



Happy 15th birthday, Part VA TPA! Australia's product liability morass*

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In early 2007, the Productivity Commission embarked on a public Inquiry into Australia's Consumer Policy Framework. This article argues that a core aspect, product liability of manufacturers for their defective goods, has become a legal morass. Multiple causes of action persist: common law negligence (including a little-noticed revival of claims for breach of statutory duty); TPA claims on a contractual basis; and TPA Pt VA claims on a strict liability basis, modelled on the EC Product Liability Directive (generally understood as a statutory tort). The picture is further complicated by state legislation, and various 'tort reforms' implemented differently in various states and in the TPA since 2002. Case law has also slowly built up, even under TPA Pt VA since it was enacted in 1992. However, it has been little analysed, and does not draw much on judgments or commentaries analysing similar provisions in Europe or indeed the Asia-Pacific region. Australia's tort reforms are likely to significantly close off opportunities for claimants to bring allegations of defective products before the courts, who might then begin addressing the ever-growing complexities. This is true even for class actions, also introduced into Australian federal courts in 1992, and generating their own complications. The resultant higher transaction costs cannot be good for manufacturers and their insurers, nor for most consumers.

The article therefore concludes that Australia's product liability law urgently needs a comprehensive overhaul, involving a range of stakeholders including the PC and the Australian Law Reform Commission. As the latter pointed out in 1989, product liability law needs to minimise transaction costs and to send clear signals so firms can internalise the costs of product-related accidents. As well as legislative reform, stakeholders should elaborate a 'Restatement of Strict Product Liability Principles'. To guide courts and policy-makers, this would synthesise experiences and ideas emerging from commentators as well as case law, not only in Australia but also other jurisdictions with provisions similar to Pt VA. Thanks to such initiatives, other areas of consumer law in Australia may improve too. Otherwise, the morass risks turning into a swamp.

* This article is dedicated to the late Professor David Harland, Challis Professor of Law at the University of Sydney from 1981 to 2002. David was a friend, mentor, and one of the godfathers of consumer law — especially product liability — in Australia and worldwide. Parts of this article were prompted by Luke Nottage's presentation at the Consumer Law Roundtable co-hosted by Griffith University at the University of Sydney on 29 September 2006. The authors are grateful for comments received there or afterwards, particularly from Professor Jean Braucher and Andrew Rogers QC on an earlier draft. The authors also thank Carolyn Newman of Clayton Utz and Joel Rheuben of the University of Sydney for their help in the preparation of this article generally, together with Timothy de Sousa of Clayton Utz for his assistance in relation to average weekly earnings to the various Civil Liability Reforms.

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I Contemporary consumer law and product liability in Australia

In January 2007, at the request of the Federal Treasurer, the Productivity Commission (PC) released an Issues Paper for its comprehensive Inquiry into Australia's Consumer Policy Framework. Most of the 'Key Considerations' listed in the Terms of Reference expressly or implicitly encourage the PC to find ways to reduce or simplify consumer protection regulation. One such consideration is 'the importance of promoting certainty and consistency for businesses and consumers in the operation of Australia's consumer protection laws'.¹

Over the last decade or more, consumer law in Australia has moved decisively into a 'post-interventionist' phase.² Even from the left of the political spectrum, concern had mounted that more intrusive forms of regulation were leading to some counter-productive outcomes as the law and other social sub-systems became ever more complex.³ Theorists such as John Braithwaite combined game theory with more normative and pragmatic insights to propose 'responsive regulation' in a variety of areas. This model centred on escalating levels of sanctions applied or threatened by public authorities, as well as the structured involvement of a variety of interested parties other than regulated firms ('trilateralism').⁴ Such justifications of softer regulation increasingly overlapped with the agenda of the political right, which gained much strength over the long term of John Howard as Prime Minister.⁵

This agenda has involved pushing ever more strongly towards outright deregulation, often drawing on neoclassical economic theory that has also tended to underpin key policy recommendations from influential international organisations like the Organisation for Economic Cooperation and Development (OECD).⁶ A recent OECD report does acknowledge lessons emerging from 'behavioural law and economics' showing many ways in which consumers do not act in their best interests, as assumed by neoclassical

1 Available at <<http://www.pc.gov.au/inquiry/consumer/index.html>>.

2 N Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1991-2) 14 *Jnl of Consumer Policy* 257.

3 See, generally, G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.

4 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992. For an application in consumer product safety reform, see L Nottage, 'Responsive Re-Regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan' (2006) 2006-5 *University of Tokyo Soft Law COE Discussion Paper* <<http://www.j.u-tokyo.ac.jp/coelaw/COESOFTLAW-2006-5.pdf>>.

5 See, generally, B Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification*, Ashgate, Aldershot, 2003.

6 For a sophisticated general application, see, eg, M Trebilcock, 'Rethinking Consumer Protection Policy' in C E F Rickett and T G W Telfer (Eds), *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, New York, 2003, p 222. Cf the 1985 UN Guidelines, described in D Harland, 'The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade' in I Ramsay (Ed), *Consumer Law in the Global Economy — National and International Dimensions*, Ashgate, Dartmouth, 1997, p 1 — arguably, the culmination of an earlier 'interventionist' era.

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economics. But the PC's Issues Paper is quick to point out that the OECD concluded that:

there is a need for more evidence before behavioural economics can provide a more widespread policy approach. Most importantly, . . . , intervention is not costless. Hence, as for other 'market failures', the choice is still very much between imperfect markets and imperfect governments.⁷

However, compared to the ongoing globalisation of both markets and policy-making processes in other jurisdictions, over the last decade Australian consumer policy and law-making seem generally to have become less open to emerging global understandings and standards. These global standards have tended to consolidate central aspects of the post-interventionist model, including minimum standards — especially in information disclosure, contracting and product liability, increasingly on a strict liability basis. Compared to the European Union (EU), for example, Australia seems to be going from leader to laggard. New South Wales is only now looking at enacting more sophisticated legislation regulating unfair terms in consumer contracts, drawing on the experience in Europe since 1993 and following Victoria in 2001.⁸ The EU is also leading the way in promoting better collective redress by consumer and other groups, and stronger re-regulation for consumer product safety as goods become more complex and diverse in origin.⁹

By contrast, Australian law-makers at both federal and state levels seem increasingly driven by domestic political expediencies.¹⁰ This more insular approach generates a consumer law framework that has become increasingly complex and counter-intuitive. Nowhere is this more obvious than in the field of product liability. Initially, Australia closely followed EU law in the form of

7 PC, above n 1, p 14; interpreting OECD, 'Roundtable on Demand-Side Economics for Consumer Policy' (2006) *Summary Report*. Putting this in the broader context of economic theory, see L Nottage Submission (No 61) to the PC's Inquiry, available via its website. That submission also elaborates on why multiple causes of action and other complexities in various areas of contemporary consumer law in Australia, and not just product liability, are likely to be detrimental to consumers (especially over the long-term) as well as to companies and regulators.

8 See the Senate Report (and Nottage Submission, No 24), available at <<http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/99D3B2CE26A40F9CCA2571D90018D245>> and L Griggs, 'The [ir] rational consumer and why we need national legislation governing unfair contract terms' (2005) 13 *CCLJ* 1.

9 See, respectively, SANCO/2005/B/010, 'An analysis and evaluation of alternative means of consumer redress other than individual redress through ordinary judicial proceedings' (coordinated by KU Leuven); and the revised GPSD (2001/95/EC) outlined in D Fairgrieve and G Howells, 'General Product Safety — a Revolution through Reform?' (2006) 69 *Mod L Rev* 59. See also generally <http://ec.europa.eu/consumers/index_en.htm> (including the EC Consumer Law Compendium: a Comparative Analysis and a database of the EU Consumer Law Acquis available directly at <<http://www.eu-consumer-law.org/>>); and G Howells, 'The Rise of European Consumer Law — Wither National Consumer Law?' (2006) 28 *Syd LR* 63.

10 Cf generally also the conclusion that 'the negative view of international law has been particularly influential over the past decade', albeit with differing and evolving views among the legislature, executive and judiciary: H Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Syd LR* 423 at 464. Prior to that, it appeared that EU law generally was gaining more traction among Australian judges: M Vranken, 'The Relevance of European Community Law in Australian Courts' (1993) 19 *MULR* 431.

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the 1985 EC Product Liability Directive (EC Directive), adding in 1992 strict-liability statutory provisions as Pt VA of the Trade Practices Act 1974 (Cth) (TPA).¹¹ Yet, the first reported judgment under Pt VA came only in 1999, and at least two dozen more judgments have accumulated without comprehensive analysis.¹² Further, this case law hardly ever refers to decisions in the EU based on the EC Directive — even for example from courts in England, where no language barrier exists.¹³ The core of Australian product liability law is further complicated in that, from the outset, the Pt VA regime left intact a variety of other causes of actions at common law under the TPA and state legislation against manufacturers and certain other suppliers of defective goods.

What makes the resultant legal morass even more impenetrable is that subsequent statutory reforms to the law of negligence and to the measure of damages recoverable for personal injury since 2002 (Civil Liability Reforms) have spread around the states and then into the TPA in inconsistent ways.¹⁴ Even if the reforms could be implemented more consistently, their effect is to limit compensation for personal injury thereby reducing already limited product liability litigation, meaning less opportunity for courts to clarify some of the complexity in this area of law. Such complexity may also explain a little-noticed renaissance of the tort of breach of statutory duty emerging in the product liability context, where until recently it was not thought to have much of a role.

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- 11 85/374/EEC (amended by 1999/34/EC to extend coverage to primary agricultural products). Even at this stage, however, the heavy reliance on the original EC Directive was a political compromise. At first, the Australian Law Reform Commission had proposed a more radical reform whereby liability was to be based upon 'the way goods act', which drew strong opposition inter alia from business interests. For more details, and parallels in enacting the EC Directive itself as well as Japan's similar Product Liability Law of 1994, see L Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows*, RoutledgeCurzon, London, 2004, Ch 2.
- 12 See Appendix A. The limited case law should not be taken as indicating that Pt VA has had no impact. As in other Asia-Pacific jurisdictions and the EU, it combines with other (possibly inter-related) factors, such as heightened media attention and consumer awareness, to generate other significant effects such as an increased number of settlements. See J Kellam and L Nottage, 'Report on Clayton Utz Asia-Pacific Product Liability Survey' (2006) 17 *Australian Product Liability Reporter* 121, elaborated in 'Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark', Sydney Law School Research Paper No 07/30, May 2007, at <<http://ssrn.com/abstract=986530>>.
- 13 Compare the extensive use of comparative law in a major UK case: M Brooke and I Forrester, 'The Use of Comparative Law in *A & Others v National Blood Authority*' in D Fairgrieve (Ed), *Product Liability in Comparative Perspective*, Cambridge University Press, Cambridge, 2005, p 13. For some comparisons of other interesting English decisions, see Nottage, above n 11, Ch 3. The EC Directive is also the basis for laws in other English-speaking jurisdictions such as Scotland, Ireland, Northern Ireland and Malaysia. See also the cross-national Product Liability Forum database of case law under EC Directive derivatives, being assembled by the British Institute of International and Comparative Law, at <<http://www.biicl.org/plf/>>. The authors serve as National Rapporteurs for Australia in that project.
- 14 See the *Review of the Law of Negligence*, 2 October 2002, commissioned by the Federal Treasury (Ipp Report), at <<http://revofneg.treasury.gov.au/content/review2.asp>>; P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *MULR* 649; the special issue 27(3) of the *Syd LR* (2005); and B MacDonald, 'The impact of the civil liability legislation on fundamental policies and principles of the common law' (2006) 14 *TLJ* 268.

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Upon the 15th anniversary of the introduction of Pt VA of the TPA, this article is a rare attempt to survey the complete landscape of Australian product liability law. Like a teenager, the law appears confused and uncertain of its boundaries. The article highlights the extent of the problem, past awareness of which has been limited mainly due to the quite haphazard accretion of layers of legislative reforms and case law.¹⁵ Key features of this landscape are the common law of torts (described in the next section), and various statutory causes of action (the TPA Pt V Divs 2 and 2A, described before the outline of Pt VA below) — each having different definitions of ‘goods’, standards for when products are defective, and defences. In respect of personal injury claims, these causes of action ground claims for compensation now limited by the Civil Liability Reforms (also described below), subject to exceptions for some categories of goods and special liability systems. Another prominent feature of Australia’s product liability terrain outlined below — albeit on the procedural law side — has been class actions, particularly representative actions in the Federal Court, which were also introduced in 1992.¹⁶ A key conclusion drawn from this analysis is that the law has so many complications, with often under-appreciated practical implications and obscure rationales, that product liability law in Australia needs a comprehensive overhaul.

In its detailed 1989 Report preceding the enactment of Pt VA, the Australian Law Reform Commission (ALRC) argued that the then existing law failed in perhaps the primary policy objective of ensuring ‘that those who manufacture and supply goods — and hence their customers, who use and enjoy the goods — should bear the risk of losses caused by what the goods do’ (ie, by defective products).¹⁷ The existing law also failed another major policy objective by generating:

high costs, particularly transaction costs. The coexistence of several rights of action arising from the one incident where loss has occurred can increase transaction costs. This is because, in the context of a particular claim for compensation, it is common practice to plead all relevant available causes of action. In fact, a legal adviser would risk a professional liability suit if he or she did not do so.¹⁸

The ALRC therefore recommended that any new statutory product liability cause of action should be exclusive of rights then available under federal and

15 Previous outlines have tended to focus on Pt VA (eg, D Harland, ‘Product liability under Pt VA of the Trade Practices Act’ (2001) 9 *CCLJ* 31), or pre-date or do not extensively discuss the implementation of the Civil Liability Reforms (eg, F A Trindade, P Cane and M Lunney, *The Law of Torts in Australia*, 4th ed, Oxford University Press, South Melbourne, 2007, pp 623–46. Other commentaries on Australian tort law may not focus on the statutory causes of action applicable to claims for defective products (eg, S Blay, *Torts Law in Principle*, 4th ed, Lawbook Co, Pyrmont, 2005).

16 Part IVA of the Federal Court of Australia Act. Equivalent procedures were adopted in Victoria 2000 to allow class actions in the Supreme Court of Victoria: see Pt 4A of the Supreme Court Act 1986 (Vic) and eg, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] Aust Torts Reps 81-692.

17 At <http://www.austlii.edu.au/au/other/alrc/publications/reports/51/Report_51.txt>, para 7.06.

18 *Ibid*, para 7.07. On more general and recent recommendations to seek ways to reduce the transaction costs of litigation, see J J Spigelman, ‘Transaction Costs and International Litigation’ (2006) 80 *ALJ* 438.

state laws, with limited exceptions.¹⁹ However, this avenue was not followed when Pt VA was added to the TPA.

The analysis in this article suggests that the same two policy failures continue to haunt product liability law in Australia today. In addition, even though it was recognised that the introduction of Pt VA would not result in uniform rights for consumers, it was hoped that harmonisation would result and that all Australian consumers would enjoy a minimum level of rights. With the inconsistent implementation of the Civil Liability Reforms, in particular, this goal has been thwarted, as explained below. Leaving aside any value judgments as to what level of rights consumers should have, current Australian product liability law is in desperate need of simplification and reconsideration at both state and federal levels.

With no disrespect to the PC (staffed primarily by learned economists), what is required is a comprehensive legal reconsideration of Australian product liability law including the cooperation of the ALRC and its state counterparts. While there may be good reasons why the ALRC does not generally review areas of law previously reformed,²⁰ the medley of overlapping, inconsistent laws beset with exceptions that comprises Australian product liability law today surely merits an exception.

The PC might also play a valuable role. For example, the Civil Liability Reforms were predicated on the basis of a perceived *public* liability crisis. The extent to which, if any, there was a *product* liability crisis has not been established. Indeed, the impact of the reforms on product liability seems hardly to have been considered in any detail either as a part of the Ipp Review or as part of their implementation. Two key precepts of the Civil Liability Reforms were that it was necessary to exclude claims for non-economic loss of 15% or less of a most severe case and to cap future economic loss at two or three times the average weekly earnings. However, what role these small and large claims played in product liability settlements and verdicts prior to the Civil Liability Reforms has not been quantified. This is an analysis the PC might usefully undertake. Similarly, it might also be considered whether it is economic for small claims still to be brought in representative actions, as this question does not appear to have been examined in the previous law reform process.

A comprehensive re-evaluation of current Australian product liability law might well lead to a stronger recommendation by the ALRC to abolish TPA Pt V Div 2A.²¹ On a theoretical level, it is difficult to justify having different definitions of 'goods', standards of 'defect', and defences for products causing injury under the TPA. Part V Div 2A is based on notions of merchantability and fitness for purpose, and one could argue that these concepts of sales law are increasingly out of place in an area now mainly understood as tort law

¹⁹ Ibid, para 7.08. The main exception was when the predominant complaint was that the goods had a defect in quality (eg, a toaster that did not work). The ALRC proposed (para 7.09) that consumers still be entitled to claim against suppliers (Div 2) or manufacturers (Div 2A) an amount equal to the cost of the goods or the cost of repair or replacement of the goods.

²⁰ But cf eg the New Zealand Law Commission in recent years: L Nottage, 'Reviewing the Arbitration Act 1996' (2003) *New Zealand L Jnl* 34.

²¹ See also early on R Travers, 'A Proposal to Reform Australian Product Liability Law' (1995) 69 *ALJ* 1006.

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(including community expectations of, and entitlement to, safety under Pt VA).²² At least, the interrelationship between Pt V Divs 2 and 2A, and the prerequisites to their contract-based liability schemes, should be made uniform.²³ Other areas ripe for re-evaluation include the inter-relationship with the special liability systems which exist for workers' compensation and

22 However, query whether a claim under Pt VA involves a 'tortious act or omission' for the purposes of leave to serve out of the jurisdiction: see *Borch v Answer Products Inc* [2000] QSC 379 (unreported, 26 October 2000, BC200006441). Cf s 6(2) of the Consumer Protection Act 1987 (Eng), which implemented the EC Directive and deems liability to be a 'wrongful act or neglect'. See also J Kellam, *The Contract Tort Dichotomy and a Theoretical Framework for Product Liability Law*, Nomos AG 2000, p 36ff ('The Difficulties of Classification').

