Product liability and safety in Australia: overview

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A Q&A guide to product liability and safety in Australia.

The Q&A gives a high-level overview of the sources of product liability law, establishing liability, liable persons, defences, excluding/limiting liability, court proceedings, evidence, class actions, litigation funding, remedies, product safety, product recall and reporting requirements.

The Q&A is part of the global guide to product liability and safety.

Sources of law

1. What are the main areas of law and regulation relating to product liability?

Australia's product liability law arises from both common law and statute. The causes of action available to a person who claims to have been injured or otherwise suffered loss or damage are outlined below.

Common law actions

Common law actions are:

- Breach of contract: this arises from breach of the implied or express terms of a contract, usually between retailer and consumer.
- Tort of negligence: this is a fault-based cause of action and relates to the duty of care owed to the buyer and user to safeguard them against foreseeable risks of injury when using the product as intended.

Statutory actions

Statutory actions include breach of consumer guarantees and express warranties under certain provisions of the Australian Consumer Law (ACL), including provisions making suppliers liable for:

- Goods of unacceptable quality.

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- Goods unfit for any disclosed purpose.
- Goods which do not correspond with their description.
- Goods which do not conform to sample or demonstration model.
- Non-compliance with express warranties.
- Injury to persons or property damage suffered due to a product with a safety defect.

Product liability proceedings not involving personal injury claims can also be based on a statutory claim for misleading or deceptive conduct under the ACL, which prohibits a person in trade or commerce from engaging in conduct that is misleading or deceptive (or that is likely to mislead or deceive).

Causes of action

> 2. What are the most common causes of action and what is required to establish liability under them? When is a product defective?

At common law, in contract actions and actions based on the ACL where strict liability does not apply, the claimant must establish the following elements:

- Loss or damage has been suffered.
- The relevant conduct is in breach of a common law duty, the contract or a provision of the ACL.
- The loss or damage was caused by the defendant's conduct.

The statutory consumer guarantees and defective product causes of action under the ACL (*see Question 1, Statutory actions*) are often referred to as "strict liability" provisions.

To establish a breach of a consumer guarantee, a claimant must establish on balance that, for example, the goods are not of acceptable quality or fit for purpose.

For claims under the safety defect regime, the claimant must establish that the goods have a safety defect.

Each of these is a term of art, with a specific meaning defined in the ACL and interpreted in case law (*see below*). The claimant does not need to establish fault by the defendant.

Goods are considered defective if their safety is not of a standard that persons generally are entitled to expect. This involves two elements: an expectation and an entitlement to a certain level of safety. This is an objective test, based on community knowledge and expectations. Factors that may be taken into account in determining this include the (among others):

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- Inherent nature of the product.
- Marketing of the product.
- Warnings on the product.
- Instructions for use.
- Expected use of the product.
- Time when the product was supplied.

Liable parties

3. Who is potentially liable for a defective product? What obligations or duties do they owe and to whom?

Under the ACL, manufacturers are strictly liable directly to consumers for personal injury or property damage suffered due to a defective product.

The definition of "manufacturer" under the ACL is very broad. It includes, for example, an importer of goods if the actual manufacturer is not present in Australia, and a person who allows his or her brand or mark to be affixed to, or used in relation to, the goods in question.

A claimant who wishes to institute a defective/unsafe goods action, but does not know who the manufacturer of the subject goods is, can make a written request to the supplier for information about the manufacturer. If the claimant still does not know the identity of the manufacturer after 30 days of making the request, the supplier is deemed to be the manufacturer for the purposes of the defective goods liability action.

Whether successor corporations can be liable for products manufactured or sold by the predecessor company depends on the particulars of the acquisition transaction. However, if the company's brand is applied to a particular product, the successor company may find itself brought into litigation. It may then be in the successor company's interest to seek to manage or defend the litigation, and cross-claim or seek to agree an indemnity or sharing of costs or damages).

Defences

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4. What are the defences to a product liability claim?

Negligence

Defences to a claim in negligence include the following.

Voluntary assumption of risk (*volenti non fit injuria*). This is a deliberate decision by the claimant to assume the risk of injury, loss or damage. The defendant must establish that the claimant was not only aware of the existence of the danger, but also fully appreciated and voluntarily accepted the risk. This defence is difficult to establish, but is a complete defence to any claim.

Contributory negligence. This can be relied on where the claimant'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.

