

**BRITISH INSTITUTE OF INTERNATIONAL & COMPARATIVE LAW**

**AUSTRALIAN PRODUCT LIABILITY LAW  
OVERVIEW AND INTRODUCTION**

**by**

**Dr Jocelyn Kellam, Partner, Clayton Utz**

**&**

**Dr Luke Nottage, Senior Lecturer (Law), University of Sydney;**

**Director, Japanese Law Links Pty Limited**

## I. Introduction

Australia's product liability law comprises common law and Commonwealth and state/territorial statutory causes of action. Australia is a federation of six States and Territories.

Civil claims for compensation for loss and injury resulting from products which are unfit for purpose and/or defective generally plead a cause of action in negligence (and possibly breach of statutory duty or breach of contract) and contravention of the consumer protection and product liability provisions in the *Trade Practices Act 1974* (Cth) ("TPA"), a Commonwealth statute.

The tort of negligence remains important in Australian product liability law and is frequently pleaded.<sup>1</sup> However, establishing a claim in negligence presents evidentiary difficulties – to be successful a plaintiff must prove fault on the part of the defendant manufacturer.<sup>2</sup> There are also limitations in relation to the recovery of pure economic loss,<sup>3</sup> psychological injuries,<sup>4</sup> and worry and anxiety.<sup>5</sup>

Provisions of the TPA regulate unfair practices (misleading conduct and false representations)<sup>6</sup> and product safety, imply conditions and warranties into certain consumer transactions, and give consumers a

---

<sup>1</sup> For example see *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* [2002] HCA 54 (2002) 211 CLR 591.

<sup>2</sup> Where plaintiffs have failed, see *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881; *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34.

<sup>3</sup> *Perre v Apand* (1999) 164 ALR at 623; *Dovuro v Wilkins* [2003] HCA 51; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27.

<sup>4</sup> In negligence, see *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317: The central question is whether in all the circumstances the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable. An objective test is applied, that is, whether a person of ordinary fitness and mental stability would suffer the illness. Where the plaintiff's response to the defendant's conduct is so extreme or idiosyncratic as to be fanciful, the defendant is not required to guard against the risk.

<sup>5</sup> In *Courtney v Medtel Pty Ltd* [2003] FCA 36, Sackville J at first instance declined to award damages for worry and anxiety to the applicant under Part V Division 2A of the TPA but noted that they may be available in appropriate cases. Claims for mental stress have been awarded in some instances under section 82: *Steiner v Magic Carpet Tours Pty Ltd* (1984) ATPR 40-490; *Zoneff v Elcom Credit Union Ltd* (1990) ATPR-009 and on appeal at ATPR 41-058 but cf *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112. Query whether the definition of "personal injury" in section 4KA of the TPA now prevents such claims being brought. Also query whether compensation for the breakdown of a marriage are payable: in *Crago & Anor v Multiquip Pty Ltd and Anor* (1998) ATPR 41-620, Lehane J was not prepared to exclude that such damages would never be awarded in negligence (*Lampert v Eastern National Omnibus Co Ltd* [1954] 1 WLR 1047) or under section 82 of the TPA (cf *Pritchard v Racecege Pty Ltd* (1997) 41-554 - reversed on other grounds (see 72 FCR 203, 142 ALR 527, 25 MVR 17, [1997] ATPR 43,657 (41-554), [1997] Aust Torts Reports 64,024 (81-421)) or possibly even in contract (although His Honour noted that the remoteness of the damage would be an obvious difficulty given the nature of the contract in question which was for the supply of an ostrich egg incubator).

<sup>6</sup> Sections 52 and 53 of the TPA are no longer available as a cause of action in personal injury claims arising after 20 April 2006 (except if the death or personal injury results from smoking or other use of tobacco products) due to recent changes introduced by the *Trade Practices Amendment (Personal Injuries and Death) Act 2006*. Claims for property damage and economic loss may still be brought under the provisions: see for example, *Doney v Palview Sawmill Pty Ltd* [2005] ATPR 42-064; [2005] QSC 062. Personal injury claims relating to

direct cause of action against manufacturers and importers of goods which are defective, unsuitable or of unmerchantable quality.

The relevant TPA provisions are contained in Part V - Consumer Protection, specifically Division 1 (Unfair Practices), Division 2 (Conditions and Warranties in Consumer Transactions) and Division 2A (Actions against Manufacturers and Importers of Goods) and Part VA (Liability of Manufacturers and Importers for Defective Products). Part VA of the TPA is based closely upon the 1985 European *Product Liability Directive* (85/374 EEC). Part VA was introduced to the TPA in 1992.<sup>7</sup> Also significant that same year was the introduction of a formal representative or class action mechanism in the Federal Court of Australia.<sup>8</sup>

Since 2002, Australia has undergone significant reform to civil liability law. These reforms were partly in response to a perception that more plaintiffs had been succeeding in personal injury claims and/or that damages awards had been increasing which resulted in restricted availability in public liability insurance and increased premiums.<sup>9</sup> The reforms have in part<sup>10</sup> followed the recommendations of the *Review of the Law of Negligence* commissioned by the Federal Treasury (commonly referred to as the "Ipp Report").<sup>11</sup>

---

smoking may continue to be brought: for an example of past litigation based upon section 52 of the TPA see *Phillip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.

<sup>7</sup> The first reported judgment on a substantive issue was *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1999) ATPR 41-672: see Kellam J and Giblett R "Australian appeal court considers issues under EC Product Liability Directive 1985" (2000) *Consumer Law Journal* 7. There have been at least 30 reported and unreported decisions since. However, Australia (and other countries in the Asia-Pacific region) has exhibited patterns similar to Europe after the 1985 EC Product Liability Directive (85/374 EEC) came into force in its member states, in terms of broader impact on product safety activities (eg recalls) and consumer expectations. See generally Kellam J and Nottage L "Report on Clayton Utz Asia-Pacific Product Liability Survey" 17(9) *Australian Product Liability Reporter* 121 (2006), with an updated version available via [www.ssrn.com](http://www.ssrn.com); and Nottage, L, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (Routledge Curzon London 2004) chapters 2 and 4.

<sup>8</sup> Introduced by Part IVA of the *Federal Court of Australia Act 1976* (Cth). Equivalent procedures were adopted in Victoria 2000 to allow class actions in the Supreme Court of Victoria: see Part 4A *Supreme Court Act 1986* (Vic) and for example, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] Aust Torts Reports 81-692, [2003] VSC 27

<sup>9</sup> See Spigelman, JJ "Negligence: the Last Outpost of the Welfare State" (2002) 76 *ALJ* 432. The perception that there was an insurance crisis was encouraged by the media coverage of a number of judgements at the time including *Simpson v Diamond* [2001] NSWSC 925 where a verdict of \$15 million was made: see Clark, S Loveday, C & Williams, G "The Future for Product Liability Law in Australia", (2005) 16(9) *Australian Product Liability Reporter* 129. Changes designed to increase access to justice had also been made in Australia during the preceding decade: see Kellam J "Changes to the Legal Environment" (1994) 5(2) *Australian Product Liability Reporter* 44. Query, however, whether the perceptions of an insurance crisis were accurate: see Davies, G L "Negligence: Where Lies the Future?", A commentary delivered at the Supreme and Federal Court Judges' Conference on the Ipp Report, Adelaide, 23 January 2003.