Strict liability for defective products emerged in the United States out of sales law, extended by some courts against manufacturers and others not in direct contractual relationships. Then it was re-conceptualised as a tort by adding § 405A to the Restatement of Torts in 1965: J Stapleton, *Product Liability*, Butterworths, London, 1994. Subsequently, although it varies by state, most product liability litigation has been brought under tort principles, and the high volume of litigation in the United States has helped refine those principles in the field of defective products.

On the one hand, Art 13 of the 1985 EC Directive preserved 'rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when the Directive was notified' (such as Germany's scheme for pharmaceuticals in the ArzneimittelG).

This meant that claims could and were brought in France on a contractual basis (*obligation de securite*) against higher links in the contractual chain (via *action directe* doctrine) pursuant to its Code Civil. France belatedly amended the Code Civil to implement the EC Directive, but extended its application to impose strict liability on suppliers. However, the European Court of Justice ((2002) ECR I-3827) struck down that aspect as beyond the Directive as a 'maximal harmonisation' measure (disallowing stricter protections unless allowed under specific Articles).

A debate may well re-emerge about whether the EC Directive should be reformed to go a step further, becoming the sole source of liability: D Fairgrieve and G Howells, 'State of Art of European Product Liability' (2007) 18(2) *Australian Product Liability Reporter* 18 at 19. This would mean that even France could no longer keep developing pre-Directive Code doctrine to deal with defective products issues. All (soon 27) EU member states would instead apply only the EC Directive.

In Japan, too, the Product Liability Law of 1994, modelled on the EC Directive, is considered a special tort. Although product liability litigation can still be brought under its Civil Code, that remains under general tort provisions, not on a contractual basis: Nottage, above n 11.

Given these trends, Australia should consider rationalising the various statutory causes of action. As well as abolishing Pt V Div 2A, however, this will mean clarifying that Pt VA of the TPA is definitely a tort: cf *Borch v Answer Products Inc* [2000] QSC 379 (unreported, 26 October 2000, BC200006441).

23 Part V Div 2 of the TPA applies to goods with a price of \$40,000 or less and goods of a kind ordinarily acquired for personal, domestic or household use or consumption: TPA s 4B. However, Pt V Div 2A applies only to goods of a kind ordinarily acquired for personal, domestic or household use or consumption (pursuant to s 74A). There does not seem to be a logical reason why the liability of manufacturers and suppliers is different, especially given that s 74H gives a seller a right to recover against the manufacturer or importer in any event. The concept of personal, domestic or household use or consumption has also proved troublesome for the courts: see *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479; 230 ALR 269. It also seems contrary to the consumer protection rationale for Pt V Div 2 to stretch the s 4B definition of 'consumer' to maintain minimum statutory warranties into contracts between sophisticated commercial parties involving services worth \$12,500 for each towing of a ship by a tug: *PNSL Berhad v Darymple Marine Services Pty Ltd* [2007] QSC 101 (unreported, 19 April 2007, BC200703327).

civil aviation accidents, whether the special status accorded to tobacco and asbestos related illnesses is justified,²⁴ and an appraisal of how Civil Liability Reforms do — and should — impact on Australia's overall product liability framework.

Insurers in particular are aware of the 'friction' costs which multiple causes of action generate. Manufacturers, suppliers, their legal advisors and insurers should especially welcome a comprehensive re-evaluation and reform of the inconsistent areas of law impacting on product liability exposure, differences between the laws of different states and territories having the potential to generate forum shopping.

At first glance, such a project may seem to go against consumer interests. It could be argued that each of the multiple causes of actions present in Australian law has some advantage for a plaintiff. A well-resourced and imaginative advocate for a consumer plaintiff might be able to advance the multiplicity of causes of action now provided for, each with its own quirks to obtain a better judgment or even settlement than if some of that law was simplified. However, this assumes the consumer can engage such an advocate, with the extra costs being outweighed by the better outcome achieved. Yet the law has become so complex that the costs are likely to be high, particularly if the consumer is faced by a well-resourced and motivated defendant facing multiple claims. Further case law may also have the effect of highlighting rather than resolving complexities in the current law. Instead, like the ALRC attempted almost two decades ago, we should confirm the solution that best balances the interests of both consumers and suppliers, and then minimise transaction costs for all concerned by formulating the law more straightforwardly.

As part of this project, or independently, work could also begin on a cross-national 'Restatement of Strict-Liability Product Liability Principles'. This would summarise preferable interpretations from the case law now emerging particularly from the EU and other jurisdictions, like Australia, which enacted legislation based on the EC Directive often more than a decade ago. Meanwhile, the legal morass engendered by Australian product liability

24 Other accidents are also singled out for special treatment. For example, s 75AI provides that Pt VA does not apply to a loss in respect of which an amount has been or could be recovered under a workers compensation statute or which gives effect to an international agreement. If, however, a claim cannot be made under workers compensation insurance for whatever reason, Pt VA will apply to injuries caused by a defective product. For example, an independent contractor injured on site can bring a claim, but a worker could not: see *Canberra Furniture Manufacturing Pty Ltd v White* [1999] ACTSC 53 (unreported, 28 May 1999, BC9902741); *Newcombe v Ame Properties Ltd* (1995) 14 WAR 259; 125 FLR 67; *Lanza v Codemo Management Pty Ltd* [2001] NSWSC 845 (unreported, 28 September 2001, BC200108023); *Roots and Raydene Pty Ltd v Trussmaster Pty Ltd* [2003] QSC 348 (unreported, 17 October 2003, BC200306087). Section 75AI also excludes claims under Pt VA in respect of a loss which could be recovered under laws that give effect to an international agreement. The ALRC (para 7.10) identified the 1980 United Nations Convention on Contracts for the International Sale of Goods and those affecting the liability of civil aviation carriers (para 7.10) as being such laws. For an example under the Warsaw Convention 1929, incorporated by the Civil Aviation (Carriers' Liability) Act 1959 (Cth), see *Agrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; 218 ALR 677. Similarly, Art 14 of the EC Product Liability Directive does not apply to injury or damage arising from nuclear accidents or covered by international conventions ratified by the Member States.

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laws may provide another argument to both those advocating that general consumer product safety regulation be strengthened, again following the EU's lead, to efficiently and legitimately rebalance the incentives provided to suppliers in a globalised environment.²⁵ Thus, this analysis of an important area of contemporary Australian consumer law opens up questions for other areas, and therefore will assist more broadly the PC in its current Inquiry into Australian consumer policy for the Commonwealth Government.

II Common law tort

Negligence

Australian negligence law remains based upon the House of Lords' decisions in *Donoghue v Stevenson*²⁶ and *Grant v Australian Knitting Mills*.²⁷ Generally, three elements are required: the existence of a duty of care; breach of that duty; and loss or injury resulting from the breach.

Unlike Pt V Divs 2 and 2A, and Pt VA of the TPA, which focus on the condition of the product, negligence law is concerned with the conduct of the manufacturer. The nature of the duty of care of a manufacturer is to take reasonable care to avoid a foreseeable risk of injury. The courts have provided various determinations regarding what might be considered 'foreseeable' or not. The accepted test is whether or not the risk was 'far fetched or fanciful'.²⁸ In deciding whether there is a breach of duty, the courts look at what a reasonable person in the position of the manufacturer or supplier would have

25 Nottage, above n 4.

26 [1932] AC 562.

27 [1936] AC 85.

28 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 per Mason J; 29 ALR 217. Note also the warning of Barwick CJ in *Maloney v Commissioner for Railways* (1978) 18 ALR 147; 52 ALJR 292 at 292-3:

It is easy to overlook the all important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect. The likelihood of the incapacitating occurrence, the likely extent of the injuries which the occurrence may cause, the nature and extent of the burden of providing a safeguard against the occurrence and the practicability of the specific safeguard which would do so are all indispensable considerations in determining what ought reasonably to be done.

The test is also not without its critics. See, eg, McHugh J in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 191 ALR 449 at [98] and in particular at [101]-[102]:

So far as possible, the issue of reasonable foreseeability of risk in breach of duty situations should no longer be determined in isolation from the issue of reasonable preventability and the ultimate issue of what reasonable care requires. Indeed at the breach stage, it is better to avoid the question of reasonable foreseeability. Instead, courts should see their task as that of deciding whether the defendant knew or ought to have recognised that he or she had created an unreasonable risk of harm to others. Whether the creation of the risk was unreasonable must depend on whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge.

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done in the circumstances in response to the foreseeable risk in relation to the design, manufacture or supply of the goods or the provision of warnings and instructions for use.²⁹

The standard of care of a retailer³⁰ or importer³¹ of goods is different to that of a manufacturer and is more limited. A non-manufacturing distributor of goods that is ignorant of a dangerous defect does not owe the same duty of care as that of a manufacturer. The duty requires reasonable care in the avoidance of personal injury by reference to what the distributor knows or has reason to know.

As a part of the Civil Liability Reforms, several state Acts³² now codify the principles that a court should take into consideration in determining the existence and scope of the defendant's duty of care to the plaintiff and causation. The exact wording of the provisions differs between jurisdictions. Generally, the reforms provide that a person will not be negligent in failing to take precautions against harm unless the risk was foreseeable, the risk was not insignificant and a reasonable person would have taken those precautions. In determining what precautions should have been taken, the relevant factors to be taken into account include the probability of harm if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid that and similar risks of harm, and the social utility of the activity creating the risk. Importantly, taking subsequent remedial action that would have avoided a risk of harm (eg, recalling a product, amending warnings or changing the design or formulation of product) does not impact upon liability, and is not an admission of liability.³³

For example, in New South Wales the Civil Liability Act 2002 (NSW) codified the law with respect to personal injury negligence and in which circumstances a duty of care would be imposed. Section 5F provides that an injured person is presumed to have been aware of the risk of harm of obvious

29 In addition, it may be reasonable to expect a manufacturer or supplier to meet its statutory duties: see *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (unreported, 28 November 2002, BC200207145).

30 *Laundess v Laundess* (1994) 20 MVR 156; Aust Torts Reps 81-316; *McPherson's Ltd v Eaton* (2005) 65 NSWLR 187; Aust Torts Reps 81-825. The common law has long recognised that the duties of the intermediate seller of goods in negligence are more restricted than those of a manufacturer. The seller must not render goods defective (*Gordon v M'Hardy* 6 F 210 (1903)), must warn of known defects (*Clarke & Wife v Army and Navy Co-op Society* [1903] 1 KB 1559), pass on instructions (*Kuback v Hollands* [1937] 3 All ER 907) and not mislead (*Watson v Buckley Osborne Garrett & Co Ltd* [1940] 1 All ER 174). An intermediate seller, however, is under no obligation to examine the goods unless they have grounds for believing that they are defective or that the manufacturer is of doubtful reputation (*Watson v Buckley Osborne Garrett & Co Ltd* [1940] 1 All ER 174; *Fisher v Harrods Ltd* [1966] Lloyd's Rep 500).

31 *Mayes v Australian Cedar Pty Ltd t/a Toronto Timber and Building Supplies* (2006) ATPR 42-119.

32 Wrongs Act 1958 (Vic); Civil Liability Act 2002 (NSW); Civil Liability Act 1936 (SA); Civil Liability Act 2003 (Qld); Civil Liability Act 2002 (WA); Civil Liability Act 2002 (Tas); Personal Injuries (Liabilities and Damages Act) 2003 (NT); Civil Law (Wrongs) Act 2002 (ACT).

33 See, eg *Moss v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2006] WASC 311 (unreported, 22 December 2006, BC200610863) regarding a manufacturer's duty to warn home handymen (but not bystanders) of the risks of asbestos under s 5B(1) of the Civil Liability Act 2002 (WA).

risks, unless the person proves otherwise on the balance of probabilities. Section 48 deals with the duty to warn of risks. It provides that a person who owes a duty of care to another to give a warning, advice or other information in respect of a risk, satisfies the duty of care if they take reasonable care in giving that warning, advice, or other information. Division 4 deals with awareness of risk. Section 51 provides that an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the same position. A risk of something occurring can be an obvious one, even though it has a low probability of occurring. Obvious risks include those that are a matter of common knowledge. Section 52 provides that a person is presumed to be aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that they were not aware of the risk.

Causation is essentially a question of fact, and can be resolved as a matter of common sense and experience, considering policy and value judgments.³⁴ Under the Civil Liability Reforms, a two step approach to causation has been adopted. First, the court considers the question of was the negligence a necessary condition of the occurrence of the harm (factual causation) and secondly, is it appropriate that the defendant's liability extend to the harm caused (scope of liability)?³⁵

There are several defences available to a claim in negligence, particularly contributory negligence (which is generally not a complete defence — damages are apportioned) and voluntary assumption of risk (*volenti non fit injuria*). To succeed under the former, the defendant must establish that the

³⁴ Mason CJ in *March v E and M H Stramare Pty Ltd* (1991) 171 CLR 506 at 518, 519; 99 ALR 423 summarised the test in the following terms:

As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff . . . as a superseding cause or *novus actus interveniens* when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff . . . and that injury occurs in the ordinary course of things. In such a situation the defendant's negligence satisfies the but for test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it.

March also acknowledges that value judgments should play a role — see Mason CJ at CLR 515–17; Deane J at 523–4; McHugh J at 531. See also J Stapleton, 'Perspectives on Causation' in *Oxford Essays in Jurisprudence*, Oxford University Press, 1999. Further, there may be a shifting onus of proof. In *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 420–1; 107 ALR 617, Gaudron J stated:

generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect or that the injury would have occurred even if the duty had been performed, it will be taken that the breach of the common law duty of care caused or materially contributed to the injury.

³⁵ The application of Civil Liability Act 2002 (NSW) is illustrated by *Finch v Rogers* [2004] NSWSC 39 (unreported, 13 February 2004, BC200400351), a first instance decision of Kirby J. The plaintiff sought damages for medical negligence arising from delayed treatment after surgery following diagnosis of testicular cancer. Breach of duty was admitted but the issue was whether the plaintiff's disablement was caused by the defendant's breach of duty. In relation to the first limb of the test, Kirby J found that the defendant's negligence was a necessary condition of the harm that ensued to the plaintiff and was factually caused by the negligence. In relation to the second limb, Kirby J stated that it was 'appropriate that the scope of the defendant's liability extend to the harm so caused'.

plaintiff not only perceived the existence of danger, but also fully appreciated it and voluntarily accepted the risk.³⁶

The defence of contributory negligence has been codified under the Civil Liability Reforms.³⁷ Other Civil Liability Reforms also impact upon the availability of the defence, for example, the duty to warn of obvious risks,³⁸ which provide that the defence is available for breach of statutory duty.³⁹ Contributory negligence may be relied on as a defence where a plaintiff has failed to meet the standard of care to which he or she is required to conform for his or her own protection and safety, amounting to a contributing cause of his or her loss or injury.

Contributory negligence is not a complete defence to a claim in negligence, but it does act to reduce awards of compensation as damages will be apportioned in accordance with a party's degree of fault. Under the Civil Liability Reforms,⁴⁰ courts have a wide discretion to reduce compensation to the extent the court considers just and equitable having regard to the plaintiff's share of responsibility for the harm suffered or, alternatively expressed, by comparing the degree of culpability of the defendant with that of the plaintiff. In exercising this discretion, courts have reduced a plaintiff's damages up to 90% or more.⁴¹ However, the High Court has held that a reduction of 100% is not permissible as it amounts to a finding that the plaintiff was wholly responsible for the damage suffered.⁴²

In addition to these defences, the possibility has also been raised that a defendant manufacturer of pharmaceutical products may seek to rely on the 'learned intermediary' defence.⁴³ The learned intermediary defence in relation

36 *Howells v Murray River North Pty Ltd* [2004] WASCA 276 (unreported, 26 November 2004, BC200408274): The defence of voluntary assumption of risk only applies when the injured person, with full knowledge of the risk, expressly or by implication agrees to waive his right to any remedy for any injury sustained. This involves the plaintiff assuming both the physical risk and also the legal risk of harm.

37 Wrongs (Amendment) Act 2000 (Vic); Div 8 of Pt 1A of the Civil Liability Act 2002 (NSW); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Div 6 of Pt 1, Ch 2 of the Civil Liability Act 2003 (Qld); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003 (WA); Div 7 of Pt 6 of the Civil Liability Act 2002 (Tas); ss 14–17 of the Proportionate Liability Act 2005 (NT) (in respect of intoxication); Pt 7.3 of Ch 7 of the Civil Wrongs Act 2002.

38 Query whether the decision of *Robinson v Halvorsen Boats Pty Ltd* (1990) Aust Tort Reports 81-042 would be decided differently today. The defendant was found liable in negligence in circumstances where the deceased (who had a blood alcohol content of 0.118g/100ml) drowned after falling overboard because he was not warned of the dangers of being on the foredeck of the cruiser.

39 Section 5A of the Civil Liability Act 2002 (NSW).

40 Under Pt VA of the TPA (but not Pt V Divs 2 or 2A), a court may reduce the amount of the loss to such an extent (including to nil) by the express words of s 75AN as it thinks appropriate.

41 In *Nicholson v Nicholson (No 2)* (1994) 35 NSWLR 308; 21 MVR 125, the appellant was rendered a quadriplegic in a motor car accident where she had not worn a seat belt. The NSW Court of Appeal thought that it could be 'just and equitable' to reduce the compensation otherwise recoverable to zero.

42 *Podrebersek v Australia Iron and Steel Pty Ltd* (1985) 59 ALR 529; see also *Civic v Glastonbury Steel Fabrications Pty Ltd* (1985) Aust Torts Reps 80-746; *Kelly v Carroll* [2002] NSWCA 9 (unreported, 5 February 2002, BC200200327) at [37] per Heydon JA.

43 In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014, Kiefel J did not think that it was necessary to refer to the US case law in relation to the effect of a 'learned

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to pharmaceutical products is not supported by express authority in Australia, but it has been suggested that the defence could be accommodated within existing common law principles.⁴⁴ Under the defence, it can be argued that the defendant manufacturer's duty of care has been fully discharged by providing all relevant information and warnings to a recognised, skilled and learned intermediary through whom the user has supplied the product.

