

Legislative Council

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STATUTES AMENDMENT AND REPEAL (FAIR TRADING) BILL

The Hon. A. BRESSINGTON (21:07): I rise to indicate that I also support the second reading of this bill and, depending on amendments, I would also support the passage of the bill. The Statutes Amendment and Repeal (Fair Trading) Bill, introduced by the Minister for Business and Consumer Affairs in November last year, proposes several changes to the regulation of business and consumer affairs in the state. Notably, there are increased penalties for breaching the Fair Trading Act, expanded powers of investigation for authorised officers, and increased powers for the commissioner to temporarily suspend some traders' licences.

Just on the latter, it is often a point of frustration that the dodgy dealers or builders exposed on programs such as *A Current Affair* and *Today Tonight* are still able to continue trading long after the show has gone to air. It is hoped that the new provision permitting the commissioner to suspend the licence of certain traders prior to the completion of disciplinary proceedings, which often occurs long after the traders' offending, will lead to proactive consumer protection.

On my understanding, many of the remaining provisions are simply codification of the present common law of contractual relations between supplier and consumer. I know this is an issue that sparks much emotion amongst members in this place, not to mention the legal fraternity, and these are issues that we will be working through during the committee stage.

I will focus on what I believe to be the main point of contention among ordinary South Australians, involving the repeal of the Recreational Services (Limitation of Liability) Act 2002 and its proposed replacement, section 74I. Prior to looking at the proposed solution, I would like to first turn to the problem as we find it.

This problem has its roots in the so-called public liability crisis at the start of this decade. As occurred in the '70s and '80s, insurance providers began increasing the premiums or withdrawing public liability insurance coverage nationally, particularly for those activities involving inherent risk, such as contact sport and horse riding. Examples of severe spikes in premiums and service providers lamenting their inability to procure public liability insurance frequently appeared in the media, both nationally and here in South Australia.

The cause of the crisis has been the subject of much speculation, with two distinct schools of thought emerging. One argues that a mix of global and domestic economic conditions, including the collapse of HIH Insurance and poor investment practices by insurance providers, led them to attempt to recoup losses and avert risk.

This school of thought proceeds on the premise that insurance providers are primarily orientated towards investment and, as such, any market turbulence will affect profit margins. Put forward by insurance providers and supported by some in the legal profession, the other dominant argument attributed to the crisis is to the

significant yet steady increase in the total cost of claims in the years prior which had not been reflected until then in premiums paid.

This argument was given credence by the Australian Competition and Consumer Commission which, in the first of many monitoring reports, detailed a 75 per cent increase in the average cost of claims settled between 1997 and 2002, with the average duration of time taken for claims to settle also increasing 34 per cent in roughly the same period. While in hindsight it is hard to ignore the influence of the economic conditions, especially the collapse of HIH Insurance, it seems that insurance providers impressed upon state and federal governments the need for reform of liability of recreational service providers and personal injury more broadly.

From research undertaken I believe the first significant response came from the ministerial meeting on public liability insurance, which commissioned the Hon. Justice David Ipp (formerly of the Western Australian Supreme Court) and others to thoroughly investigate tort liability and possible reforms. The subsequent report entitled 'Review of law of negligence: final report', known as the Ipp report and also referred to by the Hon. Rob Lawson, proposed several reforms to tort law generally, many of which have now been incorporated into the Civil Liability Act.

This government, like its interstate counterparts, also moved to limit the liability of recreational service providers and, hence, increase their ability to procure public liability insurance and reduce the premiums they pay by the introduction of the Recreational Services (Limitation of Liability) Act 2002. For limitation of liability under this act a recreational service provider is required to draft and submit a safety code which, provided it is accepted by the Office of Consumer and Business Affairs, the minister and parliament, would then limit their liability to injuries arising out of conduct outside of that permitted by that code. Notably, this act limited the legitimacy of signed waivers to those issued by recreational service providers who have a registered safety code.

