One battle subsides, the war goes on

In the last edition of *Plaintiff*, I reported on the campaign in which APLA was involved to try to prevent the federal government's further destruction of consumer rights through abolition of the right to claim under the *Trade Practices Act* 1974 (Cth) for personal injury or death caused by corporate misleading or deceptive conduct.

I am pleased to report that, despite some misleading and deceptive conduct in the Senate debate by Assistant Treasurer Senator Helen Coonan, the government's Bill was defeated and consumers – for now – still have access to this right.

This is the only time in the last couple of years of frenzied tort deform that such a Bill has been defeated outright, although APLA and other consumer groups have had some success in each jurisdiction in ameliorating some of the worst excesses of such legislation by constructive criticism and by lobbying ministers, oppositions and government backbenchers.

Throughout, our interest has been to speak for the injured, as there is no one else who will do so.

That the Australian Labor Party, the Democrats and the Greens united in the Senate to defeat the TPA amendments was, I am sure, in some small measure due to APLA, which provided legal resources and information to all senators, demonstrated the total lack of justification for the proposed changes, and the harm that would result to consumers if they were enacted.

We argued this case in our oral and written submissions to the Senate Committee that considered the changes, by writing to all parliamentarians, making public statements in the media in December and January, and by actively engaging with those senators who were willing to listen to reasoned and constructive argument about the Bill – namely, Stephen Conroy on behalf of the ALP, Aden Ridgeway for the Democrats and Kerry Nettle for the Greens.

The ALP, Democrats and Greens thus deserve the thanks of the Australian community for standing up to the government's misinformation and pressure, and for resisting an ignorant public campaign from some sections of the media which never subjected the government's flawed justification to proper analysis, or understood the ramifications of the government's Bill.

Moreover, the significance of the defeat goes beyond preserving an important consumer protection. It sends a strong message to the Insurance Council of Australia and the Australian Medical Association, as well as to large companies, tobacco and asbestos corporations, and others, that they will not always get their own way; that their wish lists will not always be ticked by compliant parliaments; and that the people still have a voice and will be heard.

During the debate in the Senate on 11 February, Senator Coonan, in an act of desperation, claimed that the floodgates were opening, with people rushing to circumvent the state prohibitions on their right to claim damages by filing TPA claims in the federal jurisdiction.

Disputing this claim, APLA had called for figures to support the government's contention that this 'loophole must be closed or premiums would

John Gordon is APLA's National President and a Barrister at Seabrook Chambers. **PHONE** (03) 9225 7064 **EMAIL** jrcgordon@bigpond.com

continue to climb' (an argument, incredibly, still being trotted out in the *Australian Financial Review* on 23 and 24 February!). Senator Coonan maintained that she had the proof: APLA was about to get its come-uppance!

And what did she produce? Evidence from all federal court and state court registries showing that injury and death claims under Part V had skyrocketed in the 18 months since the first prohibitions came into force in New South Wales? Well, no. Evidence that plaintiffs had contrived to argue (and compliant courts had dutifully accepted, despite 20 years of learning to the contrary) that misleading and deceptive conduct and negligence were interchangeable concepts, thus avoiding the prohibitions on negligence claims? Not exactly. A pile of million dollar verdicts against (non-corporation, non-trade and commerce) doctors in claims brought (somehow) under Part V, or against (non-corporate, non-trade and commerce) community or sporting groups, which threatened the hundreds of millions in profits made by insurance companies this year, forcing them to raise premiums again this year? Uh, nope...(No, that is, in terms of producing verdicts, not the increase in premiums which is happening despite the hundreds of millions in insurer profit and the destruction of people's rights to claim.)

No, in support of her claim that the floodgates were open and premiums were threatened, Senator Coonan produced a single case from the New South Wales District Court - *Johnson v Golden Circle* - which had resulted in the premium-threatening award of $10,000 to the plaintiff. But, even more stunning, it wasn't even a claim under Section 52, but a claim under the defective product provisions of the TPA - Part VA - which wasn't being abolished or affected at all by the changes in the Bill. Doh!

That is the level to which debate about the abolition of people's rights has descended in this country under this government, and the reason why injured people are suffering while insurers - like QBE this last year - bank $572 million profits (I mean, the bloody cheek of Ms Johnson, getting $10,000 for her pain!). That is the level of understanding of these claims from people who proclaim that what they are doing is necessary in the national interest.

"The entire premise of Mr Hockey's bilious attack is false. He should resign."

When, unsurprisingly, the Bill was defeated, Senator Coonan and the Minister for Tourism, Joe Hockey (no doubt apoplectic that ordinary people like Ms Johnson might be able to seek some compensation for corporate misconduct causing injury or death), let fly with a stream of abuse that was quite scary.

Joe Hockey, a man who cannot understand why anyone might take a position because it benefits others, rather than acting in self-interest, clearly hasn't been reading the material from the Australian Competition and Consumer Commission, Curtin University, the government's own actuaries, the Productivity Commission and others. All these sources have demonstrated that there is no connection between litigation rates and the oppressive premiums charged by insurers since 2001, and have reported that litigation rates have again fallen this year. Yet Mr Hockey claimed, in a rather confused release, that premiums have risen once again.

