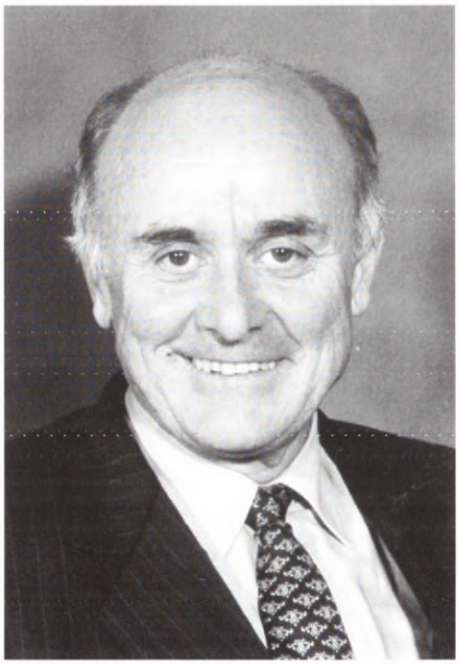
TORT REFORM & *consumer protection*



For an independent view on the role of tort reform in the current insurance climate, APLA spoke to Professor Allan Fels, Chairman of the Australian Competition and Consumer Commission.

APLA: *What role do you think plaintiff lawyers play in enforcing the Trade Practices Act and other consumer protection mechanisms?*

FELS: They provide an essential service for the public, in ensuring that consumers' rights are given effect to. Also, it can be a very important form of insurance when, for any reason, government bodies, whether regulatory or other, with enforcement responsibilities, fail to perform whether for budgetary or policy reasons. Often an individual case can have a much wider public benefit.

APLA: *How do you see the role of regulation then as opposed to civil remedies, in providing for the good of consumers?*

FELS: The Trade Practices Act itself provides a source of redress and protection for consumers where this would not otherwise be available under tort and contract law. In addition, regulation in the sense of safety laws and the like is an important preventative mechanism and needs to be properly implemented.

APLA: *When the tort reform push started, the reason that was proffered for it was skyrocketing insurance premiums and consumer problems in paying those premiums. Would regulation of the general insurance industry be able to control that sort of price increase in the future?*

FELS: I am sceptical that price regulation can do a great deal or that it is desirable in this industry. It has not had a happy history in this type of industry. It does have a legitimate role with pure monopoly situations and the history of price control is that in oligopolistic industries it tends not to keep prices down very much.

APLA: *Do you think that tort reform will have any impact on the cost of premiums and is it desirable?*

FELS: It may have some impact, but we have concerns about the general thrust of the reforms. We think that while it is true there may be some problems currently with premiums, some of the proposed reforms go too far.

Also, we think its very important that some of the underlying principles are stressed more than seems to be the case at the moment. The most important principle is that we want to minimise the number of accidents and their social and economic costs, that is, the costs to persons who are injured, both psychological and economic, and the wider costs to society. In general we believe that the principle governing this area of law should be that the person best placed to avoid an accident should bear liability, even if they are not negligent. Someone has to bear the cost of accidents and the incentive to avoid them is better placed on the person who can most easily avoid them. Typically that's the supplier, not the consumer who is injured. There also needs to be proper information to users about pos-

sible risk and proper safety measures. In light of those criteria, one has concerns about some of the things being proposed.

I'm particularly concerned about changes in the area the ACCC deals with, and we are concerned with the Ipp review's suggestions that section 52 of the Trade Practices Act should be watered down. The fact is that every day of the week, for the last 30 years, in one industry or another, one interest group or another has been trying to get an exemption from this Act. We can't understand how, if there is misleading and deceptive conduct giving rise to personal injury, why the Act should not apply.

We are also sceptical of the fears by the Ipp review that if some other legal avenues of redress are shut down that there will be a big shift into using section 52. At most, that suggests that perhaps in a couple of years there should be some kind of review to determine if that is happening.

APLA: *If that is happening, do you think that it is appropriate in light of the shutting down of other avenues to seek appropriate remedies?*

FELS: I think it is still appropriate that section 52 should apply in Australia generally. It's not inappropriate if section 52 is properly applied. It does apply to personal injury cases. I think the Ipp review fears that there will be mistaken or distorted applications of Section 52 as a result of personal injury relief being sought through here is a greatly exaggerated fear. Courts are unlikely to act in the way that it is feared and we certainly shouldn't base any policy at present on that assumption.

In any case, it's proposed that there be some ceilings on how much can be obtained from damages relief which may apply anyway, and if so, there is absolutely no need to superimpose a further restriction given that feeling.

The Ipp recommendations basically take the view that if you take damages under the Trade Practices Act in all cases except in section 52, you can claim damages but they are to be capped by a method that is consistent with what's happening in the law of negligence. Section 52 is a special case and there shouldn't be any claim at all. We fundamentally disagree with that.