Breach of statutory duty

Breach of statutory duty can be relevant in product liability litigation in Australia in several ways. Indeed, it seems to be undergoing somewhat of a renaissance, adding another layer of complexity to product liability law. First, such a breach may provide evidence of negligence⁴⁵ and hence generate civil liability,⁴⁶ although it is generally not conclusive.⁴⁷

Secondly, a breach of statutory duty may generate civil liability in limited instances regardless of whether that breach constitutes negligence.⁴⁸ Generally, for example, private rights of action are not available where the

intermediary' upon a manufacturer's obligation to warn, in particular, it having been held in Australia that the duty to warn rests with the treating physician not the manufacturer or distributor: *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reps 81-000.

44 J Kellam and S Clark, 'Product Liability Defences: A State by State Compendium', Australian Chapter, Defense Research Institute, 2004, see <<http://www.dri.org/DR1/open/Detail.aspx?ProdID=2004-08CD>>.

45 In *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147 at [16], per Brennan CJ adverted to the distinction between an action for breach of statutory duty and an action for common law negligence, noting that 'the same set of circumstances may give rise to either cause of action'.

46 See *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (unreported, 28 November 2002, BC200207145). Notwithstanding that a breach of statutory duty was not pleaded, O'Loughlin J nevertheless took it into account in determining the nature of the respondent's duty of care and in deciding whether the supplier was negligent. His Honour stated at [101]: 'The fact that the applicant (or his advisers) chose not to plead a breach of statutory duty does not mean the provisions of the statute are to be ignored. Those provisions are material . . . in making an evaluation of two critical questions: first, did the respondent owe . . . a duty of care and, secondly, if it did, what was the extent or standard of that duty?' A breach of statutory duty does not necessarily involve a failure to take reasonable care. By importing this duty of safety into negligence law, it seems to the authors that a form of strict liability may well be adduced.

47 Trindade et al, above n 15, at 448.

48 See, eg:

- *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (unreported, 28 November 2002, BC200207145) (the failure to provide an operation manual with goods to a purchaser was found to be in breach of a retailer's statutory duty under the Occupational Health, Safety and Welfare Act 1986 (SA));
- *Booksan Pty Ltd v Wehbe* (2006) Aust Tort Reports 81-830 (the plaintiffs injured by the collapse of a hoist successfully alleged a breach of a statutory duty under the Construction Safety Regulations 1950 (NSW));
- *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 (unreported, 13 August 2003, BC20034504) (a claim was rejected for losses — including to consumers — as a result of a salmonella outbreak following consumption of unpasteurised fruit juice, inter alia based upon a breach of statutory duty derived from the Citrus Industry Act 1991 (SA), the court holding that as it was a marketing statute, the Act was not intended to give a private right of action);
- *Girkraid Pty Ltd v McDonald* [2001] NSWSC 1202 (unreported, 14 December 2001, BC200108766) (breach of Regs 18 and 19 of the Dangerous Goods Regulation 1978

duties are designed to regulate motor traffic, but are available where duties are to protect the health of industrial workers. Private actionability has also been allowed in some cases outside these settings.

Whether a breach of a statutory provision confers a private right of action is a matter of statutory construction.⁴⁹ In the absence of an express conferral of a private cause of action, the court's task is to infer what the statute intends. This requires balancing several considerations, including the purpose and object of the Act in question. Where the legislature has not expressed its intention (which is commonly the case), various presumptions or considerations are applied including statutory purpose, convenience and policy, which are complex and not definitive. The same is true in determining the required standard of conduct. A further complication is the scope of the duty — determining whether the plaintiff is within the category of persons owed the duty, and whether the type of harm suffered is within the type the statute was directed at preventing.⁵⁰

Some express guidance is provided in the TPA. Part V Div 1A (Product Safety and Information) provides a basis for personal injury claims if:

- (1) a corporation supplies goods breaching a product information standard (s 65D) or product safety standard (s 65C(2)) mandated by the government; and
- (2) 'a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods'; and
- (3) 'the person would not have suffered the loss or damage if the goods had complied with that standard',

Then the person is deemed for the purposes of the TPA to have suffered the loss or damage by the supplying of the goods. Private claims can therefore be brought under s 82. The same is true for products supplied in contravention of a temporary ban (s 65C(5)) or permanent ban (s 65C(7)), except that there is no equivalent to the third-mentioned requirement (s 65C(9)). However, the authors are not aware of such a cause of action having been brought successfully, possibly because of limited safety standards, bans or recalls mandated by federal authorities in Australia.⁵¹

(NSW) gave rise to a civil cause of action — the decision also usefully reviews some of the authorities before the High Court's decision in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304; 177 ALR 585);

- *Tasmanian Alkaloids Pty Ltd v Anthony* [2005] TASSC 53 (unreported, 9 June 2005, BC200503904) (liability was affirmed on appeal inter alia for a breach of statutory duty namely under regs 36(a) and 46 of the Dangerous Goods (General) Regulations 1998 (Tas)); and
- *Transfield v Rawstron* [2005] WASCA 78 (unreported, 29 April 2005, BC200502736) (an allegation of breach of statutory duty under s 5(1) of the Occupiers' Liability Act 1985 (WA) was struck out because of a failure to seek leave to bring the action as required by s 93B of the Workers' Compensation and Rehabilitation Act 1981 (WA)).

49 See Gleeson CJ with Gummow and Hayne JJ in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304; 177 ALR 585 at [28].

50 Trindade, above n 15, at 663–75.

51 In *Zaravinos v Dairy Farmers Co-Operative Ltd & Pure-Pak Australia* (1985) 7 FCR 195; 59 ALR 603; 60 LGRA 152; the plaintiffs alleged breaches of the TPA (namely, ss 62, 74B,

In the absence of such express provisions, statutory duties resting on public authorities are particularly unlikely to be actionable by private individuals.⁵² Even when they are, and the public authorities' duties (and its broader powers) are used to define to whom and how they may be liable in common law negligence, it has become increasingly difficult to succeed in such claims in Australia.⁵³ One major consideration in the case law appears to be 'whether imposing a duty to take care not harm the (private) interests of a particular individual would potentially hinder the alleged tortfeasor's capacity to protect and promote societal or public interests that it has responsibility to protect and promote'.⁵⁴ Another factor, which has emerged as even more important in negligence claims against authorities exercising public responsibilities (compared to claims against firms or individuals), is the defendant's degree of control over the risks that resulted in the harm.⁵⁵ A third principle that has spread from English to Australian courts is that a duty of care will not be owed if the plaintiff had suitable alternative redress.⁵⁶ Most importantly, the Civil Liability Reforms have also resulted in confusing sets of provisions being enacted in various states, but aimed generally at restricting the negligence liability of public authorities.⁵⁷

74D and 74G); ss 10 and 13(1) of the Pure Food Act (1908); and negligence. One question for the court was whether provisions of the Pure Food Act (now repealed) were a prescribed consumer safety standard within s 62(1)(a) of the TPA. The court rejected the applicant's submissions that the Pure Food Act could prescribe consumer product safety standards for the purposes of s 62(1) of the TPA:

It cannot have been within the contemplation of the Commonwealth Parliament when enacting s 62 that the failure by a corporation in trade or commerce to observe the requirements of the law of a state or territory of the Commonwealth in respect of consumer product safety standards shall, without more, constitute a breach of Commonwealth law. The contrary view necessarily involves acceptance of the proposition that the Commonwealth Parliament intended to create offences against Commonwealth law for breaches of state law which may vary from time to time and from state to state without any national element, and in respect of state-prescribed safety standards which are beyond the reach of Commonwealth control.

52 Trindade, above n 15, at 671. For detailed discussion of the relevant principles, see *Amaca Pty Ltd (formerly James Hardie and Co Pty Ltd) v New South Wales* (2004) 132 LGERA 309; Aust Torts Reps 81-749 (the plaintiffs argued unsuccessfully that the state of New South Wales was in breach of its obligations under the Scaffolding and Lifts Act 1912 (NSW)). See also *Ryan v Great Lakes Council* (1999) 102 LGERA 123 (first instance); *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307; 177 ALR 18 and *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337, each with some discussion regarding the interrelationship between an action in negligence and for breach of statutory duty and the distinction between a statutory duty and a statutory power.

53 Compare other jurisdictions where civil liability claims are more readily pleaded, often successfully, against public authorities especially in the product liability context. In Japan, see Nottage, above n 11, Ch 2; L Nottage, 'The ABC of Product Safety Re-Regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts' (2006) 15 *Griffith L Rev* 242; L Nottage, 'Product Liability and Safety Regulation' in G McAlinn (Ed), *Japanese Business Law*, Kluwer, The Hague, 2007, forthcoming. In the EU, see D Fairgrieve, *State Liability in Tort: A Comparative Law Study*, Oxford University Press, Oxford, England, 2003.

54 Trindade et al, above n 15, at 615.

55 See, eg, *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337 (no duty owed by authorities to oyster growers and consumers for injury caused by water pollution).

56 Trindade et al, above n 15, at 617-18.

57 Ibid, at 619-22.

III Statutory causes of action

A number of parts of the TPA give consumers an action against manufacturers and importers of goods that are defective, unsuitable or not of merchantable quality. These provisions may be supplemented by state law, depending upon the jurisdiction.⁵⁸ The most relevant TPA provisions⁵⁹ are contained in Pt V — Consumer Protection, specifically Div 2 (Conditions and Warranties in Consumer Transactions), Div 2A (Actions against Manufacturers and Importers of Goods), and Pt VA (Liability of Manufacturers and Importers for Defective Products). Part V Div 2A⁶⁰ and Pt VA give consumers statutory causes of action against manufacturers. In contrast, the relevant cause of action against suppliers for breach of Pt V Div 2 is breach of contract in respect of warranties implied by the statute.⁶¹

The TPA applies to corporations and the state Fair Trading Acts apply to persons⁶² supplying goods in trade and commerce. The Federal Court has characterised the nature of ‘supply’ as being ‘a bilateral and consensual process’. The bilateral ‘transaction’ or ‘dealing’ which occurs in the supply of goods sees one party transferring the goods and the other acquiring them. The events must occur ‘as an aspect or element of activities or transactions which themselves have a trading character’.⁶³

The statute does not apply to private transactions. While some state Fair Trading Acts imply consumer warranties equivalent to those in Pt V Div 2 and/or 2A of the TPA⁶⁴ others do not. This is another example of consumers having different rights in different states and territories.⁶⁵ ‘Goods’ are defined

58 In relation to claims against manufacturers, see the Manufacturers Warranties Act 1974 (SA); Pt 8 of the Sale of Goods Act 1923 (NSW) and Fair Trading Act 1987 (NSW) and Consumer Affairs and Fair Trading Act 1990 (NT); for warranties against suppliers equivalent to Pt V Div 2 see Fair Trading Acts (NSW), (WA) and (Vic); and Consumer Affairs and Fair Trading Act 1990 (NT).

59 A claim for compensation may also be made under Pt V Div 1A. See Pt II Breach of Statutory Duty above. However, the authors are not aware of a successful claim being made.

60 Although it gives consumers statutory causes of action with a contractual flavour, that is, when goods are not of merchantable quality or are unfit for purpose, such claims are generally not predicated on the basis of there being either an implied warranty (such as under Pt V Div 2 of the TPA) or a notional contract (eg, under the Manufacturers Warranties Act 1974 (SA)) (at 261) (but cf s 74H of the TPA which gives a seller the right to recover against a manufacturer or importer ‘as . . . if the liability . . . had arisen under a contract of indemnity’).

61 *Arturi v Zupps Motors Pty Ltd* (1980) 33 ALR 243; 49 FLR 283.

62 If a defendant is not a corporation it is not liable under the TPA, see *White v Canberra Manufacturing Pty Ltd* [1999] ACTSC 53 (unreported, 28 May 1999, BC9902741) at [21] per Gallop J (where the defendants were corporations that traded in partnership as Canberra Wall Frames). Note, however, TPA s 6 — in particular subs (2)(h) deeming individuals to be corporations, the effect and constitutionality of which is untested. In contrast, the state Fair Trading Acts apply to ‘persons’, which is to be broadly interpreted and includes employees, see *Houghton v Arms* (2006) 225 CLR 553; 231 ALR 534.

63 *Cook v Pasmenco* (2000) 99 FCR 548 per Lindgren J.

64 For Pt V Div 2 equivalents, see the Fair Trading Acts in NSW, NT, WA and Vic; for Pt V Div 2A, see the Fair Trading Acts in NSW and NT.

65 There also seems to be no logical reason why, for example, the Fair Trading Acts of the ACT, Queensland, South Australia and Tasmania do not contain provisions equivalent to Pt V Div 2. The Fair Trading Acts of the ACT, Queensland, South Australia, Victoria, Western Australia and Tasmania do not contain provisions equivalent to Pt V Div 2A. In

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to include ships, aircraft and other vehicles, animals (including fish), minerals, trees and crops (whether on, under or attached to land and gas and electricity).⁶⁶ Pollution is not considered a product.⁶⁷

Multiple parties are liable to be joined as manufacturers to an action under the TPA. The definition of the term 'manufactured' under s 74A of the TPA includes the growing, extraction, production, processing and assembly of a product which includes agricultural production.⁶⁸ Due to the broad definition of manufacturer in the TPA, a component part manufacturer, assembler and importer can all be joined to proceedings.⁶⁹ Under Pt V Div 2A and (via s 75AB) Pt VA of the TPA, a person is also deemed to be a manufacturer of goods if they hold themselves out as being the manufacturer, allowing their name or brand or mark to be affixed to goods, or they import the goods into Australia where the actual manufacturer does not have a place of business in Australia.⁷⁰ Parallel claims may be brought against the actual foreign manufacturer and the importer into Australia.⁷¹ If a corporation applies its label to a product it will be deemed to be the manufacturer, even if the label states that it was not the manufacturer, for example, by stating that it has been manufactured for it by a third party.⁷²

Part V Divs 2 and 2A of the TPA

Part V Divs 2 and 2A of the TPA impose liability on suppliers, manufacturers and importers of certain goods to consumers who have suffered loss or damage as a result of their use. This liability generally cannot be excluded.⁷³

Although both Divs 2 and 2A concern similar statutory warranties, the Divisions apply to different goods. Part V Div 2 applies to consumers. Section 4B defines them as persons who acquire⁷⁴ goods with a price which

addition, alternatively expressed, while Western Australia and Victoria have provisions equivalent to Pt V Div 2, there have been no reforms to introduce Pt V Div 2A.

66 Section 4. Regarding 'electricity' and 'goods', see *AGL Victoria Pty Ltd v Lockwood* (2003) 10 VR 596, which held that 'goods' is intended to signify deliverable personal property and to the extent that 'goods' have the characteristic of tangibility, then electricity met the description.

67 *Cook v Pasmenco* (2000) 99 FCR 548.

68 This definition encompassed the activities of the oyster farmer and its growing, harvesting, cleaning, depurating and packing of oysters for sale to consumers by retailers in *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337.

69 For example, *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359 involved a manufacturer of retread tyres.

70 Section 74A (which is incorporated into Pt VA by s 75AB).

71 *Leeks v FXC Corporation* (2002) 118 FCR 299; 189 ALR 288 at [8] (approving Boehm AJ in *White v Eurocycle* (1994) ATPR 41-330 and Doussa J in *ETSA v Krone (Australia) Technique Pty Ltd* (1994) 51 FCR 540; 123 ALR 202; ATPR 41 337 at 42,426).

72 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1999) ATPR 41-672.

73 See in relation to Pt V Div 2 of the TPA, ss 68 (Application of provisions not to be excluded or modified) and 68A (Limitation of liability for breach of certain conditions or warranties); see also in respect of Pt V Div 2A ss 74K (Application of Division not to be excluded or modified); 74L (Limitation in certain circumstances of liability of manufacturer to seller).

74 'Acquire' is a common word having 'a very wide meaning'. Even if it is illegal to supply goods they may fall within the section. The definition also includes gifts and giveaways: 'Even if the price be deemed to be nil because the value of the goods was nil, this provision

does not exceed \$40,000 or, where the price exceeds that amount, goods are of a kind ordinarily⁷⁵ acquired for personal, domestic or household⁷⁶ use or consumption or the goods consist of a commercial road vehicle. Accordingly, the Division applies to supplies of non-consumer goods with a price of below \$40,000.⁷⁷

In contrast, Pt V Div 2A only applies to consumers of 'consumer goods'. This is because s 74A(2) of the TPA provides that a reference to goods in that Division shall be read as a reference to 'goods of a kind ordinarily acquired for personal, domestic or household use or consumption'.⁷⁸ This phrase is to be construed broadly so as to give the broadest relief that the fair meaning will allow wherever it appears in the TPA.⁷⁹ To further complicate matters, the equivalents to both Divs 2 and 2A in the Fair Trading Act 1987 (NSW), for example, apply to similarly defined consumer goods.⁸⁰ The equivalent to Div 2 warranties under s 64 of the Sale of Goods Act 1923 (NSW), but which follow the common law definitions of merchantability, apply instead to 'consumer sales' defined as being 'of a kind commonly bought for private use

was satisfied for the price nil did not exceed the prescribed amount': see *Clarke v New Concept Import Services Pty Ltd* (1981) ATPR 40-264 per Davies J.

75 The meaning of the word 'ordinarily' was considered in *Federal Commissioner of Taxation v Chubb Australia* (1995) 56 FCR 557; 128 ALR 489 in the context of the Sales Tax (Exemptions and Classifications) Act 1935 (Cth). 'Ordinarily' was held to be used idiomatically in the sense of 'commonly' and was not equivalent to 'exclusively' or 'predominantly'. Burchett J noted at FCR 560:

It is possible, and it happens frequently, that something is ordinarily used for one purpose, and is also ordinarily used for a quite different purpose. German Shepherd dogs are not the less ordinarily kept as guard dogs because they are also ordinarily kept by dog lovers as companions. An axe is ordinarily used in country households in which wood is burnt to fuel a stove or heater, or where encroaching trees must from time to time be cut back. The very same type and brand of axe may also be found in use . . . in operations having nothing to do with households . . .

Hill J approved Davies J in *OR Cormack Pty Ltd v Federal Commissioner of Taxation* (1992) 92 ATC 4121 at 4124: 'The adverb "ordinarily" does not have a precise denotation. It requires a use of the goods which lies between "primarily or principally" on the one hand and mere "use by" on the other. The adverb conveys the meaning of "generally" or "customarily" or "usually".'