From my understanding, the concept underlying this act was a point of great pride for the government in 2002. However, in operation the reality is that, six years on, only one safety code has been registered, submitted by the Miniature Horse Society at a cost of \$35,000, which I have had confirmed. The Miniature Horse Society is the only provider of recreational activities in South Australia protected by the 2002 act. I would also like to know—and the minister can answer this in the committee stage—what recourse the Miniature Horse Society has now to regain the \$35,000 expended on the presumption that the 2002 act was what they were stuck with and that they had best make the most of it by submitting a code. As one can imagine, they are hardly an affluent organisation and the commitment of this money was a significant drain on its frugal savings. Now, six years on, it was all for nothing. Will the government reimburse the Miniature Horse Society for funds wasted through no fault of its own?

As was highlighted by the Hon. Iain Evans when introducing the private member's Civil Liability (Recreational Services) Amendment Bill 2008, the fact that only one code has been registered is not solely the fault of service providers. Five other providers submitted codes to the Office of Business and Consumer Affairs only to have them sat on for years. It cost the each of the aforementioned organisations that submitted codes (so Iain Evans informed the house in the other place) about \$7,700. I have been informed that, in total, nine codes have been submitted to the Office of Business and Consumer Affairs.

I am reliably informed that a majority of the codes had been drafted with the assistance of government grants. One such example is a code submitted for trail riding by Horse SA. After expending approximately \$16,000 generously provided drafting the code, Horse SA, like the others, was constantly told that the code submitted was not adequate due to a requirement that it be narrowly defined.

As one would presume, this became increasingly frustrating, because it required many unpaid hours by volunteers, and eventually Horse SA, like the others, came to the conclusion that the act was unworkable and gave up. Its code has been sat on since—although the Office of Consumer and Business Affairs can be forgiven, because it seems that the code was lost for a portion of this time.

As a matter of interest, I have also been informed that the Office of Consumer and Business Affairs has expressed the view that the sole code registered is not satisfactory and that, if this scheme were to continue, it would have to be reviewed. So, in effect, there would be no registered safety codes at all. Also excusing service providers is the fact that many report legal advice against initiating the costly process of having a code drafted and submitted, for it offers little to no protection. Like the bill before us, it does not apply to minors, with whom most recreational service providers engage at some level.

In addition, the requirement that the safety code be narrowly defined meant that service providers would be walking on eggshells to remain within its scope. Importantly, several service providers have reported to me that they received legal advice to move interstate, because only there would they have the necessary protection under the law.

One of the great offences inflicted so far on recreational service providers, other than the failed law, is the suggestion that it is service providers who should bear responsibility for the failure of the 2002 act. In a recent feature article that appeared in *The Courier* newspaper, the minister said that the new bill 'addresses a situation that recreational service providers told us was cumbersome'—no apportionment of responsibility and no recognition that it is their current act that is the complete failure (as the Australian Lawyers Alliance called it), and not service providers failing to comply.

While I am sure the government is more than willing to allow the perception that it took several years for the flawed nature of this bill to become apparent, that is simply not the case. The report of the Economic and Finance Committee which reviewed the operation of the 2002 act, which was furnished in this and the other place in 2005, highlighted that 'certain categories of insurance have now been either prohibitively priced or are just not being offered'. The report also states that 'the social impacts remain serious and sometimes insurmountable'. The report further revealed that premiums payable in South Australia and nationally have been increasing at a rate far greater than the consumer price index and yet no action was taken to repeal the failed act.

One service provider and vocal lobbyist, Ms Sarita Stratton, has stated that in early 2003 she was invited by the then commissioner for consumer affairs to his office to inform her that the new law would not be achieving its goal of placing downward pressure on premiums. So, in early 2003, this government knew that its attempt to improve the access to public liability insurance for recreational service providers had not hit the mark. Now, nearly six years later, we are finally doing something about it.

And let us not forget the legislative exemption that this government granted itself so that participants of the Masters Games could sign waivers that were legally binding, despite no safety code being developed.