Statutory defences. There are also certain statutory defences to an action for negligence which differ between Australian states and territories. For example, the following have been introduced as complete defences in New South Wales:

- The harm was suffered due to the materialisation of an inherent risk, that is, one that cannot be avoided by the exercise of reasonable care and skill.
- The harm was suffered due to the materialisation of an obvious risk associated with a dangerous recreational activity (this is a risk that would have been obvious to a reasonable person in the claimant's position, and may include risks that are patent or a matter of common knowledge).
- A defendant who provides professional services acted in a way that, at the time the relevant service was provided, was widely accepted in Australia as competent professional practice (unless the court considers such opinion to be irrational);
- The defendant is considered to be a "good Samaritan" or volunteer and has exercised reasonable skill and care under the circumstances.
- In certain cases where the defendant is a public or other authority.

Safety defect claims

There are a number of specific defences to an action based on a claim that goods have a safety defect, including the following.

No defect when the goods were supplied. The defect alleged did not exist when the goods were supplied by the manufacturer.

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Compliance with a mandatory standard. The goods were only defective because of compliance with a mandatory standard. A mandatory standard, in relation to goods, means a standard for the goods or anything relating to the goods that, under a law of the Commonwealth, a state or a territory, must be complied with when the goods are supplied by their manufacturer. It is a law creating an offence or liability if there is such non-compliance. It does not include a standard which can be complied with by meeting a higher standard.

There are penalties for non-compliance with a mandatory standard. In both an action for negligence and under the statutory guarantee provisions of the Australian Consumer Law (ACL), compliance with regulations or standards is a relevant factor in determining whether goods are fit for the purpose for which they were intended.

"Development risk" or "state of the art" defence. The supplier must establish that 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.

Similarly, in the case of the manufacturer of a component used in the product, the manufacturer must establish that 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, as opposed to a defect in the component.

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, considering any description applied to the goods by the supplier or manufacturer, the price received by the supplier or manufacturer for the goods, and other relevant circumstances.

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

Time limits for bringing proceedings

5. Is there a time limit in which proceedings can be brought?

Limitation periods

Limitation periods apply to all causes of action pleaded in product liability litigation as follows.

Contract and tort. There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, although recent tort reform has resulted in more uniformity.

Generally, limitation periods are defined by reference to the nature of the cause of action, including whether the claimant advances fault-based or strict liability claims. 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 claimant (date of discoverability) or 12 years from the date of the alleged act or omission (long-stop period).

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- 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. This includes the period before a claimant turns 18, or during which a claimant suffers from a mental or physical disability which impedes them from managing his or her affairs.

Actions under the ACL. An action in relation to a defective product:

- Can be commenced within three years after the time the person becomes aware, or ought reasonably to have become aware, of the alleged loss or damage, the safety defect of the goods, or the identity of the person who manufactured the goods.
- Must be commenced within ten years of the supply by the manufacturer of the goods to which the action relates.

An action for non-compliance with a consumer guarantee (*Part 5-4, ACL*) 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.

Excluding/limiting liability

> 6. Can a supplier limit its liability for defective products and are there statutory restrictions on a supplier doing this? Do consumer protection laws apply? Are guarantees or warranties as to quality implied by law? Is there a mandatory or minimum warranty period for consumer products?

Statutory restrictions on limiting liability

Suppliers cannot exclude or limit the:

- Consumer guarantees provided by the ACL, regardless of any other warranties they provide or sell to a consumer.
- Provisions providing the basis for an action in respect of goods with a safety defect.

Any contractual term that purports to limit such guarantees or the right to bring a defective goods action is void to the extent that it seeks to exclude or limit rights to a level below that available under the ACL. The circumstances of supply, including any instructions for use, labelling and the nature of the goods themselves, are all "relevant circumstances" in determining how the consumer guarantees or safety defect provisions are applied.

Consumer guarantees do not apply if the consumer:

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- Received what was asked for but simply had a change of mind, found it cheaper somewhere else, decided they did not like the purchase or found they no longer had any use for it.
- Misused the good in any way that caused the problem.
- Knew of, or were made aware of, the faults before buying the goods.

Rights to a repair, replacement or refund do not apply to goods unless they were acquired by a person "as a consumer". For goods to be acquired "as a consumer", they must:

- Cost less than AUD40,000. This will increase to AUD100,000 on 1 July 2021.
- Be goods ordinarily acquired for personal, domestic or household use or consumption, or be a vehicle or trailer.
- Not have been acquired for the purpose of re-supply, for the purpose of using them up or transforming them in the course of a production or manufacturing process or in the course of repairing or treating goods or fixtures.