76 The meaning of the 'use for household purposes' was also considered in *Federal Commissioner of Taxation v Chubb Australia* (1995) 56 FCR 557; 128 ALR 489 in the context of the Sales Tax (Exemptions and Classifications) Act 1935 (Cth) and held to have a domestic context. Burchett J commented at FCR 560:

With respect to those who think otherwise, it is not clear to me that a cabinet, desk or safe used in a home for the storage of professional or business papers would not be used for household purposes. In the late twentieth century, many people do much work at home, with or without the aid of computers linked to their offices and facsimile machines. . .

77 See *PNSL Berhad v Dalrymple Marine Services Pty Ltd and PNSL Berhad v The Owners of the Ship 'Koumala'* [2007] QSC 101 (unreported, 19 April 2007, BC200703327) where a contract for the provision of tug towing services in circumstances where the fee for the services was less than \$40,000 and a ship being towed, the *Pernas Arang* fell within the definition of 'goods' in the TPA.

78 D Harland, 'Consumer Guarantees — the Relevance for Europe of the Australian Experience' (1995) *Consumer LJ* 153.

79 *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479; 230 ALR 269.

80 See, respectively, s 40L(1) of Pt 4 Div 4 of the Fair Trading Act 1987 (NSW) (claims against suppliers) and s 40T(2)(a) of Pt 4 Div 5 (claims against manufacturers).

or consumption'.⁸¹ Suffice it to say, there appears to be no useful reason behind these distinctions.

Part V Divs 2 and 2A of the TPA impose liability where goods are not reasonably fit for a particular purpose (unless the consumer did not rely, or it was unreasonable to rely, on the skill or judgment of the corporation)⁸² or are not of merchantable quality (except in relation to defects drawn to the consumer's attention or, if the consumer examines the goods before purchase, as regards defects which that examination ought to reveal).⁸³ Both Pt V Divs 2 and 2A⁸⁴ are frequently pleaded in product liability cases.

A distinction exists between warranties of merchantable quality and fitness for purpose at common law and those under the TPA; it is unnecessary and undesirable to refer to common law decisions on the definitions.⁸⁵ In respect of the definition of merchantable quality, the statutory definition differs from

81 Section 62(a). Another difference is that s 62(b) adds that such goods are to be 'sold to a person who does not buy or hold himself or herself out as buying them in the course of a business'. The Fair Trading Act 1987 (NSW) and TPA instead exclude certain goods acquired for 'resupply'.

82 In *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207, Barclay Oysters argued that it was not reasonable for the consumer to rely on its skill and judgment to ensure that the goods were reasonably fit for the purpose of consumption. The defendant relied on the practical impossibility of testing oysters for the presence of viruses, the farmer's inability to know that the oyster leases had been subjected to viral contamination and the farmer's inability to control the environment in which the oysters grow (with reference to contact with contaminants from private land or council stormwater). This argument was rejected. In the absence of obvious defect or special circumstances or a warning of the possibility that the oysters might contain viruses that could not be detected, a consumer will reasonably assume that goods are fit for the purpose they were intended.

On appeal to the Full Court of the Federal Court, *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337, the oyster farmer submitted that whether or not it was 'unreasonable for the consumer to rely on the skill or judgment of the corporation' under s 74B(2)(b) was to be assessed objectively. Accordingly it must be hypothesised that consumers knew all the relevant facts, including what the manufacturer knew or should have known, the circumstances in which the manufacture took place, and the steps available or otherwise to the manufacturer to ensure that the goods were reasonably fit for the purpose they were intended. The court also rejected this construction holding that special technical knowledge touching the process of manufacture of the goods should ordinarily not be imputed to the consumer.

83 *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (unreported, 28 November 2002, BC200207145): The applicant was aware of and willing to take the machine in its condition. Even if the absence of the side screens was a 'defect', the court held that the applicant was well aware of the defect and so an implied warranty did not arise where it was causative of the accident.

84 *Bright v Femcare Ltd* (2000) 175 ALR 50; *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014; *Courtney v Medtel Pty Ltd* (2003) 130 FCR 182; 198 ALR 630; [2003] HCA Trans 496 (2 December 2003); *Effem Foods Ltd v Nicholls* (2004) ATPR 42-034; *Leeks v FXC Corporation* (2002) 118 FCR 299; 189 ALR 288; *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168 (unreported, 6 September 2005, BC200506537).

85 At first instance, in *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at [263], Sackville J said that in considering the meaning of merchantable quality in respect of the statutory cause of action under s 74D it was 'unnecessary and undesirable' to look at the common law definition of merchantability as the relevant decisions referred to the tests of merchants and were appropriate to commercial sales. See also *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323; (1990) 96 ALR 375.

the common law because it considers relevant all normal purposes for which the goods in question are commonly bought.⁸⁶

Whether goods are of merchantable quality or fit for purpose will be determined upon the facts of each case. It is not determinative that the goods have not yet failed.⁸⁷ The general purpose of the goods is relevant.⁸⁸ The question is to be answered not only by reference to whether or not the goods failed to accomplish their purpose, but also by reference to what a consumer could reasonably expect from the goods. For example, a medical device is not unfit for purpose if it is unreasonable for the plaintiff to have expected an absence of complications considering the advice given by medical practitioners in relation to a procedure utilising the device.⁸⁹ A product that is subject to a significant additional risk of premature failure by reason of the materials used in the manufacturing process may not be reasonably fit for its intended purpose.⁹⁰ The fact that a product is included in a hazard alert or product recall notice alone is not sufficient to render a product unmerchantable.⁹¹ Similarly, it is not appropriate to attribute to one item any qualities derived by statistical analysis of the total batch of goods from which the goods came.⁹²

Under ss 74B and 74D of the TPA it is a defence to prove that goods were not reasonably fit for purpose and were not of merchantable quality because of an act or default of a person not being the manufacturer, or a cause independent of human control occurring after the goods left the control of the manufacturer. The manufacturer bears the legal and evidentiary burden of proof to establish the existence of any of the circumstances.⁹³

In addition, under s 74B in respect of goods not reasonably fit for purpose, it is a defence if the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the manufacturer. Section 74D provides a defence in relation to goods which are not of merchantable quality, specifically where defects are drawn to the consumer's attention before the formation of a contract for supply. It is a defence under this section if the consumer examines the goods before supply and, through the examination, any defects in the goods ought to have been revealed.

86 See *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323; (1990) 96 ALR 375, declining to follow *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1. Section 74E, however, may provide an exception to this rule — see the concluding remarks of Cooper J in this judgment.

87 In *Courtney v Medtel Pty Ltd* (2003) 130 FCR 182; 198 ALR 630 the Full Court of the Federal Court stated that the fact that it is known at the time of the trial that goods had not failed does not compel a conclusion that they were of merchantable quality.

88 *Action Paintball v Clarke* [2005] NSWCA 170 (unreported, 25 May 2005, BC200503463): The relevant purpose for which goods must be reasonably fit should not be determined generally and not by reference to the particular facts of a case.

89 *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014.

90 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

91 In *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at [272], Sackville J made clear that courts would be reluctant to impose liability on a manufacturer because of a hazard alert or warning to consumers as it would discourage manufacturers from disclosing possible defects to consumers.

92 *Courtney v Medtel Pty Ltd* (2003) 130 FCR 182; 198 ALR 630 (Full FC).

93 *Effem Foods Ltd v Nicholls* (2004) ATPR 42-034.

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Part V Div 2 operates by implying warranties into the contract for the supply of goods to the consumer. In contrast, Pt V Div 2A creates a statutory cause of action.⁹⁴ The distinction has a practical effect in that claims based on Pt V Div 2 are actions for breach of contract and the damages awarded are assessed according to the contractual measure and state law.⁹⁵

Claims for compensation brought under Pt V Div 2A are not based upon s 82, although the measure of damages seems likely to be similar given the similarity in wording of the different provisions.⁹⁶ Section 82, which provides a statutory basis for a claim for compensation for losses as a result of a contravention of a number of other provisions of Pt V of the TPA (eg, Div 1A), is therefore irrelevant. An exception may be s 74H. Where a seller is liable to a consumer for loss suffered by the consumer as a result of a breach of Pt V Div 2 and the manufacturer is liable to compensate the consumer in respect of the same loss or damage, the manufacturer is liable to indemnify the seller in respect of its liability.⁹⁷ This right is enforceable as if it were a right arising out of a contract of indemnity between the seller and the manufacturer.⁹⁸

Under s 75A of the TPA, consumers also have a statutory right to rescind a contract where there is a breach of a condition implied by Pt V Div 2.⁹⁹ However, a notice of rescission must first be given within a reasonable time after

94 At first instance, in *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at [261] Sackville J recognised that claims under Pt V Div 2A are founded upon an anomaly. Although it gives consumers statutory causes of action with a contractual flavour, that is, when goods are not of merchantable quality or are unfit for purpose such claims are generally not predicated on the basis of there being either an implied warranty (such as under Pt V Div 2) or a notional contract (eg, under the Manufacturers Warranties Act 1974 (SA)) (but cf s 74H of the TPA which gives a seller the right to recover against a manufacturer or importer 'as . . . if the liability . . . had arisen under a contract of indemnity'). See G Gregg and T Tzovaras, 'The Liability of Manufacturers and Importers under the Trade Practices Amendment Act 1978' (1979) 10 *Fed L Rev* 39; and S Ahmed, 'Products Liability in Australia' (1979) 6 *U Tas L Rev* 189.

95 A real question exists as to whether the Civil Liability Reforms are effective to limit damages under s 71 of Pt V Div 2 of the TPA or are unconstitutional by virtue of s 109 of the Constitution: by analogy with the High Court decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388; 120 ALR 440. An express saving provision equivalent to subs (2A) of s 74 has not been added to s 71 (see also *Action Paintball v Clarke* [2005] NSWCA 170 (unreported, 25 May 2005, BC200503463)).

96 In *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at [265], Sackville J also noted the difference in wording between s 74D and s 82 of the TPA. An entitlement to compensation arises under s 74D of the TPA if the consumer 'suffers loss or damage by reason that the goods are not of merchantable quality'. This is different to the wording of s 82 which provides that a person who suffers 'loss or damage by conduct of another person' in contravention of a provision of the Act may recover compensation. His Honour expressed the view that the wording of s 74D conforms more closely to how notions of causation should be expressed.

97 However, while Pt VA provides that if two or more corporations are liable under Pt VA, then they are jointly and severally liable under s 75AM, a mechanism allowing the attribution of proportionate responsibility is not given. Part VA is also silent as to responsibility between 'manufacturers' and other persons who may be liable in respect of the same loss.

98 See *White v Eurocycle Pty Ltd* (1994) ATPR 41-390; (1995) 64 SASR 461; *Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd* [1998] 1 Qd R 149; (1997) 146 ALR 120; ATPR 41-565.

99 In respect of the right to rescind in the context of an alleged offence under s 75AZC of the TPA, see *ACCC v Skippy Australia Pty Ltd* [2006] FCA 1343 (unreported, 18 October 2006, BC200608295).

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the consumer has had a reasonable opportunity of inspecting the goods.

Part VA of the TPA

Part VA of the TPA is another statutory cause of action, based on the EC Directive. The latter, and offshoots such as Japan's Product Liability Law of 1994, are generally construed as creating a special statutory tort.¹⁰⁰ The provisions of Pt VA of the TPA apply only to goods supplied after 9 July 1992, and their application cannot be excluded or modified.¹⁰¹ After a slow start,¹⁰² there is now a body of Australian case law considering their application.

If a plaintiff is having difficulty identifying the manufacturer of a defective product, s 75AJ (Unidentified Manufacturer) of the TPA provides a mechanism for a plaintiff to make a formal request of the supplier to identify the name of the manufacturer that supplied the goods.¹⁰³

The test of when goods are defective under Pt VA is different to Pt V Divs 2 and 2A of the TPA.

Under Pt VA of the TPA, goods have a defect 'if their safety is not such as persons generally are entitled to expect'.¹⁰⁴ This involves two elements: an expectation and an entitlement to a certain level of safety. The test is objective, based on community knowledge and expectations.¹⁰⁵ The product must be

100 See above n 22.

101 Section 75AP (Application of provisions not to be excluded or modified).

102 The first reported judgment on a substantive issue was *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1999) ATPR 41-672. See Appendix A.

103 In *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359, the plaintiff's solicitor knew shortly after the accident that retreading of a tyre had been done by 'Vulcap'. However, Vulcap conducted its business through more than one corporate entity containing in its name the word 'Vulcap'. The plaintiff took steps to identify which corporate entity was involved by issuing a subpoena upon Vulcap. The court took the view that the time of awareness of the identity of the manufacturer includes a measure of reasonableness and where there are a number of companies in a corporate structure, 'it is unreasonable to expect the outsider to penetrate the veils and find the right corporate defendant unless there is prompt, frank and adequate disclosure'. This only happened some four years after the accident.

104 Section 75AC. See R Travers, 'Australia's New Product Liability Law' (1993) 67 *ALJ* 516 at 519ff. Jane Stapleton observes that the circularity of the definition of 'defect' in the EU Directive and the TPA is not fatal to the coherence of the legal rule, referring by example to Lord Atkin's well worn definition of the class of those in the tort of negligence whom 'we ought reasonably to have in contemplation as those we ought reasonably to have in contemplation': *Donoghue v Stevenson* [1932] AC 562, referred to in J Stapleton 'The Conceptual Imprecision of "Strict" Product Liability' (1998) *TLJ* 260.

105 By analogy with *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45; 169 ALR 677; 74 ALJR 573. In this case involving an alleged trade mark infringement, passing off and s 52 of the TPA, the High Court said that a court must assess the reactions or likely reactions of ordinary or reasonable members of the class to whom the conduct was addressed, and might disregard any extreme or fanciful reactions. The High Court stated at [102]-[105]:

Although a class of consumers may be expected to include a wide range of persons, in isolating the 'ordinary' or 'reasonable' members of that class, there is an objective attribution of certain characteristics. . . . Where the persons in question . . . are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class. The inquiry thus is to be made with respect to this hypothetical individual . . . where the effect of conduct on a class of persons, such as consumers, was in issue, the section must be 'regarded as

actually unsafe, not just of poor quality or inoperative.¹⁰⁶ Just because goods may cause injury, however, does not mean they are defective. Goods may be harmful not due to a defect in them but simply because of their inherent nature.¹⁰⁷ Similarly, just because goods operate as intended, does not mean that they are not defective if they cause personal injuries, for example, because of inadequate warnings or instructions for use.¹⁰⁸

All circumstances are to be taken into account including the manner in which the goods have been marketed, their purposes, packaging, the use of any mark in relation to them, what reasonably might be expected to be done or in relation to them, any instructions for use or warnings¹⁰⁹ and the time when they were supplied. An inference that goods have a defect is not to be made only because of the fact that safer goods have been subsequently supplied.¹¹⁰

The list of circumstances provided in s 75AC(2) is not exclusive. It neither sets outer parameters of the relevant circumstances nor specifies a minimum qualification to be met.¹¹¹ The test of whether a product was defective was to be applied by reference to the public at large rather than any particular individual.¹¹² This is notwithstanding that consumers generally may have

contemplating the effect of the conduct on reasonable members of the class'. . . . Nevertheless, in an assessment of the reactions or likely reactions of the 'ordinary' or 'reasonable' members of the class of prospective purchasers of a mass-marketed product for general use, . . . the court may well decline to regard as controlling the application of s 52 those assumptions by persons whose reactions are extreme or fanciful. . . .

106 M Hammond, 'Defect Test in Pt VA Trade Practices Act 1974 (Cth): Defectively Designed?' (1998) 6 *TLJ* 29; E Olsson, 'Liability for Defective Goods — Limiting the Parameters of Part VA' (2003) 11(1) *Trade Practices L Jnl* 51; J Kellam and M Kearney, 'Product Liability — Decade of Change' (2001) 12(4) *Australian Product Liability Reporter* 49.

107 Cf, however, Lindgren J in *Cook v Pasmenco* (2000) 99 FCR 548, 'it is a poison that does not do its deadly work that is defective rather than one that does'. Certainly, a poison which was not toxic would not be fit for its intended purpose. However, it would not be unsafe per se (although it could have dangerous consequences if it failed to do its work, for example, to eradicate vermin). Highlighting the difference between 'defect' in sales law and tort, see also Brooking J in *Minchillo v Ford Motor Company of Australia* [1995] 2 VR 594 at 598–9:

One man's meat is another man's poison. The scribbling block bought for a few cents at the supermarket might serve very well for the correspondence of the artisan, but it would not have done for the Duke . . . We should adopt the view that has now been three times expressed in the House of Lords, . . . that as regards to goods which are merely defective in quality as opposed to dangerous manufacturers are under no general duty of care towards consumers.

108 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 40 IPR 619; ATPR 41-632.

109 Regarding the adequacy of the warning labels and the role of expert evidence, Emmett J noted in *Glendale Chemical Products Pty Ltd v ACCC* (1998) 40 IPR 619; ATPR 41-632:

The court is clearly much benefited by evidence as to the chemical properties of substances such as caustic soda. Further the court is equally benefited by evidence as to the harm and damage which might be occasioned to human tissue as a consequence of contact with caustic soda. However, the adequacy of labels to warn consumers of such dangers is ultimately a question for the court. Expert evidence may be of assistance in describing what is habitually done by organisations which are involved in the handling or use of substances such as caustic soda. Whether those practices are adequate by reference to some standard, however, is a question for the court.

110 Section 75AC(3).

111 *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) Aust Contract R 90-167.

112 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1999) ATPR 41-672.

either a low or high expectation of safety due to a lack of information to accurately assess risk.¹¹³

Goods also do not have to be absolutely safe. However, persons generally, or the 'public at large', are entitled to expect for example that a gas heater will not operate so as to cause significant damage.¹¹⁴ A product can be defective even if it operates as intended if the warnings are insufficient to alert consumers of the possible dangers of using the product.¹¹⁵ It may be sufficient for a third party to rely on an inadequate warning, even if the plaintiff has not seen it.¹¹⁶ The plaintiff also need not prove that the defect existed at the time of supply by the manufacturer.¹¹⁷

Under the TPA a defect must not be inferred only from the fact that after the product was supplied, a safer good was supplied by the manufacturer. If there was compliance with a (rare) minimum product safety standard mandated by the Australian Federal Government (not by the states and territories), and that standard was unsafe at the time of supply, the government can be substituted as defendant in the proceedings.¹¹⁸

113 J Kellam and B Arste, 'Current Trends and Future Directions in Product Liability Legislation and Litigation in Australia' (2000) 27(1) *William Mitchell L Rev* 141 at 149.