The Recreational Services (Limitation of Liability) (Miscellaneous) Amendment Bill 2005 provided a period of two years where waivers were again effective. This was done under the guise of recognising that uptake of the protection provided by the 2002 act was non-existent and the two year period was to provide an incentive to develop a code in this time. However, the cynic would clearly see that the true impetus was the refusal of the insurer of the Masters Games to provide coverage unless safety codes were submitted. This was obviously too difficult a task, so the government instead opted to legislate out of the act.

Is there a greater testament to the failure of the law than the government itself, with all its resources, finding it too difficult to comply? But more importantly, what a slap in the face to those providers who had been struggling to remain viable, paying exorbitant public liability premiums, or who had been forced to bear the weighty risk of operating without insurance because they were unable to procure it—or, sadly, those who had folded as a result of either of those circumstances—or because of this government's slowness to act on its knowledge that the Recreational Services (Limitation of Liability) Act was flawed.

On a slight tangent, if the government sincerely desired the success of the 2002 act, it could very well have extended its vast resources to the development of safety codes for all the sports conducted during the Masters Games, which subsequently could have been applied by recreational service providers.

For small organisations to whom the act was intended to apply, this would have alleviated the significant burden of developing those safety codes. Further demonstrating the failure of this act, and more broadly the failure of the Office of Consumer and Business Affairs to educate and regulate, is the fact that many organisations have—and continue to this day—waivers signed by participants and, yes, this includes children, despite such waivers being unenforceable.

Examples of such organisations believing waivers to be effective are too numerous to mention. However, an example can be found in the waivers that participants in the 2009 Skoda Breakaway Series—the amateur sub event of the Tour Down Under—were required to sign. As I am aware that members have been provided with a copy of the terms and conditions for this event, I will avoid reading clause 36(g) in its entirety. However, in part it reads:

I release all persons or corporations associated directly or indirectly with the conduct of the event from all claims, demands and proceedings arising out of my participation, and I hereby indemnify them against all liability, including liability for their negligence and the negligence of others, for all injury, loss or damage, arising out of or connected with my participation in this event.

This event was partly organised by the South Australian Tourism Commission—a government body. So, even if the Tourism Commission did not draft the terms and conditions, it is definitely possible, if not presumable, that it would have at least sighted the waiver that participants would be required to sign.

Another example that I know has been circulated to members is a Motorcycling SA waiver that purports to limit the organiser and venue providers for any injury arising from any action or omission. As members would have noted, the

waiver circulated is specifically for parents to sign on behalf of their children. Clearly the aversion felt in this place to parents signing waivers is not shared by the community at large, and I will address this later.

It must be acknowledged that not all service providers are having waivers signed naively. I am aware that members have received an open letter of sorts from a local businesswoman who, under compulsion by her insurance provider, was required to have quite an explicit waiver, purportedly absolving her and, as a result, the insurer from any liability arising from injury or death, signed by all participants. As the majority of her consumers were children, this woman was directed by the insurer to have the waiver signed by the children's parents.

This woman knew from her colleagues in the industry that the waivers were not worth the paper they were printed on but, if having them signed was the difference between coverage for public liability and not, she was more than willing to comply. However, when one organisation that had made a booking made a decision that their participants would not sign the waiver, this woman was forced to appeal to her insurer to allow her to operate without the waiver. Despite the waiver having no legal effect, and that cancelling the booking would severely affect the woman's business, the insurer was adamant that the waivers must be signed and that, if she was to proceed with the booking, she would be doing so without public liability insurance. Needless to say the booking did not proceed.

How the Office for Business and Consumer Affairs, the Commissioner for Consumer Affairs and the minister can allow such a situation to develop and go unchecked is beyond me. But, alas, for seven long years little intervention occurred and instead now we find ourselves in 2009 debating a bill to finally repeal the old act and replace it with yet another novel scheme. The news that the government would finally be addressing this issue was understandably met with a sigh of relief amongst those who were actually aware of the Recreational Services (Limitation of Liability) Act 2002. These people have been paying inflated premiums or have been unable to procure public liability insurance since the crisis and have desperately awaited reform. Reform is what they were promised by this bill.