<sup>10</sup> In a recent article, The Hon Justice DA Ipp writes: "Many reforms have been made. Several of these were recommended by the panel in which I participated. Several were not. I approve of those reforms that the panel recommended. In many respects, the reforming legislation goes further, sometimes much further, than the recommendations." in "The Metamorphosis of Slip and Fall" (2008) 29 *Australian Bar Review* 150 at 150.

<sup>11</sup> See <http://revofneg.treasury.gov.au/content/review2.asp>. The Terms of Reference included the following statement:

Reforms to civil liability law relating to personal injury claims have been variously introduced in the States and Territories, and in Part VIB of the TPA<sup>12</sup> including in relation to limitation periods and caps on damages and introducing proportionate liability.<sup>13</sup> The *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth) also provides that claims alleging misleading or deceptive conduct or false representations in breach of sections 52 and 53 of the TPA are no longer available as a cause of action in personal injury claims (except if the death or personal injury results from smoking or other use of tobacco products), although equivalent reform has not been made to all State *Fair Trading* legislation and so these causes of action remain available under State law.<sup>14</sup>

In respect of claims seeking compensation for economic loss/property damage under section 82 arising from a breach of section 52 which occurred on or after 26 July 2004, Part VIA of the TPA now provides for proportionate liability.<sup>15</sup> Pursuant to this Part, a defendant can allege contributory negligence on the part of the plaintiff<sup>16</sup> and claim contribution from joint wrongdoers. Other state

---

"The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another."

<sup>12</sup> Section 87E of the TPA provides that Part VIB (Claims for Damages or Compensation for Death or Personal Injury) applies to claims under Part V, Div 1A and 2A and Part VA. Div 1A (Product Safety and Information) provides a basis for personal injury claims are possible under sections 65C (Product Safety Standards and Unsafe Goods), 65D Product Information Standards and section 65H (Loss or damage caused by contravention of product recall order) in conjunction with section 82 of the TPA, the authors are not aware of such a cause of action being brought. The provisions of Part VIB of the TPA do not apply to claims under Part V Division 2 of the TPA which imply statutory warranties into a contract for the supply of goods and to which state law applies.

<sup>13</sup> The *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002* (Cth) removed tax barriers to structured settlements; the *Trade Practices Amendment (Liability for Recreational Services) Act 2002* amended the TPA to allow people to sign waivers and assume the risk of participating in inherently risky recreational activities; *Commonwealth Volunteers Protection Act 2002* exempted Commonwealth volunteers from liability. The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* amended the TPA to allow proportionate liability for economic loss. The *Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004* introduced changes to limitation periods and limits on damages arising from personal injury or death applying to any claim alleging unconscionable conduct, a contravention of the product safety and information provisions, a supply by a manufacturer or importer of consumer goods in breach of a statutory warranty or a supply by a manufacturer or importer of defective goods.

<sup>14</sup> Equivalent reforms have been introduced into Tasmania, New South Wales, Victoria and Queensland. However, the *Fair Trading* legislation of Western Australia, Northern Territory, South Australia and the Australian Capital Territory has not been so limited (as at 30 July 2006). Sections 52 and 53 were previously frequently pleaded in personal injury cases - see *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537; *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) 90 FCR 40; (1999) ATPR 41-672; *Hampic Pty Ltd v Adams* (1999) ASAL 55-035 ; [2000] ATPR 40,545 (41-737) *Courtney v Medtel Pty Ltd* [2003] FCA 36; [2003] 130 FCR 182; [2003] HCA Trans 496 (2 December 2003).

<sup>15</sup> These provisions do not otherwise apply to actions for breach of other Unfair Practices in Part V Division 1 of the TPA, including section 53 (which prohibits various false representations in connection with the supply of goods) or claims for monetary compensation under section 87.

<sup>16</sup>In effect reversing the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41 which held that contributory negligence was not available in damages claims under section 82 of the TPA.

laws also provide for proportional liability in claims involving economic loss or property damages whether in tort, contract or under state legislation.<sup>17</sup>

## II. Traditional (Common Law) Liability Regime

### II.A Contract

Australia's law of contract is based on the common law. A valid contract requires an offer and an acceptance with an intention to create legal relations (that is, that the parties intend to be legally bound), consideration (such as the payment of a price), legal capacity of the parties (minors being one class of persons which are subject to a degree of incapacity to enter an enforceable contract), legality of object and genuine consent. Contracts for the sale or supply of goods are not required to be in writing or evidenced in writing to be valid (except in Tasmania and Western Australia, for sales of goods valued \$20 or more<sup>18</sup>). Such contracts are frequently oral. The terms of a contract may also be express or implied.

Each Australian State and Territory has also enacted *Sale of Goods* legislation<sup>19</sup> based on the *Sale of Goods Act* 1894 in the United Kingdom. This legislation implies warranties into each contract entered for the supply of goods, whether they be written or oral. These warranties include that the goods are of merchantable quality (including being safe), and that they are fit and proper for any notified purpose for which they are supplied.

Some jurisdictions prevent these warranties being excluded in consumer sales.<sup>20</sup> Similar warranties are also implied into contracts for the supply of consumer goods under the TPA and some State legislation<sup>21</sup> as described below.

---

<sup>17</sup> *Wrongs and Limitation of Actions Act (Insurance Reform Act)* 2003 Vic; *Civil Liability Amendment (Personal Responsibility Act)* 2002 and *Civil Liability Amendment Act* 2003 NSW; *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act* 2005 SA; *Justice and Other Legislation Amendment Act* 2005 Qld; *Civil Liability Amendment Act* 2003 WA; *Civil Liability Amendment (Proportionate Liability) Act* Tas; *Proportionate Liability Act* 2005 NT; *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act* 2004 Qld.

<sup>18</sup> Section 9 *Sale of Goods Act* 1896 (Tas); section 4 *Sale of Goods Act* 1895 (WA)

<sup>19</sup> *Sale of Goods Act* 1923 NSW; *Sale of Goods Act* 1896 Qld; *Goods Act* 1958 Vic; *Sale of Goods Act* 1895-1952 SA; *Sale of Goods Act* 1895 WA; *Sale of Goods Act* 1954 ACT; *Sale of Goods Act* NT.

<sup>20</sup> For example, see section 40Q of the *Fair Trading Act* 1987 (NSW) and section 6 of the *Consumer Transactions Act* 1972 (SA). However, this is not the case in Victoria - see section 61 of the *Goods Act* 1958 (Vic) and only in certain circumstances in many jurisdictions - see section 19 *Sale of Goods Act* 1896 (Tas), section 17 of the *Sale of Goods Act* 1896 (Qld), section 19 of the *Sale of Goods Act* 1954 (ACT), section 38 of the *Fair Trading Act* 1987 (WA) and section 19 of the *Sale of Goods Act* (NT).

