



PRODUCT SAFETY & LIABILITY



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Many countries in the Asia-Pacific region have reformed their product liability laws in the last 15 years.

Clayton Utz, an Australian law firm, surveyed international manufacturers, insurers/brokers, and lawyers over the last three years to learn whether these reforms have changed the product liability risk environment in the region. The Clayton Utz Asia-Pacific Survey sought to assess the impact of legislative reforms in the area of product liability throughout the region since 1992. In this article, attorney Dr. Jocelyn Kellam discusses the survey results.

Product Liability Risks in the Asia-Pacific: Clayton Utz Asia-Pacific Survey

By DR. JOCELYN KELLAM

Introduction

Over the last 15 years, many countries in the Asia-Pacific region have reformed their product liability laws.

Have these reforms markedly altered the product liability risk environment in the Asia-Pacific region? Clayton Utz, an Australian law firm, has undertaken a

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survey of international manufacturers, insurers/brokers, and lawyers over the last three years to answer this question. Specifically, the Clayton Utz Asia-Pacific Survey sought to assess the impact of legislative reforms in the area of product liability throughout the region since 1992.

The results of the survey show that while there has been some increase, there has been no large or widespread jump in claims throughout the Asia Pacific region since 1992. The reported increase in claims is between 0% and 20%. In fact, the overwhelming majority of manufacturers responding to the survey reported that they had no claims. Any reported increase was also attributed by respondents to factors such as an increased awareness of consumer rights and the media, rather than the reforms themselves.

One of the conclusions that emerges from the Clayton Utz survey, therefore, is that the United States'

product liability experience is not being replicated in the Asia-Pacific.

However, that does not mean that U.S. manufacturers should be complacent about product liability risks in the region. Most respondents thought that the reforms had increased or greatly increased product liability risk for manufacturers distributing goods in the region. Notwithstanding a slow start, product liability litigation is well established in Australia and Japan. There are “hot spots” in the region. Respondents to the Clayton Utz Survey also reported other countries of concern including, in particular, China.

Reforms to Product Liability Laws in the Asia Pacific

The product liability laws of the Asia-Pacific region are diverse. A mosaic of legal rights exists under contract, tort and statute in most countries. In many of these jurisdictions, product liability is only just beginning to emerge as a significant body of law. With many countries going through a period of economic development, some legislatures are only now beginning to recognize the need to address consumer protection and the legal liability of manufacturers in the region.

The diversity of approaches to product liability is a reflection of the diversity of legal systems in the region. Some countries such as India, Singapore, and Hong Kong do not have a specific body of law dealing with product liability. Instead, consumer protection is governed under the general principles of the common law or statutory provisions applicable to each country. The laws of some jurisdictions share a common law heritage (Australia, New Zealand, India, Malaysia, Hong Kong and Singapore) or have mostly continental European origins (Philippines, Japan and Indonesia).

Widespread reform of product liability laws has taken place in the Asia-Pacific region since 1992. The reliance on the provisions of the European Community’s Product Liability Directive 1985 as a model for reform has provided some measure of uniformity in the region. Implementation of the EC Directive introduced a regime of strict liability for defective products across countries in Europe. Australia, Korea, Japan, Taiwan, Indonesia, Malaysia, and the Philippines have introduced laws similar to the EC Directive. Thailand is considering whether to introduce such laws.

There is product liability litigation in the Asia Pacific region. Product liability litigation is well established in Australia with well over 25 reported cases concerning Part VA of the *Trade Practices Act 1974* (Cth). In Japan, there are at least 21 reported (as well as many unreported) decisions under the Japanese Product Liability Law. Both countries have introduced laws based on the EC Directive.

Elsewhere in Asia, there have been at least two cases of prominence. In *Phillips v Ciba-Geigy (HK) Ltd.* (unreported, 31 July 1997) a timpanist with the Hong Kong Philharmonic Orchestra was awarded in excess of \$HK18 million (U.S. \$2.32 million) damages, excluding interests and costs, after exposure to a chemical at the Hong Kong Academy for Performing Arts. More recently in Singapore, the case of *Andrea Heidi De Cruz v Guangzhou Yuzhitang Health Products* [2003] SGHC 229 achieved attention after a prominent actress suffered liver failure after consuming Slim 10 capsules, a popular brand of slimming capsules. In comparison, however, the compensation award of S\$250,000 (U.S.

