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The International Comparative Legal Guide to:
Product Liability 2011

A practical cross-border insight into product liability work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

15 general chapters. These are designed to provide readers with a comprehensive overview of key product liability issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 31 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Ian Dodds-Smith of Arnold & Porter (UK) LLP and Michael Spencer QC of Crown Office Chambers, for all their assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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Chapter 17

Australia

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1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

Australia's product liability laws are a mixture of the common law and various Federal and State statutes.

A person who claims to have been injured or who has otherwise suffered loss or damage may commence an action for compensation on the following bases:

- the common law tort of negligence which is fault-based;
- contract; and
- breach of provisions of the Federal Trade Practices Act 1974 ("**TPA**") and the new Australian Consumer Law ("**ACL**"). The ACL is a new law which came into effect on 1 January 2011 and which replaces the TPA provisions relating to product liability and produce safety from that date. The TPA and ACL impose statutory obligations including a strict liability regime for defective/unsafe products and statutory warranties/guarantees imposed on manufacturers. Almost identical provisions exist under various State fair trading legislation.

Typically, product liability claims for damage to persons will involve causes of action based on negligence and breaches of various provisions of the TPA/ACL.

1.2 Does the state operate any schemes of compensation for particular products?

No formal schemes for particular products exist, except for asbestos-related claims. In New South Wales, the Dust Diseases Tribunal has exclusive jurisdiction to determine "dust diseases" claims. Similarly in South Australia the District Court has exclusive jurisdiction to hear such matters.

There are also state-based schemes requiring compulsory insurance in respect of motor vehicle accidents. As a result, personal injury claims arising from motor vehicle accidents have, to date, generally been brought under these statutory schemes, as opposed to being brought against motor vehicle manufacturers.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Liability for fault or defect depends upon the particular facts and cause of action relied upon.

Negligence

It is generally accepted that the manufacturer of goods owes a duty of care to the purchaser and user to safeguard them against the foreseeable risks of injury when using the product as intended.

Retailers, importers and distributors are not expected to test or inspect products which the manufacturer delivers in sealed containers which would not normally be opened until they reach the ultimate consumer. However, in these circumstances, the retailer still has a duty to guard against those dangers known to it or which it has reasonable grounds to expect.

To the extent that any party in the supply chain adds to or modifies a product including packaging and labelling, that party will also owe a common law duty to the purchaser and user in respect of those changes.

Contract

Parties are free to enter into contracts on terms agreed between them, subject to terms implied into the contract by common law or statute.

Part V Division 2 of the TPA and sale of goods legislation in each state and territory require certain implied terms to be incorporated in contracts for the supply of goods to a person – whether that contract be written or oral. These include warranties that the goods are:

- of merchantable quality; and
- fit for the purpose for which they are supplied.

Contractual remedies are only available to parties to the contract. Since, in most circumstances, it is the retailer that will have a contractual relationship with the purchaser, the retailer will bear the liability for any defect or fault in accordance with the express and implied terms of the contract of sale. However this does not prevent a retailer from consequently seeking contractual remedies from other parties.

Statutory Warranties and Guarantees

Under Part V Division 2A of the TPA and Part 3-2 of the ACL, manufacturers are liable directly to consumers for:

- goods which do not correspond with their description;
- goods of unmerchantable (TPA) or unacceptable (ACL) quality;
- goods which do not conform to sample;
- goods unfit for a stated purpose; and

- non-compliance with express warranties.

Thus, privity of contract is no barrier to relief.

The operation of these statutory warranties and guarantees is restricted to claims of consumers who have suffered loss or damage as a result of their use or consumption of *consumer goods*. These are goods that are ordinarily acquired for personal, domestic or household use or consumption.

Under the TPA and ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if *their safety is not such as persons generally are entitled to expect*.

The definition of "manufacturer" under these provisions of the TPA and ACL is extremely broad and potentially includes anyone in the supply chain.

1.4 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

Under the common law, manufacturers and suppliers of products owe a continuing duty to purchasers and foreseeable users to take reasonable care to prevent a product from causing harm, including after the product is sold. Failure to recall a product which may cause harm may amount to negligence and give rise to the obligation to pay compensation to persons suffering injury, loss and damage as a result.