<sup>21</sup> See sections 40P to 40S *Fair Trading Act* 1987 (NSW), sections 32H, 32HA, 32I and 32J *Fair Trading Act* 1999 (Vic), sections 37 to 40 *Fair Trading Act* 1987 (WA) and sections 63 to 66 of the *Consumer Affairs and Fair Trading Act* 1990 (NT). There is no equivalent to Part V Division 2 in the *Fair Trading Act* 1992 (ACT), *Fair Trading Act* 1989 (Qld), *Fair Trading Act* 1987 (SA), *Fair Trading Act* 1990 (Tas);, or.

The doctrine of privity of contract limits recovery for breach of contract to the parties to the contract. Very few product liability actions against manufacturers in Australia are based in contract, as privity of contract usually does not exist between a manufacturer and the consumer or user of the product who has suffered personal injury. At common law, a purchaser's rights in contract are limited to rights against the supplier of the product. However, Part V Division 2A of the TPA was added to overcome this hurdle and provide consumers a direct cause of action against manufacturers and importers of goods in respect of consumer goods which are not of merchantable quality or are not reasonably fit for purpose. There are similar provisions in some (but not all) state law.<sup>22</sup>

## Remedies

Breach of contract at common law, however minor, entitles the innocent party to damages for loss even if the damages are only nominal. Damages are essentially compensatory in nature. Damages are recoverable at common law when they are such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things following the breach or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a consequence of the breach.<sup>23</sup>

Contractual damages are based on the measure of placing the plaintiff in the position they would have been in, had the defendant properly performed the contract.<sup>24</sup> The injured plaintiff is under a duty to mitigate the loss by all reasonable efforts, which may include the obtaining of substitute performance elsewhere.

Serious breaches of contract give the innocent party a right to treat the contract as discharged. A serious breach means a breach of an essential term ("condition") or a serious breach of an intermediate term. The innocent party can also terminate the contract if the other party repudiates (words or conduct amounting to a refusal to perform the contract to a serious extent).

---

<sup>22</sup> See sections 40T to 40ZC *Fair Trading Act* 1987 (NSW) and sections 72 to 82 of the *Consumer Affairs and Fair Trading Act* 1990 (NT). There is no equivalent to Part V Division 2A in the *Fair Trading Act* 1992 (ACT), *Fair Trading Act* 1989 (Qld), *Fair Trading Act* 1987 (SA), *Fair Trading Act* 1999 (Vic), *Fair Trading Act* 1990 (Tas) or the *Fair Trading Act* 1987 (WA). See, however, the *Manufacturers Warranties Act* 1974 (SA) and Part VIII *Sale of Goods Act* 1923 (NSW) which imply warranties in some circumstances.

<sup>23</sup> *Hadley v Baxendale* (1854) 9 Exch 341 at 354.

<sup>24</sup> The High Court has summarised the difference between the measure of damages in contract and tort in these terms:

"In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss)."

The law regarding the quantum of damages to be awarded for breach of sale of goods contracts is regulated in state *Sale of Goods* legislation. The relevant provisions restate the common law position by providing that damages are available for loss directly and naturally resulting in the ordinary course of events from the breach of warranty. However, a prima facie measure of damages is also given<sup>25</sup>, that is, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. If there is physical injury to the plaintiff or loss to other property, for example, this provision is not applicable.<sup>26</sup>

The equitable remedy of specific performance is also available in limited circumstances. It is a discretionary remedy which is only awarded where damages are inadequate and it would not be ordered in the case of generic goods.

## **II.B Tort – Negligence**

Australian negligence law is based upon the House of Lords decision in *Donoghue v Stevenson*<sup>27</sup> and *Grant v Australian Knitting Mills*.<sup>28</sup> In general terms, three elements are required: the existence of a duty of care; breach of that duty; and loss or injury resulting from the breach.

The nature of the duty of care of a manufacturer is to take reasonable care to avoid a foreseeable risk of injury. Generally, a consumer will easily be able to establish such a duty on the part of a manufacturer, that is, that there was a reasonable foreseeability of a real risk of injury to the type (class) of persons of which the claimant was a member. The Courts have variously made determinations regarding what might be considered "foreseeable" or not. The accepted test is whether or not the risk was "far fetched or fanciful".<sup>29</sup>

---

*Gates v City Mutual Life Assurance Society Limited* (1985-86) 160 CLR 1 at 11-12.

<sup>25</sup> Section 54 *Sale of Goods Act* 1923 NSW: equivalent provisions: Vic section 59; SA section 52; WA section 52; Qld section 54; Tas section 57; ACT section 56; NT section 56.

<sup>26</sup> As breach of contract is a common law action it is governed by state law and accordingly is impacted by state civil liability reforms in respect of personal injury cases.

<sup>27</sup> [1932] AC 562.

<sup>28</sup> [1936] AC 85.

<sup>29</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47, Mason J. Note also the warning of Barwick CJ in *Maloney v Commissioner for Railways* (1978) 52 ALJR 292 at 292-293:

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

In deciding whether there is a breach of duty, the Court will look at what a reasonable person in the position of the manufacturer or supplier would have done in the circumstances in response to the foreseeable risk in relation to the design, manufacture or supply of the goods or the provision of warnings and instructions for use.<sup>30</sup>

The duty of care of a retailer or supplier of goods is more limited.<sup>31</sup> A non-manufacturing distributor of goods that is ignorant of a dangerous defect does not owe the same duty of care as that of a manufacturer. The duty requires reasonable care in the avoidance of personal injury by reference to what the distributor knows or has reason to know.

Parent companies may also owe an independent duty of care to persons injured by an act of a subsidiary.<sup>32</sup> However, the fact that a parent company exercises control and influence over its subsidiary does not alone justify lifting or piercing the corporate veil so as to create a duty of care. The separate corporate identities must be respected in the absence of evidence that the subsidiary company is a mere façade, at least in respect of claims involving employees.<sup>33</sup>

---

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

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

<sup>30</sup> In addition, it may be reasonable to expect a manufacturer or supplier to meet its statutory duties: see *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (unreported, 28 November 2002, BC200207145).

<sup>31</sup> *Laundess v Laundess and Anor* (1990) 20 MVR 156, [1994] Aust Torts Reports 61,870 (81-316); *Elliott v Bali Bungy Co* [2002] NSWSC 906; *McPherson's Ltd v Eaton* [2005] Aust Torts Reports 81-825, [2005] NSWCA 435, 3 DDCR 255, [2006] ALMD 3640; *J & V Pesl Pty Ltd v Ray Smith Tractors Pty Ltd* [2007] NSWCA 74. The common law has long recognised that the duties of the intermediate seller of goods in negligence are more restricted than those of a manufacturer. The seller must not render goods defective (*Gordon v M'Hardy* (1903) 6 F 210), warn of known defects (*Clarke & Wife v Army and Navy Co-op Society* (1903) 1 KB 1559), pass on instructions (*Kuback v Hollands* (1937) 3 All ER 907) and not mislead (*Watson v Buckley Osborne Garrett & Co Ltd* [1940] 1 All ER 174). An intermediate seller is under no obligation to examine the goods unless they have grounds for believing that they are defective or that the manufacturer is of doubtful reputation (*Watson v Buckley Osborne Garrett & Co Ltd* [1940] 1 All ER 174; *Fisher v Harrods Ltd* (1966) L Lloyds Rep 500).

