The Product Regulation and Liability Review

Fourth Edition

Editors
Chilton Davis Varner and Bradley W Pratt

The Law Reviews

THE PRODUCT REGULATION AND LIABILITY REVIEW

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Chilton Davis Varner and Bradley W Pratt

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PREFACE

In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. But the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition reflects a few of these trends from 2016. Notably, many jurisdictions saw an increase in both mandatory and voluntary product recalls across various industries. In India, for instance, several global car manufacturers initiated voluntary recalls of vehicles owing to various product defects, such as emissions systems that violated environmental norms. This unprecedented rise in voluntary vehicle recalls spawned legislation known as the Motor Vehicles Amendment Bill, currently pending approval in the Indian Parliament, that would for the first time mandate vehicle recalls under certain conditions. Several jurisdictions also saw a proliferation of class actions in product liability contexts. In July, the Collective Claims Act came into force in Japan, enabling small consumer claims to be aggregated and pursued by 'certified organisations', which are required to disburse to consumers 50 per cent or more of the claims recovered from business operators. This edition also highlights how certain countries' product liability laws have grappled with novel issues in the modern economy, ranging from e-commerce (e.g., the Brazilian Superior Court of Justice's conclusion that internet search providers cannot be held liable for defective products marketed through their websites) to emerging technologies (e.g., Australia's interim ban on self-balancing scooters or 'hoverboards'). Although these changes and trends may be valuable in their own right, they also create a need for greater vigilance on the part of manufacturers, distributors and retailers.

This edition covers 22 countries and territories and includes a high-level overview of each jurisdiction's product liability framework, recent changes and developments, and a look forward at expected trends. Each chapter contains a brief introduction to the country's product liability framework, followed by four main sections: regulatory oversight (describing the country's regulatory authorities or administrative bodies that oversee some aspect of

product liability); causes of action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, discovery, whether mass tort actions or class actions are available and what damages may be expected); and the year in review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements and any notable trends).

Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that may affect your business.

We wish to thank all of the contributors who have been so generous with their time and expertise. They have made this publication possible. We also wish to thank our colleagues Madison Kitchens and Jordan Raymond, who have been invaluable in assisting us in our editorial duties.

Chilton Davis Varner and Bradley W Pratt
King & Spalding and The Pratt Law Firm
United States
March 2017

Chapter 2

AUSTRALIA

Colin Loveday and Sheena McKie[1]

I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK

Australia's product liability laws are a mixture of the common law and legislation.

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

a the common law tort of negligence;
b contract; and
c breach of a number of consumer protection legislative provisions, the main one being the Australian Consumer Law (ACL).

The ACL is a federal (also known as Commonwealth) law that came into effect on 1 January 2011. It applies to transactions occurring on or after that date. The ACL replaces a collection of federal and state consumer protection legislation with a single law that applies in all jurisdictions. The ACL is found in Schedule 2 to the Competition and Consumer Act 2010 (Cth) (CCA), which until 2011 was the Trade Practices Act 1974 (TPA). The consumer protection regime formerly found in the TPA has been transferred to the ACL and, in doing so, has been substantially modified.

The ACL imposes statutory obligations including a strict liability regime for products that are said to have a 'safety defect' and statutory guarantees imposed on suppliers and manufacturers. State fair trading legislation exists to provide for the application of the ACL in each of the states and territories, as well as covering some additional areas such as industry-specific regulation.

Typically, product liability claims for damage to persons will involve multiple causes of action variously based on negligence and breaches of numerous provisions of the ACL.

II REGULATORY OVERSIGHT

In broad terms, there are three federal regulatory authorities in Australia that oversee areas relevant to product liability issues affecting consumers.