The issues that will be considered in deciding whether recall action is necessary include the:

- magnitude of the potential harm involved;
- probability of such harm occurring;
- availability and effectiveness of alternative remedial action; and
- degree of knowledge in potential users of the potential harm.

In addition, the product safety provisions of Part 3-3 of the ACL contain a stringent regime for the compulsory recall of goods which:

- do not comply with a prescribed safety standard;
- have been declared to be unsafe goods or permanently banned; or
- will or may cause injury to any person.

1.5 Do criminal sanctions apply to the supply of defective products?

Yes. Certain conduct by corporations and their officers may be subject to criminal sanctions under federal or state legislation.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

In negligence, contract and under some of the provisions of the TPA/ACL, the claimant has the burden of proving that the product was defective.

The statutory warranty/guarantee and the defective/unsafe product causes of action under the TPA/ACL are often referred to as "strict liability" provisions. In the former, a claimant need not prove fault but nonetheless must establish, on balance that the subject goods are not fit for purpose or are not merchantable in the circumstances. In the latter, a claimant needs to prove that the subject goods are not as safe as persons are generally entitled to expect.

At common law, in contract and in other actions based on the provisions of the TPA/ACL, the claimant must establish:

- that loss or damage has been suffered;
- that the relevant conduct is either in breach of a common law duty, in breach of the contract or contravenes one of the provisions of the TPA; and
- that the loss or damage was caused by the defendant's conduct.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

The test for causation depends upon the cause of action relied upon.

Prior to the Tort Reform Process in 2002, the position at common law was that causation was a question of fact to be decided according to evidence before the court. Australian courts applied a "common sense" test to determine the question of causation.

Following the Tort Reform Process, while the test varies between jurisdictions, there are basically two requirements:

- first, that the negligence was a necessary condition of the occurrence of the harm (referred to as "factual causation"); and
- second, that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (referred to as "the scope of liability").

There is, however, an allowance for determining in an "exceptional" case, whether negligence that cannot be established as a necessary condition of the occurrence of harm should nonetheless be accepted as establishing factual causation.

Australian courts have not embraced the view that a plaintiff proves causation or reverses the onus of proof in relation to causation by demonstrating that the exposure they were subjected to simply increased the probability of their injury occurring.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

Under the common law the claimant must establish the identity of the manufacturer that was responsible for the relevant defect. The sole exception to this is where a claimant is able to rely on the maxim *res ipsa loquitur* (when the negligence speaks for itself) when they cannot provide evidence as to why or how the occurrence took place. Under this doctrine a rebuttable inference of negligence may be drawn against the defendant by the mere fact that it would not have happened without negligence.

Conversely the TPA/ACL contains deeming provisions that assist claimants in circumstances where it is not clear who actually manufactured the defective product.

Under the TPA/ACL the definition of "manufacturer" is very broad and can potentially include anyone in the supply chain, particularly when the actual manufacturer is outside Australia.

In relation to the defective/unsafe product cause of action, a claimant is entitled to make a written request to the supplier for information about the manufacturer. If, after 30 days, neither the claimant nor the supplier knows the identity of the manufacturer, the supplier is deemed to be the manufacturer.

Whilst no generally established system of market-share liability exists in Australia, as a result of the Tort Reform Process, most jurisdictions

have introduced proportionate liability for co-defendants in respect of non-personal injury claims for economic loss or property damage, or claims for misleading or deceptive conduct brought pursuant to state fair trading legislation. In such cases, each co-defendant will only be liable to the extent of its responsibility.

In personal injury claims defendants may still rely on a statutory right to seek contribution from any or all other parties that would have been held liable for the same damage had they been a party to the proceedings.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

The common law of negligence imposes a duty of care on the manufacturer of a product to take reasonable steps to ensure that ultimate users of that product are given adequate warnings of foreseeable risks associated with its use to enable users to adjust their use of the product so as to avoid or minimise danger or to make an informed decision about whether or not to use the product.