114 See *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34 (unreported, 16 February 2004, BC200400317). Compare the escalating controversy in Japan about defective gas fan heaters, resulting in amendments to its Consumer Product Safety Law in late 2006: L Nottage, 'Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?' (2008) 2 *Yearbook of Consumer Law* forthcoming.

115 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1999) ATPR 41-672.

116 By analogy with *Hampic Pty Ltd v Adams* (1999) ASAL 55-035; (2000) ATPR 41-737 which concerned a claim under ss 52 and 82 of the TPA. Adams had not seen the label. In circumstances where compensation is payable when loss or damage has been suffered 'by conduct of another person that was done in contravention of a provision' in Pt V, however, direct reliance on the warning was not necessary. This is consistent with other *dicta*. For example, in *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1 at [89], Wilcox J noted that it is not essential for the causal relationship to be established by proof that the applicant relied on an act or statement of the respondent. Similarly, Wilcox J noted that in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; 109 ALR 638, Lockhart J held good a company's claim to recover damages for losses sustained by it as a result of a competitor's allegedly misleading advertising. The company contended the advertising caused it to lose sales it otherwise would have made because purchases relied on the competitor's advertising. His Honour at [530] referred to the use of the preposition 'by' and noted: 'Loss or damage must directly result from or be caused by the respondent's conduct. The respondent's conduct must be the real or direct or effective cause of the applicant's loss; it must have been "brought about by virtue of" the conduct which is in contravention of s 52.'

117 See, eg, *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359. No evidence was adduced that suggested the operations of the tyre manufacturer (Vulcap) did not comply with the relevant Australian standard. The court found that the totality of the evidence did not establish that the defect was in existence at the time of retread by the manufacturer or that there was any indication of underlying defect which ought reasonably to have been picked up and responded to by Vulcap. It found it *equally probable* that the tyre was damaged subsequently. However, the court noted that s 75AC of the TPA provides that there is a relevant defect if the tyre is deficient as to safety in terms of what persons generally are entitled to expect, and that s 75AK(1) provided an affirmative defence only if the manufacturer can establish that the defect did not exist at the supply time. In a negligence claim, by contrast, the burden of proof in these (quite rare) marginal cases rests with the plaintiff.

118 Section 75AK of the TPA. In respect of 'electricity', supply time means the time at which

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The defences under Part VA of the TPA are different to those under Pt V Divs 2 and 2A (although they are equivalent, with minor drafting disparities,¹¹⁹ to those under the EC Directive). The defences are as follows:

- (1) The alleged defect did not exist when the goods were supplied by the manufacturer;
- (2) The goods were defective only because there was compliance with a mandatory standard;¹²⁰
- (3) The state of scientific or technical knowledge at the time the goods were supplied was not such as to enable the defect to be discovered (also referred to as the 'development risk defence');¹²¹ and

it was generated being a time before it was transmitted or distributed. However, s 53 of the Electricity Supply Act 1995 (NSW) provides that distributors of electricity are not liable for loss in certain circumstances.

119 The term 'goods' and 'manufacturer' are used in preference to 'product' and 'producer'. The term 'producer' is arguably broader as it would include farmers as primary producers, although the difference may be one of semantics. In relation to the options under the EC Directive, Pt VA includes agricultural products as goods and a development risk defence. It also includes a mechanism by which the ACCC can bring a representative action on behalf of consumers (s 75AQ) and for the Commonwealth to be joined to proceedings if goods are defective solely because of compliance with a Commonwealth mandatory standard. See Kellam, above n 22, at 237–8.

120 See, eg, *Effem Foods Ltd v Nicholls* (2004) ATPR 42-034. The manufacturer unsuccessfully tried to invoke this defence by setting up two possibilities — inadvertent problem in the factory making the chocolate bar that ended up with a safety pin, versus sabotage by employee of retailer — but the court applied the presumption against criminality in civil cases to disfavour the second possibility and reject the defence.

121 In *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337, the oyster farmer was entitled to rely upon the development risks defence in s 75AK(1)(c), namely, that 'the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered'. In this case the Federal Court also seems to have been influenced by the fact that the only test for contamination gave 'false negatives', and results from a test applied to the sample could not be extrapolated to the whole batch — so even if negatives had been reliable, one would have to test and thereby destroy each oyster.

The court at first instance reasoned that:

The paragraph obviously intends the defence be unavailable if the goods were supplied notwithstanding the possibility of discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, discovery and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods.

On appeal Lindgren J observed, *ibid*, at [549]:

If the problem of the 'false negative' had not existed and if it had been appropriate to test by sample, an interesting question would have arisen as to whether the expression 'such as to enable that defect to be discovered' in s 75AK(1)(c) was to be construed as importing a modifying notion of reasonableness or practicability. Let it be assumed that extrapolation from sample to bulk was valid, but that the testing of the sample had to take place at a laboratory a considerable distance from the grower's establishment, the cost of the testing was great and the results could not be known for some days. A question would have arisen whether it could be truly said in these circumstances that the state of scientific or technical knowledge enabled the defect to be discovered.

Cf *European Commission v UK* [1997] 3 CMLR 923, discussed in Nottage, above n 11, pp 127–30.

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- (4) (In the case of a manufacturer of a component part used in the product) the defect is attributable to the design of the finished product or to any markings, instructions or warnings given by the manufacturer of the finished product, rather than a defect in the component; and
- (5) Under Pt VA a court may reduce the amount of the loss to such an extent (including to nil by the express words of s 75AN) as it thinks appropriate.

It has been suggested that the development risk defence¹²² in the EC Directive may be viewed in two ways. First, it retains a measure of strict liability, its reference point being the existence of knowledge in the world at large. Alternatively, it includes a relative element of what the defendant manufacturer might be expected to discover. Australian case law appears to favour the second approach and hence differs from case law in other jurisdictions applying similar law.¹²³

The wording of the Australian defence is also different from that of the EC Directive. Section 75AK(1)(c) refers to the state of scientific 'or' technical knowledge whereas the EC Directive uses the word 'and'. A possible consequence is that an issue may arise as to whether the elements of 'scientific' knowledge and 'technical' knowledge are cumulative or not.¹²⁴

In addition, the very need for an express defence has been queried. The definition of 'defect' in s 75AC requires all relevant circumstances to be taken

122 See C Newdick, 'Risk, Uncertainty and "Knowledge" in the Development Risk Defence' (1991) 20 *Anglo-American LR* 309 and C Newdick, 'The Development Risk Defence of the Consumer Protection Act 1987' (1988) 47 *Cambridge LJ* 455; M Schubert, 'Verschuldenselemente im Fehlerbegriff des neuen Produkthaftungsrechts' (1989) *PHI* 74.

123 The approach taken in *Ryan v Great Lakes Council* (1999) 102 *LGERA* 123; *ATPR* 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 *FCR* 307; 177 *ALR* 18; *ATPR* (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 *CLR* 540; 194 *ALR* 337 by the Federal Court both at first instance and on appeal contrasts with courts in other jurisdictions applying quite similarly worded defences. See, eg, in the United Kingdom, *A v National Blood Authority* [2001] 3 *All ER* 289. In this decision Mr Justice Burton noted that the safety in question was not what was actually expected by the public at large, but what they were 'entitled' to expect, with the Judge acting as the 'informed representative of the public at large'. It was noted that the level of safety which persons generally are entitled to expect may differ from that of someone with medical knowledge and also that in some circumstances the public has no expectation at all as to the level of safety. In the circumstances, the judge did not consider that there was any public knowledge or acceptance of the risk of contamination of blood products with hepatitis C and he did not consider it to be a product which by its very nature contained a risk. In all of the circumstances, Burton J held that 'the public at large was entitled to expect that the blood transfused to them would be free from infection'. The defendant argued that the development risks defence applied to it in that it was not possible to identify the individual bag(s) of blood which contained the virus. However, in circumstances where the risk of hepatitis C was known, the court held that the defence did not apply.

At least three German decisions have held that the defence is not available in the case of manufacturing defects: see 'Johannisbeerchmandkuchen' decision *OLG Frankfurt* = *NJW* 1995, 2498; 'Mineralwasser-Mehrwegflaschen' decision *BGH* = *NJW* 1995, 2162; 'Mineralwasser-Mehrwegflaschen II' *OLG Koblenz*; 20.08.1998. On the strict interpretation of the defence taken by commentators and the Tokyo District Court regarding Japan's Product Liability Law of 1994, see Nottage, above n 11, p 126.

124 G Howells, 'The New Product Liability Law: the Relevance of European and United Kingdom Reforms for the Development of Australian Law' (1996) 4 *CCLJ* 102.

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into account, which would presumably include the 'state of the art'.¹²⁵

IV Remedies

Compensation under the Civil Liability Reforms

At common law, if a person suffers injuries or dies as a result of use of a defective product, and the defect was caused by a manufacturer's wrongful act, neglect or fault, compensation is governed by the law of an Australian state or territory.

Since 2002, however, Australia has undergone significant Civil Liability Reforms.¹²⁶ This was partly in response to perceptions that personal injury litigation had been increasing, more plaintiffs had been succeeding and more damages were being awarded, resulting in restricted availability of public liability insurance and significantly increased premiums.¹²⁷ The Civil Liability Reforms largely followed the recommendations of the Review of the Law of Negligence which were predicated on the basis that reforms were needed.¹²⁸ Legislative amendments to personal injury law have been variously introduced in the states and territories, and in Pt VIB of the TPA,¹²⁹ including by way of caps on damages, thresholds to liability and the introduction of proportionate liability¹³⁰ together with other amendments.¹³¹ State laws also now provide for proportional liability in claims involving economic loss or

125 See Howells, *ibid*, at 112–13 n 50, referring also to the late Professor David Harland's view that the development risk defence only makes explicit that which is implicit in the defectiveness standard — that is, a producer cannot be expected to make a product safer than the state of scientific and technical knowledge allows it to. See also Nottage, *above* n 11, at 95, 99 and 130.

126 See, eg, in New South Wales, the Civil Liability Act 2002 (NSW) and the Law Reform (Miscellaneous Provisions) Act 1944 (NSW).

127 Query whether these perceptions were accurate. See, eg, G L Davies, 'Negligence: Where Lies the Future?', a commentary delivered at the Supreme and Federal Court Judges' Conference on the Ipp Report, Adelaide, 23 January 2003. On similar and more longstanding controversy in the United States, W Haltom and M J McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*, University of Chicago Press, Chicago, 2004.

128 *Above* nn 14 and 127 and below n 203. The Terms of Reference included the following opening statement: 'The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another.'

129 The Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004 introduced limits on damages arising from personal injury or death applying to any claim alleging a contravention of the product safety and information provisions, a supply by a manufacturer or importer of consumer goods in breach of a statutory warranty, or a supply by a manufacturer or importer of defective goods. Section 87E of the TPA provides that Pt VIB (Claims for Damages or Compensation for Death or Personal Injury) applies to claims under Pt V Divs 1A and 2A, and Pt VA. The provisions do not apply to claims under Pt V Div 2 of the TPA, which imply statutory warranties into a contract for the supply of goods to which state law applies.

130 Generally, liability under Australian common law is joint and several. Assuming two or more defendants are liable for a plaintiff's loss, then they are joint tortfeasors and their liability is joint and several. The plaintiff can recover the whole of its loss from any of the joint or concurrent tortfeasors, which may have rights of contribution against the others. English common law may be different. In *Barker v Corus* [2006] 3 All ER 785, the House of Lords held that where a plaintiff was suffering from an asbestos related illness as a result of exposure to asbestos fibre at different times by different entities, each defendant's liability

property damages, whether in tort, contract or under state legislation.¹³²

The recent Civil Liability Reform process in Australia has extinguished the right to aggravated and exemplary damages in common law personal injury claims in some states. While it is unclear as to whether such damages may be awarded in negligence,¹³³ there were decisions making it clear that aggravated and punitive damages are not awarded in claims brought under the TPA, as these are not compensatory in nature.¹³⁴ However, an express provision precluding such damages in relation to personal injuries is now included in the TPA.¹³⁵ However, such damages may (or may not) be awarded in tort in

was proportionate to the probability that that defendant caused the harm. However, this no longer follows due to the Compensation Act 2006 (Eng).

Unlike joint and several liability, proportionate liability means that each defendant is only liable for their share of the plaintiff's loss. For a plaintiff to recover the whole of its loss, it must obtain against each tortfeasor responsible. As each tortfeasor is only responsible to the extent it is responsible for the plaintiff's loss, there is no right of contribution between tortfeasors. The main difference between joint and several liability and proportionate liability is that with proportionate liability it is the plaintiff who bears the risk of a defendant not being able to satisfy a claim. The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 amended the TPA to allow proportionate liability for economic loss.

131 The Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002 (Cth) removed tax barriers to structured settlements.

132 The Wrongs and Limitation of Actions Act (Insurance Reform Act) 2003 (Vic); Civil Liability Amendment (Personal Responsibility Act) 2002 and the Civil Liability Amendment Act 2003 (NSW); the Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005 (SA); the Justice and Other Legislation Amendment Act 2005 (Qld); the Civil Liability Amendment Act 2003 (WA); the Civil Liability Amendment (Proportionate Liability) Act (Tas); the Proportionate Liability Act 2005 (NT); the Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004 (Qld).

133 Most recently, in the product liability context, see *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 (unreported, 6 July 2006, BC200605475) and *Wiatr v CSR Ltd* [2006] WASC 77 (unreported, 9 May 2006, BC200603189).

134 Section 87ZB of the TPA; this provision codified case law, see *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251; *Munchies Management Pty Ltd v Belperiod* (1989) 58 FCR 274; 84 ALR 700; *Marks v GIO Holdings* (1998) 196 CLR 494; 158 ALR 333 per Gaudron J. It is unclear whether such damages could be awarded for compensation for loss under the TPA not involving personal injury, see *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453; 165 ALR 515. For interrelationship with state law, see *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 (unreported, 6 July 2006, BC200605475).

135 Section 87ZB of the TPA, s 21 of the Civil Liability Act 2002 (NSW), s 8 of the Personal Injuries Proceedings Amendment Act 2002 (Qld), the Compensation to Relatives Act 1897 (NSW) and the Northern Territory Personal Injuries (Civil Claims) Act 2003 (NT) provide that no exemplary or aggravated damages can be awarded in respect of death or personal injury.

In Queensland, the Civil Liability Act 2003 (Qld) Ch 3 Pt 2 s 52 provides that a court cannot award exemplary or aggravated damages in relation to a personal injury claim unless the act causing injury was an unlawful intentional act done with intent to cause personal injury or an unlawful sexual assault or other unlawful sexual misconduct. In South Australia, the Law Reform (Delay in Resolution of Personal Injury Claims) Act 2002 No 38 (SA) provides for an award of exemplary damages for unreasonable delay in resolution of personal injury claims.

Other states (Tasmania, WA, ACT and Victoria) have not abolished such a claim (s 24AP of Pt IVAA (Proportionate Liability) of the Wrongs Act 1958 (Vic) expressly provides that the proportionate liability provisions do not prevent a court from awarding exemplary or punitive damages against a defendant in a proceeding).

claims involving property damage and economic loss,¹³⁶ and possibly under s 22 of the Federal Court of Australia Act 1976 (Cth).¹³⁷

In relation to personal injury claims, awards are calculated by reference to general damages (including pain and suffering, loss of amenities and expectation of life) and special damages (including loss of wages — both past and future — and medical expenses). Damages have traditionally been assessed by courts on a lump sum, once and for all basis. Structured settlements, however, are now possible.¹³⁸ The effect of the Civil Liability Reforms is also to abolish the common law relating to awards of damages for pain and suffering, disfigurement, loss of the amenities of life, and loss of expectation of life.

Further, considerable limitations, thresholds and ‘caps’ have been placed on the amounts of damages a claimant can now recover as a result of the Civil Liability Reforms in respect of personal injuries. However, these limitations are variously expressed by reference to percentage disability, a scale or a monetary amount and are not uniform.

These reforms were introduced because it was reported that a key factor in the growth of public liability insurance costs in the period preceding the Civil Liability Reforms was an increase in smaller claims between \$20,000 and \$50,000.¹³⁹ No consideration appears to have been given in the reform process, however, that such a loss would represent a substantial amount of money for most Australians. The focus appears only to have been to reduce the legal costs incurred in litigating such claims.¹⁴⁰

Some jurisdictions have introduced a threshold test before there is an entitlement to general damages. In New South Wales, damages are not payable for a disability below 15% of a most extreme case and for general damages equalling or above 15%, and up to 33%, a fixed percentage of the maximum to be awarded is payable.¹⁴¹ Victoria similarly has a percentage threshold test of 5% in the case of injury other than psychiatric injuries and 10% for psychiatric injuries.¹⁴² Under Pt VIB of the TPA, if the plaintiff’s non-economic loss is less than 15% of the most extreme case, the court must not award personal injury damages for non-economic loss.¹⁴³ Other jurisdictions have adopted a different approach. In South Australia, general damages are calculated by reference to a scale of value reflecting gradations

136 As to common law claims in negligence, see *Midalco Pty Ltd v Rabenalt* [1989] VR 461; (1988) Aust Torts Reps 80-208 (in relation to recklessness) and *Wiatr v CSR Ltd* [2006] WASC 77 (unreported, 9 May 2006, BC200603189) (whether aggravated damages available for negligence).

137 See *Nixon v Phillip Morris Australia Ltd* (1999) 95 FCR 453; 165 ALR 515.

138 ACT: Ch 7 s 106 of the Civil Law (Wrongs) Act 2002 (ACT); NSW: Div 7 ss 22–26 of the Civil Liability Act 2002 (NSW); NT: Pt 4 Div 6 ss 31 and 32 of the Personal Injuries (Liabilities and Damages) Act (NT); QLD: Ch 3 Pt 4 ss 63–67 of the Civil Liability Act 2003 (Qld); SA: s 38A of the District Court Act 1991 (SA), s 33A of the Magistrates Court Act 1991 (SA) and s 30BA of the Supreme Court Act 1935 (SA); TAS: Pt 5 ss 7A and 8 of the Civil Liability Act 2002 (Tas); VIC: Pt VC ss 28M and 28N of the Wrongs Act 1958 (Vic); WA: Pt 2 Div 4 ss 14 and 15 of the Civil Liability Act 2002 (WA).