The Australian Competition and Consumer Commission (ACCC) has a number of important investigation and enforcement powers under the ACL. Relevantly, the ACCC is empowered to institute proceedings in relation to certain provisions of Parts 3-5 (defective

1 Colin Loveday is a partner and Sheena McKie is a senior associate at Clayton Utz. Colin Loveday wishes to acknowledge the considerable contribution of Larissa Cook in preparing previous editions of this chapter and to thank her for her assistance.

goods actions) and 5-4 (remedies relating to guarantees), either in its own right or on behalf of those who have suffered or are likely to suffer loss as a result of contraventions of the ACL. The ACCC is also responsible for overseeing product recalls and the mandatory reporting of deaths, serious injuries or illnesses associated with consumer goods (and has published extensive guidelines addressing both of those requirements). The penalty for non-compliance with either is substantial.

The ACL requires that a person taking action to recall consumer goods must notify the Minister (practically achieved by notifying the ACCC) within two days of taking that action. In practice, however, the ACCC (and any applicable industry-specific or state-based regulator) will expect to be engaged at an early juncture before steps to recall goods (including advertising a recall) have been taken. Unless the ACCC is properly notified and satisfied with the strategy adopted by the manufacturer or distributor, it takes a very proactive role in managing product recalls.

In addition, the mandatory reporting requirement mentioned above requires a supplier to notify the Minister (usually via an online form) within two days of becoming aware of any death, serious injury or serious illness (as defined in the legislation) associated with or thought to be caused by use or foreseeable misuse of a consumer good.

The Therapeutic Goods Administration (TGA) is Australia's regulatory agency for therapeutic goods including medicines, medical devices, blood and blood products. The TGA administers the Therapeutic Goods Act 1989 (Cth), and regulates therapeutic goods through: pre-market assessment; post-market monitoring and enforcement of standards; licensing of Australian manufacturers; and verifying overseas manufacturers' compliance with the same standards as their Australian counterparts.

The Australian Securities and Investments Commission (ASIC) oversees Australian corporations and financial markets. In particular, ASIC regulates the provision of consumer credit, financial products and financial services; however, this chapter will focus on product liability for non-financial consumer products.

In addition to the above, there are a number of state-based regulators with responsibility for administration of industry-specific regulation, for example. food or consumer electrical goods.

III CAUSES OF ACTION

There is a range of potential causes of action under which manufacturers, distributors or sellers can be held liable for injury to consumers.

i Forum

It is well 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 that the manufacturer delivers in sealed containers that 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 that 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.

ii 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.

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 in the supply chain with which it has a contractual relationship.

The importance of contract as a cause of action in product liability claims has diminished in recent times as a result of the growth of the statutory causes of action. Since 1978, consumer protection provisions have existed to allow for claims where there was no privity of contract, which are now included in the ACL. The ACL has also affected the relationship between contract and product liability by introducing provisions that render void any unfair term in a standard form contract. It also creates 'statutory guarantees' that exist independently of any contract of supply (see below).

iii Statutory warranties and guarantees

Under Part 3-2 of the ACL, manufacturers are liable directly to consumers for:

a goods that do not correspond with their description;
b goods of unacceptable quality;
c goods that do not conform to sample;
d goods unfit for a stated purpose; and
e non-compliance with express warranties.

Privity of contract is no barrier to relief.

The operation of these statutory warranties and guarantees applies to the supply of goods, in trade or commerce, to a 'consumer'. This includes where the amount paid or payable for goods did not exceed A$40,000 (or greater amount as prescribed by regulations), or the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or the goods were a vehicle or trailer acquired for use principally in the transport of goods on public roads. However, a person does not acquire goods 'as a consumer' if the person acquired (or purported to acquire) the goods for the purposes of resupply or for the purpose of using them up or transforming them in trade or commerce (either in production or manufacturer or in repairing or treating other goods or fixtures on land).

Under the 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 the ACL is extremely broad and potentially includes anyone in the supply chain.

Following the Federal Court decision in *Courtney v. Medtel Pty Ltd*, a consumer product may sometimes be considered defective if it is subject to a higher-than-expected risk of premature failure or risk. This means that manufacturers may be liable where the product does not demonstrate any signs of failure, but where the manufacturer has indicated, often by taking product recall action, that the product may have a future or potential risk of failure.

Certain conduct in relation to the supply of defective products by corporations and their officers may be subject to criminal sanctions under the ACL.

iv Statutory causes of action for financial services

The providers of financial services products are subject to strict regulations. In the event that those providers act inappropriately in providing financial advice to their clients or selling them inappropriate products, those clients may have several statutory causes of action against the provider.