A failure to warn may also found a claim that a product is defective/unsafe or unfit/unmerchantable/unacceptable quality under the TPA/ACL. In deciding whether the product is defective or unfit/unmerchantable/unacceptable quality, the court may look at all relevant circumstances including any warnings and the marketing strategy adopted by the manufacturer or supplier to determine whether they placed the user in a position to properly understand the risks associated with the product.

There is yet to be a decision by an Australian court on the learned intermediary doctrine. However for medical products which may only be accessed through a doctor, the doctrine is consistent with Australian law which acknowledges the importance of the relationship between doctor and patient in the provision of warnings about medical treatment.

Following the Tort Reform Process, in some jurisdictions, evidence from plaintiffs as to what they would have done had there been a warning about a risk of injury is now inadmissible in negligence cases except to the extent that it is evidence against the plaintiffs' interest.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Limitation periods apply to all causes of action pleaded in product liability litigation. Details of limitation defences are set out in question 5.2 below.

Negligence

The following defences may be available to a claim in negligence:

- *volenti non fit injuria* (voluntary assumption of risk);
- contributory negligence; and
- the learned intermediary defence.

Voluntary assumption of risk is a deliberate decision by the plaintiff to assume the risk of injury, loss or damage. To establish the defence of *volenti*, the defendant must show that the plaintiff not only perceived the existence of the danger, but also fully appreciated it and voluntarily accepted the risk. This defence is difficult to establish, but is a complete answer to any claim.

Contributory negligence may be relied on where the plaintiff's conduct fails to meet the standard of care required for his or her own protection and safety and is a contributing cause in bringing about his or her injury. Damages are apportioned by the court in accordance with each party's degree of fault. In certain jurisdictions, contributory negligence can be a complete defence to an action if the court thinks this just and equitable in the circumstances.

There is no express authority in Australia for a learned intermediary defence, although there is no reason why the defence cannot be accommodated within existing common law principles.

The Tort Reform Process has created new statutory defences to an action for negligence, although these differ from jurisdiction to jurisdiction.

For example, the following have been introduced as complete defences in New South Wales:

- where the harm was suffered as a result of the materialisation of an inherent risk, which is defined as the risk of something occurring that cannot be avoided by the exercise of reasonable care and skill;
- where the harm was suffered as a result of the materialisation of an obvious risk associated with a dangerous recreational activity. An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff and includes risks that are patent or a matter of common knowledge;
- where a professional defendant acted in a manner that, at the time the relevant service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice (unless the court considers such opinion to be irrational);
- where the defendant is a good Samaritan or volunteer and has exercised reasonable skill and care under the circumstances; and
- in certain cases where the defendant is a public or other authority.

Part VA Trade Practices Act and Part 3-5 Australian Consumer Law

There are a number of specific defences to an action brought that goods are defective or unsafe:

- the defect alleged did not exist when the goods were supplied by the manufacturer;
- the goods were defective only because there was compliance with a mandatory standard (see further question 3.3);
- 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 (the so-called 'development risk defence') (see further question 3.2); or
- in the case of the manufacturer of a component 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.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

If a product is found to be defective or unsafe under the TPA/ACL, the manufacturer or supplier can argue what is commonly referred to as the "state of the art defence" or "development risk defence". The manufacturer or supplier must establish that the state of scientific or technical knowledge at the time when the product was supplied by its actual manufacturer was not such as to enable the defect to be discovered.

Under the statutory warranty/guarantee provisions of the TPA/ACL, the issue would be whether the product was fit for the purpose for which it was intended, giving consideration to any description applied to the goods by the corporation, the price received by the corporation for the goods, and all the other circumstances.

In negligence, the claimant must establish that the manufacturer failed to exercise reasonable care. The state of scientific and technical knowledge is often pertinent to this issue and forms the basis of the manufacturer's defence.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Under the defective/unsafe cause of action provisions of the TPA/ACL, it is a defence that the goods had the defect only because there was compliance with a mandatory standard. A mandatory standard is a standard for the goods or anything relating to the goods which, under law, must be complied with when goods are supplied, and which carries a penalty for non-compliance. A standard which simply requires a minimum standard to be achieved is not a mandatory standard.