Time frames

There is no mandatory or minimum warranty period for a consumer product in Australia. All consumer guarantees are separate and apply regardless of any other warranty the supplier may sell or provide a consumer. The consumer guarantees apply for a reasonable time depending on the nature of the goods, therefore the consumer guarantees may continue to apply after the warranty period has expired.

A manufacturer or supplier can provide a warranty in relation to:

- The quality, state, condition, performance or characteristics of the product.
- What the product can do and for how long.
- Availability of servicing and supply of parts.

If a manufacturer or supplier provides such a warranty, there is a consumer guarantee under the ACL that the manufacturer or supplier will comply with that warranty. If the supplier or manufacturer fails to comply with any warranty provided, a consumer will have rights against them under the consumer guarantees. In addition, the manufacturer or supplier must include a statement in a prescribed form alongside that warranty about rights under the ACL.

Product liability litigation

Courts

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7. In which courts are product liability cases brought? Are product liability disputes generally decided by a judge or a panel of judges? Are juries used in certain circumstances?

Product liability cases can be brought in the Federal Court of Australia or the Supreme, County or District Courts of a state or territory. Such cases are usually decided by a single judge sitting without a jury.

Jury trials for product liability cases are uncommon across all jurisdictions, but there are provisions in the various court rules for this to occur in certain circumstances.

Cases on appeal may be heard by a panel of judges.

Proceedings

8. How does a party initiate proceedings?

Product liability actions are commenced by an application, generally accompanied by a statement of claim, which must be filed in the registry of the relevant court.

The procedure for commencing proceedings and the amount of detail required in relation to the claim differ slightly, depending on whether the case is brought in the Federal Court or a state court, and is detailed in the applicable court rules for that jurisdiction.

In the Federal Court, for example, the originating application outlines what relief is being sought by the applicant, while the statement of claim sets out the material facts on which the applicant relies in pursuing their claim.

9. Who has the burden of proof and to what standard?

The claimant bears the burden of proof. The relevant standard is that of the balance of probabilities. This means that:

- In negligence, contract and under most provisions of the ACL, the claimant has the burden of proving that the product was defective.

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- Under the strict liability provisions of the ACL (the statutory warranty/guarantee and defective/unsafe product causes of action), the claimant does not need to prove fault, but must establish, on balance, that the relevant products are defective or not of acceptable quality.

The defendant has the burden of proof in relation to any defence relied on or any new fact which the defendant pleads.

Evidence

10. How is evidence given in proceedings and are witnesses cross-examined?

Product liability trials are typically conducted orally. Where written statements or affidavits have been exchanged before the trial and a witness is called, their statement is commonly adopted and tendered in court as evidence in chief, with any minor additions or modifications addressed orally at the start of the witness's testimony.

The witness can be cross-examined at large and with very limited restriction on time, subject always to the court's discretion. This comparative freedom to cross-examine means that cross-examination in product liability cases is often searching and extensive.

Evidence can be lay or expert, and can be provided by a witness or by a process of documentary tender.

11. Are parties able to rely on expert opinion evidence and are there special rules or procedures for it?

Expert evidence is common in Australian proceedings. Expert witnesses prepare a written report outlining their opinion in advance of giving evidence. They are generally subjected to detailed cross-examination on both their specific opinion evidence and the underlying science relating to those opinions.

Each jurisdiction and court has its own rules and procedures. Most Australian jurisdictions require independent experts, although retained by the individual parties, to agree to abide by a code of conduct. These usually provide that, although an expert is instructed by one party, their primary duty is to assist the court. They are therefore expected to give an independent opinion and not to act as an advocate for the party seeking to rely on their expertise.

Courts can refuse to admit evidence from any expert who has prepared their report without agreeing to abide by the applicable code of conduct.

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12. Is pre-trial disclosure/discovery required and which rules apply? If not, are there other ways to obtain evidence from a party or a third party?

Discovery is an integral part of the pre-trial process. To obtain discovery of documents from a party to the proceedings, the other party must satisfy the court that discovery is necessary. However, the threshold to do so is not very high. This process is governed by the applicable court rules and the Evidence Acts.

Alternatively, parties can seek leave of the court to issue a subpoena to a party or to a third party. A subpoena compels an individual or entity to attend court to give evidence or to produce certain documents to the court.