139 See Ipp Report, above n 14, at para 13.15.

140 Ibid, ‘Legal costs of smaller claims’.

141 Division 3 s 16(3) of the Civil Liability Act 2002 (NSW).

142 Part VBA ss 28LB and 28LF of the Wrongs Act 1958 (Vic).

143 Section 87S of the TPA.

of non-economic loss.¹⁴⁴ Similarly, in Queensland, there is no threshold and injuries are assessed on a '100 point scale' and by reference to similar injuries in prior proceedings.¹⁴⁵ In Western Australia, the threshold for general damages is \$12,000.¹⁴⁶ This amount also operates as a deductible for general damages over \$12,000.¹⁴⁷ In the Northern Territory, the threshold for general damages for non-economic loss is 5% of the maximum amount of damages for non-pecuniary loss.¹⁴⁸

All jurisdictions have introduced a cap on lost earnings for personal injury. With one exception, the states and territories have introduced a cap of three times the average weekly wage.¹⁴⁹ South Australia is the exception (which has a total amount cap).¹⁵⁰ The cap applying to claims under the TPA, however, is different and is two times the average weekly wage.¹⁵¹ Unfortunately also, the 'average weekly wage' is defined differently in different jurisdictions, sometimes being the 'average total weekly earnings of all employees',¹⁵² 'the seasonally adjusted amount of full time adult persons ordinary time earnings',¹⁵³ 'the average weekly total earnings of full time adult employees',¹⁵⁴ 'the dollar figure for full time adult ordinary time earnings',¹⁵⁵ or 'the average weekly earnings, states and territories, seasonally adjusted (all males) total earnings',¹⁵⁶ and 'average weekly earnings for all employees (total earnings, seasonally adjusted)'.¹⁵⁷

These variations result in great differences between the average weekly earnings between the states and territories — the highest being between the Australian Capital Territory at \$1235.60 and Victoria at \$821.80, a difference of \$413.80 per week.¹⁵⁸

Different discount rates are applied to future economic loss at a rate of 5% in New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Victoria and 6% in Western Australia.¹⁵⁹

Restrictions on recovery of damages for gratuitous care are also subject to different thresholds in various jurisdictions. In New South Wales, Victoria, Queensland and the Northern Territory no damages may be awarded to a

144 Part 8 s 52 of the Civil Liability Act 1936 (SA).

145 Chapter 3 Pt 3 ss 61 and 62 of the Civil Liability Act 2003 (Qld).

146 Part 2 Div 2 ss 9 and 10 of the Civil Liability Act 2002 (WA).

147 Part 2 Div 2 ss 9(2) and 9(3) of the Civil Liability Act 2002 (WA).

148 Part 4 Div 4 ss 27 and 28 of the Personal Injuries (Liabilities and Damages) Act (NT).

149 NSW: Div 2 s 12 of the Civil Liability Act 2002 (NSW); NT: Pt 4 Div 3 s 20 of the Personal Injuries (Liabilities and Damages) Act (NT); QLD: Ch 3 Pt 3 s 54 of the Civil Liability Act 2003 (Qld); VIC: Pt VB s 28F of the Wrongs Act 1958 (Vic); WA: Pt 2 Div 3 s 11 of the Civil Liability Act 2002 (WA); TAS: Pt 7 s 26 of the Civil Liability Act 2002 (Tas).

150 Pt 8 s 54, Pt 1 s 3 of the Civil Liability Act 1936 (SA).

151 Section 87U(d).

152 Section 12(3) of the Civil Liability Act 2002 (NSW); s 28F of the Wrongs Act 1958 (Vic).

153 Schedule 2 of the Civil Liability Act 2003 (Qld).

154 Section 11 of the Civil Liability Act 2002 (WA).

155 Section 11 of the Civil Liability Act 2002 (WA).

156 Section 3 of the Civil Liability Act 2002 (Tas).

157 Section 18 of the Personal Injuries (Liabilities and Damages) Act 2003 (NT).

158 Section 87V of the TPA.

159 As at March 2007 based on the most recent data for average weekly earnings from the Australian Bureau of Statistics being for Quarter 2 of the 2006–2007 financial year released in November 2006.

claimant for gratuitous care if the services are provided or are to be provided for less than six hours per week and for less than six months.¹⁶⁰ It is also not clear how worry and anxiety is to be treated.¹⁶¹ Overall, the implementation of Civil Liability Reforms has added another level of complexity to personal injury law in Australia, despite attempting to restore some order in the law.

There are also limitations in relation to recovery for pure economic loss¹⁶² and psychological injuries.¹⁶³

Damages under the TPA

The basis upon which a plaintiff is entitled to claim compensation for a breach of a provision of the TPA varies according to the claim. It would be an easy mistake to make that s 82 of the TPA were the governing provision as it is headed 'Actions for damages'. However, the analysis below makes clear that it actually has hardly any role to play.

Part V Div 2 of the TPA implies statutory warranties into contracts and accordingly the relevant cause of action is a claim for breach of contract governed by state law.¹⁶⁴ Claims for compensation may be made under the

160 NSW: Div 2 s 14 of the Civil Liability Act 2002 (NSW); NT: Pt 4 Div 3 s 22 of the Personal Injuries (Liabilities and Damages) Act (NT); QLD: Ch 3 Pt 3 s 57 of the Civil Liability Act 2003 (Qld); SA: Pt 8 s 55, Pt 1 s 3 of the Civil Liability Act 1936 (SA); TAS: Pt 7 s 28A of the Civil Liability Act 2002 (Tas); VIC: Pt VB s 28I of the Wrongs Act 1958 (Vic); WA: s 5 of the Law Reform (Miscellaneous Provisions) Act 1941 (WA).

161 NSW: Div 2 s 15 of the Civil Liability Act 2002 (NSW); VIC: Pt III s 19A of the Wrongs Act 1958 (Vic); QLD: Ch 3 Pt 3 s 59 of the Civil Liability Act 2003 (Qld); NT: Pt 4 Div 3 s 23 of the Personal Injuries (Liabilities and Damages) Act (NT).

162 In *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 (unreported, 6 July 2006, BC200605475) the court held that the plaintiffs were entitled to some damages for vexation and upset. However, notwithstanding that these feelings were real, they did not justify a significant award. Significantly, the court also held that these feelings of distress and upset would not come within the definition of 'mental harm' in Pt 3 of the Civil Liability Act 2002 (NSW) since they did not involve the impairment of a person's mental condition. The court noted, however, that there was no foreseeability requirement in relation to a claim for damages under s 75AD and Pt VA of the TPA. However, the court was of the view that the distress and upset suffered by the plaintiffs did not amount to a personal injury envisaged by s 75AD.

163 *Perre v Apand* (1999) 198 CLR 180; 164 ALR 606; *Dovuro v Wilkins* (2003) 215 CLR 317; 201 ALR 139; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reps 81-692. See, generally, J Swanton, 'Liability in Negligence for 'Pure' Economic Loss' (2000) 14(2) *Commercial Law Quarterly* 7; J Anderson, 'Economic Loss: the Latest Word' (2000) *New Zealand L Jnl* 79.

164 In negligence at common law, see *Tame v New South Wales* (2002) 211 CLR 317; 191 ALR 449: the central question was whether in all circumstances the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable. An objective test is applied, that is, whether a person of ordinary fitness and mental stability would suffer the illness. Where the plaintiff's response to the defendant's conduct is so extreme or idiosyncratic as to be fanciful, the defendant is not required to guard against the risk. In *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, Sackville J at first instance declined to award damages for worry and anxiety to the applicant under Pt V Div 2A of the TPA but noted that such damages may be available in appropriate cases. Claims for mental stress have been awarded in some instances under s 82 of the TPA: *Steiner v Magic Carpet Tours Pty Ltd* (1984) ATPR 40-490; *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-009 and on appeal at (1990) ATPR 41-058 but cf *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; 94 ALR 719. It is questionable whether the definition of 'personal injury' in s 4KA of the TPA now prevents such claims being brought. Also query whether compensation for the

provisions of Pt V Div 2A and Pt VA. If a claim is made for property damage or economic loss alleging misleading or deceptive conduct pursuant to ss 52 or 53 of the TPA (and these claims have been abolished in relation to personal injury claims) or if there is a contravention of Pt V Div 1A (and the authors are not aware of such a claim successfully being made), compensation can be ordered under s 82 of the Act.

The measure of damages under the different Parts, may or may not be the same.¹⁶⁵

In relation to claims under s 82, the High Court has made clear in a number of cases that there is no stated limitation on the kinds of loss or damage for which compensation may be recovered.¹⁶⁶ Analogies with the law of contract or tort are not generally thought to be useful to limit awards. However, generally in assessing damages a comparison will be made between the position in which a person who suffered loss or damage is in, and the position the person would have been if there had been no contravention. Nonetheless, it is not an exclusive test.

In respect of claims seeking compensation for economic loss and/or property damage under s 82 and which arises from a breach of s 52 on or after 26 July 2004, Pt VIA of the TPA now provides for proportionate liability.¹⁶⁷ Pursuant to this Part, a defendant can allege contributory negligence on the part of the plaintiff¹⁶⁸ and claim contribution from joint wrongdoers.

Sections 75AD through to 75AG enable a claim for compensation for loss or injury caused by defective goods, namely, personal injury (by the injured individual and a person other than the injured individual not as a result of a business relationship),¹⁶⁹ loss relating to other goods and loss relating to land, buildings or fixtures ordinarily acquired for private use. Compensation to

breakdown of a marriage is payable: in *Crago v Multiquip Pty Ltd* (1998) ATPR 41-620, Lehane J was not prepared to exclude that such damages would never be awarded in negligence (*Lampert v Eastern National Omnibus Co Ltd* [1954] 2 All ER 719; [1954] 1 WLR 1047) or under s 82 of the TPA (cf O'Loughlin J in *Pritchard v Racecage Pty Ltd* (1996) 64 FCR 96; 135 ALR 717 — reversed on other grounds (see (1997) 72 FCR 203; 142 ALR 527) or possibly even in contract (although his Honour noted that the remoteness of the damage would be an obvious difficulty given the nature of the contract in question which was for the supply of an ostrich egg incubator).

165 Above n 94.

166 *Zaravinos v Dairy Farmers Co-Operative Ltd & Pure-Pak Australia* (1985) 7 FCR 195; 59 ALR 603; 60 LGRA 152; *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537; *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

167 See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; 109 ALR 247; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; 204 ALR 26.

168 The 2004 amendments to the TPA introducing Pt VIA Proportionate Liability for Misleading and Deceptive Conduct in respect of claims for damages under s 82 in respect of economic loss or damage to property in contravention of s 52 do not apply to claims under Pt V Divs 2 and 2A or Pt VA as s 87CB provides that the part only applies to a claim under s 82 for economic loss and damage to property. These provisions also do not otherwise apply to actions for breach of other Unfair Practices in Pt V Div 1, including s 53 (which prohibits various false representations in connection with the supply of goods) or claims for monetary compensation under s 87.

169 In effect reversing the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; 192 ALR 1, which held that contributory negligence was not available in damages claims under s 82 of the TPA.

relatives claims are brought under s 75AE.¹⁷⁰ However, Pt VA does not apply to a loss in respect of which an amount could be recovered under a workers compensation statute¹⁷¹ or which gives effect to an international agreement. Under s 75AN of the TPA, in assessing the level of compensation payable to a plaintiff, the court will take into account the extent to which the acts or omissions of the plaintiff contributed to the cause of the loss.

The availability of other remedies under Pt VA, such as injunctions or declarations, is also in some doubt. Sections 80 (Injunctions) and 87 (Other orders) are available on the application of a person who has suffered loss or damage by conduct of another person in contravention of Pt V.¹⁷² Accordingly, while such remedies could be sought in conjunction with claims pleading a breach of Pt V Divs 2 and 2A, they are not available in claims which plead only Pt VA of the TPA.

Claims for damages or compensation for death or personal injury under the TPA

Part VIB (Claims for Damages or Compensation for Death or Personal Injury) of the TPA took effect on 13 July 2004. The provisions apply to claims for personal injury and death under Pt V Divs 1A and 2A and Pt VA. 'Personal injury' includes pre-natal injury, impairment of a person's physical or mental condition (which is a recognised psychiatric illness) or disease.¹⁷³

¹⁷⁰ However, s 75AE (Liability for Defective Goods Causing Injuries — Loss by Person other than Injured Individual) does not allow claims for contribution not with standing that assigning the facts of a case may satisfy the literal words of the section. In *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359, the court rejected the argument and said that a claim under the section was available only to those who have suffered loss derived from the injuries as distinct from a loss suffered by being required to meet a judgment entered by reason of that person being a cause of the injuries. Similarly in *Stegenga v J Corp Pty Ltd* (1999) ASAL 55-025; ATPR 41-695 the court held that Pt VA of the TPA was intended to create a strict liability regime for use by private individuals as opposed to commercial entities and it would be inconsistent with that purpose to interpret 'person', within s 75AE, as including corporate entities. Accordingly, s 75AE does not create a right of action in a commercial party allowing it to make a claim for indemnity from the manufacturer.

¹⁷¹ The section overcomes difficulties that might otherwise exist under the Act in relation to compensation to relatives claims. For example, Pt V Div 2A and s 82 of the TPA may not allow claims by relatives, the reference to 'a person' possibly not extending to or including the estate of a deceased person or the representative of that estate: see *Pritchard v Racecage Pty Ltd* (1996) 64 FCR 96 at 114 per O'Loughlin J; 135 ALR 717. In contrast, Pt VA contains specific provisions in s 75AH (Survival of Liability Actions) and to save such claims. Others have identified further limitations of Div 2A, such that bystanders who are injured by products cannot rely upon it: eg, J Stapleton, 'Product Liability: Comparing Australia with the EU and US' (2000) 11(6) *APLR* 71.

¹⁷² The effect of s 75AI of the TPA is to preclude all recovery from the manufacturer under Pt VA where a recovery can be made under a workers compensation law: *Lanza v Codemo Management Pty Ltd* [2001] NSWSC 845 (unreported, 28 September 2001, BC200108023). However, Pt VA will apply to workplace accidents where there is no such recovery: see *Newcombe v Ame Properties Ltd* (1995) 14 WAR 259; 125 FLR 67; *Canberra Furniture Manufacturing Pty Ltd v White* [1999] ACTSC 53 (unreported, 28 May 1999, BC9902741); *Roots v Trussmaster* [2003] QSC 348 (unreported, 17 October 2003, BC200306087).

¹⁷³ See Emmett J in *ACCC v Glendale Chemical Products; Barnes v Glendale Chemical Products* (1998) 40 IPR 619; ATPR 41-632, where the application for an injunction was linked to the breach of s 52 of the TPA, not the claim under Pt VA.

The main restrictions on recovery of compensation are as follows:

- Damages for future economic loss are capped at twice the average weekly earnings.¹⁷⁴ This is different to the state Civil Liability Reforms where the cap is three times the average weekly earnings.¹⁷⁵
- General damages are capped at \$250,000.
- General damages are not payable below 15% of a most extreme case, with a deductible operating to 33% of a most extreme case.¹⁷⁶

Considered in isolation, these limits to compensation for personal injuries may or may not have merit depending upon one's value judgments.

What is disturbing, however, by any standard is the discord which results from a cap based on two times average weekly earnings under the TPA when, with one exception, the states and territories have used a three times cap under the various implementations of the Civil Liability Reforms. The resulting disparity in potential levels of compensation is most marked. For example, the total cap under the TPA is \$1692.00 whereas in New South Wales, for example, the cap is \$2640.60. There seems to be no valid reason why an injured consumer should potentially receive \$948.60 more compensation for economic loss under the state cap.

This example is deliberately chosen for another reason. The NSW Fair Trading Act 1987 (NSW) has provisions equivalent to Pt V Div 2A.¹⁷⁷ Using the present value tables for \$1 per week at 3% compound interest (with no allowance for mortality),¹⁷⁸ the potential difference before discount is \$428,767 (10 years), \$747,497 (20 years) and \$984,647 (30 years).

An identical cause of action under state and federal statutes, therefore, produces different levels of compensation for consumers injured in New South Wales. It is difficult to argue against the proposition that consumers suffering the same loss or damage should have the same rights to compensation. It also seems to be commonsense that the law should be consistent. Measured against these standards, the laws require reform.

Other features of Pt VIB are as follows:

- Damages for gratuitous services are limited on a similar basis in New South Wales;¹⁷⁹
- A discount rate of 5% will apply in relation to damages for losses which occur in the future;¹⁸⁰
- Structured settlements are permitted;¹⁸¹
- The limitation period is three years from the date of discoverability (no longer three years from the date of the event).¹⁸²

174 Section 4KA.

175 Section 87U.

176 Sections 87M, 87Q, 87R, 87S.

177 Part 4 Div 5 (Actions against Manufacturers and Importers of Goods).

178 Appendix Table 2 in H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, LexisNexis, Sydney, 2002, p 683.

179 Section 87W.

180 Section 87Y.

181 Section 87ZC.

182 Section 87F.

Representative actions

In Australia, product liability litigation is generally commenced in either the Federal Court of Australia, or the Supreme or District Courts of one of the states or territories.¹⁸³ Recent reforms also now allow proceedings to be commenced in the Federal Magistrates Court.¹⁸⁴ The effect of s 75AS of the TPA is that the Federal Court and state courts have jurisdiction to hear and determine proceedings brought under Pt VA. Section 86A of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) allows the transfer of matters by the Federal Court of Australia to a court of a state or territory. However, it provides that the Federal Court shall not transfer a matter to another court unless the other court has power to grant remedies sought before the Federal Court in the matter. If declaratory relief is sought, for example, a transfer to the District Court of New South Wales would be refused as it does not have the power to grant declaratory relief.¹⁸⁵

The Federal Court has recognised that state courts are well suited to determine personal injury claims,¹⁸⁶ and in many applications such an order will be made by consent. The judges of state courts are familiar with handling personal injury claims and the court rules are tailored to deal with these claims.¹⁸⁷ In addition, if the proceedings concern a pharmaceutical product or medical device, it may be a relevant consideration that the claimant intends to join a medical practitioner to the proceedings.¹⁸⁸ There also seems to be an attitude on the part of the Federal Court that claims under Pt VA are subsidiary

183 Under s 86(1) of the TPA, the Federal Court has jurisdiction in respect of any civil proceeding instituted under Pt VI (Enforcement and Remedies), that is, including claims under Pt V Divs 1, 1A, 2 and 2A. Under s 86(2) of the TPA, state and territory courts are vested with federal jurisdiction within the limits of their several jurisdiction, although subs (3) provides that those courts can only grant those remedies it is able to do under the law of that state or territory. Section 86 (and s 86A) of the TPA have been amended by s 75AS of the TPA to include reference to Pt VA. Under s 86A of the TPA matters relating to Pt V Divs 1 or 1A may be transferred to a state or territory court, providing it has the power to grant equivalent remedies. Transfers from the Federal Court to the Federal Magistrates Court may occur under s 32AB of the Federal Court of Australia Act 1976. Transfers from the Federal Magistrates Court to the Federal Court may occur pursuant to s 39 of the Federal Magistrates Act 1999. See, eg, *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537 where the plaintiff successfully resisted transfer of the case from the Federal Court to a State District Court, mainly on the ground that declaratory relief as well as damages was being claimed.