In an action for negligence and under the statutory warranty/guarantee provisions of the TPA/ACL, compliance with regulations or standards is a relevant factor in determining whether goods are as fit for the purpose(s) for which goods of that kind are commonly bought as is reasonable to expect.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Claimants may re-litigate these issues. This is not possible in cases where the issue has already been determined in a representative proceeding (class action) in the Federal Court of Australia where the claimant is bound by a ruling made in that class action by virtue of their failure to "opt out" of the proceeding. There are also special rules in dust disease cases litigated in the New South Wales Dust Diseases Tribunal.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Yes. Defendants are permitted to rely on a statutory right to contribution from other concurrent tortfeasors (whether joint or several). Alternatively defendants may seek to rely on a contractual right of indemnity. These remedies may be pursued either in the same or subsequent proceedings. If subsequent proceedings are required, time limits do apply. These differ between jurisdictions and depend on the cause of action.

Following the Tort Reform Process, all Australian state and territory jurisdictions enacted a statutory regime of proportionate liability for non-personal injury claims for damages. The liability of a defendant who is a concurrent wrongdoer is now limited to an amount reflecting the proportion of the damage the court considers just having regard to the extent of that defendant's responsibility.

Certain state jurisdictions allow parties to expressly contract out of the proportionate liability scheme.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

Under the common law and certain legislation, if the defendant can demonstrate the plaintiff contributed to the damage by failing to take reasonable care, damages will be apportioned by reference to the plaintiff's share in the responsibility for that damage. The regime expressly covers personal injury and loss of life.

4 Procedure

4.1 In the case of court proceedings is the trial by a judge or a jury?

Product liability litigation may be brought in either the Federal Court of Australia or the State Supreme Courts. Civil proceedings in Australia are generally heard by a judge sitting without a jury. However, there are provisions in the various court rules for some matters to be heard by jury.

As a matter of practice, juries are usually not available in matters before the Federal Court. However, juries are not uncommon in the State of Victoria.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

Courts in several jurisdictions may appoint a "court expert" to inquire and report on a question of fact arising in a matter before the court or an "expert assistant" to assist the court on any issue of fact or opinion identified by the court (other than an issue involving a question of law) in the proceeding, should the need arise.

An expert is generally accepted to be a person who has specialised knowledge about matters relevant to the question based on that person's training, study or experience.

The role of court experts or expert assistants is advisory in nature and does not extend to sitting with the judge and assessing evidence presented by the parties.

In most jurisdictions the parties are joint and severally liable for payment of the expert's fees.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

There is a detailed class action procedure in the Federal Court of Australia and the Supreme Court of Victoria. There are also representative action procedures in other state jurisdictions. An action can only be commenced in the Federal Court where it attracts federal jurisdiction, for example, if it involves a claim under the TPA or ACL under federal legislation.

Class actions have involved products including weight loss drugs, heart pacemakers, aircraft fuel, gas, water, tobacco and a variety of food stuffs ranging from oysters to peanut butter. Australia is now the most likely jurisdiction outside North America where a corporation will face a class action.

The Federal and Victorian legislation provides for the commencement of a class action where seven or more persons have a claim against the same person and the claims are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial common issue of law or fact.

If these threshold requirements are met, any of those persons may commence an action on behalf of the group. There is no certification process as occurs in the United States. The representative plaintiff must describe the group but need not identify, name, or specify the number of group members. With limited exceptions, a person's consent to be a group member is not required.

Once proceedings have been commenced, the court will fix a date by which a group member may opt out by written notice to the court, and will give directions regarding the procedure for notifying potential group members of the existence of the proceedings. Unless a person actively opts out of the proceedings, they will continue to be a part of the action and be bound by its outcome.

In order to protect absent group members, the action may not be settled or discontinued without the approval of the court. Similarly, the representative plaintiff may only withdraw from the proceedings or settle his or her individual claim with the leave of the court.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

Yes. The TPA expressly provides for the institution of proceedings by the Australian Competition and Consumer Commission ("ACCC") on behalf of those who have suffered or are likely to suffer loss as a result of contraventions of the TPA, including certain provisions of Parts V and VA. Under these provisions the ACCC requires the prior written consent of the persons on whose behalf the application is being made.