For us, it's a more fundamental issue about the nature of the norm of conduct section 52 espouses – to make sure that an entity, a business entity or business groups engaged in conduct are subject to the same rule of law and that there are no exceptions. It's a fundamental principle for us.

APLA: *If they were to not make section 52 available in personal injury cases and then pass the Trade Practices Amendment (Liability for Recreational Services) Bill 2002, would this not allow a supplier to contract for reduced liability with a consumer based on a misleading and deceptive inducement?*

FELS: If other parts of the new policy either force consumers into greater self assumption of risk or provide them with less protection than in the past for damages and so on, the policy need is the exact opposite of that proposal. Instead of cutting back on a law which requires proper information or prohibits incorrect or misleading information being given to consumers, the thrust of policy should be to increase information to consumers in the new situation. It is especially inappropriate to be cutting back section 52 at this time. Of course, we also say that if there are to be any changes that reduce the liability of suppliers, that there needs to be more action taken to provide information to users, to ensure that there is a proper duty of care requirement imposed on those suppliers and to ensure that they conform with safety laws. There may need to be some stepping up of safety laws.

APLA: *Paragraph 5.45 of the Ipp report suggests that the desirability of persons taking responsibility for their own actions and safety may be more important than the consideration of the economics of accidents and the allocation of risk and efficient risk management. Is this something you would disagree with?*

FELS: We think the more important principle is that everything should be done to minimise the risk of accidents. We only support the principle of consumers taking more risks if this could be shown that this led to fewer accidents in any case. We still want to see that there are proper mechanisms that compensate them when they are harmed. There's no way of avoiding the fact that when accidents occur they have a major ▶

economic cost and someone has to pay.

Consumers are well known to always under-appreciate risk. If you leave it to bargain over the amount of risk involved, the consumer will always under-assume how much risk is involved in the activity, or assume that it won't happen to them. The allocation will always be in the supplier's favour in terms of the bargain and in terms of the increased risk on society.

APLA: *NSW is proposing to allow reduced liability by way of a warning of some sort without there being a need for a contractual relationship. How do you feel about that?*

FELS: I'm wary of that approach. It fairly sharply reduces the incentive for the party issuing the warning to ensure there are proper and adequate warnings.

APLA: *The Trade Practices Amendment (Public Liability Insurance) Bill 2002, was tabled with the purpose of giving the ACCC power to deal with price exploitation arising from changes to the law. Can you ensure that savings to insurers from tort reform are passed on through lower premiums?*

FELS: It should be noted that the government has already asked the commission to report on pricing matters over the next couple of years. We have been directed to monitor premiums of public liability insurance over the next two years, to report on a six-monthly basis to the minister and this monitoring approach is not that dissimilar to that proposed in the Bill.

Generally speaking, there are many proposals in parliament, and publicly, for the ACCC to monitor prices, whether it be bank fees, supermarket prices and now insurance. There are differences between the political parties on this topic and the commission has long held the view that it's up to the parliament to make decisions on what is appropriate and what is not appropriate for us to monitor. Therefore we tend to keep out of debates on proposals that we should monitor or not monitor a particular area.

I would want to stress that prices surveillance is different from trade practices. Under the Trade Practices Act it's entirely up to the commission as to what it investigates and as to its priorities and as to whether or not it will pursue one issue or another. For over 20 years, under prices surveillance and prices justification laws, everyone has agreed that given the contentious nature of prices policies in market economies and the large political differences there are over their role, that it should be up to parliament and politicians. If the commission is asked to monitor, it tries to do that properly.

APLA: *The government refused to bail out Ansett. It certainly seems here, like they are bailing out the insurance industry. Has political expediency here, triumphed over consumer protection?*

FELS: I have no interest in getting into political analysis or sloganeering. I do generally believe that there are dangers in being steamrollered in a perceived short term period of difficulty, into long term changes in the law that fundamentally change the rights of consumers. I am in particular concerned if there are undue deviations from some of the most important principles underlying these laws. I acknowledge that there are some difficulties at present with insurance in terms of its costs being seemingly prohibitive in some areas causing a close down of some activity. My concern is that even if something needs to be done it should be considered very carefully and we should be wary of extreme over-reactions.

APLA: *There seems to be a push from the professions – the legal profession, auditors, medical profession etc. – to have their liability capped and have them excluded from liability under the Trade Practices Act. What are your views on that?*

FELS: We are very wary of any proposal to water down the coverage of the Trade Practices Act, similarly to reduce liability. One reason being, typically in liability cases there is a real cost which someone has to bear and if liability is cut back it merely shifts the cost on to someone else. It merely shifts the costs onto the victims and the taxpayer. PL