Most of the causes of action and the available remedies are contained in Chapter 7 of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2002 (Cth). In general, a person is prohibited from:

a making a false statement which is likely to cause a person to apply for or acquire;
b inducing another person to deal in financial products by making a misleading statement;
c engaging in dishonest conduct while carrying on a financial services business; and
d engaging in unconscionable conduct (which would include taking unfair advantage of a customer's inferior knowledge about a product or service).

If a provider breaches any of those prohibitions, and that breach results in a customer suffering a loss, the customer may recover that loss in damages. In addition, if a term of a contract between a provider and customer is unfair to the customer, he or she can apply to have that term declared void.

v Product recalls

At 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 that 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:

a the magnitude of the potential harm involved;
b the probability of such harm occurring;
c the availability and effectiveness of alternative remedial action; and
d the degree of knowledge of the potential harm.

The ACL does not require a supplier of consumer goods to obtain the ACCC's approval before a voluntary recall can be initiated. However, if the recall action is being taken because the consumer goods (or a reasonably foreseeable use or misuse) will or may cause injury to any person, the goods do not comply with a prescribed safety standard, or the goods are subject to an interim or permanent ban, the supplier must notify the ACCC of the recall action within two days of that action being taken. As a matter of practice, the ACCC (and any other industry-specific regulator) is often proactive in discussing with suppliers the structure and implementation (including advertisement) of a recall action.

In addition, the product safety provisions of Part 3-3 of the ACL contain a regime for the compulsory recall of consumer goods including where it appears to the responsible Minister that one or more suppliers of such goods have not taken satisfactory action to prevent the goods causing injury to any person.

IV LITIGATION

i Forum

Product liability litigation is usually commenced in either the Federal Court of Australia or the Supreme Court of the relevant state or territory. 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.

ii Burden of proof

The claimant bears the burden of proof, requiring it to prove all facts essential to its claim. In civil cases, the required standard of proof is the 'balance of probabilities' (i.e., that the claim is more probable than not). The defendant bears the onus of establishing any affirmative defence, and must also prove this on the balance of probabilities.

In negligence, contract and under some of the provisions of the ACL, the claimant has the burden of proving that the product was defective. 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 the outcome could not have happened without negligence.

The statutory consumer guarantees and the defective product causes of action under the ACL are often referred to as 'strict liability' provisions. In claims for breach of a consumer guarantee, a claimant need not prove fault, but nonetheless must establish, on balance that, for example, the subject goods are not fit for purpose or are not of acceptable quality in the circumstances. For a defective goods action, a claimant needs to prove that the subject goods have a safety defect (i.e., that they are not as safe as persons are generally entitled to expect (having regard to all relevant circumstances)).

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

a that loss or damage has been suffered;

b that the relevant conduct is either in breach of a common law duty, in breach of contract or contravenes one of the provisions of the ACL; and

c that the loss or damage was caused by the defendant's conduct.

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

Prior to reforms to the law of negligence that occurred in 2002 (the Tort Reform Process), 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 two principal requirements for causation in negligence:

a first, that the negligence was a necessary condition of the occurrence of the harm (referred to as 'factual causation'); and

b 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 (in Victoria, an 'appropriate' case) whether negligence that cannot be established as a necessary condition of the occurrence of harm should nonetheless be accepted as establishing factual causation.

Defective goods actions under Part 3-5 of the ACL may arise where a person has suffered loss or damage because of a safety defect. A person may be able to recover damages for loss or damage suffered where it is reasonably foreseeable that a consumer would suffer such loss or damage as a result of the failure to comply with a consumer guarantee.[2]

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

In cases where there are two or more possible causes of the damage suffered, the High Court of Australia in *Amaca Pty Ltd v. Ellis* held that a claimant must establish that the relevant product that is the subject of the claim more probably than not was a cause of the damage suffered. Proving that it was merely a possible cause is not enough.

iii Defences

Negligence

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

a *volenti non fit injuria* (voluntary assumption of risk);
b contributory negligence; and
c 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 it is just and equitable in the circumstances.