Recently the Australian government passed a bill that will prevent the ACCC from pursuing a representative action for personal injury or death under the unfair practice provisions of Part V, Division 1 of the TPA (which includes misleading and deceptive conduct).

4.5 How long does it normally take to get to trial?

Time to trial depends on the particular jurisdiction and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined.

Proceedings in the Federal Court are usually heard faster than those in the state and territory supreme courts, due in part to the Federal Court's case management system whereby each proceeding is allocated to a particular judge who manages the case and usually hears and determines it, and the supreme courts' heavier case load.

There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

In some jurisdictions, the court may try preliminary issues whether of fact or law or mixed fact and law.

Historically, courts have been of the view that trials of preliminary issues should only be granted on special grounds such as whether the preliminary issue will substantially narrow the field of controversy, shorten the trial and/or result in a significant saving in time or money.

Preliminary issues are usually heard and determined by a judge.

4.7 What appeal options are available?

In virtually all jurisdictions there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal.

A party dissatisfied with the decision of a state or territory Court of Appeal or the Full Federal Court may seek leave to appeal to the High Court of Australia, the country's ultimate appellate court. Appeals to the High Court are essentially restricted to questions of law. The High Court will only grant leave to appeal if it is convinced that there is a significant question to be determined.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

See question 4.2. Where the court has appointed an expert in relation to a question arising in the proceedings, the rules provide that the court may limit the number of other experts whose evidence may be adduced on that question, or that a party must obtain leave to adduce such evidence.

Court experts are rarely appointed. However, as a matter of course, parties adduce evidence from appropriate experts.

The nature and extent of expert evidence is subject to the discretion of the court. In a number of jurisdictions, practice notes provide guidance on the number of experts that might be called by any party in a particular area of expertise.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Depositions of the parties and witnesses are not taken before trial. However, the Australian legal system is more onerous in terms of

the obligations imposed on parties to give discovery of documents (see question 4.10).

In some jurisdictions, most notably the Federal Court of Australia, pre-trial directions are made in the ordinary course that witness statements and expert reports be exchanged before hearing and that those statements and reports comprise the evidence in chief of those witnesses.

It is also common for directions to be made requiring the parties to exchange objections to their opponent's statements and reports before trial. Any objections that are not conceded or otherwise addressed are then argued, and ruled upon, before cross-examination of the witnesses at trial.

4.10 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

A party is obliged to discover − that is to identify and allow the other parties to access − all documents in its possession, custody or power which are relevant to a matter in issue in the proceedings. Discovery occurs at the pre-trial stage so that all documents relevant to the case are disclosed by the parties before the hearing commences.

The obligation to give discovery extends to documents which are no longer in the party's possession, custody or power, but which were previously. This may occur where a relevant document has been lost, destroyed or provided to someone else. In such a case, a description of the document must be provided to the other parties.

Documents that are relevant to a case include those documents on which the party relies, documents that adversely affect the party's own case, documents that adversely affect another party's case, documents that support another party's case, and documents that the party is required by a relevant practice direction to disclose.

All discovered documents must be listed, and the parties' lists sworn and exchanged. Parties are entitled to inspect each others' documents and if desired, copy them, save for those in relation to which a claim for privilege has been advanced.

Preliminary discovery before the substantive proceedings assists parties in identifying prospective defendants, to determine whether or not they have a claim or to gain information from third parties where any party to a proceeding reasonably believes that a particular party holds a document which relates to any question in the proceeding.

The obligation to discover all relevant documents continues throughout the proceedings. This means that any document created or found after providing initial discovery must also be discovered.

4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?

Alternative methods of dispute resolution ("ADR") such as mediation, arbitration and conciliation are available in Australia. There is now an emphasis on ADR, particularly mediation, enshrined in various court procedures.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, time limits do exist under common law and statute.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the Court have a discretion to disapply time limits?