<sup>32</sup> *Heys and Barrow v CSR Limited and Midalco Pty Ltd*, Roland J SCWA 4 October 1988 (unreported).

<sup>33</sup> *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554; (1998) 16 NSWCCR 289.



As a part of civil liability reform, a number of state statutes<sup>34</sup> now codify the principles which a Court should take into consideration in determining the existence and scope of the defendant's duty of care to the plaintiff, that is, foreseeability and the standard of care, together with remoteness and causation. The exact wording of the provisions differs between jurisdictions.

In overview, the state legislation provide that a person will not be negligent in failing to take precautions against harm unless the risk was foreseeable, the risk was not insignificant, and a reasonable person would have taken those precautions. In determining what precautions should have been taken, the relevant factors to be taken into account include the probability of harm if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid that and similar risks of harm, and the social utility of the activity creating the risk. Importantly, taking subsequent remedial action that would have avoided a risk of harm (eg, recalling a product, amending warnings or changing the design or formulation of product) does not impact upon liability and is not an admission of liability.<sup>35</sup>

For example, in New South Wales the *Civil Liability Act 2002* (NSW) codified the law with respect to personal injury negligence and the circumstances in which a duty of care would be imposed. Section 5F provides that an injured person is presumed to have been aware of the risk of harm of obvious risks, unless the person proves otherwise on the balance of probabilities. Section 48 deals with the duty to warn of risks. It provides that a person who owes a duty of care to another to give a warning, advice, or other information in respect of a risk to a plaintiff, satisfies the duty of care if they take reasonable care in giving that warning, advice, or other information. Division 4 deals with awareness of risk. Section 51 provides that an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the same position. A risk of something occurring can be an obvious one, even though it has a low probability of occurring. Obvious risks include those that are a matter of common knowledge. Section 52 provides that a person is presumed to be aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that they were not aware of the risk.

Australian Courts have traditionally applied the "but for" test to determine if the plaintiff would still have been injured but for the act of the defendant. Causation is essentially a question of fact, and can be

---

<sup>34</sup> *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (NSW); *Civil Liability Act 1936* (SA); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas); *Personal Injuries (Liabilities and Damages Act) 2003* (NT); *Civil Law (Wrongs) Act 2002* (ACT).

<sup>35</sup> See, eg *Moss v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2006] WASC 311 and *Hannell v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2006] WASC 310 regarding a manufacturer's duty to warn home handymen (but not bystanders) of the risks of asbestos under s 5B(1) of the *Civil Liability Act 2002* (WA).

resolved as a matter of common sense and experience, considering policy and value judgments.<sup>36</sup> Under the civil liability reforms, a two step approach to causation has been adopted: first, was the negligence a necessary condition of the occurrence of the harm (factual causation) and secondly, is it appropriate that the defendant's liability extend to the harm caused (scope of liability).<sup>37</sup>

## II.C Breach of Statutory Duty

Breach of statutory duty can be relevant in product liability litigation in Australia in two ways and a significant volume of case law has emerged in this context in recent years. First, such a breach may provide evidence of negligence<sup>38</sup> and hence generate civil liability,<sup>39</sup> although it is generally not conclusive.<sup>40</sup>

---

<sup>36</sup> Mason CJ in *March v E and MH Stramare Pty Ltd and Anor* (1991) 171 CLR 506 at 518, 519 summarised the test in the following terms:

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

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

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

<sup>37</sup> The application of *Civil Liability Act* 2002 NSW is illustrated by *Finch v Rogers* (2004) NSWSC 39, a first instance decision of Kirby J. The plaintiff sought damages for medical negligence arising from delayed treatment after surgery following diagnosis of testicular cancer. Breach of duty was admitted but the issue was whether the plaintiff's disablement was caused by the defendant's breach of duty. In relation to the first limb, Kirby J found that the defendant's negligence was a necessary condition of the harm that ensued to the plaintiff and was factually caused by the negligence. In relation to the second limb, Kirby J stated that it was "appropriate that the scope of the defendant's liability extend to the harm so caused".

<sup>38</sup> In *Pyrenees Shire Council v Day* (1998) 151 ALR 147, Brennan CJ at para [16] adverted to the distinction between an action for breach of statutory duty and an action for common law negligence noting "the same set of circumstances may give rise to either cause of action".

<sup>39</sup> See *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485. Notwithstanding that a breach of statutory duty was not pleaded, O'Loughlin J nevertheless took it into account in determining the nature of the respondent's duty of care and in deciding whether the supplier was negligent. His Honour stated: "*The fact that the applicant (or his advisers) chose not to plead a breach of statutory duty does not mean the provisions of the statute are to be ignored. Those provisions are material ... in making an evaluation of two critical questions: first, did the respondent owe ... a duty of care and, secondly, if it did, what was the extent or standard of that duty?*". By importing this duty of safety into negligence law, it seems to the authors that a form of strict liability is adduced.

<sup>40</sup> F A Trinidade, P Cane and M Lunney, *The Law of Torts in Australia*, 4th ed, Oxford University Press, South Melbourne 2007, 448.

Secondly, a breach of statutory duty may generate civil liability regardless of whether that breach constitutes negligence. Generally, private rights of action are not available where the duties are designed to regulate motor traffic, but are available where duties are to protect the health of industrial workers. Private actionability has also been allowed in some cases outside these settings.<sup>41</sup> Whether a breach of a statutory provision confers a private right of action is a matter of statutory construction.<sup>42</sup> In the absence of an express conferral of a private cause of action, the Court's task is to infer what the statute requires. This requires the balancing of a number of considerations including the purpose and object of the Act in question. In the usual situation where the legislature has not expressed its intention, the various presumptions or considerations applied (statutory purpose, convenience, policy, etc) are complex and not definitive. That is also true in determining the required standard of conduct. A further complication is the scope of the duty – both whether the plaintiff is within the category of persons owed the duty, and whether the type of harm suffered is within the type the statute was directed at preventing.<sup>43</sup>

## Defences

There are several defences available to a claim in negligence namely, contributory negligence (which is not a complete defence, damages are apportioned) and voluntary assumption of risk (*volenti non fit injuria*).

To successfully defend a claim using the voluntary assumption of risk defence, the defendant must establish that the plaintiff not only perceived the existence of danger, but also fully appreciated it and voluntarily accepted the risk.<sup>44</sup> It is a difficult defence to establish.