There is no express authority in Australia for a learned intermediary defence. However, for medical products that 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. It will be important for a manufacturer to establish that it provided appropriate information and warnings to those learned intermediaries.

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:

2 Part 5-4 of the ACL.

a 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; and
b 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.

Part 3-5 of the ACL

There are a number of specific defences to an action based on a claim that goods have a safety defect:
a the defect alleged did not exist when the goods were supplied by the manufacturer;
b the goods were defective only because there was compliance with a mandatory standard (discussed further below);
c 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 (discussed further below); or
d 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.

'State-of-the-art' or 'development risk' defence

If a product is found to have a safety defect under the 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 guarantee provisions of the 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.

Compliance with regulatory or statutory requirements

Under the defective goods action provisions of the 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 that, under law, must be complied with when goods are supplied, and which carries a penalty for non-compliance. A standard that simply requires a minimum standard to be achieved is not a mandatory standard.

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

Statutes of limitation

Time limitations on issuing proceedings exist under common law and statute. Since limitation statutes are largely state-based (noting that the ACL also has its own applicable limitations periods), this is an area of complexity given the myriad of different statutory provisions that might apply.

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 concealed. In those circumstances the limitation period is deemed to have commenced from the time the cause of action or defendant was discovered or the time that it would have been discovered by a plaintiff exercising reasonable diligence. Throughout all Australian jurisdictions, the courts have various discretionary bases for extending the time period where it is just and reasonable to do so.

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 some states limitation periods run from when a plaintiff's cause of action first accrues, which is when compensable injury has first been suffered. Other states employ a discovery rule.

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:

a the earlier of three years from the date the cause of action is discoverable by the plaintiff ('the date of discoverability') or 12 years from the date of the alleged act or omission (the 'long-stop period'); or

b 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 that impedes them from properly managing their affairs.

ACL

Defective goods actions brought under Part 3-5 of the ACL 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 10-year period of repose, which requires actions to be commenced within 10 years of the supply of the goods by the manufacturer.

An action for non-compliance with a consumer guarantee[3] must be commenced within three years after the time the person becomes aware, or ought reasonably to have become aware, that the guarantee had not been complied with.

3 Part 5-4 of the ACL.

For personal injury claims that relate to Parts 2-2, 3-3, 3-4, 3-5 or Division 2 of Part 5-4 of the ACL, the applicable limitation period is the later of the 'date of discoverability' or the 'long-stop period' as defined above.[4]

iv Personal jurisdiction

Whether an Australian court has jurisdiction in a product liability matter depends on whether the defendant can be validly served with initiating process. The court rules in most major Australian jurisdictions permit service outside Australia if the plaintiff has suffered some disadvantage or detriment in Australia as a result of the tort or breach of the ACL.

Ordinarily, a foreign defendant submits to the Australian jurisdiction, enters an appearance as a defendant to proceedings, or agrees with a plaintiff that it will so submit to the jurisdiction. If a foreign defendant refuses to submit to the jurisdiction, there may be a dispute about the proper forum for hearing of a claim.

The choice of law rules dictate that the appropriate law for a tortious action is, generally speaking, the *lex loci delicti* (law of the place where the wrong occurred). Where a product liability claim is made against a foreign manufacturer and the allegation is that the manufacture or design was negligent, the location of the manufacture or design is the place where the tort was committed. However, where the negligence alleged is a failure to warn an Australian claimant, the cause of action arises in Australia (where it is alleged the warning ought to have been given or was inadequately given).

The ACL regulates the conduct of corporations, including foreign corporations carrying on business in Australia, and individuals.