184 Under s 86(1A) of the TPA the Federal Magistrates Court has jurisdiction in any matter arising under Divs 1, 1A or 2A of Pt V or Pt VA in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission (subject to the monetary limit specified in s 86AA). Pt V Div 2A and Pt VA were added by the Federal Magistrates Court Legislation Amendment Act 2006 (Cth).

185 *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537; A Tonking, 'Brooks v R & C Products Pty Ltd — Product Liability: A Federal Case?' (1997) 5 *Trade Practices L Jnl* 133.

186 *Eastley v Mauger* [2000] FCA 266 (unreported, 2 March 2000, BC200000860).

187 See, eg, r 15.12 of the Uniform Civil Procedure Rules 2005 (NSW) relating to personal injury cases. This requires that certain particulars of injuries, disabilities, special damages and economic loss are to be provided by the plaintiff as soon as practicable after serving the statement of claim. Rule 21.8 provides that discovery may not be made to any document in relation to a personal injury claim unless the court for special reasons orders otherwise. The Federal Court Rules do not contain similar provisions.

188 *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461 (unreported, 25 October 1999, BC9906912).

to claims founded in negligence.¹⁸⁹ In these circumstances, it seems likely that the majority of personal injury claims seeking compensation will be heard by state courts.

When Pt VA was added to the TPA in 1992, reforms were also introduced allowing plaintiffs to commence representative proceedings (or class actions) in the Federal Court where it attracts federal jurisdictions, like a claim under the TPA.¹⁹⁰ Similar legislation came into effect in Victoria in 2000 for tort claims under that state's law. The Australian Competition and Consumer Commission (ACCC) may also commence representative proceedings under s 87(1B)¹⁹¹ and (for Pt VA claims) s 75AQ of the TPA,¹⁹² but these have been rare.¹⁹³

Federal legislation and its Victorian counterpart provide for the commencement of a class action where seven or more persons have a claim against the same entity, and the claims arise out of the same, similar or related circumstances, giving rise to a substantial common issue of law or fact. Class action proceedings conducted in Australia are not subject to a requirement of certification, as imposed upon such proceedings in the United States. Once commenced, the matter is likely to continue unless the respondent seeks to terminate the action, in which case the onus will be on that party to satisfy the court that the action should be terminated.¹⁹⁴

Representative actions were introduced into the Federal Court following another detailed report by the ALRC,¹⁹⁵ which made this recommendation because it was thought that class actions would promote:

189 Ibid; *Eastley v Mauger* [2000] FCA 266 (unreported, 2 March 2000, BC200000860).

190 The Federal Court of Australia Amendment Act 1991 No 181, 1991. These provisions have been the subject of unsuccessful constitutional challenges: see *Femcare Ltd v Bright* (2000) 100 FCR 331; 172 ALR 713.

191 Section 87(1B) of the TPA allows the ACCC to bring an application seeking compensation on behalf of persons who 'have suffered, or are likely to suffer, loss or damage by conduct of another person' in contravention inter alia of Pt V of the TPA. For an example of such proceedings see: *ACCC v Bio Enviro Plan Pty Ltd* (2004) ATPR 41-998; ALMD 6514. The ACCC may only make such an application with the prior written consent of the persons on whose behalf the application is made. This means in effect that the ACCC is not entitled to pursue a representative action on behalf of a general class of aggrieved persons but only on behalf of those who have been identified and who have consented to the action.

192 The ACCC is given a similar power under s 75AQ(1) of the TPA to bring an action in reliance upon the strict liability regime on behalf of persons who have suffered loss as a result of a defective product. Section 75AQ(2) imposes the same limitation of prior written consent.

193 To date, there is one substantive decision concerning a representative action by the ACCC under Pt VA of the TPA in *ACCC v Glendale Chemical Products Pty Ltd* (1998) 40 IPR 619; ATPR 41632. In *ACCC v Pacific Dunlop* (2001) ATPR 41-823; ASAL (Digest) 55-064, a representative action was brought arising out the failure to warn of risks associated with the use of latex rubber gloves. In addition to seeking compensation on behalf of an individual, the ACCC sought orders including a declaration that the respondent had engaged in misleading and deceptive conduct and an injunction requiring it to implement a trade practices compliance program. The ACCC argued successfully that it was entitled to sue in different capacities in the same action, that is, to vindicate a public right and also the private rights of individuals.

194 See, generally, eg D Grave and K Adams, *Class Actions in Australia*, Lawbook Co, Sydney, 2005.

195 'Grouped Proceedings in the Federal Court', Report No 46, AGPS, Canberra, 1988.

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- (1) access to justice, allowing people with similar claims, individually too small, to justify litigation, to pursue their claims; and
- (2) efficiency in the use of court resources.¹⁹⁶

During the last 15 years, product liability representative actions have been brought in the Federal Court in many claims involving multiple plaintiffs.¹⁹⁷ Broadly, such Pt IVA proceedings appear to have encouraged access to justice in the product liability context. However, there may be grounds for concern. The significant number of interlocutory judgments suggests that the conduct of representative proceedings generally may attract large transaction costs, so the goal of efficiency in the use of court resources may not have been achieved. Class actions are frequently lengthy¹⁹⁸ and expensive.¹⁹⁹

A representative action offers benefits for both plaintiffs and defendants that can be clearly stated, at least in theory. For plaintiffs, it facilitates claims for compensation which, although significant for the individual, are outweighed by the cost of legal proceedings and allow for the sharing of legal costs.²⁰⁰ For defendants, the advantages are twofold. First, a representative action offers the benefit of resolving a large number of claims in one proceeding whether by verdict or settlement; and second, it obviates the need for a nuisance value settlement based upon what would otherwise be the cost of defending the claim.²⁰¹

How these factors operate in practice are demonstrated, for example, by the *Courtney v Medtel* litigation.²⁰² This involved 1048 potential class members (as recipients of a medical device) and the class at the time of settlement was 480. The applicant was awarded \$9988.20 plus interest for his stress and anxiety due to having been fitted with a medical device that carried a statistical

196 Alternatively expressed, the principal objectives of class action procedure are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings: *Bright v Femcare Ltd* (2002) 195 ALR 574 per Finkelstein J.

197 See Appendix B.

198 *Moylan v The Nutrasweet Company* [2000] NSWCA 337 (unreported, 24 November 2000, BC200007222). The nine plaintiffs in the actions that were the subject of appeal were selected from about 265 actions begun in the NSW Supreme Court to recover damages for injury said to have been caused by the use of intra uterine devices. The judgment notes that evidence before the trial judge, Bruce J, in the liability proceedings began on 24 January 1996 and finished on 13 September 1996. Oral submissions were made between 27 October 1997 and 23 December 1997 when Bruce J reserved his decision. The transcript of oral evidence and submissions exceeded 8000 pages. Bruce J received several thousand pages of written submissions together with additional voluminous documentary exhibits. Bruce J said that the documentary evidence comprised approximately 15 'lineal metres of folders of exhibits' and the written submissions comprised approximately three 'lineal metres of folders of submissions and supporting documents'.

199 In *Wong v Silkfield* [2000] FCA 1421 (unreported, 2 October 2000, BC200006043), Spender J stated: '... absent approval of the proposed settlement the litigation would clearly be at great expense to group members who have thus far contributed legal fees. The anticipated legal costs of the matters proceeding to trial is more than a million dollars.'

200 F Hawke, 'Class actions: the negative view' (1998) 6 *TLJ* 68 at 68-9.

201 *Ibid*, at 68-9.

202 *Courtney v Medtel Pty Ltd* (2003) 130 FCR 182; 198 ALR 630; [2003] HCA Trans 496 (2 December 2003).

risk of failure.²⁰³ Statistics on the awards to class members are unavailable. Without the representative action mechanism, the litigation may not have been commenced: the amount of compensation awarded was disproportionate to the legal costs involved in the proceeding, which might otherwise have prompted a nuisance value settlement.

Similarly, the settlement sums approved by the Federal Court in the *Oysters* class action²⁰⁴ involved similar amounts. There were two categories of claims. Category A claims were those where it was asserted that the claimant could establish, on a more probable than not basis, a claim against a single incorporated respondent and it was proposed that each claimant receive a minimum of \$10,000 after all deductions (including legal costs, repayments to the Health Insurance Commission, private health insurers, workers compensation insurers and Centrelink) 167 claimants fell into category A. Category B claims were those where the claimant's consumption of oysters traced to Wallis Lake but not to a single respondent. In these claims, a minimum amount of \$3000 was sought per claimant, clear of deductions. 103 claimants fell into this category.

However, these proceedings were both commenced before the Civil Liability Reforms. Under s 87S of the TPA, a court is now prevented from awarding personal injury damages for non-economic loss if the non-economic loss is less than 15% of a most extreme case. One must query what representative actions will be brought in the future. While not denying that some of the lawsuits so far have included group members with claims for death or serious injuries, many are less serious. For example, six past representative proceedings followed food poisoning incidents when the majority of group members would have suffered symptoms of gastroenteritis lasting a few days.²⁰⁵

A decline in representative proceedings may result in fewer interlocutory challenges, and in fewer Pt VA judgments by a superior court well placed to consider issues at law. This could be considered undesirable on several bases. First, such a decline would obviously reflect a narrowing of one significant avenue to accessing the courts with product liability claims in Australia. Second, fewer judgments may result in the relevant provisions remaining unclarified. Third, there may be philosophical or policy-based objections.

203 *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

204 *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 591; 194 ALR 337. The authors thank Andrew Grech and Dina Tutungi of Slater and Gordon Solicitors for provision of this information.

205 *Arthur Butler v Kraft Foods Ltd* VG 393 of 1996; *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705 (unreported, 7 April 2006, BC200604060); *Lopez v Star World Enterprises* (1999) ATPR 41-678; *Ryan v Great Lakes Council* (1997) 78 FCR 309; 149 ALR 45; *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337; *Ryan v Great Lakes Council* (1998) 155 ALR 447; *Ryan v Great Lakes Council* (1998) 154 ALR 584; and *Pasco v Carlton International Pty Ltd* 1997 No QG 19/97. See also *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 (unreported, 13 August 2003, BC20034504), which refers to representative proceedings being brought after orange juice was contaminated with salmonella and the failed personal injury class action in respect of the alleged contamination of Sydney Water in 1998; *Hogan v Sydney Water Corporation Ltd* FCA Proceedings No 1118 of 1998.

There may or may not be merit to exclude claims involving a disability less than 15% of a most extreme case balancing the impact on one individual against the cost to society in terms of litigation and the use of the court's resources.²⁰⁶ Leaving aside that value judgment, however, a different equation is relevant to representative actions.

Extrapolated across a class, the injuries and loss may not be not so minor. A loss of two days' work for an individual equates to almost two years' loss of work in representative proceedings involving 250 group members. A small claim of \$20,000 potentially transmutes into a large claim of \$5 million. Rather than 250 individual proceedings involving a substantial allocation of the court's resources, there would be one common issues hearing with fewer litigation costs.²⁰⁷ In this respect, it appears that the Civil Liability Reforms have had an unintended effect that was inadequately examined in the preceding law reform process.

The legal morass: Conclusions

Upon the 15th anniversary of the introduction of Pt VA of the TPA, product liability in Australia presents a very mixed picture. It is difficult to argue against the proposition that different categories of consumers suffering the same loss or damage should have the same rights and receive the same compensation.²⁰⁸ It also seems self-evident that the law should be coherent in content and structure.²⁰⁹ Measured against these simple propositions, Australian product liability laws fail.²¹⁰

The experience of the last 15 years shows Australian product liability law has developed into a legal morass. A true maze or labyrinth has been created by overlapping causes of action, inconsistent implementation of the Civil Liability Reforms, and special treatment given to some categories of plaintiff. In particular, it is difficult to justify the current differing definitions of goods and defect in the TPA, the different availability of defences, and the divergent caps to economic loss (involving multiple definitions of average weekly

206 The recommendations in the Ipp Report were predicated on the basis that the cost of claims had to be reduced. In circumstances where 45% of the total cost of public liability insurance claims were for general damages claims between \$20,000 and \$100,000, a threshold was recommended: see Ipp Report, above n 14, paras 13.27 and 13.28.

207 It does not appear that the Ipp Report gave any consideration to the possibility of representative proceedings: see Ipp Report, 'Legal costs of smaller claims', *ibid*, para 13.15.

208 See Kellam, above n 22, pp 2, 14 and 100.

209 See, eg, *Breavington v Godleman* (1988) 169 CLR 41 at 88; 80 ALR 362 at 379 per Wilson and Gaudron JJ: 'It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.'

210 In many respects, this is not a new conclusion: Travers, above n 21, at 1011; W Pengilly, *Product Liability: Matters not covered by Pt VA of the Trade Practices Act*, Legal Books, Sydney, 1993, p 2: 'A myriad of remedies give rise to a myriad of technical, procedural and substantive diversities.' This has also been acknowledged by the Federal Government, which at one stage proposed: 'the development of a national system of easily understood consumer protection laws to replay the current overlapping and sometimes inconsistent laws': Attorney-General's Department, *The Justice Statement*, AGPS, Canberra, 1995, p 140. See also Federal Bureau of Consumer Affairs, *Getting What You Pay For: New Rights and Remedies for Consumers of Goods and Services Under the Trade Practices Act 1974*, AGPS, Canberra, November 1995.

earnings). A key conclusion is that so many complications have arisen that product liability law in Australia needs comprehensive reconsideration.

It is illogical that a consumer who has an identical cause of action for the same injuries under the NSW Fair Trading Act 1987 (NSW) and Pt V Div 2A of the TPA would receive different amounts of compensation under both statutes, in particular in circumstances where the potential difference before discount is so large.

Further difficulties with the current product liability regime can be illustrated using the following example. Assume three plaintiffs, each of whom can establish that they are suffering from lung cancer as a result of exposure to cigarette smoke, asbestos and a toxic chemical, respectively. Their legal rights and the amount of compensation each might receive will differ significantly depending upon what law governs the assessment of damages.

The Trade Practices Amendment (Personal Injuries and Death) Act 2006 (Cth) provides that ss 52 and 53 are no longer available as a cause of action in personal injury claims, except if the death or personal injury results from smoking or other use of tobacco products.²¹¹ Accordingly, the asbestos and chemical victims could not bring a claim, unless their accident occurs in a state where equivalent reform has not been made to the relevant state fair trading legislation.²¹² A plaintiff's rights, however, should not depend arbitrarily upon the place of the wrong.

If one plaintiff knows the retailer of the product causing his or her injuries, this plaintiff may have rights under Pt V Div 2 of the TPA.²¹³ However, these rights are subject to constitutional issues with regard to how that Part interacts with the Civil Liability Reforms to state law. The insertion of a saving provision into s 71 equivalent to s 74(2A) of the TPA is urgently needed.

A plaintiff suffering a wrong in Western Australia, Tasmania, the ACT and Victoria who is able to establish a contumelious disregard for his or her rights, may also have a claim for aggravated or exemplary damages, but a plaintiff involved in an equivalent wrong in New South Wales, the Northern Territory or Queensland would not.²¹⁴ One might also question whether it is just that one victim would receive a windfall above their loss (whether defined by the common law or the Civil Liability Reforms).²¹⁵

Further, the Civil Liability Act 2002 (NSW) does not apply to claims for damages for dust diseases brought under the Dust Diseases Tribunal Act 1989 (NSW) or to claims where the injury or death concerned resulted from

211 Section 82(1AAA).

212 Equivalent provisions to ss 52 and 53 of the TPA excluding personal injury actions have not been introduced in Western Australia, Northern Territory, ACT and South Australia. Equivalent reforms to the Trade Practices Amendment (Personal Injuries and Death) Act 2006 have been introduced in Tasmania, New South Wales, Victoria and Queensland.

213 The smoker will have likely purchased cigarettes from a multiplicity of vendors (cf *Scanlon v American Cigarette Co (Overseas) Pty Ltd (No 1)* [1987] VR 261 where although the plaintiff had smoked only one brand of cigarettes, only the manufacturer was joined); the identity of the supplier of the asbestos product may be lost in time (but cf *McPherson's Ltd v Eaton* (2005) 65 NSWLR 187; Aust Torts Reps 81-825 where the retailer was joined)

214 See above n 135.

215 For a discussion on the advantages and disadvantages of exemplary damages, see the Ipp Report, above n 14, paras 13.159ff.

smoking or other use of tobacco products.²¹⁶

The consumer suffering lung cancer as a result of chemical exposure is disadvantaged compared to their co-sufferers. The victim of chemical exposure will not have a cause of action based on ss 52 and 53 of the TPA and the Civil Liability Reforms will apply to the limit of damages in respect of all causes of action against manufacturers.

Except for South Australia and under the TPA, each jurisdiction limits recovery for future economic loss to three times the amount of average weekly earnings at the date of the award.²¹⁷ The difference between a two times cap under the TPA and the three times cap under the Civil Liability Reforms in most states is a gross anomaly. Further, even between the different states some jurisdictions have more liberal caps than others.²¹⁸

Such complexity and anomalies in existing Australian product liability law are unacceptable.²¹⁹ As the majority of the High Court said in *John Pfeiffer Pty Ltd v Rogerson*:

It may be reasonable to recognise the right of a litigant to choose different courts in the one nation by reason of their advantageous procedures, better facilities or greater expedition. However, it is not reasonable that such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents. If this could be done, the law would no longer provide a certain and predictable norm, neutrally applied as between the parties. Instead, it would afford a variable rule which particular parties could manipulate to their own advantage. Such a possibility would be obstructive to the integrity of a federal nation, the reasonable expectations of those living within it and the free mobility of people, goods and services within its borders upon the assumption that such movement would not give rise to a significant alteration of accrued legal rights (*Tolofson v Jensen* [1994] 3 SCR 1022 at 1055).