---

<sup>41</sup> See *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485 (where the failure to provide an operation manual with goods to a purchaser was found to be in breach of a retailer's statutory duty under the *Occupational Health, Safety and Welfare Act 1986* (SA)). *Booksan Pty Ltd v Wehbe* [2006] NSWCA 3; Aust Tort Reports 81-830 (the plaintiffs who were injured as a result of the collapse of a hoist successfully alleged a breach of a statutory duty under the *Construction Safety Regulations 1950* (NSW)); *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 (a claim for losses (including liability to consumers) as a result of a salmonella outbreak following consumption of unpasteurised fruit juice *inter alia* based upon a breach of statutory duty based on the *Citrus Industry Act 1991* (SA) was rejected, the Court holding that as it was a marketing statute, the Act was not intended to give a private right of action); *Girkraid Pty Ltd v McDonald* [2001] NSWSC 1202 (the New South Wales Court of Appeal held that breach of Regulations 18 and 19 of the *Dangerous Goods Regulation 1978* (NSW) gave rise to a civil cause of action and contains a useful review of some of the authorities prior to the High Court's decision in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 ); *Tasmanian Alkaloids Pty Ltd v Anthony* [2005] TASSC 53 (where liability was affirmed on appeal *inter alia* for a breach of statutory duty namely under regulations 36(a) and 46 *Dangerous Goods (General) Regulations 1998* (Tas)); *Transfield v Rawstron* [2005] WASCA 78 (an allegation of breach of statutory duty under s 5(1) of the *Occupiers' Liability Act 1985* WA was struck out because of a failing to seek leave to bring the action as required by section 93B *Workers' Compensation and Rehabilitation Act 1981* (WA)).

<sup>42</sup> See Gleeson CJ with Gummow and Hayne JJ in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at 316.

<sup>43</sup> *Trinidad et al*, above note 38, 663-75.

<sup>44</sup> *Howells v Murray River North Pty Ltd* [2004] WASCA 276: The defence of voluntary assumption of risk only applies when the injured person, with full knowledge of the risk, expressly or by implication agrees to waive his right to any remedy for any injury sustained. This involves the plaintiff assuming both the physical risk and also the legal risk of harm.

The defence of contributory negligence has been effectively codified under the civil liability reforms.<sup>45</sup> Other civil liability reforms also impact upon the availability of the defence, for example, the duty to warn of obvious risks,<sup>46</sup> and provisions which provide that the defence is available for breach of statutory duty.<sup>47</sup> Contributory negligence may be relied on as a defence where a plaintiff has failed to meet the standard of care to which he or she is required to conform for his or her own protection and safety, amounting to a contributing cause of his or her loss or injury. Contributory negligence is not a complete defence to a claim in negligence, but it does act to reduce damages awards as damages will be apportioned in accordance with a party's degree of fault. Under the civil liability reforms, the Court has a wide discretion to reduce compensation to the extent the Court considers just and equitable,<sup>48</sup> having regard to the plaintiff's share of responsibility for the harm suffered or (alternatively expressed) by comparing the degree of culpability of the defendant with that of the plaintiff. In exercising this discretion, Courts have reduced a plaintiff's damages up to 90 per cent. However, the High Court has held that a reduction of 100 per cent is not permissible as it amounts to a finding that the plaintiff was wholly responsible for the damage suffered.<sup>49</sup>

In addition to these defences, the possibility has also been raised that a defendant manufacturer of pharmaceutical products may seek to rely on the "learned intermediary" defence.<sup>50</sup> The learned intermediary defence in relation to pharmaceutical products is not supported by express authority in Australia, but it has been suggested that the defence could be accommodated within the existing common law principles.<sup>51</sup> Under the defence, it would be argued that the defendant manufacturer's duty of care has

---

<sup>45</sup> *Wrongs (Amendment) Act 2000* (Vic); Division 8 of Part 1A of the *Civil Liability Act 2002* NSW; *Law Reform (Contributory Negligence and Apportionment of Liability Act) 2001* SA; Division 6 of Part 1, Chapter 2 *Civil Liability Act 2003* Qld; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003* (WA); Division 7 of Part 6 *Civil Liability Act 2002* (Tas); sections 14-17 *Proportionate Liability Act 2005* (NT) (in respect of intoxication); Part 7.3 of Chapter 7 *Civil Wrongs Act 2002*

<sup>46</sup> Query whether the decision of *Robinson v Halvorsen Boats Pty Ltd* (1990) Aust Tort Reports 81-042 would be decided differently today. The defendant was found liable in negligence in circumstances where the deceased who had a blood alcohol content of 0.118g/100ml drowned after falling overboard because he was not warned of the dangers of being on the foredeck of the cruiser.

<sup>47</sup> Section 5A *Civil Liability Act 2002* (NSW)

<sup>48</sup> In *Nicholson v Nicholson* [No 2] (1994) 35 NSWLR 308 the Court was prepared to consider that it could be "just and equitable" that damages might be reduced to zero under section 74(3) of the *Motor Accidents Act 1988* NSW in circumstances where the plaintiff had failed to wear a seat belt providing the defendant could establish that the plaintiff's injuries were due solely to that act.

<sup>49</sup> *Podrebersek v Australia Iron and Steel Pty Limited* (1985) 59 ALR 529; See also *Civic v Glastonbury Steel Fabrications Pty Limited* (1985) Aust Torts Reports 80-746; *Kelly v Carroll* [2002] NSWCA 9, [37] per Heydon JA.

<sup>50</sup> In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853, Kiefel J did not think that it was necessary to refer to the US case law in relation to the effect of a "learned intermediary" upon a manufacturer's obligation to warn, in particular, it having been held in Australia that the duty to warn rests with the treating physician not the manufacturer or distributor (*H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000).

<sup>51</sup> Kellam, J and Clark, S *Product Liability Defences: a State by State Compendium*, Defence Research Institute, September 2004 (2007 update in preparation).

been fully discharged by providing all relevant information and warnings to a recognised, skilled and learned intermediary through whom the user has supplied the product.

### **Remedies in tort**

Common law damages in tort aim to return the plaintiff to the position they would have been in had the defendant's negligence not occurred.

### **HC- Damages for personal injury under State law**

If a person dies as a result of injuries sustained from use of a defective product, and the defect was caused by a manufacturer's wrongful act, neglect or fault, the law of the Australian State or Territory in relation to damages applies.<sup>52</sup>

Damages have traditionally been assessed by Courts on a lump sum basis, once and for all. Structured settlements, however, are now possible.<sup>53</sup> In relation to personal injury claims, awards are calculated by reference to general damages (including pain and suffering, loss of amenities and expectation of life) and special damages (including loss of wages - both past and future - and medical expenses).

Further, considerable limitations and "caps" have been placed on the amounts of damages a claimant can now recover as a result of civil liability reform. However,, these limitations are not uniform, being variously expressed by reference to percentage disability, a scale or a monetary amount. The purpose of the reforms is to abolish the common law relating to awards of damages for pain and suffering, disfigurement, loss of the amenities of life, and loss of expectation of life.