The term 'manufacturer' is defined broadly under the ACL to include both the actual manufacturer, as well as certain entities that are 'deemed' manufacturers for the purposes of the ACL. For example, where the actual manufacturer does not have a place of business in Australia, the importer is deemed to be a manufacturer of the goods. Similarly, if goods are imported into Australia 'on behalf of' a person, that person is taken to have imported the goods into Australia under the ACL. Thus, a local importer of overseas manufactured goods may, in some cases, be exposed to liability under the ACL.

v Expert witnesses

As a matter of course in Australian litigation, parties adduce evidence from appropriate expert witnesses who give evidence concerning specialised areas of knowledge arising from their training, study or experience. The nature and extent of expert evidence, including the number of experts that might be called by any party in a particular area of expertise, is subject to the discretion of the court. In many jurisdictions, practice notes provide guidance on the way in which experts may be engaged and the content of their expert reports. Most recently, in October 2016, a new Expert Witness Practice Note was issued by the Federal Court.

The courts may also require the experts instructed by opposing parties to meet and sometimes to prepare a joint report before giving evidence in court, to narrow the issues in dispute.

An expert who is to give evidence as a witness in litigation has an overriding duty to assist the court impartially, and not to be an advocate for a party.

4 Section 87F of the CCA and Part VIB of the CCA, more generally.

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; however, court experts are rarely appointed and it is more common for the parties to adduce expert evidence from their retained independent experts.

vi Discovery

The procedural rules relating to documentary discovery vary considerably from court to court and have undergone numerous changes in recent times. All these changes (usually in the form of practice directions) have been intended to streamline the process. In product liability litigation, documentary discovery continues to be a very onerous process for defendants. In some courts there is a rule (either formal or in practice) that discovery only be given after lay and expert witness statements have been exchanged, to reduce the burden of discovery.

In general terms, 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 that are relevant to a matter in issue in the proceedings. Discovery occurs at the pretrial 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 that are no longer in the party's possession, custody or power, but that 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.

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.

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, the parties' lists verified by affidavit and exchanged. Parties are entitled to inspect each other's documents and, if desired, copy them, save for those in relation to which a claim for privilege has been advanced. Often, discovery is given electronically, by exchange of documents formatted to an agreed technical protocol.

Parties may apply for preliminary discovery before the substantive proceedings, to determine whether or not they have a claim against a prospective defendant or to gain information from third parties.

Depositions of the parties and witnesses are not taken before trial.

In some jurisdictions, most notably the Federal Court of Australia, pretrial 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, however, becoming more commonplace for a Federal Court judge to prefer to hear lay evidence, in particular, given orally.

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.

vii Apportionment

Defendants are permitted to rely on a statutory right to contribution from other concurrent tortfeasors (whether joint or several). A defendant must demonstrate that the person from whom contribution is sought would have been held liable for the same damage had they been a party to the proceedings. Alternatively, defendants may seek to rely on a contractual right of indemnity.

Rights of contribution or indemnity 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.

While 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. In such cases, 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.

viii Mass tort actions

There is a detailed class action procedure in the Federal Court of Australia and the Supreme Courts of Victoria and New South Wales. In November 2016, the Queensland Parliament also passed legislation enacting a new Part 13A to the Civil Proceedings Act 2011 (Representative proceedings in Supreme Court) aimed at facilitating class action proceedings in the Queensland Supreme Court. That legislation is expected to commence in early 2017. There are also representative action procedures in other state jurisdictions.

A class action (called a representative proceeding) can only be commenced in the Federal Court where it attracts federal jurisdiction, for example, if it involves a claim under the ACL, which is federal legislation.

Generally speaking, a class action can be commenced 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 question 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, it being an 'opt-out' rather than an 'opt-in' system.

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 through advertising and the like. 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. 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.

Similarly, the representative plaintiff may only withdraw from the proceedings or settle his or her individual claim with the leave of the court.

Court approval is also required for claims brought by infants or people suffering from a legal disability.

Australia is generally a 'loser pays' system. However, of significance for successful defendants, only the named representative plaintiff is liable for costs if the class action fails. The amount of costs recoverable is not usually on an indemnity basis and therefore often only represents a fraction of the actual costs incurred.

ix Damages

Monetary compensation is available for both pecuniary and non-pecuniary loss. The following damages are available for claims of bodily injury:

a general damages, including pain and suffering, loss of amenity and loss of expectation of life; and

b special damages, including loss of wages (both past and future), medical and hospital expenses and the like.