Just prior to exploring the proposed solution, I make clear my understanding of the intent of this bill. As was the intention in 2002, this bill ultimately seeks to provide greater access to and reduce the premiums payable by recreational service providers. As the Hon. Kevin Foley stated when introducing the 2002 legislation, this is achieved by giving some certainty to the provider as to what the law requires of him or her and to the consumer as to just what safety measures he or she can expect. He continued:

This should assist insurers in actually assessing risks and setting premiums at a realistic level, reflecting actual risks rather than the less predictable risk of being found negligent.

It is the last quote that strikes the fundamental intention of the 2002 act, that is:

...to limit the liability of recreational providers which, in turn, limits the actual risk of insurance providers, resulting in a reduction in premiums payable.

While the bill before us takes a very different approach to the 2002 act, the objective of this bill is again to place downward pressure on insurance premiums and to encourage the provision of public liability insurance.

The introduction of this bill is a clear recognition of the need for an additional measure for recreational service providers and due to the inability to extract figures from the insurance industry—a common complaint, I might add—we must rely on the government's assessment of this need.

Of course, there is a competing objective that cannot be disregarded, that being the interest of plaintiffs, for any limitation on the liability of service providers will, in turn, limit the ability of those who suffer injury to access monetary compensation. In our haste to ensure the viability of recreational service providers, we must ensure that we do not overtly impact on the right of plaintiffs to recoup damages for injury sustained by the fault of a recreational service provider, and so the balance between the two competing interests becomes the objective.

This bill attempts to achieve that objective by introducing a new test, that of reckless conduct, by which a court is to determine whether a recreational service provider is to be held liable at law and, hence, monetarily responsible for an injury sustained during the provision of that recreational service.

It is envisaged that this test is to be of a slightly higher threshold than that currently applied by the common law test of negligence, and this will decrease the number of viable claims against service providers and subsequently reduce premiums paid. The new test's ultimate effectiveness will, of course, be determined by the judiciary and we are asked to simply trust that the bill will work.

However, we can, like the minister, attempt to predict the outcome, although this is made difficult, as much of the language of the new test of reckless conduct, like the safety codes under the present act, is a first in Australia. Just on that, I find it remarkable that the government is willing yet again to allow recreational service providers to play the lab rats in a legislative experiment. Clearly, lessons are not learnt easily.

From my understanding, the reckless conduct test can adequately be summarised as: a recreational service provider will be held liable to damages if they cause a non-trivial injury, if the service provider was aware that there was a non-trivial risk that the injury would occur and proceeded to operate without adequate justification.

The minister, when introducing this bill, provided an example of what is to be considered reckless conduct, that being a horse riding instructor who proceeds with a lesson despite knowing that a snake was around earlier and fails to cut all grass. This is an affront to lovers of horses and, I would say, to rationality in general.

Many horse properties, if large enough, grow their own feed and, regardless, long grass on horse properties or riding trails is a common feature. As for snakes, these are a part of life in this country and while too often killed, their presence is, in the main, accepted. To suggest that a provider of riding lessons or trail rides should cease to operate because a snake was sighted, for fear that it may later re-emerge from long grass, is unrealistic.

To provide this as an example to guide the courts on what is reckless conduct makes one question whether the objective mentioned shall be achieved. I am no lawyer but I have been informed by several that you would struggle, on these basic facts, to hold the recreational service provider liable for negligence, yet the minister, through her second reading explanation, basically instructed the courts to hold them liable for reckless conduct.

Concerns have also been expressed about the minister's example of a significant injury. A significant injury is defined in the bill as not nominal, trivial or minor and was translated by the minister into the practical example of a broken arm. The significant injury element is supposedly intended to reduce the number of viable claims by avoiding those where the injury was nothing more than scratches or bruises.

I know that we have become an increasingly litigious society, but I did not think we had reached the point of a heavy burden of claims arising from mere scratches and bruises. I ask the minister to provide details of how many claims will now be denied by this requirement.