13. Is there liability for spoliation of evidence/a remedy for destruction of or failure to preserve evidence (in particular, the product)?

There is no liability as such for spoliation of evidence but, if it can be shown that documents and/or other materials were destroyed with an intention of destroying evidence, the court can be invited to draw an adverse inference from this conduct. In extreme cases, it can result in part or whole of a defence being struck out.

One Australian jurisdiction, Victoria, has legislation dealing specifically with the consequences for litigation of the destruction of potentially relevant documents.

Interim relief

14. What types of interim relief are available before a full trial and in what circumstances?

Interim relief is sought through an interlocutory application, which can be made at any time (subject to obtaining the leave of the court) after the commencement of proceedings. The most common example is an injunction.

Injunctions are rarely sought in product liability litigation. In a product liability context, an injunction can be sought to restrain a party from publishing confidential materials.

An injunction is granted where the court is satisfied that:

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- There is a serious question to be tried.
- The parties have tried to rectify the matter, and those attempts have failed.
- Damages are not sufficient to cure the wrong (if the conduct sought to be stopped was in fact engaged in).
- There is a reason for the urgent application.
- The balance of convenience favours the court making the order.

This involves satisfying the court that the conduct subject to the application is unlawful or otherwise ought to be refrained from, and the party subject to the order has engaged, or is likely to engage, in the relevant conduct.

Costs

15. Can the successful party recover its costs associated with the litigation, such as legal fees and experts' costs and to what extent?

A successful party to litigation can usually claim the payment of costs from the unsuccessful 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, costs are not the total or actual costs incurred by the successful party, but are determined on a "party/party basis". Depending on the jurisdiction, this is calculated by reference to a court scale or by a system that considers the reasonableness of the costs incurred.

In some jurisdictions, further limitations are imposed by statute on the legal costs recoverable in small personal injury claims. However, there are exceptions to this limitation, such as where the lawyer and client have entered a costs agreement that provides otherwise.

Statutory provisions have significantly modified common law rules concerning representative or class actions. These provisions restrict a costs order being made against class members other than those who actually commenced the proceedings. Similarly, where representative action is successful, the court can make a costs order in favour of the class members who commenced the representative proceedings.

Appeals

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16. What types of appeal are available?

Practically all jurisdictions recognise the right to appeal the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. The court's leave is generally necessary to appeal an interim judgment.

While an appeal generally turns on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during an appeal.

A party can seek leave to appeal a decision of the Full Federal Court or a state or territory Court of Appeal to the High Court of Australia. The High Court is Australia's ultimate appellate court. Leave to appeal to it is only granted where the court is convinced that there is a significant question to be determined.

Length of proceedings

17. How long does it typically take to litigate a product liability action from start to finish?

The length of time to litigate a product liability claim depends on many factors. These include the complexity of the claim, whether it is a class action, the size of the discovery process and the number of witnesses involved.

Claims can be resolved at an early opportunity by a negotiated settlement. On the other hand, claims following a sequence including numerous interim disputes, a contested hearing and one or more appeals can be litigated for years, and even a decade.

It is unusual for a contested product liability action to be heard in court within six months of filing. Depending on the matters identified above, it is more likely for a product liability action to take a number of years from start to finish.

For a product liability class action, the need for court approval of a settlement or the hearing of individual group member claims can also increase the length of time associated with litigating such an action.

Settlements

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18. Is it common for product liability actions to settle? Are there any rules or procedures that govern settlements (for example, for minors or class actions?

As with all litigation, it is possible and indeed can be common for product liability actions to settle. A range of factors apply, including litigation risk, commercial imperative for certainty and whether acceptable terms are capable of being negotiated between the parties.

A class action settlement must be approved by the court. This is primarily because, while a lead claimant or lead applicant represents the claims of group members, the court is not aware of the claims of those individual group members. The court must be satisfied that the proposal is fair and reasonable for all group members considered as a whole before granting approval.

Where a party is a minor, those actions must also be approved by the court.

Class actions/representative proceedings

19. Are class actions, representative proceedings or co-ordinated proceedings available? If so, what are the basic requirements? Are they commonly used?

There are detailed class action procedures in the Federal Court of Australia, the Supreme Court of Victoria, the Supreme Court of New South Wales, the Supreme Court of Queensland and the Supreme Court of Tasmania. The legislation in each of these jurisdictions is very similar.