The Tort Reform Process and the introduction of the ACL 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.

Under the ACL, a person other than an injured party may also claim compensation where that person suffers loss as a result of another 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.

Damages are also recoverable for damage to mental health 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.

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

There is generally no maximum limit on the damages recoverable from one manufacturer, distributor or seller. 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. As a general rule, damages for the costs of medical monitoring in the absence of any established injury or loss are not recoverable.

In addition, courts may grant injunctions, including interim injunctions, to restrain breaches or attempted breaches of the consumer protection provisions of the ACL. The potential breadth of remedies available is illustrated by Sections 237 and 238 of the ACL, 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 ACL.

Breaches of the ACL's criminal offences are subject to criminal fines of a maximum of A$1.1 million for a body corporate and A$220,000 for a person other than a body corporate for many of the offences.

V YEAR IN REVIEW

During 2016, the ACCC continued to be active in its supervision of consumer product recalls, as well as monitoring 'hot topic' issues in product safety. In particular, following an interim ban in place between 19 March and 16 July 2016, a new mandatory standard was introduced to set out minimum requirements for self-balancing scooters (e.g., hoverboards) (Consumer Goods (Self-balancing Scooters) Safety Standard 2016). The standard came into effect on 17 July 2016.

In September 2016, all ACL regulators (including the ACCC and state-based regulators) launched a National Strategy for improving the safety of button battery consumer products 2016-18. This Strategy is designed to develop evidence to inform regulatory and other approaches to improve button battery safety, and is supported by a series of voluntary industry actions and educational activities. (Voluntary) industry-based actions are set out in the Industry Code for Consumer Goods that Contain Button Batteries was developed by retailers, associations and product safety consultants together with state and federal regulators.

There are presently a range of interim bans in force across states and territories nationally in respect of decorative alcohol-fuelled burners, following reports of serious burn injuries and house fires. In addition, a national proposed ban notice was proposed by the Minister for Small Business in December 2016.

The ACCC has also been pressing for increased penalties under the ACL by appealing first judgments to the Full Federal Court.

A review of the ACL (initiated by Consumer Affairs Australia and New Zealand (CAANZ)), which formally commenced on 31 March 2016, is ongoing. An Interim Report was published in the second half of 2016. A final report is expected to be released in March 2017.

Appendix 1

ABOUT THE AUTHORS

COLIN LOVEDAY

Clayton Utz

Colin Loveday has over 20 years' experience defending complex multi-plaintiff claims involving representative actions and is internationally recognised for his expertise and industry-leading experience in product liability law and class actions. He has led the defence team in some of Australia's largest and most complex class actions and in doing so, has worked extensively with in-house counsel and lawyers in the US and Europe, developing international defence strategies and working with international expert witnesses.

Mr Loveday has a commanding track record in defending class actions and has been actively involved in the running of trials in the past decade. He has extensive experience in defending and resolving class actions, whether by having them struck out at an early stage, running representative trials to resolve critical issues or implementing resolution schemes. He understands the tactical and procedural nuances of class action litigation and works with clients to develop strategies to address them. He is also engaged in providing strategic advice to boards and senior executives in relation to high-level issues and tactics.

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

He is a member of the International Association of Defense Counsel, the National Product Liability Association and the Defense Research Institute and is former chair of the product law and advertising committee of the International Bar Association.

SHEENA McKIE

Clayton Utz

Sheena McKie is a senior associate in the Sydney office of Clayton Utz, with experience in complex product liability and class action litigation. She has been involved in a broad range of product liability and general commercial matters, including advisory and contentious work, including specifically for clients in the pharmaceutical and medical device industries, as well as suppliers and manufacturers of consumer goods.

Ms McKie is experienced in advising clients on a variety of regulatory issues, including registration and listing, advertising and marketing requirements, as well as product safety issues, including product recalls. She has experience in the running of both small and

large-scale commercial litigation matters, including class actions, in the Supreme Court of NSW and the Federal Court of Australia.

Ms McKie has worked closely with counsel in the US, EU and New Zealand in advisory matters including product recalls as well as the coordinated defence of similar claims internationally.

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