While I am willing to be proved in wrong, I find it highly unlikely that anyone, or at least a significant number of people, has alleged negligence where only scratches and bruises were sustained. However, I can see the significant injury requirement having an effect for mental and nervous shock if the common law, and now the Civil Liability Act 1936, by section 53, did not require the mental affliction sustained to be a recognised psychiatric injury in a claim for pure mental harm.

The liability of defendants is further restricted by section 33 of the Civil Liability Act, which limits a defendant's liability to where a reasonable person would have foreseen that a person of normal fortitude would, in the circumstances, suffer a psychiatric illness. This section also compels a court, when hearing a claim for mental harm, to have regard to whether the mental harm suffered was the result of a sudden shock, whether the plaintiff witnessed another person being killed, injured or put in peril, the relationship between the plaintiff and this person, and whether there was a pre-existing relationship between the defendant and the plaintiff.

However, it seems that section 33 may not apply on a technicality in the reckless conduct test. As section 33 resides in part 6, negligence, I have been advised that it will be open to a plaintiff's lawyer to argue that the normal fortitude element and the other requirements mentioned do not apply. While it is possible that section 33 of the Civil Liability Act 1936 will still be drawn on by the courts when assessing a claim of mental harm, there is, however, nothing in the bill to compel it, and we cannot be certain that this will be extensively litigated by any plaintiff's lawyer whose claim would otherwise fail. To give guidance to the courts, I ask the minister to confirm prior to the committee stage whether it is intended that the elements in section 33 apply.

There is also concern that the inclusion of 'contributes to' in the new statutory definition of 'the cause' has the potential to undermine the fundamental element of the causation as applied in claims for negligence. Causation requires a plaintiff to demonstrate not only that the defendant's negligence was a necessary cause of the injury but also that it is appropriate to hold the defendant liable for injury sustained. The concern is that the proposed wording 'contributes to' is hardly the necessary condition required by causation. This concern is further compounded by the wording of section 34 of the Civil Liability Act in which the present principle of causation is codified, stipulating that it is to apply to an assessment of negligence only.

In the light of this, I will move amendments that, firstly, remove the definition of cause from the bill and direct the courts to apply the principle of causation when determining whether the reckless conduct of the service provider caused significant injury. I acknowledge that the minister has indicated her support for these amendments, and I also thank her and her staff for being available to discuss the

issues I have raised tonight and to help us find a resolution that will work for service providers, for people who are injured and also for insurance companies.

The issue of the application of section 33 would lose all potency if the test of negligence is to be applied prior to the test of reckless conduct. I have received contrary advice on the order of argument, and I seek clarification from the minister prior to the committee stage on when exactly during proceedings the courts will hear argument on the reckless conduct test. Will they first turn their attention to the waiver signed to determine its legal efficacy and, if it is found to be valid, then proceed to apply reckless conduct in absence of negligence, or will the courts first hear argument on negligence and, providing this is successfully navigated, turn their attention to the waiver signed?

If it is the latter, the concern about the application of section 33 would be negated as the plaintiff, who would be denied compensation under negligence, will accordingly be denied regardless of the waiver signed. This would also mean that the present certainty that has evolved with the test of negligence will not be discarded—something that will do much to settle the nerves of service providers about this bill.

Being able to clearly determine plaintiffs who succeeded at negligence but who failed due to not being able to demonstrate reckless conduct will also enable this parliament to gauge the efficacy of the bill. However, this becomes somewhat perverted when one realises that it will also make it very clear in the mind of an injured plaintiff why it is that they were denied compensation for their injury.

Prior to moving on, I have one remaining question for the minister. It has been conveyed to me that the hopes of this clause rest upon the words 'without adequate justification', that is, where a service provider proceeds despite a significant risk without adequate justification. I received advice to the effect that this phrase will largely come to resemble the present test of remoteness as applied when determining negligence, which is now largely codified in section 32(2) of the Civil Liabilities Act 1936. I ask for the record: what difference is the minister expecting between the 'without adequate justification' and the 'test of remoteness'?