Class actions are relatively common in Australia. Class actions have involved products including pharmaceuticals, medical devices, consumer products, automobiles, aircraft fuel, gas, water, tobacco, financial products and a variety of foodstuffs.

In each jurisdiction, a class action can be commenced where:

- Seven or more persons have a claim against the same person.
- The claims are in respect of, or arise from, the same, similar or related circumstances.
- The claims give rise to a substantial common issue of law or fact.

Unlike jurisdictions like the US, class actions do not need to first be certified by a court in order to be recognised as representative proceedings.

Australia operates under an "opt-out" class action system. All group members who fit the definition within the claim (for example, all owners of a certain product during a certain time period) are considered to be part of the class

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and are bound by the end result, unless they give notice to the court that they wish to opt out of the proceedings. Before a class action proceeds to hearing, the court fixes a date by which opt-out notices must be filed and orders the publication of a notice to group members which advises them of their rights.

There are also older-style representative action procedures available in other state jurisdictions, but these are rarely used.

Litigation funding

20. Is litigation funding by third parties allowed? Is it common? Are contingency fee or no win no fee arrangements allowed?

Lawyers and clients can agree that the lawyer's normal fee, or a fee calculated using criteria such as the time spent on the case, can be increased by a pre-agreed percentage. A cap is generally imposed by the relevant rules on the percentage by which these fees can be increased.

Proceedings on a "no win, no fee" basis are also allowed.

Some jurisdictions allow lawyers to agree an "uplift fee" where an additional fee can be charged, calculable by reference to the initial fees. Not all jurisdictions allow such arrangements in personal injury cases.

Contingency fee arrangements where the lawyer's fee is calculated by reference to a percentage of the client's award are prohibited. However, in January 2019 the Australian Law Reform Commission recommended the limited introduction of percentage-based fee arrangements. Further, the Victorian Parliament recently amended its Supreme Court Act to permit a court to make a "group costs order" if, on application by a claimant, the court is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. In a group costs order:

- The legal costs payable to the law practice representing the claimant and group members are calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding.
- Liability for payment of the legal costs is shared among the claimant and all group members.

Other jurisdictions have not yet followed this.

Third-party funding of litigation is allowed and common. Litigation funders have emerged to promote and fund class action litigation. The mechanism is relatively straightforward:

- A non-lawyer or corporation (the litigation funder) identifies a potential claim, contacts potential claimants and then enters into express contractual arrangements with potential claimants.
- These agreements provide for the litigation funder to receive an agreed percentage of any monies that come to the claimant by way of settlement or judgment. In addition, the claimants often assign the benefit of any

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costs order they receive to the litigation funder who is, under the contractual arrangement, also given broad discretion to conduct the litigation as they see fit.

- The litigation funder then retains a lawyer, who agrees to conduct the litigation on behalf of the litigation funder based on the usual rules of the legal profession.

A further recent development is "common fund" orders in funded class actions. A court orders that a litigation funder can take a contribution from all class members, and not just from group members who have signed a funding agreement. Common fund orders have only been made in a few cases. The circumstances in which they will be permitted and the rules governing them remain unclear. In two cases in the latter half of 2019, the High Court found that the Federal Court and Supreme Court of New South Wales do not have power to make common fund orders, at least not before a settlement approval or judgment is delivered. There remains uncertainty as to the future of such orders without amending legislation or further High Court guidance.

Litigation funders are required by Australia's corporate and financial regulator to have adequate procedures to deal with conflicts of interest, but do not have to be licensed or have their funding arrangements approved. Litigation funding was the primary focus of the Australian Law Reform Commission's report published in 2019. It is possible that further reforms may be introduced following its recommendations.

Remedies

21. What remedies are available to a successful party in a product liability claim?

The remedies available to a successful claimant depend on the cause of action.

A claimant bringing a statutory action under the ACL can claim the remedies prescribed by the ACL. A broad range of remedies are available under Part 5 of the ACL, from compensation to injunctions.

Part 5-2 of the ACL permits courts to make compensatory orders for damage resulting from breaches of certain provisions of the ACL. The court can also make such orders as it thinks appropriate against a person involved in breaching the consumer protection provisions of the ACL.

Part 5-4 of the ACL provides a range of remedies against suppliers and manufacturers of goods in relation to consumer guarantees:

- If an action is brought against a manufacturer, a consumer's remedy is limited to damages.
- For actions against suppliers, an affected person can seek a broader range of remedies, including rejecting goods or terminating contracts.