Contract and tort

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, resulting from a profusion of specialist legislation and court decisions, although the Tort Reform Process has resulted in more uniformity in relation to the limitation period applicable to personal injury actions.

In general terms, limitation periods are routinely defined by reference to the nature of the cause of action, including whether the claimant alleges fault-based or strict liability. In most jurisdictions the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff ("the date of discoverability") or twelve years from the date of the alleged act or omission (the "long-stop period"); or
- three years from the date the cause of action accrued.

Limitation periods including those applicable to personal injury claims are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability which impedes them from properly managing their affairs.

Trade Practices Act

Actions brought under Part V Division 2A and Part VA of the TPA must generally be commenced within three years after the time the person becomes aware, or ought reasonably to have become aware, of particular circumstances giving rise to the action. There is also a ten-year period of repose, which requires actions to be commenced within ten years of the supply by the manufacturer of the goods.

Where a claim is brought under these provisions of the TPA for personal injury, the applicable limitation period is the later of the "date of discoverability" or the "long-stop period" as defined above.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Most Australian jurisdictions provide for the postponement of commencement of the limitation period where the plaintiff's right of action or the identity of the person against whom a cause of action lies is fraudulently concealed. The limitation period is deemed to have commenced from the time the fraud was discovered or the time that a plaintiff exercising reasonable diligence would have discovered. Throughout all Australian jurisdictions the courts have various discretionary bases for extending the time period where it is just and reasonable.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

Monetary compensation is available for both pecuniary and non-pecuniary loss. In addition, courts may grant injunctions, including interim injunctions, to restrain breaches or attempted breaches of the restrictive trade practices and consumer protection provisions. The potential breadth of remedies available is illustrated by section

87 of the TPA where a court has power to make such orders as it thinks appropriate against a person who was involved in the contravention of the consumer protection provisions of the TPA.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Common law

The following damages are available for claims of bodily injury:

- general damages, including pain and suffering, loss of amenities and loss of expectation of life; and
- special damages, including loss of wages (both past and future), medical and hospital expenses and the like.

The Tort Reform Process has resulted in caps, thresholds and other limitations being placed on the amount of such damages that can be recovered.

Damages are assessed on a once and for all basis.

Damages are also recoverable for mental damage provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for "pure economic loss" but the nature and extent of such damages is extremely complex.

Part VA of the Trade Practices Act

Under Part VA of the TPA, damages are recoverable for losses suffered as a result of personal injuries, including medical expenses (subject to similar caps, thresholds and other limitations imposed on common law damages following the Tort Reform Process). A person other than an injured party may also claim compensation where that person suffers loss as a result of the other person's injury or death, for losses relating to personal, domestic or household goods other than the defective goods, and losses relating to private land, buildings and fixtures.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

As a general rule, damages for the costs of medical monitoring in the absence of any established injury or loss are not recoverable.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

Exemplary, punitive or aggravated damages can be awarded by the courts, although not in relation to claims brought under the TPA and, in some jurisdictions (as a result of the Tort Reform Process) not in negligence actions seeking damages for personal injury.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

Generally no. However, the Tort Reform Process has resulted in caps, thresholds and other limitations being placed on the amount of damages a personal injury claimant can recover.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

Court approval is required for the settlement of representative proceedings in Australia and is also required for claims brought by infants or people suffering from a legal disability. Under section 33V of the Federal Court Act, a representative proceeding may not be settled or discontinued without the approval of the Court. If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

Yes, government authorities can reclaim these amounts. A claimant is required to refund that part of the damages awarded or settlements paid, which have previously been awarded to the claimant as part of a social security benefit payment. This is to prevent "double dipping". The damages awarded or settlements paid are withheld from the claimant by the defendant until such time that repayment to the relevant government authority has been resolved.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

The unsuccessful party usually pays the costs of the successful party. These costs include, not only court filing fees, copying charges and other out-of-pocket expenses, but also the lawyer's professional fees. In this context, a reference to costs is not a reference to the total or actual costs incurred by the successful party. Recoverable costs are generally calculated by reference to a court scale, which invariably limits the amounts a successful party can claim for disbursements and services performed by their lawyers.