\$145,000) was small, and on appeal, the Singapore Court of Appeal reduced it to S\$150,000 (U.S. \$87,000).

Summary of the Results

In summary, the Clayton Utz Asia-Pacific survey found that:

- Overall, 44% of respondents thought that the reforms had increased or greatly increased product liability risk for manufacturers distributing goods in the region. However, 62% of manufacturers and 72% of insurers thought implementation of the reforms had not changed product liability risks.
- Unanimously, 100% of insurers/brokers thought that there had been an increase in the number of product liability claims in the Asia-Pacific region since the reforms. All reported that there had been an increase in settlements. Overall, total respondents thought the increase was between 0% and 20%. However, 78% of respondents, in explaining why they could not return completed surveys in any detail, reported that they had no claims in the region, and the balance reported that they had experienced no increase in claim numbers. The risk profile of foreign manufacturers and domestic manufacturers appears to be different. Overall, 37% of total respondents thought that claims against foreign manufacturers were prevalent compared to 26% for domestic manufacturers.
- Perhaps unsurprisingly given that manufacturers, members of the insurance industry, in-house counsel and defendants’ lawyers were surveyed, 59% of respondents thought that traditional causes of actions adequately protected consumers from unsafe products (yet only 22% thought it provided consumers with an efficient means of obtaining compensation).
- In terms of the impact of the reforms, 20% of manufacturers thought that they provided consumers with an efficient means of compensation. The main motivations for consumers to bring actions under the reforms were reported as a perceived higher success rate and damages, with the factors of less expense and evidentiary hurdles also being identified. An increase in out-of-court settlements was identified as being due to the reforms and greater access to legal advice.
- Regarding future law reform, while 26% of total respondents thought that consumers would benefit from the introduction of a common and sole system of liability, 49% of respondents were indifferent as to whether it would be beneficial for consumers. In contrast, 56% of respondents thought that consumers would benefit if fault-based claims in tort/delict such as negligence were abolished (including 70% of lawyers, both external and in-house).

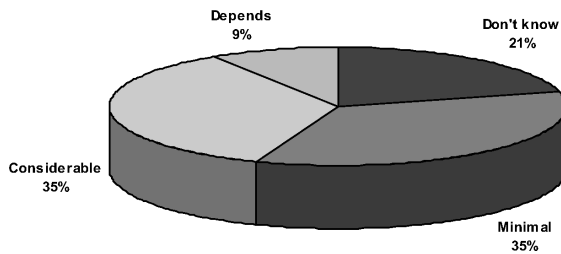
Product Liability Risks

Respondents were divided on whether product liability risk varied in the region, that is, whether there were any liability hot spots and what precisely was the impact of the reforms. Regardless, however, the assessment of risk did not affect how manufacturers did business in the region. However, as might be expected, risk issues were seen as affecting insurers’ decisions concerning premiums and limits of indemnity.

To what extent do you find product liability risk varies amongst different countries?

The lawyer and manufacturer groupings within the survey showed conflicting views as to the extent of geographical diversity in product liability risks between countries, from considering the risks being “very alike” to “very different” from country to country. Responses indicated that the United States is considered to be the

Total - To what extent do you find product liability risk varies amongst different countries?



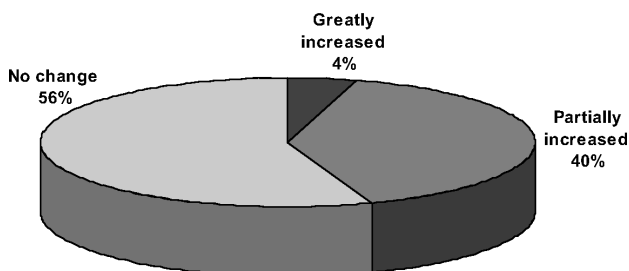
benchmark for what constitutes “high risk,” that Australia and New Zealand were perceived as having “entrenched laws” governing product liability, and that manufacturers were more likely to become involved in product liability suits in Japan and China.

In contrast, insurers/brokers almost universally saw product liability risks as being notably different between countries. It is probably reasonable to suggest that the insurers/brokers are best placed to form an accurate opinion despite being a minority of respondents, as assessment of risk and handling of product liability claims across the region constitutes their day-to-day business.

