Stop this farce

The object of the *Trade Practices Act* 1974 (Cth) 'is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection'.[1] This is a laudable ambition and one that the consumer protection provisions of the Act, particularly section 52 which proscribes corporate misleading and deceptive conduct, has achieved most effectively.

Usually, in cases of corporate misconduct causing injury, one can (or at least until recent legislative enactments took effect, one could) establish a breach of some relevant duty of care. But occasionally, for various reasons, an injury is caused by misleading and deceptive conduct, and negligence cannot be established or is not a suitable remedy. In such cases, section 52 was an important consumer protection, effective in preventing injuries as a result of corporations making representations about the safety of products, premises or recreations, or willfully failing to reveal information that consumers had a right to know.

In early 2003, in an act of absolute anti-consumer bastardry, the Howard government decided it would completely abolish the right to compensation under the TPA for consumers who were injured or killed as a consequence of corporate misleading and deceptive conduct. This amendment, effected through the *Trade Practices Amendment (Personal Injuries and Death) Bill* 2003, was necessary, the government claimed, to close a 'loophole' in the states' tort reform agenda. This 'loophole' was the anticipated flood of claims as injured persons, unable to claim damages for negligence any more, proceeded under section 52.

The obvious misconception is that it does not follow that a person with a negligence action would necessarily have a section 52 claim, but in any event one would hope and expect that before a government removed an important consumer safeguard from the statute books, it would require convincing proof of the need for the change, not just the speculative assertion of vested interests.

In July 2003, on behalf of APLA, I appeared before the Senate Economics Committee to which the Senate had referred the Bill for consideration, and stressed the fact that none of the Bill's explanatory memorandum, the submission of the Insurance Council of Australia or the submission from Commonwealth Treasury set out any facts or figures which compelled the need for change. I pointed out that the New South Wales negligence restrictions had been in effect for 12 months, and there had not been the alleged flood of claims brought under the TPA. (Indeed, to this day, I am unaware of any such claim brought in any jurisdiction by an injured person whose claim in negligence had been abolished by a state law.)

The Committee responded by requesting the Treasury representatives, who appeared after APLA, to provide a fiscal analysis to justify the complete abolition of injury claims under the TPA. In an act of contemptuous defiance of our elected representatives, by the time the Senate Committee came to write its reports, Treasury had failed or refused to provide the figures or the analysis. I do not believe it has provided them yet. This is the process that masquerades as representative and accountable democracy under the present administration.

Australian Competition and Consumer Commission deputy chair, Louise Sylvan, warned, 'Serious harm would flow from any proposal that narrowed the scope of the provisions prohibiting misleading and deceptive conduct.'

Faced with such a warning, without evidence of the claimed justification, and in order to meet the objects of the TPA, one would have expected a responsible executive to withdraw the Bill, and to continue to monitor the situation with a view to reintroducing it if the need later became compelling.

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But not this government, which seems determined to hand this gift to corporate cowboys, reckless operators and bloated insurance companies at the expense of injured persons. It forged ahead with the Bill.

In the Senate, thankfully, the Greens opposed the Bill, and the ALP and the Democrats moved an amendment to ameliorate the worst effects of the Bill by seeking to align the damages available under the TPA provisions with the limitations on damages imposed under the state tort reform regimes. The logic of this was sound enough. If the states did not see fit to totally abolish the many claims brought in negligence, why should the Commonwealth totally abolish the few brought under the TPA?

In the Senate debate, the proponent of the Bill, Senator Helen Coonan (remember her – she thought people with psychiatric injuries like depression should stop malingering and get back to work), trotted out an absurd example, suggesting that unless the Bill was passed, there would be a flood of claims alleging misleading and deceptive conduct against doctors who advised patients to have investigative or preventive surgery, which in retrospect proved unnecessary.

Where do you start in responding to such nonsense? Doctors are not corporations acting in trade or commerce (except in the limited respect of any promotional representations) and are therefore not subject to the TPA. How could any such representation, if made in possession of all available evidence and with the patient's consent, be misleading or deceptive (and if not so made, then why wouldn't it be justifiable to seek compensation for such reckless misconduct, although the claim would probably be brought in assault and battery)? What loss and damage has been suffered as a result of the misleading or deceptive conduct, if the investigative surgery was warranted?

Faced with defeat of the Bill in the Senate, and taken to task on the pages of the *Australian Financial Review* (AFR) last month by Labor's Senator Conroy and myself, Senator Coonan hit back with a letter to the AFR on 29 December 2003.

In an extraordinary response, Senator Coonan sought to meet criticism of the Bill with this confused nonsense, which would have made Sir Humphrey Appleby of 'Yes Minister' fame swell with pride:

'Closing this loophole [you will remember that the stated reason for the Bill was to prevent people, whose rights to negligence claims under state law had been abolished, from bringing claims under the TPA] is not about infringing the rights of consumers or excusing companies that engage in misleading and deceptive conduct, as plaintiffs would still be able to sue for negligence in all states and territories.'

Senator Coonan then trotted out some doctor scare-mongering again, and for good measure suggests 'a range of professionals . . . would continue to be under threat of litigation for misleading conduct, regardless of whether they were at fault or not'. Get it? All those accountants and lawyers who are causing injury mayhem out there, although they haven't done anything wrong, will be under serious threat without the immediate passage of this important legislation.

"Senator Coonan's response would have made Sir Humphrey Appleby of 'Yes Minister' fame swell with pride."

The Minister then created a fictitious controversy by claiming the amendments moved in the Senate could not work because there would be doubt about which state or territory's laws applied. Torts 101 is all you need to know that it would be the laws of the state where the injury occurred.

Senator Coonan then had the temerity to conclude this dribble with a warning to Senators that the Bill's passage is required 'in the national interest'.

I'll tell you what is in the national interest: honesty and accountability in government; public servants doing what they are directed to by our elected representatives; some proof of a pressing need before long-standing rights are stripped away on a whim; ministers of the Crown not propagating unsubstantiated garbage as reasoned political argument in the national media; the national media holding the government to account over such garbage; and the government, for once, putting the interests of consumers and the welfare of its people, rather than big business, big insurance and the Australian Medical Association at the forefront of its agenda.

The APLA public affairs team and national policy committee have pursued this campaign, as it does not fall squarely in any state committee's jurisdiction and the states have been busy fighting their own battles. We have done so, not because it is the worst piece of tort reform to emerge in the last 12 months – far from it – and not because masses of people will be affected (though many will, and that is reason enough for us). We have pursued it because something far more fundamental is at stake. If these rights can be taken from ordinary people in this way; if fundamental protections against business misconduct can be dismantled without any proper justification being required; if executive government, without proper scrutiny, can make up facts to do something that will harm thousands, then we will have crossed a line in this country to which we may never be able to return.

Rest assured APLA will continue to pursue this campaign when the legislation is reintroduced this year. It is too important for us not to. PL

Endnote: 1 s2.