'Federal and state governments agreed in 2002 to reform the law of negligence so plaintiff lawyers could not exploit loopholes in the law that were contributing to higher premiums. The state governments did their bit by passing the necessary laws. The federal government played its part by introducing the law into parliament, but it was voted down last week by the Labor Party in the Senate. They voted down a law to reduce the cost of insurance to sporting bodies, social clubs and the community. The Labor party put the interests of plaintiff lawyers ahead of the well-being of both small business and these community groups that have been crying out for legislative support to end the explosion of insurance premiums... It was a pity...[the] Labor party...[didn't] vote with the government last week to reduce insurance premiums.'

But, like all the other changes over the past 18 months, the legislation would have had no effect on premiums. And far from being a law to reduce the cost of insurance, the legislation is yet another attack on the rights of the injured and consumers.

Most tellingly, how many sporting bodies, social clubs and community groups have been sued by injured people under Section 52 of the TPA since mid-2002? None. How many since 1974? None. Because such groups are rarely corporations, do not act in trade and commerce, or engage in misleading or deceptive conduct in trade or commerce that causes injury or death. They are already protected from injuries caused by their negligence by three waves of tort reform in 18 months. Nothing the Senate did or didn't do makes a jot of difference to the prospective liability, or the cost of premiums, to any of these groups (even if insurers undertook to pass on any benefits - which they haven't).

The entire premise of Mr Hockey's bilious attack is false. He should resign.

Meanwhile, Senator Coonan, who had already misled Australians with her (single) mistaken ($10,000) example, and her (wrongful) claim that doctors and other professionals were at risk of massive amounts of litigation if the Bill weren't passed, and her stupid assertion that people whose claims had been ▶

abolished by state laws, and who would be prevented from making claims under the TPA, could bring their claims under state laws (!), was carrying on like someone who had sold her soul to the devil and was suddenly realising that she couldn't deliver her side of the bargain. In a confused and wide-ranging diatribe traversing Mark Latham, the 'powerful plaintiff lawyers lobby', medical negligence premiums, pony clubs, and governments working 'tirelessly' and 'diligently' to 'ease the pressure on premiums', Senator Coonan conjured an amusing image of our elected representatives, sweat pouring from their brows, up against a door about to cave in with the pressure of law suits, or waving their arms around to prevent the system exploding, like the workers in the classic movie, *Metropolis*.

First, she adopted the discredited Joe Hockey line that preserving the right to sue under the TPA was 'a slap in the face for every pony club, tourist attraction, community event and small business struggling with higher premiums'. I suspect that several pony clubs - on hearing the news - immediately ordered the kids to dismount and turfed them out, lest they were considering an action alleging they were a corporation in trade or commerce engaging in deceptive conduct.

But Senator Coonan, having already abandoned sense and reason, went the full monty, and said again - twice - that doctors would now face the 'threat' and the 'spectre' of litigation 'regardless of whether they were at fault or not'. No doubt Senator Coonan had ignored the plethora of examples of TPA claims that had been brought against doctors (who had not been at fault) in favour of citing the example of *Johnson v Golden Circle* to the Senate. Does she seriously take the Australian public, whose rights she is so keen to obliterate, for idiots?

She then blamed us. 'Their Labor colleagues in the states and territories have been willing to stand up to the powerful plaintiff lawyers lobby; federal Labor obviously doesn't have the same intestinal fortitude.'

"The propaganda has affected and influenced judges on superior courts who have been keen to demonstrate that they, too, are an arm of government that can confine liability for negligent conduct into a package smaller than a bottle of ginger beer."

No, Senator. federal Labor and the other senators showed considerable intestinal fortitude in standing up to the ICA, federal treasury, the Liberal government and their fellow travellers in the states.

And then, just to prove that 12 days is an eternity in politics, on 23 February Senator Coonan issued a release which proved that everything that she said was wrong, and which justified the Senate's rejection of her nasty law.

'Increases in average public liability insurance premiums were slowing and...in the first six months of 2003 (that is, before there could be any effect from the state reforms, most of which had not been enacted) premiums had grown by just 4%, compared to an increase of 88% between 1999 and 2002.'

So, had the pony clubs that had closed their doors, having been slapped on the face on 11 February, been saved? The spectre hanging over the opthalmic surgeons and gastroenterologists vanished? And without the TPA changes? It's a miracle.

Over the next few days, Big Insurance began reporting their 12-month profit figures for 2003. QBE, having stuck away several hundred million in provisions, announced $572 million, and tipped a further 10% growth this year. No wonder, if they want to saddle the pony clubs with a further premium increase this year. Promina booked $271.8 million. IAG was tipped to announce $303 million. Oh, happy days.

And while this was happening, APLA members around the country were telling people (at least those who managed to find a plaintiff lawyer), who were injured as a result of the negligence of product manufacturers, owners of premises, recreation providers, and doctors, that they would get nothing to compensate them for their pain and despair.

For that pain and despair, for the obscenity of insurance industry profits, for the 150% premium increase charged to Surf Life Saving Australia while those profits were rolling in, for the deceit that she tried to perpetrate on the Senate, and because, in the face of all of this, she still wants to totally abolish injury claims under Part V of the TPA, Senator Coonan, too, should resign in shame.

Make no mistake. Insurers are still pressuring the government to cross that bridge in a war that is being waged against ordinary Australians by big corporations, big insurers and many governments. The propaganda has affected and influenced judges on superior courts who have been keen to demonstrate that they, too, are an arm of government that can confine liability for negligent conduct into a package smaller than a bottle of ginger beer.

We must continue our efforts to make that bridge one too far. We must never give up. PL