How has implementation of the reforms affected product liability risks?

Respondents were divided in their assessment of the impact of the reforms. Overall, 44% of respondents returning detailed responses thought that the reforms had either increased or greatly increased product liability risks. Of these, 39% of manufacturers and 28% of insurers thought that the reforms had either increased or greatly increased product liability risks for manufacturers, with 60% of lawyers considering that the reforms had increased levels of consumer protection. However, 61% of manufacturers, and 71% of insurers, thought implementation of the reforms had not changed product liability risks.

Total - How have the changes in product liability law in the Asia Pacific (“the Reforms”) changed your assessment of product liability in the region?



How do these differences in product liability risks in different countries affect your business?

Manufacturers reported overall that the difference in product liability risk did not affect their decision to distribute to countries throughout the region. A number of reasons were given—that their products were not high risk, that the company insured against product liability risks, and that in the case of pharmaceutical products there was an ethical obligation to distribute drugs internationally. One U.S. corporation commented that as its

products were distributed in accordance with U.S. product liability requirements, local risks did not affect its decision to distribute to countries in the region, unless local laws had more stringent requirements.

Insurers/brokers suggested that differences in risks between countries did affect their premiums and/or the level of coverage and the amount of deductibles offered. The different product liability exposures and the differing costs of insurance appear not to be prohibitive to either manufacturers or insurers/brokers, at least not to the point where they would decide not to supply products or not to underwrite product liability risks in certain countries.

Claims Management

Insurers and brokers reported unanimously, and a clear majority of respondents returning detailed responses reported, that there had been an increase in the number of product liability claims in the Asia-Pacific region since the reforms. The most important factors leading to this increase were the media, access to justice, the implementation of the reforms and changes in the regulatory environment.

In relation to the legal basis for claims, the survey results show that claims are more frequently brought upon the basis of traditional causes of action in tort/delict such as negligence rather than under the reforms. That being said, claims under the reforms were perceived to have a number of benefits for consumers relating to damages, less expense, and a higher success rate.

Do you think there has been a general increase in product liability claims in the Asia-Pacific over the past decade?

Overall 72% of respondents returning completed questionnaires thought that there had been an increase in claims in the Asia-Pacific region. Significantly, however, 100% of the insurance industry thought that there had been an increase in claims in the Asia-Pacific region. One would expect that insurers and brokers would be well placed to have an overall and general perspective and have statistics allowing for an assessment of such a trend. In contrast, 69% of lawyers and 63% of manufacturers thought that there had been an increase.

Most manufacturers, however, would appear to be unaffected by product liability claims. In characterising their experience since 1992, 78% of respondents explaining why they could not return completed surveys in detail reported that they had no claims in the region and the balance reported that they had experienced no increase in claim numbers.

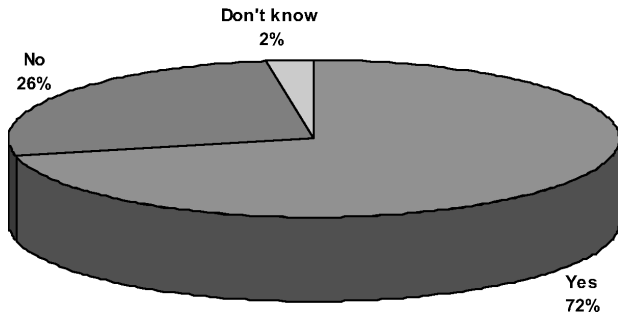
The risk profile of foreign manufacturers and domestic manufacturers appears to be different. Overall, 37% of total respondents thought that claims against foreign manufacturers were prevalent compared to 26% for domestic manufacturers.

Do you find that the number of product liability claims against manufacturers generally have increased as a result of the reforms, and, if so, by what percentage?

Of respondents returning detailed responses:

- 31% of total respondents thought that the number of product liability claims had increased as a result of the reforms by 0-20%;

Total - Do you think there has been a general increase in product liability claims in the Asia Pacific over the past decade?



- 24% of manufacturers thought that the number of product liability claims had increased by 0-20%;
- 40% of lawyers thought that the number of product liability claims had increased, with 33% considering the increase was 0-20%; and
- 43% of insurers/brokers thought that the number of product liability claims had increased but were equally divided as to whether the increase was 0-20%, 21-40% or 41-60%.