Some jurisdictions have introduced a threshold test before there is an entitlement to general damages. In NSW damages are not payable for disability below 15% of a most extreme case and for general damages equalling or above 15 percent and up to 33 per cent, a fixed percentage of the maximum to be awarded is payable.<sup>54</sup> Victoria similarly has a percentage threshold test of 5% in the case of injury other than psychiatric injuries and 10% for psychiatric injuries.<sup>55</sup> Under Part VIB of the TPA, if the non-economic

---

<sup>52</sup> For example, in the State of New South Wales, see the *Civil Liability Act 2002* (NSW), *Law Reform (Miscellaneous Provisions) Act 1944* (NSW).

<sup>53</sup> ACT: Chapter 7, Section 106 *Civil Law (Wrongs) Act 2002* ACT, NSW: Division 7, Sections 22 - 26 *Civil Liability Act 2002* NSW, NT: Part 4, Division 6, Section 31 and 32 *Personal Injuries (Liabilities and Damages) Act* NT, QLD: Chapter 3, Part 4, Sections 63 - 67 *Civil Liability Act 2003* QLD, SA: Section 38A *District Court Act 1991* SA, Section 33A *Magistrates Court Act 1991* SA and Section 30BA *Supreme Court Act 1935* SA, TAS: Part 5, Sections 7A and 8 *Civil Liability Act 2002* TAS, VIC: Part VC, Sections 28 M and 28 N *Wrongs Act 1958* VIC, WA: Part 2, Division 4, Sections 14 and 15 *Civil Liability Act 2002* WA.

<sup>54</sup> Division 3, Section 16(3) *Civil Liability Act 2002* NSW.

<sup>55</sup> Part VBA, Sections 28LB and 28LF *Wrongs Act 1958* VIC.

loss of the plaintiff is less than 15% of the most extreme case, the Court must not award personal injury damages for non-economic loss.<sup>56</sup>

Other jurisdictions have adopted a different approach. In South Australia, general damages are calculated by reference to a scale of value reflecting gradations of non-economic loss.<sup>57</sup> Similarly in Queensland there is no threshold and injuries assessed on a '100 point scale' and by reference to similar injuries in prior proceedings.<sup>58</sup>

In Western Australia, the threshold for general damages is \$12,000.<sup>59</sup> This amount also operates as a deductible for general damages over \$12,000.<sup>60</sup> In the Northern Territory, the threshold for general damages for non-economic loss is 5% of the maximum amount of damages for non-pecuniary loss.<sup>61</sup>

Discount rates are applied to future economic loss at a rate of 5% in NSW, Northern Territory, Queensland, South Australia, Tasmania and Victoria and 6% in WA.<sup>62</sup> All jurisdictions have introduced a cap on lost earnings for personal injury. This is at three times the average weekly wage in all jurisdictions<sup>63</sup> but South Australia (which has a total amount cap).<sup>64</sup>

Restrictions on recovery of damages for gratuitous care is also subject to different thresholds in various jurisdictions. In New South Wales, Victoria, Queensland and the Northern Territory no damages may be awarded to a claimant for gratuitous care if the services are provided or are to be provided for less than six hours per week and for less than six months.<sup>65</sup>

---

<sup>56</sup> Section 87S of the TPA.

<sup>57</sup> Part 8, Section 52 *Civil Liability Act* 1936 SA.

<sup>58</sup> Chapter 3, Part 3, Sections 61 and 62 *Civil Liability Act* 2003 QLD.

<sup>59</sup> Part 2, Division 2, Section 9 and 10 *Civil Liability Act* 2002 WA.

<sup>60</sup> Part 2, Division 2, Section 9(2) and 9(3) *Civil Liability Act* 2002 WA.

<sup>61</sup> Part 4, Division 4, Section 27 and 28 *Personal Injuries (Liabilities and Damages) Act* NT.

<sup>62</sup> NSW: Division 2, Section 14 *Civil Liability Act* 2002 NSW, NT: Part 4, Division 3, Section 22 *Personal Injuries (Liabilities and Damages) Act* NT, QLD: Chapter 3, Part 3, Section 57 *Civil Liability Act* 2003 QLD, SA: Part 8, Section 55, Part 1, Section 3 *Civil Liability Act* 1936 SA, TAS: Part 7, Section 28A *Civil Liability Act* 2002 TAS, VIC: Part VB, Section 28I *Wrongs Act* 1958 VIC, WA: Section 5 *Law Reform (Miscellaneous Provisions) Act* 1941 WA.

<sup>63</sup> NSW: Division 2, Section 12 *Civil Liability Act* 2002 NSW, NT: Part 4, Division 3, Section 20 *Personal Injuries (Liabilities and Damages) Act* NT, QLD: Chapter 3, Part 3, Section 54 *Civil Liability Act* 2003 QLD, VIC: Part VB, Section 28F *Wrongs Act* 1958 VIC, WA: Part 2, Division 3, Section 11 *Civil Liability Act* 2002 WA, TAS: Part 7, Section 26 *Civil Liability Act* 2002 TAS.

<sup>64</sup> Part 8, Section 54, Part 1, Section 3 *Civil Liability Act* 1936 SA.

<sup>65</sup> NSW: Division 2, Section 15 *Civil Liability Act* 2002 NSW, Vic: Part III, Section 19A *Wrongs Act* 1958 Vic, Qld: Chapter 3, Part 3, Section 59 *Civil Liability Act* 2003 Qld, NT: Part 4, Division 3, Section 23 *Personal Injuries (Liabilities and Damages) Act* NT.

Civil liability reforms have also introduced restrictions in relation to mental harm and nervous shock in most states. It is also not clear how worry and anxiety is to be treated.<sup>66</sup>

The recent tort reform process in Australia has extinguished the right to aggravated and exemplary (punitive) damages in common law personal injury claims in some states and under the TPA.<sup>67</sup> However, such damages may be available for property damage and economic loss,<sup>68</sup> and possibly under section 22 of the *Federal Court of Australia Act 1976* (Cth).<sup>69</sup>

### III. Statutory causes of action

Provisions of the TPA give consumers an action against manufacturers and importers of goods which are defective, unsuitable or not of merchantable quality. These provisions may be supplemented by state law depending upon the jurisdiction.<sup>70</sup>

The most relevant TPA provisions<sup>71</sup> are contained in Part V - Consumer Protection, specifically Division 2 (Conditions and Warranties in Consumer Transactions) and Division 2A (Actions against

---

<sup>66</sup> In *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 the Court held that the plaintiffs were entitled to some damages for vexation and upset. However, notwithstanding that these feelings were real, they did not justify a significant award. Significantly, the Court also held that these feelings of distress and upset would not come within the definition of "mental harm" in Part 3 of the *Civil Liability Act 2002* NSW since they did not involve the impairment of a person's mental condition. The Court noted, however, that there was no foreseeability requirement in relation to a claim for damages under section 75AD and Part VA of the TPA. However, the Court was of the view that the distress and upset suffered by the plaintiffs did not amount to a personal injury envisaged by section 75AD.

<sup>67</sup> Section 87ZB of the TPA, section 21 *Civil Liability Act 2002* (NSW), the *Compensation to Relatives Act 1897* (NSW) and the Northern Territory *Personal Injuries (Civil Claims) Act 2003* NT provide that no exemplary or aggravated damages can be awarded in respect of death or personal injury.