The type of remedy, and who must provide it, depends on the severity of the issue and which consumer guarantee has been breached:

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- If an issue is not described as a "major failure", the supplier can choose between providing a repair, a replacement or a refund.
- If there is a major failure, the consumer has the right to ask for a repair, replacement or refund for the good. "Major failure" has a specific meaning under the ACL.

A claimant pursuing an action in common law negligence can claim compensatory damages.

22. How are damages calculated and are there limitations on them? Are punitive or exemplary damages available and in what circumstances?

Under Australian common law, compensatory damages for personal injury include:

- General damages for pain and suffering.
- Damages for loss of amenities and loss of expectation of life.
- Special damages, for example for loss of wages (past and future), economic loss and medical treatment expenses.

The calculation of damages is largely governed by the various state and territory civil liability acts. These impose strict caps, thresholds and other limitations on the amount of compensatory damages that can be recovered for causes of action in negligence.

Damages are also recoverable for psychiatric claims in some cases, 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. Damages for "pure economic loss" are recognised, but their nature and extent are disputed.

Compensatory damages for breach of consumer protection provisions under the ACL include actual loss and future and gain-based loss. This derives from the contractual (rather than tort-based) origins of the ACL protections. In contrast to the broad definition of compensatory loss, there are strict limits on the availability of damages for non-economic loss under the ACL.

Exemplary, punitive or aggravated damages can be awarded by the courts. However, there are extensive statutory restrictions on them. They are universally excluded for claims brought under the ACL. They are not available in some jurisdictions for negligence actions seeking damages for personal injury. In practice, awards of exemplary damages are extremely rare.

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23. Is liability joint and several/how is liability apportioned, including where a partially responsible entity is not a party to the proceedings?

The default position is that liability between persons who are each liable for the same damage is joint and several. However, each Australian jurisdiction has a proportionate liability regime. This provides for liability of persons who are "concurrent wrongdoers" to be apportioned between them, and for each concurrent wrongdoer's liability to be limited to the extent of their contribution to the loss.

The precise circumstances in which these proportionate liability regimes apply varies from jurisdiction to jurisdiction. However, they do not apply to personal injury claims in any of the jurisdictions.

In addition, defendants have a statutory right to seek contribution to their liability from concurrent tortfeasors (whether joint or several) and in some jurisdictions from concurrent wrongdoers generally. A defendant can also rely on an indemnity from another party. If these remedies are pursued subsequent to the main liability proceedings, time limits apply.

Product safety

24. What are the main laws and regulations for product safety?

Australia's product safety laws are a mixture of the common law and legislation. There are specific regimes and regulators for particular types of products (*see Question 25*).

The ACL is set out in Schedule 2 to the federal Competition and Consumer Act 2010 (Cth). Product safety provisions in the ACL apply to the supply of "consumer goods" or supply of goods "to a consumer".

"Consumer goods" under the ACL means "goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption", and extends to goods that have become fixtures since the time they were supplied where those goods have been recalled (*section 2, ACL*).

Where the ACL refers to goods supplied to or acquired by "a consumer" (for example, the consumer guarantees as to acceptable quality or fitness for a disclosed purpose), "consumer" extends to any of the following:

- The amount paid or payable for the goods did not exceed AUD40,000. This will increase to AUD100,000 on 1 July 2021.
- The goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.
- The goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

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A person does not acquire goods "as a consumer" if they were acquired for the purposes of re-supply (for goods other than gift cards), or for using them up or transforming them in trade or commerce in the course of a process of production or manufacture, or to repair or treat other goods or fixtures on land (*section 3, ACL*).

25. Are there general regulators of product safety issues? Are there specific regulators for particular goods or services? Briefly outline their role and powers.

The Australian Competition and Consumer Commission (ACCC) is the general product safety regulator at federal level, along with state and territory consumer affairs agencies. The ACCC is an independent statutory authority that enforces the ACL and its product safety regime (*www.accc.gov.au/*).

A "responsible Minister" under the ACL (whose powers can be exercised by the ACCC or a relevant fair trading minister under state/territory laws) has power to impose mandatory information or safety standards which must be complied with by suppliers. For a list of the current standards, see *www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards*).

The responsible minister can order a compulsory recall of, or impose an interim or permanent ban on, a product where a supplier has not taken satisfactory action to prevent it causing injury.