Causes of increase in product liability claims

A number of causes were thought to have contributed to an increase in product liability claims.

The most important factors which respondents overall thought had either increased or greatly increased claims were: increased awareness of consumer rights (65%), the media (56%), the implementation of the reforms (55%), and access to legal advice (54%). There was no real suggestion that any decrease in product safety was responsible (8%). Only 3% of total respondents thought that advertising by lawyers was a factor behind the increase.

Among the manufacturers and insurers/brokers, there was generally a view that "greater access to legal advice (i.e. from consumer groups)" was a leading cause for the increase in claims.

Lawyers gave more weight to the view that increased awareness of consumer rights was responsible. In all three groups, there was a significant number of views that an increase in awareness of consumer rights had contributed to the increase in product liability claims.

Types of Product Liability Claims

In addition to looking at the geographical diversity of product liability risks throughout the region, the perception of product liability risk and the numbers of claims, the Clayton Utz Asia-Pacific survey also sought to identify what types of claims are commonly being brought, that is, whether claims are being made under the reforms, contract, fault-based liability (tort/delict), criminal, or country specific legislation and sought to identify whether claims were most frequently brought against domestic or foreign manufacturers.

Overall, total respondents reported that claims are still frequently brought in tort/delict (67%), contract (45%) and under country specific legislation (36%). Criminal-based actions are infrequent (43% reported them as unlikely).

Some 71% of manufacturers and 60% of lawyers thought that between 0% and 20% of product liability claims were being brought under the reforms. Fifty-seven percent of insurers/brokers were evenly divided as to whether 0-20%, 21-40%, 41-60% or 61-80% of claims were being brought under the reforms; the average of 40% was however considerably more than the manufacturer and lawyer groupings.

All three groups of respondents accredited fault-based liability (that is negligence or tort/delict) as continuing to be a key basis for a product liability claim, notwithstanding the extensive introduction of strict liability and no-fault actions in different jurisdictions in the region under the reforms.

Factors influencing consumers when deciding to bring actions under traditional causes of action or the reforms.

Overall, the factors rated as very influential by total respondents were types of damages (36%), less expense (31%) and higher success rate (29%).

Similarly, grouping the top two categories of responses, the most important factors influencing consumers in deciding to bring a cause of action under the reforms were reported to be the higher success rate (68% of total respondents rated this factor as very influential or influential), types of damages (64% overall), and evidentiary hurdles (58% overall).

To what extent have the courts/tribunals applied fault-based principles in their interpretation of the reforms?

Lawyers reported that the reforms had introduced strict liability/liability without fault and were being interpreted as such. There was one report by an insurer of tribunals/courts attempting to reintroduce fault-based principles when interpreting the reforms.

In general, manufacturers felt they were unable to comment.

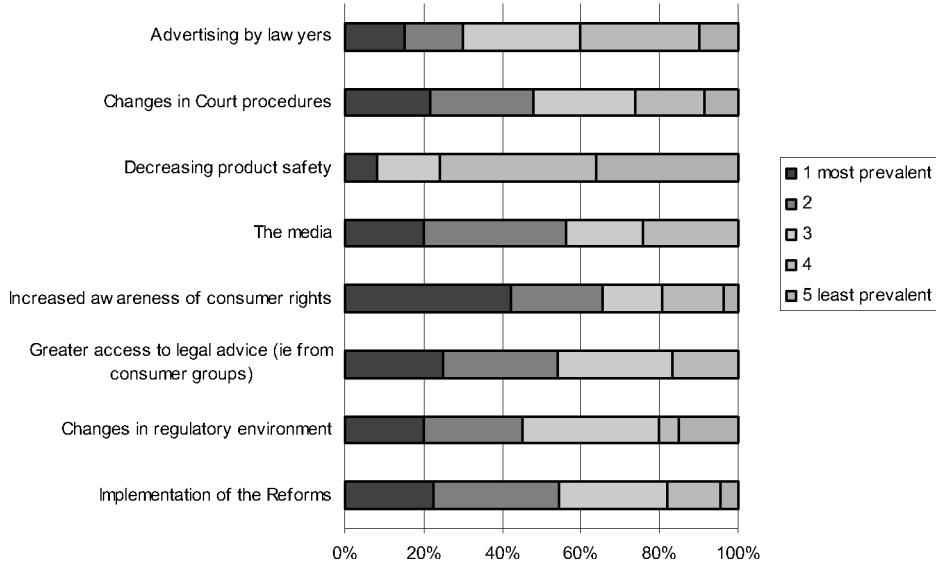
The one exception was in the area of proof, where one Japanese manufacturer thought that the courts had adopted the notion of a shifting burden of proof, that is, the courts had been easily persuaded to draw an inference of defect and or causation. However, there was no suggestion that there had been a reversal of the onus of proof, which had been debated in Japan prior to the reforms.