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

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

<sup>68</sup> As to common law claims in negligence, see *Midalco Pty Ltd v Rabenalt* [1989] VR 461, [1988] Aust Torts Reports 68,054 (80-208) (in relation to recklessness) and *Wiatr v CSR Ltd* [2006] WASC 77 (whether aggravated damages available for negligence). In the context of a claim concerning cattle contaminated with an agricultural chemical, Wilcox J accepted that exemplary damages may be awarded, in Australia, in a negligence case. However, although the negligence exhibited by ICI in manufacture and distribution of Helix could be described as "gross", it was not deliberate action or actions taken in contumelious disregard of anyone's rights and accordingly the claim was rejected on the facts: *McMullin v ICI Australia Operations Pty Ltd* (1997) 77 FCR 1 at 88.

<sup>69</sup> see *Nixon v Phillip Morris Australia Ltd* [1999] FCA 1107.

<sup>70</sup> In relation to claims against manufacturers see *Manufacturers Warranties Act 1974* SA; Part 8 *Sale of Goods Act 1923*; *Fair Trading Acts* (NSW) and *Consumer Affairs and Fair Trading Act 1990* (NT); for warranties against suppliers equivalent to Part V Division 2 see *Fair Trading Acts* (NSW); WA and Vic and *Consumer Affairs and Fair Trading Act 1990* (NT).

Manufacturers and Importers of Goods) and Part VA (Liability of Manufacturers and Importers for Defective Products). Part V Division 2A<sup>72</sup> and Part VA give consumers statutory causes of action against manufacturers. In contrast, the relevant cause of action for breach of Part V Division 2 is breach of contract in respect of warranties implied by the statute.<sup>73</sup>

The TPA applies to corporations<sup>74</sup> which supply goods in trade and commerce. In the context of a claim under Part VA, the Federal Court has characterised the nature of “supply” as being “a bilateral and consensual process”. The bilateral “transaction” or “dealing” which occurs in the supply of goods sees one party transferring the goods and the other acquiring them. The events must occur “as an aspect or element of activities or transactions which themselves have a trading character”.<sup>75</sup>

The statute does not apply to private transactions, although some state *Fair Trading Acts* imply consumer warranties equivalent to those in Part V Division 2 and 2A of the TPA.<sup>76</sup> “Goods” are defined inclusively to include ships<sup>77</sup>, aircraft and other vehicles, animals (including fish), minerals, trees and crops (whether on, under or attached to land and gas and electricity).<sup>78</sup> Pollution is not a product.<sup>79</sup>

---

<sup>71</sup> A claim for compensation may also be made under Pt V Div 1A. See Pt II Breach of Statutory Duty above. However, the authors are not aware of a successful claim being made.

<sup>72</sup> Although it gives consumers statutory causes of actions with a contractual flavour, that is, when goods are not of merchantable quality or are unfit for purpose, such claims are generally not predicated on the basis of there being either an implied warranty (such as under Part V Division 2) or a notional contract (as, for example, under the *Manufacturers Warranties Act 1974* (SA)) (at 261) (but cf section 74H of the TPA, which gives a seller the right to recover against a manufacturer or importer “as ... if the liability ... had arisen under a contract of indemnity”).

<sup>73</sup> *Arturi v Zupps Motors Pty Ltd* (1980) 49 FLR 283; 33 ALR 243; *Walsh v University of Technology, Sydney* [2007] FCA 880 at [62]; *Transport Accident Commission v Lease Auto Pty Ltd* [2002] FCAFC 430; (2002) 125 FCR 399; (2002) 37 MVR 430; *Lavrick v Lease Auto Pty Ltd* (2002) 192 ALR 290; (2002) 36 MVR 133; [2002] FCA 599; *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; (1996) 136 ALR 510; (1996) 70 ALJR 590; [1996] HCA 12; *Wallis v Downward-Pickford (North Queensland)* (1994) 179 CLR 388; (1994) 120 ALR 440; (1994) 68 ALJR 395; (1994) ATPR 41-300; *Lloyd Offshore Helicopters Pty Ltd v BH Pacific Pty Ltd* (1993) ATPR 41-262.

<sup>74</sup> If a defendant is not a corporation it is not liable under the TPA, see *White v Canberra Manufacturing Pty Ltd* [1999] ACTSC 53 (unreported, 28 May 1999, BC9902741) at [21] per Gallop J (where the defendants were corporations that traded in partnership as Canberra Wall Frames). Note, however, TPA s 6 — in particular subs (2)(h) deeming individuals to be corporations, the effect and constitutionality of which is untested. In contrast, the state Fair Trading Acts apply to ‘persons’, which is to be broadly interpreted and includes employees, see *Houghton v Arms* (2006) 225 CLR 553; 231 ALR 534.

<sup>75</sup> *Cook v Pasmenco* [2000] FCA 677 per Lindgren J.

<sup>76</sup> Part V Division 2 see *Fair Trading Acts* NSW, NT, WA and Vic; Part V Division 2A see *Fair Trading Acts* NSW and NT.

<sup>77</sup> *PNSL Berhad v Dalrymple Marine Services Pty Ltd and PNSL Berhad v The Owners of the Ship ‘Koumala’* [2007] QSC 101

<sup>78</sup> Section 4; in relation to “electricity” and “goods”, see *AGL Victorial Pty Ltd v Lockwood* (2003) 10 VR 596; [2003] VSC 453 which held that “goods” is intended to signify deliverable personal property and to the extent that “goods” have the characteristic of tangibility, then electricity met the description.

<sup>79</sup> *Cook v Pasmenco* [2000] FCA 677.



Multiple parties are liable to be joined as manufacturers to an action under the TPA. The definition of the term “*manufactured*” under section 74A of the TPA includes the growing, extraction, production, processing and assembly of a product which includes agricultural production.<sup>80</sup> Because of the broad definition of manufacturer in the TPA, a component part manufacturer, assembler and importer can all be joined into proceedings.<sup>81</sup> Under Part V Division 2A and Part VA of the TPA, a person (including a corporation) is also deemed to be a manufacturer of goods if it holds itself out as being the manufacturer, it allows its name or brand or mark to be affixed to goods or it imports goods into Australia where the actual manufacturer does not have a place of business in Australia.<sup>82</sup> Parallel claims may be brought against the actual foreign manufacturer and the importer into Australia.<sup>83</sup> If a corporation applies its label to a product it will be deemed to be the manufacturer, even if the label states that it was not the manufacturer, for example, that it has been manufactured for it by a third party.<sup>84</sup>

### **Part V Division 2 and 2A**

Part V Divisions 2 and 2A of the TPA impose liability on suppliers, manufacturers and importers of certain goods to consumers who have suffered loss or damage as a result of their use. This liability generally cannot be excluded.<sup>85</sup>

Part V Division 2 applies to consumers, that is, persons who acquire<sup>86</sup> goods with a price which does not

---

<sup>80</sup> This definition encompassed the activities of the oyster farmer and its growing, harvesting, cleaning, depurating and packing of oysters for sale to consumers by retailers in *Ryan v Great Lakes Council* (1999) 102 LGERA 123; ATPR 46-191; *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; 177 ALR 18; ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337.