There are also specific product regulators that monitor and regulate the safety of specific types of products. For example:

- Medicines and medical devices are regulated by the Therapeutic Goods Administration (TGA) under the Therapeutic Goods Act 1989 (Cth) (*www.tga.gov.au*).
- Food must meet the requirements set out in the Australia New Zealand Food Standards Code (FSC). The FSC is developed and administered by Food Standards Australia New Zealand (FSANZ) and is enforced by various state and territory health departments (*www.foodstandards.gov.au/Pages/default.aspx*).
- Motor vehicles and vehicle parts are regulated by the Federal Department of Infrastructure, Transport, Cities and Regional Development and state or territory governments (*www.infrastructure.gov.au/vehicles*).
- Electrical and gas supply and products are regulated by state and territory electrical and gas regulators (www.erac.gov.au and *www.gtrc.gov.au*).
- Agricultural and veterinary products are regulated by the Australian Pesticides and Veterinary Medicines Authority (*www.apvma.gov.au*).

Product recall

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26. Do rules or regulations specify when a product recall is required or how companies should make decisions regarding product recalls and other corrective actions? Are any criteria specified?

Voluntary product recall processes are not specified in the rules and regulations. However, the ACL requires notification to the relevant minister within two days after beginning a voluntary recall of goods because of a risk of injury, breach of a mandatory safety standard or breach of a product ban. This notification is usually made to the ACCC via an online reporting form. The type of actions which trigger notification of a safety-related recall are not defined in the ACL. However, the ACCC considers that a broad range of actions constitute action to recall goods. These may include software updates, product withdrawals or notification to consumers requiring repair or modification of goods for a safety-related reason.

A decision to undertake a voluntary safety-related recall is the responsibility of the supplier, and is made in accordance with common law principles. Under the common law, manufacturers and suppliers of products owe a continuing duty to consumers to prevent a product from causing harm. While case law in Australia is limited, it is clear that a manufacturer's common law duty of care extends to a duty to recall products in certain circumstances.

If a risk of injury is identified and may be causally related to the product, a supplier must consider appropriate remedial action, including a voluntary recall of the product. If a product defect has potential safety-related consequences, or the defect may affect critical product performance, the appropriate course of action is likely to be a product recall.

Guidelines have been published by the ACCC and industry-specific regulators or bodies (such as the Electrical Regulatory Authorities Council). They outline expected or recommended recall process which should be followed.

In addition, steps can be taken by relevant regulators to initiate compulsory product recall action if the regulators consider action taken has been insufficient to protect consumers from injury.

27. Are there mandatory advertising requirements for product recalls? Are there other rules governing how a product recall should be conducted?

The ACL does not prescribe the specific content of a recall notice or expressly stipulate mandatory advertising requirements, other than providing for publication of notices (for example safety warning notices) by the relevant minister on the internet.

The ACCC has published guidelines which address these issues. In practice, the ACCC strongly recommends using a standard form of template (available at *www.recalls.gov.au*) with a distinctive hatched border and a safety triangle, and that the content of the notice includes:

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- A clear product description (which can include an image of the product).
- A description of the defect.
- A statement of the hazard which explains the action that a consumer should take in respect of the product.
- Contact details for the responsible entity.

Appropriate advertising of the recall depends on the product, the hazard, how the product was advertised and sold, and the proposed remedy.

Ultimately, the sufficiency of recall communication or advertising is subject to a consultation between the responsible entity and the regulator, considering the product being recalled (including the immediacy and severity of any safety issue, how the product was initially advertised for sale or supplied and the number of affected goods). Recall communication can include:

- Advertising in print, television, radio and/or social media.
- In-store display of a recall notice or notification by sales and service staff.
- Display of a recall notice on the supplier's website and other online sources, including the ACCC's product safety website.
- Direct customer communication, including by mail, service, warranty or loyalty programmes.

Reporting

28. Is there a mandatory obligation to report dangerous products or safety issues to the regulatory authorities?

Under section 131 of the ACL, suppliers must provide written notice of any serious injury or illness relating to product safety to the relevant minister, within two days or on becoming aware of a death, serious injury or illness of a person, and where the supplier either:

- Considers that an incident was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods.
- Becomes aware that a person, other than the supplier, considers that the incident was caused by the use or foreseeable misuse of the consumer goods.

Section 132 of the ACL is similar and relates to "product related services".

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Serious injury or illness is defined as "an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place)".

Given the requirement of death, personal injury or illness, a potential safety defect in a product is not of itself sufficient to trigger the reporting obligation under section 131. Similarly, property damage in the absence of death, serious injury or illness does not trigger the mandatory reporting requirement.