Manifestations and implications of changes in risk exposure

Some insurers/brokers reported that as a result of the reforms there was an increased number of claims alleging defective design, manufacturing defects and failure to warn. One observation was made that failure-to-warn cases were of the most concern because liability was the most subjective.

The increase in risk exposure had resulted in higher premiums and limits of indemnity. In total, 83% of insurers/brokers reported increases in premiums and 80% reported that insureds were being more stringently monitored (including their risk management strategies and quality checks). In contrast 38% of manufacturers reported an increase in premium and 25% said that the reforms had forced them to seek additional product liability cover or that there was a change in the conditions of their insurance. Only 19% of manufacturers re-

Total - If you think there has been a general increase how influential do you think the following factors have been on increasing product liability claims?



ported that the reforms had not had any impact on insurance.

Increase in settlements

A clear majority of respondents thought that there had been an increase in settlements over the last decade. Overall, 69% of respondents (100% of insurers/brokers, 70% of lawyers and 58% of manufacturers) considered that there had been an increase. However, only a minority of 44% of total respondents and 33% of insurers/brokers thought that it was caused by the reforms.

However, there was a wide variation in assessments as to what the increase in settlements had been, with very few respondents choosing to answer these questions. Lawyers reported that settlements had increased

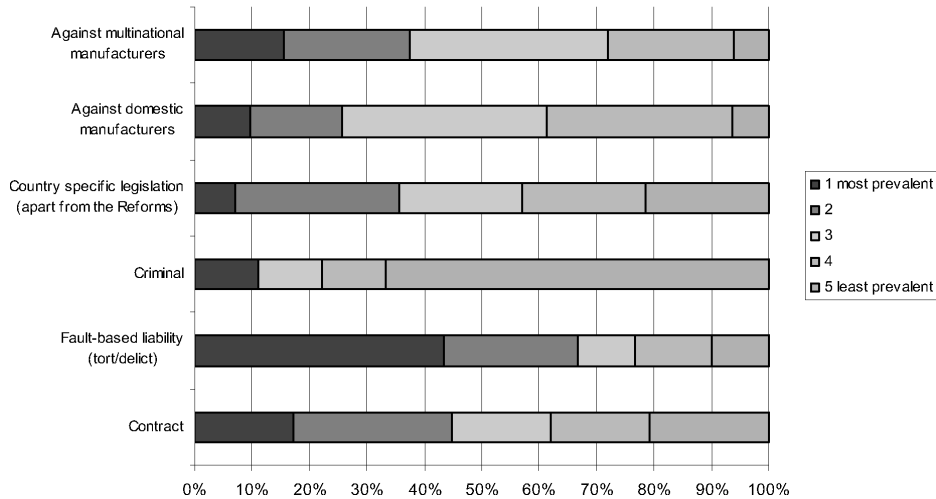
to no more than 20%, manufacturers to up to 75% and insurers/brokers to up to 90%.