In some jurisdictions the Tort Reform Process has resulted in further limitations being imposed on the legal costs recoverable in small personal injury claims (although there are exceptions including where the lawyer and client have entered into a costs agreement that provides otherwise).

The common law rule has been significantly modified in the case of representative or class actions. Statutory provisions restrict a costs order being made against class members other than those who actually commenced the proceedings. Where the representative action is successful, a costs order may be made in favour of the class members who commenced the representative proceedings in an amount determined by the court.

7.2 Is public funding e.g. legal aid, available?

Yes, public funding is available.

7.3 If so, are there any restrictions on the availability of public funding?

Legal aid services rigorously apply means and merits tests to determine eligibility for aid. As a general rule, very limited funding is available to assist claimants to bring civil actions, including product liability claims. Funding is available at the federal level for, *inter alia*, consumer protection matters, arising under a Federal statute such as the TPA.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Recently, rules prohibiting lawyers from entering into contingency fee arrangements were relaxed and a variety of arrangements are now sanctioned. These new arrangements allow lawyers and clients to enter into an agreement which provides for the normal fee, or a fee calculated by reference to some pre-determined criteria such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an "uplift fee" where an additional fee may be levied, calculable by reference to the initial fees. All jurisdictions continue to prohibit contingency fee arrangements where the lawyer's fee is calculated by reference to a percentage of the client's verdict.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding of claims is permitted in Australia, subject to the rules set out in question 7.4 above.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in Australia.

The effects of new ACL are now beginning to be felt. Manufacturers and suppliers are coming to terms with the following changes:

(a) the introduction of mandatory reporting where suppliers must report to the appropriate regulator products which have been associated with serious injury or death. This is potentially the most significant change for suppliers, including manufacturers, in terms of post market surveillance requirements and product reporting; and

(b) a broader test for bans and recalls. Previously, the Minister could ban or recall goods which were unsafe because of a defect in the product itself, but it was unclear whether he or she can do so if the threat to consumer safety arises only as a result of consumer misuse. Under the ACL, the threshold test for bans and recalls would cover all goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person. In a country where self-regulation through reportable voluntary recalls has been the norm, this change will force manufacturers and suppliers to give careful consideration to both anticipated consumer use and misuse, including so-called "off-label" use (i.e. use other than for indicated or approved purposes).

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Colin Loveday leads the Clayton Utz product liability group. He is an experienced trial lawyer with particular expertise in the defence of product liability actions involving class actions and multi-plaintiff tort claims and has worked extensively with defence lawyers in other jurisdictions in the coordinated defence of multinational mass tort claims.

Over the past decade, Colin has been intimately involved in the development of Australia's product liability laws and in the majority of class actions and mass tort cases in this area. His defence work includes IUD, pacemakers, diet pills and a variety of prescription products and medical devices. Colin is internationally recognised for his work in the field of drug and device litigation. He has worked extensively with in-house counsel and lawyers in the US and Europe developing international defence strategies and working with international expert witnesses.

Colin also has a special interest advising manufacturing, pharmaceutical and medical device clients on regulatory requirements, clinical trial, labelling and advertising issues, product recalls and hazard alerts and priorities management issues. He practiced as a barrister in New South Wales between 1985 and 1990, when he became a partner at Clayton Utz.

Colin is a member of the International Association of Defense Counsel, the Australian Product Liability Association, the Defense Research Institute and is Chair of the Product Law and Advertising Committee of the International Bar Association.

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Holding a PhD in comparative product liability law, Jocelyn has a significant litigation practice defending and settling product liability suits (including class actions) and regulatory prosecutions. She is also one of Australia's leading regulatory lawyers, particularly in the food and pharmaceutical areas. She has unique experience in relation to product recalls having been centrally involved in some of Australia's largest recalls. Jocelyn is a member of the Product Liability Advisory Counsel.

Jocelyn is also an Adjunct Professor and she is a lecturer in the Consumer Protection - Advertising and Promotion and Consumer Law - Supplier liability in the LLM course at the University of Sydney. She is co-National Rapporteur for Australia and Product Liability for the British Institute of International and Comparative Law.

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