Failure to report a death, serious injury or illness in accordance with section 131 of the ACL carries a penalty (up to AUD16,650 for a body corporate, for each offence). Conversely, making a report is not an admission of liability in respect of the product or event being reported.

In practice, notification is made by an online form. The ACCC has also published guidelines on how and in what circumstances these notifications should be made (*www.productsafety.gov.au/publication/a-guide-to-the-mandatory-reporting-law-in-relation-to-consumer-goods*).

29. Is there a specific requirement to provide progress reports and/or keep the authorities updated about the progress of corrective actions? In practice, do authorities expect periodic update reports?

If a supplier/manufacturer undertakes a safety-related recall under the ACL relating to consumer products, written notice must be given to the relevant minister within two days of commencement (*see Question 26*). Similarly, the ACCC requires suppliers to notify it when they decide to withdraw or repair products to address a product safety hazard.

This means that, in practice, any recall or corrective action relating to a product safety issue is managed and monitored closely by the relevant regulator from the beginning. The frequency of progress reports varies depending on the nature of the product and scope of the recall or corrective action. However, regulatory authorities expect to be kept informed through progress reports. They also expect comprehensive records to be kept of steps taken relating to the recall or corrective action.

Various other product categories have their own recall regimes. They are not based on legislation but are administered by the relevant industry regulator and generally observed by participants in that industry. Examples include the TGA's Uniform Recall Procedure for Therapeutic Goods, and FSANZ's Food Industry Recall Protocol.

Recent trends and reform

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30. Are there any recent trends in product liability and safety law? Have there been any recent significant changes or important cases? Are there any legal or procedural issues that are attracting particular interest in your jurisdiction?

Australia continues to have a very active product liability class action system. This is partly due to the ACCC's interest in the structure and implementation of consumer product recalls and compliance with the product safety regime under the ACL.

A proliferation of new entrants and inexperienced or opportunistic suppliers of consumer goods in the context of the 2019 novel coronavirus disease (COVID-19) pandemic may also lead to product liability or product safety claims for consumer injury, loss or damage. It has already led to increased regulatory interest in therapeutic goods, including product-specific reviews and issuing of penalties in relation to breach of advertising requirements.

Mandatory reporting requirements under the ACL continue to be vigorously investigated and enforced by the ACCC. In addition, there is a strong interplay between ACCC product safety enforcement action and consumer compensation claims against manufacturers for alleged breaches of the ACL. There are several recent examples where the ACCC has successfully prosecuted suppliers for breaches of the ACL, which have then triggered consumer actions seeking compensation for related ACL breaches. Some of these have been class actions.

In a novel prosecution, the ACCC successfully prosecuted a major Australian retailer for engaging in misleading or deceptive conduct, by continuing to offer products for sale following receipt of customer complaints raising concerns about product safety. Similar allegations are now finding their way into product liability class action claims.

The "major failure" (*see Question 21*) remedies for breach of consumer guarantees were introduced in 2011 and have yet to be widely tested. However, some cases are starting to make their way through the courts which consider these provisions.

In addition, the recent passage of the Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020 (Cth) will increase from AUD40,000 to AUD100,000 the threshold for the amount paid or payable for goods in the definition of acquiring goods as a "consumer" in the ACL (*section 3(1)(a), ACL*). From 1 July 2021 (when these regulations commence), this will substantially expand the range of goods captured by the ACL, specifically the consumer guarantees (*see Question 1*).

Such developments have added to the product liability risk for consumer product manufacturers and suppliers in Australia.

31. Are there any proposals for reform and when are they likely to come into force?

A review of the ACL by Consumer Affairs Australia and New Zealand published in April 2017 (available at *http://consumerlaw.gov.au*) proposed a number of reforms, including changes to the laws governing consumer rights to repairs, refunds or replacement goods.

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In August 2017, the national and state/territory consumer affairs ministers agreed to a package of legislative reforms to the ACL, as well as further proposals for investigation and assessment. Some of those have been made, including increasing maximum penalties for a breach of the ACL to align those with maximum breaches under the competition provisions of the competition and consumer legislation.

Many of the more controversial proposals (including changes to the recall provisions and a general prohibition against unsafe goods) have not yet been progressed.

The ACCC's Product Safety Priorities for 2020 do not focus on legislative reform but rather focus on improvements to e-commerce and product specific areas.

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