In Australia, the consideration of the mobility of people, goods and services within a federation therefore encourages both the broadest possible access to the available courts within the unified Judicature of the nation and the adoption of a choice of law rule which helps to promote an identical outcome for the parties' substantive rights, wherever in that nation those rights fall to be determined by a court of law.²²⁰

At the very least, the inconsistencies in Australian product liability law will give rise to issues of election in product liability litigation.²²¹ At worst, it will

216 Section 3B(1)(c).

217 NSW: s 12(2) of the Civil Liability Act 2002 (NSW); VIC: s 28F of the Wrongs and Other Acts (Public Liability Insurance Reform Act 2002 (Vic)); QLD: s 54 of the Civil Liability Act (2003) (Qld); TAS: s 26(1) of the Civil Liability Act 2002 (Tas); NT: s 20 of the Personal Injuries (Liability and Damages) Act 2004 (NT); ACT: s 98 of the Civil Law (Wrongs) Act 2002 (ACT); WA: s 11(1) of the Civil Liability Act 2002 (WA); but SA: s 54(2) of the Civil Liability Act 1936 (SA) provides that damages for loss of earning capacity are not to exceed the prescribed maximum and s 87U of the TPA provides for a cap of twice the average weekly wage.

218 For example, in NSW see s 12(3) of the Civil Liability Act 2002 (NSW).

219 See 'The need for national consistency', Ipp Report, above n 14, para 13.8ff in particular paras 13.13 and 13.14 regarding perceptions of injustice.

220 (2000) 203 CLR 503; 172 ALR 625 at [129] and [130] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

221 Ibid, at [129] and [130] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

encourage 'forum shopping',²²² which the High Court thinks important to discourage.²²³

A further difficulty is that the *lex causae* determining the rights of a plaintiff is that of the place of the wrong. Identifying the *lex loci delicti*²²⁴ may present difficulties.²²⁵ In the large-scale manufacture and international distribution of products, the place where loss or damage occurs will not necessarily be the same place where the product originates.²²⁶ It is still unclear whether the law relating to the quantification of damages is procedural or substantive.²²⁷ In addition, procedural issues may arise as to how a claim is made.²²⁸ Such unresolved issues, technical distinctions and multiplicity of causes of action generate a product liability regime in Australia that is best described as a morass.

In conclusion, the 15th anniversary of Pt VA of the TPA does not leave too much to celebrate. In its initial report resulting in enactment of Pt VA in 1992, the ALRC argued that good product liability law should:²²⁹

222 See Gummow and Hayne JJ in *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337 at [130] (obiter), quoted in *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 (unreported, 6 July 2006, BC200605475).

223 However, compare the opposing views (with related commentary) of Kirby J (at [118]) and the other members of the High Court (at [128]) about the desirability of forum shopping: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

224 See also *Breavington v Godleman* (1987) 169 CLR 41 at 73 per Mason CJ.

225 In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625, the High Court held that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti*. In *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, the High Court held that the substantive law for the determination of rights and liabilities in respect of foreign torts should also be the *lex loci delicti*: at [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

226 See, eg, *Dow Jones and Co Inc v Gutnick* (2003) 210 CLR 575; 194 ALR 433; 77 ALJR 255 at [43] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

227 Kellam, above n 22, at 56–8. In *Amaca Pty Ltd v Frost* [2006] NSWCA 173 (unreported, 4 July 2006, BC200605025) the question was whether the law of New Zealand (place of exposure) or New South Wales (place of manufacture) was the law of the tort. The respondent was prevented from bringing proceedings in New Zealand by the NZ Accident Insurance Act. The NSW Court of Appeal concluded that New Zealand law applied because it was always intended that the product would be distributed in New Zealand; the respondent, to whom the duty was owed, was in New Zealand; and the element of causation occurred in New Zealand. Accordingly, as a matter of substance, the place where the cause of action arose was New Zealand. Similarly, in *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 (unreported, 13 October 2006, BC200608206) the court was asked to determine the place of the wrong in circumstances where the deceased was employed in New Zealand, exposed to asbestos in Malaysia and Belgium, was subsequently diagnosed with asbestosis in Victoria. It was held that the substance of the cause of action arose in New Zealand. Cf *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807 (unreported, 25 June 2004, BC200403853): where there was no evidence of the place of manufacture his Honour considered that it was impossible on the evidence to ascertain the *lex loci delicti*. Accordingly, it could not be determined whether any limitation period relevant to the proposed amendments had expired.

228 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625. See also Mason CJ and Brennan J at [42] in *Breavington v Godleman* (1987) 169 CLR 41.

229 See, eg, *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48; 230 ALR 156. The plaintiffs in a class action brought proceedings for damages for personal injuries in both tort and under the TPA in New South Wales. Some of the plaintiffs were from Queensland and the torts alleged occurred in Queensland. The defendants argued that the failure of the claimants to comply with the notice before action and compulsory conference provisions of the Personal

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- ensure that those who manufacture and supply goods — and hence, their customers, who use and enjoy the goods — bear the risk of losses caused by what the goods do (ie, by defective products);
- take full account of other causes of those losses; and
- provide the cheapest, most efficient means of determining compensation claims.

Instead, layers of complexity have been added in and around Pt VA, making it unlikely that suppliers, consumers or public authorities can operate efficiently or effectively. The case law under Pt VA has taken years to accumulate, and is developing with little overt reference to judgments and commentary applying provisions based similarly on the EC Directive. Some consider that its standard of liability is becoming largely indistinguishable from common law negligence, making it unlikely that a major reform objective will be achieved — ‘reducing the time and cost involved in resolving product liability claims by reducing the complexity of the issues of liability and causation presented by such claims’.²³⁰ Problems are compounded because other statutory causes of action remain in place under the TPA, as well as the common law, but with differences — big and small — in wording and scope of application (eg, regarding definitions of ‘consumers’). The Civil Liability Reforms were intended to clarify the law of negligence, but have been implemented differently in the states and now the TPA.

A decade ago, commentators were critical of the ‘myriad of remedies giving rise to a myriad of technical, procedural and substantive diversities’ and were urging further comprehensive reform.²³¹ The Federal Government at the time also proposed ‘the development of a national system of easily understood consumer protection laws to replay the current overlapping and sometimes inconsistent law’.²³² The current situation is much worse. On the 15th birthday of Pt VA of the TPA, there are very good reasons why policy-makers — especially the ALRC — should reconsider Australian product liability law as a whole. In particular, it should revisit the original proposal to make Pt VA rights basically exclusive of other statutory rights.²³³

To satisfy concerns that such reform will close off avenues of redress to consumers, principles applicable to Pt VA need to be clarified in reference to global standards. The ALRC could take the lead in bringing together judges, lawyers, academics, regulators and other stakeholders to try to generate a

Injuries Proceedings Act 2002 (Qld) meant that the claims were not enforceable in New South Wales. The issue was whether the Queensland provisions were applicable to the NSW litigation, that is, whether they were procedural or substantive. The NSW Court of Appeal concluded that, notwithstanding the fact that the PIPA stated that the provisions were substantive was not determinative of the issue and the provisions were procedural. The governing law for any torts involving the Queensland claimants was the law in Queensland, while the governing law for the NSW claimants was the law in New South Wales. The procedure for the determination of the dispute was that of New South Wales.

230 ALRC, above n 17, para 2.16.

231 Trindade et al, above n 15, at 645 (referring especially to *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014).

232 Respectively, Travers, above n 21, at 1011; and Pengilley, above n 210, at 2.

233 Attorney-General’s Department, above n 210, at 140. See also: Federal Bureau of Consumer Affairs, above n 210.

'Restatement of Strict-Liability Product Liability Principles'. They would be derived not only from the growing Australian case law, but also the much greater volume of decisions collectively generated in the EU and other jurisdictions that modelled product liability law reform on the EC Directive, especially in the Asia-Pacific region.²³⁴ Those decisions can provide further depth of analysis on the points raised in the Australian judgments, or fill gaps in terms of the points at issue in various jurisdictions. The inspiration is the American Law Institute's Restatements in various areas, including product liability,²³⁵ attempting to harmonise the law within national borders, but extending comparative analysis cross-nationally. Similar initiatives have been developed, beginning with contract law, through UNIDROIT and in the EU.²³⁶ Like all such restatement projects, however, the participants should also be prepared to offer some 'Pre-statements' or opinions as to what comprises a better solution, especially when case law or ideas differ. The proposed restatement will also need to take into account the surrounding law (substantive and procedural) and more diffuse non-legal considerations of practical relevance.²³⁷

Meanwhile, the complicated picture presented for product liability in Australia should give pause to those suggesting that incentives from this civil liability regime obviate much need to strengthen consumer product safety regulation, as in the EU particularly since 2001.²³⁸ If anything, the problems in product liability may strengthen the case for reform in that neighbouring area of law.²³⁹ More generally, if product liability law has become more complex despite the unveiling of strict liability in the form of Pt VA (albeit partly due to subsequent developments, like the Civil Liability Reforms), then

234 ALRC, above n 17.

235 Kellam and Nottage, above n 12. Japan would be a promising candidate for such comparisons, since it also has more than two dozen product liability law judgments: J Masuda, *Saikin PL-Kankei Hanrei to Jitsumu [Up-to-Date Product Liability-Related Judgments and Practice]*, Minjiho Kenkyukai, Tokyo, 2004; L Nottage, 'Comparing Product Liability and Safety in Japan: Path-Dependent Globalization' in H Scheiber (Ed), *Emerging Concepts of Rights in Japanese Law*, UC Berkeley-Robbins Collection, Berkeley, 2007, p 143. It also has a strong tradition of using comparative law to inform the development of its private law: Nottage, above n 11, pp 59–60, 64–66. Further afield, as mentioned above n 13, BIICL is already assembling a database of case notes on EC Directive related decisions from multiple jurisdictions.

236 See, eg, J Henderson and A D Twerski, 'A Discussion and a Defence of the Restatement (Third) of Torts: Product Liability' (1998) 8 *Kansas Jnl of Law and Public Policy* 18. The inspiration is only as to the process of this harmonisation initiative, not the substance of the recent US Restatement, which steps back from strict-liability product liability towards more negligence-based tests.

237 See L Nottage, 'Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law' (2004) 1 *Annual of German and European Law* 166.

238 More narrowly, B Macdonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Syd LR* 443 at 444 puts the onus on courts 'to meet the challenge of restoring some coherence to the law of tort' following the Civil Liability Reforms.

239 Cf the PC's *Review of the Australian Consumer Safety System*, 16 January 2006, at <<http://www.pc.gov.au/study/productsafety/finalreport/productsafety.pdf>>, especially pp 24–7, 59–64 and 69–71. That analysis primarily focuses on Pt VA, not the complications engendered by other liability regimes, although it acknowledges that the Civil Liability Reforms should in principle reduce incentives to supply safe products.

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Australian consumer law in other areas may be facing even greater challenges. This broader concern should also inform the PC as it continues its Inquiry into Australia's Consumer Policy Framework.²⁴⁰ We should certainly not have to wait another 15 years to clarify the law and underlying principles of product liability in Australia. There is a real risk that the morass will become a swamp.

²⁴⁰ Nottage, above n 4.

Appendix A: TPA Part VA judgments

- 1 *Newcombe v Ame Properties Ltd* (1995) 14 WAR 259; 125 FLR 67.
- 2 *Brooks v R&C Products Pty Ltd* (1996) ATPR 41-537.
- 3 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 40 IPR 619; ATPR 41-632 (FCA, Emmett J); (1998) 90 FCR 40; (1999) ATPR 41-672 (first substantive decision).
- 4 *Stegenga v J Corp Pty Ltd* (1999) ASAL 55-025; ATPR 41-695.
- 5 *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337.
- 6 *Canberra Furniture Manufacturing Pty Ltd v White* [1999] ACTSC 53 (unreported, 28 May 1999, BC9902741).
- 7 *Borch v Answer Products Inc* [2000] QSC 379 (unreported, 26 October 2000, BC200006441).
- 8 *Bright v Femcare Ltd* (2000) 175 ALR 50.
- 9 *Eastley v Mauger* [2000] FCA 266 (unreported, 2 March 2000, BC200000860).
- 10 *Lanza v Codemo Management Pty Ltd* [2001] NSWSC 845 (unreported, 28 September 2001, BC200108023).
- 11 *ACCC v Pacific Dunlop Ltd* (2001) ATPR 41-823
- 12 *Leeks v FXC Corporation* (2002) 118 FCR 299; 189 ALR 288.
- 13 *Forbes v Selleys Pty Ltd* [2002] NSWSC 547 (unreported, 3 July 2002, BC200203689); [2004] NSWCA 149 (unreported, 12 May 2004, BC200402622).
- 14 *Courtney v Medtel Pty Ltd* (2003) 130 FCR 182; 198 ALR 630; [2003] HCA Trans 496 (unreported, 2 December 2003).
- 15 *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359.
- 16 *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) Aust Contract R 90-167.
- 17 *Roots & Raydene Pty Ltd v Trussmaster Pty Ltd* [2003] QSC 348 (unreported, 17 October 2003, BC200306087).
- 18 *Stewart v Pegasus Investments and Holdings Pty Ltd* [2004] FMCA 712 (unreported, 29 October 2004, BC200407366).
- 19 *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34 (unreported, 16 February 2004, BC200400317).
- 20 *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014.
- 21 *Effem Foods Ltd v Nicholls* (2004) ATPR 42-034.
- 22 *Fitzpatrick v Job (t/a Job's Engineering)* [2005] WADC 89 (first instance); [2007] WASCA 63 (appeal in relation to negligence only).
- 23 *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168 (unreported, 6 September 2005, BC200506537).
- 24 *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd* [2006] FCA 875 (unreported, 6 July 2006, BC200605239).
- 25 *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 (unreported, 6 July 2006, BC200605475).
- 26 *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48; 230 ALR 156
- 27 *Mayes v Australian Cedar Pty Ltd t/a Toronto Timber and Building Supplies* (2006) ATPR 42-119.

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Appendix B: Federal product liability class actions

- 1 *Arthur Butler v Kraft Foods Ltd* VG 393 of 1996
- 2 *Bates v Dow Corning* G458 of 1994
- 3 *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147.
- 4 *Cook v Pasmenco* (2000) 99 FCR 548; *Cook v Pasmenco Ltd (No 2)* (2000) 107 FCR 44; 179 ALR 462; 111 LGERA 406.
- 5 *Courtney v Medtel Pty Ltd* [2001] FCA 949 (unreported, 20 July 2001, BC200103985); *Courtney v Medtel Pty Ltd* [2001] FCA 1037 (unreported, 2 August 2001, BC200104899); *Courtney v Medtel Pty Ltd (No 4)* [2004] FCA 1233 (unreported, 15 September 2004, BC200406288); *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; *Courtney v Medtel Pty Ltd (No 6)* [2004] FCA 1598 (unreported, 3 December 2004, BC200408374); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; *Darcy v Medtel Pty Ltd* [2002] FCA 925 (unreported, 25 October 2002, BC200204131).
- 6 *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461 (unreported, 25 October 1999, BC9906912).
- 7 *Femcare Ltd v Bright* (2000) 100 FCR 331; 172 ALR 713; *Bright v Femcare Ltd* (2000) 175 ALR 50; *Bright v Femcare Ltd* (2001) 188 ALR 633; *Bright v Femcare Ltd* (2002) 195 ALR 574.
- 8 *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705 (unreported, 7 April 2006, BC200604060).
- 9 *Hogan v Sydney Water Corporation Ltd* FCA Proceedings No 1118 of 1998
- 10 *J F Yandle Co Pty Ltd v CSN Pty Ltd* [2000] FCA 1823 (unreported, 5 December 2000, BC200007635).
- 11 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167; 166 ALR 731; *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 2)* (1999) ATPR 41-698; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reps 81-692; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 45 IPR 453; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564; ATPR 41-794; *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 3)* (2000) 98 FCR 311; 174 ALR 701.
- 12 *Lowe v Mack Trucks Australia Pty Ltd* [2001] FCA 388 (unreported, 6 April 2001, BC200101481).
- 13 *Lopez v Star World Enterprises* (1999) ATPR 41-678.
- 14 *McMullin v ICI Australia Operations Pty Ltd* (1996) 69 FCR 473; *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; 156 ALR 257; *McMullin v ICI Australia Operations Pty Ltd* (1996) 69 FCR 473; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; 156 ALR 257.
- 15 *Neil v P & O Cruises Australia Ltd* [2002] FCA 1325 (unreported, 30 October 2002, BC200206424).
- 16 *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453, 165 ALR 515; ATPR 41-707 (reversed on appeal); *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487; ATPR 41-759; *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487; ATPR 41-759; *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453; 165 ALR 515; ATPR 41-707.
- 17 *Pasco v Carlton International Pty Ltd* 1997 No QG 19/97.
- 18 *Peterson v Merck Sharpe and Dohme (Australia) Pty Ltd* [2006] FCA 875 (unreported, 6 July 2006, BC200605239).
- 19 *Ryan v Great Lakes Council* (1997) 78 FCR 309; 149 ALR 45; *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v*

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- Ryan* (2002) 211 CLR 540; 194 ALR 337; *Ryan v Great Lakes Council* (1998) 155 ALR 447; *Ryan v Great Lakes Council* (1998) 154 ALR 584.
- 20 *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Australia Ltd (Attorney-General for the State of Victoria Intervening)* (2000) 1 VR 545.
- 21 *Schneider v Hoechst Schering Agrevo Pty Ltd* NG 374 of 1997.
- 22 *Schokman v Sydney Water Corporation Ltd* NG 794 of 1998.
- 23 *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) (1997) 78 FCR 164; 149 ALR 261.
- 24 *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* (2000) ATPR (Digest) 46-205; *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* (2000) FCA 1404 (unreported, 14 September 2000, BC2000006261).
- 25 *Tongue v Council of the City of Tamworth* [2005] FCA 124 (unreported, 18 February 2005, BC200500524); *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233.