The factors behind the increase in settlements

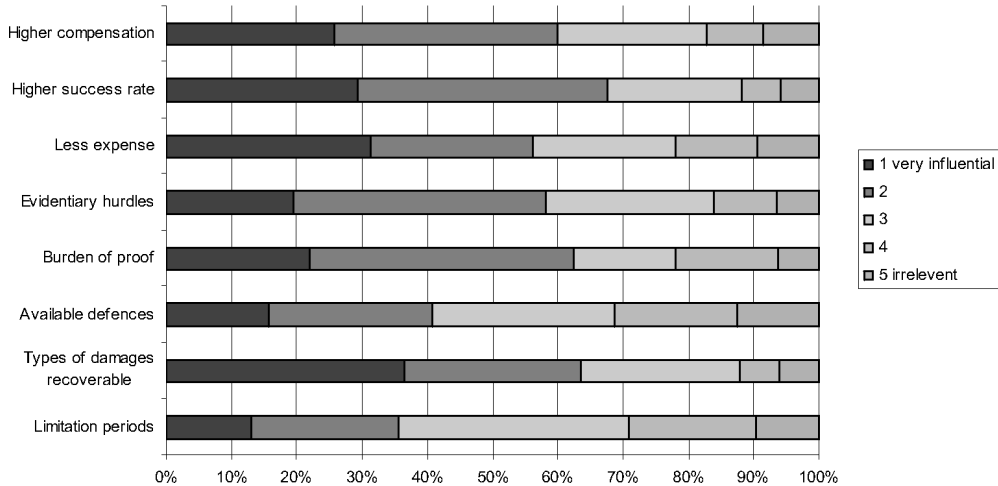
There was a general consensus of opinion across manufacturers, insurers/brokers and lawyers that “greater access to legal advice (i.e. from consumer groups)” was a key factor for the increase in settlements, with 80% of all respondents considering this factor to be either influential or very influential.

Changes in regulatory environment (47%), changes in judicial attitudes towards claims (47%), the media (50%) and cultural changes (50%) were also thought to be influential or very influential. In comparison, only 26% of respondents thought that changes in court procedures were an influential or very influential factor

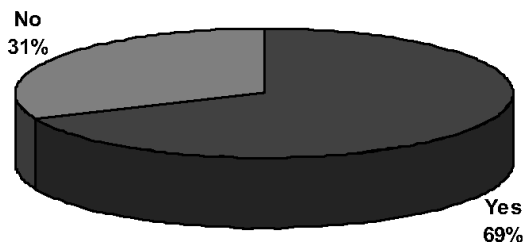
Total - What types of product liability claims are the most prevalent?



Total - What factors do you think influence consumers when deciding whether to bring actions under traditional causes of action or the Reforms?



Total - Apart from the effects of the Reforms, do you believe that there has been a general increase in out of court settlements over the past decade?



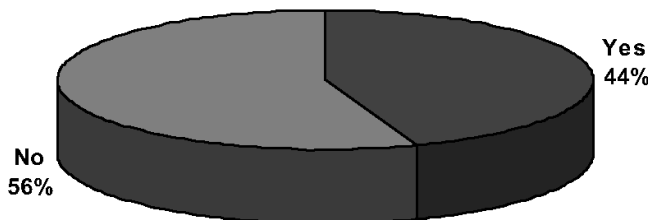
and 47% thought that it was of minor importance or not applicable.

The Adequacy of the Product Liability Regime

The Clayton Utz Survey sought to identify respondents' views about the extent to which traditional causes of action and the reforms balanced the interests of manufacturers and consumers respectively and whether further changes were needed.

The impression gained from the results overall is that there is no general call for further reform. While some respondents expressed concern about increased risk, implementation of the reforms has not given rise to any

Total - Do you believe that there has been an increase in the level of out of court settlements as a result of the Reforms?



single issue focussing the overall attention of respondents.

Do the traditional causes of action or the reforms adequately protect consumers, deter manufacturers from developing new products or make it harder for manufacturers to obtain insurance?

Perhaps paradoxically, 59% of respondents thought that traditional causes of action protected consumers from unsafe products (yet only 22% thought it provided consumers with an efficient means of obtaining compensation). In contrast, 35% of respondents thought that the reforms protected consumers and 45% thought that it provided an efficient means of obtaining compensation.

Overall 15% of respondents thought that traditional causes of action provided a disincentive for manufacturers to develop and supply products or made it harder for manufacturers to obtain insurance at a reasonable price whereas 10% thought that the reforms did so.

How do you think that further reforms such as making special liability regimes, contract law or fault-based liability no longer apply to defective products or the introduction of a common and sole system of liability for defective products affect the balance between consumers' and manufacturers' rights?

Overall, 45% and 56% of total respondents thought that abolishing contract and fault-based liability respectively would favour consumers. In total, 50% of respondents thought that abolishing special liability regimes would favour manufacturers (but 38% thought the impact of doing so would be neutral). Similarly, 26% thought that introduction of a common and sole system of liability would benefit consumers, but again 49% thought the effect would be neutral.