Next, I turn to an issue that I know most members present have had brought to their attention. Many stakeholders have raised the possibility of the new reckless conduct provision conflicting with the present terms and conditions of public liability insurance. The concern is that insurance providers exclude, that is, refuse to cover, conduct amounting to reckless conduct.

I have been able to obtain a copy of one insurer's public liability policy, and for the benefit of members, I quote the relevant section:

7. This Policy does not cover liability directly or indirectly caused by, arising out of or in any way connected with:

7.25 . Any alleged or actual fraudulent , dishonest, malicious, wilful or criminal act or omission of the Insured or any person covered by Definition 2.5 of this Policy.

As a reckless conduct test requires a plaintiff to allege that the recreational service provider was aware of a significant risk that proceeding with the conduct could result in significant injury and did so without adequate justification, this could be considered a wilful, if not malicious, act of the service provider, meaning that the insurer would be under no obligation to pay. In fact, as the policy quoted uses the

words 'any alleged or actual', it is possible that the insurer would be under no obligation to even defend the claim.

I know this issue was raised with the Commissioner for Consumer Affairs in early February where a promise was made to investigate it further, and it has since been raised with the minister on several occasions. I just want to know from the minister what the advice from insurance providers and others has been and whether such a conflict does exist. I am inclined to believe that it does because, when I raised this issue in the briefing provided, the response I received was essentially, 'Well, insurers will just have to change their policy.' That was in the very first briefing, I might add.

Has the minister received a commitment from the Insurance Council of Australia and others that this conflict between the bill and present policies will not be exploited, or are we just trusting that insurance providers will change their policies as was suggested to me in the briefing provided? I would also like to raise the issue of one-off events. Many charitable and community-minded citizens have expressed severe disappointment that one-off events will not be covered by these reforms.

The minister in her second reading explanation made it very clear that one-off events are not intended to be covered, yet the bill itself is silent on this issue. An example of such an event would be the cattle run that was held several years ago or a one-off community fundraiser, and I would like the minister to provide the rationale for why these are not to be covered.

The last issue that must be addressed is that of waivers and minors. I initially filed an amendment to charge parents with the responsibility of observing the risks involved in the activity, determining whether the activity is fitting for their child and signing the waiver permitted under section 74I accordingly. However, as I mentioned earlier, the objective of this bill must be the balance between the interests of the plaintiffs and the interests of recreational service providers and, following extensive consultation, I have withdrawn that amendment.

I have nearly finished, and I am sorry I have taken so long. I would like to thank the minister for her cooperation with this, and I do believe that we have been able to reach some sort of agreement on some amendments. I inform members that I did file another amendment this afternoon that I would like them to consider, and I will discuss it with the minister. That amendment would provide that, where recreational service providers are required by their insurer to have waivers signed, the Commissioner for Consumer Affairs will post on a website an explanation of the legality of that waiver so that these recreational service providers can download it and print it so that, when they are forced to have a waiver signed by insurers, they can also provide their consumers with an explanation that the waiver actually does not negate their legal rights to claim compensation under the Civil Liability Act if serious injury occurs through negligence or reckless conduct.

What has concerned me in regard to waivers is that this is the big lie that the insurance companies want to perpetrate, and it is a bluff. By posting this on the website of the Office of Consumer and Business Affairs people will be better informed, if they are required to sign a waiver, that they still do have some legal rights. I think that is very important. It will also, as I said, dispel the big bluff of the insurance companies. The hope is that people will sign waivers and then truly believe

they have no right to make any claim for injuries under the Civil Liability Act. That is the bluff.

If members of the general public are sufficiently well educated to believe that they still have those rights, even though service providers are forced to have waivers signed, this will go a long way to assist service providers and also people who may have been injured during an activity. Also, we are not compromising the rights of children. I thank members for their patience. I look forward to the committee stage of this debate, and I believe that there is still more to learn.