices as well as premium pricing and claims handling.

The Ipp report can not be relied on as any justification for legislative dismantling of citizen's rights.

Civil Liability Bill (Qld) 2002

The Tort Reform Institute makes the following submissions in relation to the Bill:

Children's Notice of Claim Provisions – Schedule 2

The Bill contains a proposed amendment to the Personal Injuries Proceedings Act to require notices to be given on behalf of children within 6 years of the date of injury. The Institute opposes such provisions.

The change to laws that would see legal decisions (or lack of them) made by parents having binding permanent effect on the lives of children is discriminatory and contrary to the interests of children.

By virute of the Bill, businesses and people who maim kids through recklessness will escape all liability unless the child decides on legal action within six years of the injury. Protections currently in place allow children to reach adulthood before they are required to make legal decisions.

This will absolve those people to whom we entrust our children from any duty to take reasonable care and allow their insurer to deny responsibility for tragedies that are the very purpose of the insurance policy in the first place.

Taking away the current laws means there will be countless cases of children having to live with the injury and the lifelong consequences of their parents' inaction.

The Institute submits that the children's limitation provisions should be removed from the Bill.

Section 48 – Exemplary Damages

The Institute argues that awards of exemplary damages can be important deterrents against unacceptable conduct and there is no justification for their removal. Such awards send strong messages of outrage on

behalf of the community and encourage injury-avoidance conduct. The Institute calls for a deletion of this section. A Court should be permitted to award damages to mark the community's disapproval of an outrageous act.

Standard of Care, Causation, Assumption of Risk and Dangerous Recreational Activities – sections 8-19

These provisions are generally anti-consumer as their intention is to deliberately place unreasonable obstacles in the place of persons injured through no fault of their own through reckless conduct on the part of persons who are best able to understand and cheaply control the risks.

In the business context - especially dealing with dangerous and recreational activities - the persons who promote these type of activities and who are liable to be reckless, make profit from their activities.

Children should be specifically exempted from the scope of these sections of the Bill.

Sections 11, 14, 15 and 19 ought to be removed from the Bill entirely.

Proportionate Liability – sections 28-33

The whole of sections 28 – 33 ought to be deleted. They were found to have no justification by the Ipp panel itself.

In a commercial transaction, the businesses involved - not the consumers - are in a far better position to know of its legitimacy. For them it is a profit making transaction whereas for a consumer it is a consumer transaction. They also know who were the other businesses involved and the extent of their involvement.

If the consumer is wronged as a result eg by fraud or recklessness the consumer ought to be allowed to pursue the most expedient course of recovery. They should not be faced with obstacles of determining what proportion of liability each of the shonky businesses deserve to be allocated.

Allocation of extent of responsibility is something that the collaborating businesses are best equipped to deal with among themselves. It was not the consumer, after all, who set up the elaborate transaction that created the fraud, were aware of exactly how it operated against the consumer and how exactly it was concealed from the consumer.

Businesses should be allowed to pursue each other to the extent that they each participated but it should not be up to the consumer to perform this costly exercise. To require this of a consumer is like asking them to "pin the tail on the donkey" from under a blindfold and with a moving and slippery donkey target.

The proposals would also make defrauded or abandoned consumers susceptible to further schemes to minimise liability. Often for example, fraud promoters or dodgy auditors/lawyers can send businesses to the 'bottom of the harbour' or wind them up to avoid recourse by consumers.

The proportionate liability provisions in the Bill mean:

- consumers who may have already lost their life savings will be denied the opportunity of full recourse.

- consumers will be dissuaded from pursuing any legal remedy whatsoever

- consumers will face unjustifiable barriers to justice

The current law however allows whoever the consumer pursues to join its business partners as a 'party to the proceedings' and to pursue them for their share of loss that the business being pursued must pay to the defrauded consumer. This is reasonable. Just as they were in the best position to decide whether or not to become part of the questionable transaction in the first place, they are in the best position to know who else was involved and from whom they can expect to obtain contribution to pay for the consumer's loss.

Joint liability of tortfeasors should remain as a disincentive to businesses not to participate in questionable and rapacious activity.

Liability of Public Authorities – sections 34-38

These provisions should be amended to impose on public roadway authorities the obligation to inspect and repair at regular intervals and to hold them liable to persons maimed by their carelessness according to the usual (current) law.

Criminal Behaviour – section 40

This provision discriminates against persons for reasons that have nothing to do with the cause of the injury. The provision requires amendment to avoid this consequence.

The provisions should be limited so that the injured persons remedy is denied only to the extent that the nature of any criminal activity contributed to the resulting injury. As currently drafted, the section is far wider than that and ought to be amended.

Intoxication – sections 41-44

These provisions need amendment so that owners of licensed premises who profit from the sale of alcohol are not protected from the consequences of their own negligence towards patrons who may become intoxicated because of alcohol sold and consumed on those premises.

Publicans and other similar operators derive significant profits from the sale of alcohol. They promote its consumption yet the provisions of the Bill protect them from adverse consequences to their customers even if the publican himself, through recklessness causes calamity.

The proposed provisions Sections 41 – 43 would also have the effect of removing any incentive to keep patrons safe and promote unsafe licensed premises.

For example, the provisions as currently drafted would allow a patron at a hotel who was rendered brain--damaged as a result of unsafe premises (eg from a fall after consuming some alcohol at a hotel bar) to be denied compensation even if the publican caused the injury by having an unsafe balcony railing through which the patron fell.

Unless such amendments as the Institute calls for are made, patron safety and the safety of licensed premises are likely to decline and serious costly injuries that could have been avoided are likely to occur.

Assessment of Damages – sections 45-57

Wrongdoers should be liable for the full reasonable cost to innocent victims of the consequences of their reckless acts. This promotes accountability and injury avoidance conduct.

In particular provisions contained in Sections 50, 51, 52, 53, 54, 55, 56 and 57 are specifically designed to reduce wrongdoers' responsibility and reduce the responsibility of insurance companies to whom premiums have been paid for policies to cover exactly the type of events from which these sections excuse them of liability.

Summary

The Tort Reform Institute calls for the provisions of the Bill to be deleted or amended according to the above submissions.