The effect of the reforms and suggestions for further reforms

In general, very few respondents took the opportunity to make suggestions about the effect of the reforms or suggestions about further reform. One manufacturer complained that there was a general presumption (including underlying survey) that plaintiffs had valid

claims which were directed at the correct defendant whereas its experience was to the contrary.

One insurer thought that any reforms should take into consideration the different types of products in terms of usage (consumables or durables), value (small or large) and typical users (industrial, commercial, household, medical etc).

One response from Japan said that effective reform would require the introduction of punitive damages, a system for legally shifting the burden of proof and allow the recovery of attorney's fees from the losing defendant.

Another manufacturer suggested that caps on damages were needed and security for costs should be required to prevent frivolous suits.

One manufacturer noted that they were experiencing very different court outcomes in relation to the same product in Asian jurisdictions and thought a common approach to liability would make the outcome more "pre-visible."

Conclusion

The Clayton Utz survey establishes a benchmark for claims in the region 15 years after the reform process had begun, long enough one would have thought for trends to have become apparent.

The Clayton Utz survey confirms what some have suspected through anecdotal observation and comment. That is, there has been no large or widespread increase in claims throughout the Asia-Pacific region. Indeed, the increase is modest and is reported to be between 0-20% with the overwhelming majority of respondents reporting that they have no claims. Rather than the reforms, increased awareness of consumer rights and the media were identified as being more important factors behind the increase in claims.

Product liability reform internationally has typically been preceded internationally by statements from governments and consumer groups as to the need for reform versus concerns expressed by industry groups and manufacturers as to a possible flood of claims, replicating the US experience. This concern is yet to materialize. Indeed, underlying many of the responses is the extent to which the reforms have come to be accepted as a part of the legal systems in the region. There was no call for a roll-back of the reforms, although concerns were expressed about some aspects of product liability risk.

Manufacturers doing business throughout the region can be content that the product liability risks they face are measured. However, as some manufacturers are facing claims and some jurisdictions such as Australia, China and Japan are perceived to be more litigious than others, the possibility of claims cannot be ignored. The possibility also exists for further reforms throughout the region and increased consumer awareness of the potential to bring claims.

Postscript: Survey Design, Sample and Response Rate

The Clayton Utz Asia-Pacific survey could be answered either online or by hard copy. In total approximately 4,800 hard copy surveys were distributed to manufacturers, insurers/brokers and lawyers internationally.

In total, 143 responses were received to the survey, with 47 being detailed responses. The response rate at 3%, while perhaps to be expected, was numerically relatively small. The overwhelming majority of the respondents (96) chose to answer the two questions only. The 47 participants who answered the survey in detail, comprised 25 manufacturers, 15 lawyers and seven insurers/brokers. The calibre of the respondents—comprising leading international insurance companies and brokers and major multinational manufacturers across a broad range of industries—suggests that the results should provide a good indication of product liability exposure generally and in different industries.

The majority of responses were received from Australia, the United States and Europe from companies that do business in the region. The remainder were received from companies based in Asia (mainly from Singapore but also China, Japan and Korea). Respondents generally also reported that they did business throughout the region in either all or almost all countries. The manufacturers which responded are members of a broad range of industries producing computers, food/beverages, chemicals, toys, household appliances, pharmaceuticals and medical devices, plastics, cosmetics, general electronics, aviation, clothing, telecommunications, sporting goods, furniture, automotive, tobacco and tools.

A pilot survey conducted by Clayton Utz to identify any problems, for example, with the survey's design, indicated that a low response rate might be expected because companies, insurers and lawyers thought that they did not have the requisite experience to answer the survey as the reforms may not have had widespread impact throughout the Asia-Pacific region. To increase the response rate, respondents sent the survey by email were given the opportunity to either answer the survey in detail or to answer two simple questions, that is, whether they had no product liability claims or had experienced no increase in claims.

By including the two questions, it was hoped to increase the number of respondents who otherwise might not complete the Clayton Utz survey, thinking that they had nothing to contribute and thereby biasing the results towards respondents reporting claims or an increase in claims. The results showed that the number of respondents answering the two questions (96) was more than double the number of respondents who completed the survey in detail.