<sup>81</sup> *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881 involved a manufacturer of retread tyres.

<sup>82</sup> Section 74A (which is incorporated into Part VA by section 75AB).

<sup>83</sup> *Leeks v FXC Corporation* (2002) 118 FCR 299; 189 ALR 288 (approving Boehm AJ in *White v Eurocycle* (1994) ATPR 41-330 and Doussa J in *ETSA v Krone (Australia) Technique Pty Ltd* (1994) 51 FCR 540; 123 ALR 202; ATPR 41 337 at 42,426).

<sup>84</sup> *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) 90 FCR 40; (1999) ATPR 41-672.

<sup>85</sup> See in relation to Part V Division 2 of the TPA, section 68 (Application of provisions not to be excluded or modified); but, for non-consumer goods, compare section 68A (Limitation of liability for breach of certain conditions or warranties). See also in respect of Part V Division 2A sections 74K (Application of Division not to be excluded or modified); 74L (Limitation in certain circumstances of liability of manufacturer to seller).

<sup>86</sup> “Acquire” is a common word of “a very wide meaning” and includes gifts and giveaways. Even if it is illegal to supply goods, under Division 1A allowing the Minister to ban goods deemed unsafe, they may fall within the section 4B definition of goods acquired by “consumers” as “Even if the price be deemed to be nil because the value of the goods was nil, this provision was satisfied for the price nil did not exceed the prescribed amount”: see *Clarke v New Concept Import Services Pty Ltd* (1981) ATPR 40-264 per Davies J. Contrast *Elms v Ansell Ltd* [2007] NSWSC 618 where it was held that in circumstances where an employer purchased gloves for use by staff, there was no acquisition of the goods by the staff as a “consumer”, as required by sections 4B and 74B of the TPA.

exceed \$40,000 or, where the price exceeds that amount, the goods are of a kind ordinarily<sup>87</sup> acquired for personal, domestic or household<sup>88</sup> use or consumption or the goods consist of a commercial road vehicle.<sup>89</sup> Accordingly, the Division applies to supplies of non-consumer goods with a price of below \$40,000.<sup>90</sup> It does not apply where the goods are purchased for the purpose of re-supply or of using them up or transforming them in trade and commerce.<sup>91</sup>

In contrast, Part V Division 2A only applies to consumers of consumer goods<sup>92</sup>. This is because section 74A(2) of the TPA provides that a reference to goods in that Division shall be read as a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption.<sup>93</sup>

The phrase "goods of a kind ordinarily acquired for personal, domestic or household use or consumption

---

<sup>87</sup> The meaning of the word "ordinarily" was considered in *Federal Commissioner of Taxation v Chubb Australia* (1995) 128 ALR 489 in the context of the *Sales Tax (Exemptions and Classifications) Act 1935*. "Ordinarily" was held to be used idiomatically in the sense of "commonly" and was not equivalent to "exclusively" or "predominantly". Burchett J noted "*It is possible, and it happens frequently, that something is ordinarily used for one purpose, and is also ordinarily used for a quite different purpose. German Shepherd dogs are not the less ordinarily kept as guard dogs because they are also ordinarily kept by dog lovers as companions. An axe is ordinarily used in country households in which wood is burnt to fuel a stove or heater, or where encroaching trees must from time to time be cut back. The very same type and brand of axe may also be found in use ...in operations having nothing to do with households...*". Hill J approved Davies J in *OR Cormack Pty Ltd v Federal Commissioner of Taxation* (1992) 92 ATC 4121 (at 4124): "*The adverb 'ordinarily' does not have a precise denotation. It requires a use of the goods which lies between 'primarily or principally' on the one hand and mere 'use by' on the other. The adverb conveys the meaning of 'generally' or 'customarily' or 'usually'.*".

<sup>88</sup> The meaning of the "use for household purposes" was also considered in *Federal Commissioner of Taxation v Chubb Australia* (1995) 128 ALR 489 in the context of the *Sales Tax (Exemptions and Classifications) Act 1935*. Cth and held to have a domestic context. Burchett J commented: "*With respect to those who think otherwise, it is not clear to me that a cabinet, desk or safe used in a home for the storage of professional or business papers would not be used for household purposes. In the late twentieth century, many people do much work at home, with or without the aid of computers linked to their offices and facsimile machines...*".

<sup>89</sup> Section 4B "Consumers".

<sup>90</sup> See *PNSL Berhad v Dalrymple Marine Services Pty Ltd and PNSL Berhad v The Owners of the Ship 'Koumala'* [2007] QSC 101 (unreported, 19 April 2007, BC200703327) where a contract for the provision of tug towing services in circumstances where the fee for the services was less than \$40,000 and a ship being towed, the Pernas Arang fell within the definition of 'goods' in the TPA.

<sup>91</sup> However, this does not mean that if the goods are perishable or depreciable, and/or may be damaged beyond repair that they are "used up". Notwithstanding that a tyre on a car, truck or tractor is an acquisition of goods which may be used in repairing or treating other goods (and sometimes in the course of a process of production or manufacture) and would be acquired for the purpose of using it up, it would not be used up in the course of that repair or treatment. see *Laws v GWS Machinery Pty Ltd* [2007] NSWSC 316.

<sup>92</sup> *Laws v GWS Machinery Pty Ltd* [2007] NSWSC 316: The purchase of the tyre was a consumer transaction and the provisions of sections 66, 68 and 71 of the TPA applied. Similarly, Part VA applied because the general definition of "goods" in section 4 is applicable to those provisions. However, the tyre was not of a kind ordinarily acquired for personal, domestic or household use or consumption so Part V Division 2A was not applicable because of the operation of section 74A(2)(a).

<sup>93</sup> David Harland "Consumer Guarantees - the Relevance for Europe of the Australian Experience" [1995] Consumer LJ 153.

is to be construed broadly so as to give the broadest relief that the fair meaning will allow wherever it appears in the TPA.<sup>94</sup>

Both Part V Divisions 2 and 2A impose liability where goods are not reasonably fit for particular purpose (unless the consumer did not rely or it was unreasonable to rely on the skill or judgement of the corporation)<sup>95</sup> or are not of merchantable quality (except in relation to defects drawn to the consumer's attention or, if the consumer examines the goods before purchase, as regards defects which that examination ought to reveal).<sup>96</sup> Both Part V Division 2 and 2A<sup>97</sup> are frequently pleaded in product liability cases.

A distinction exists between warranties of merchantable quality and fitness for purpose at common law and those under the TPA, and it seems unnecessary and undesirable to refer to common law decisions on the definitions.<sup>98</sup> In respect of the definition of merchantable quality, the statutory definition differs from the common law because it requires that all normal purposes for which the goods in question are

---

<sup>94</sup> *Bunnings Group Ltd v Laminex Group Ltd* [2006] 153 FCR 479; 230 ALR 269.

<sup>95</sup> In *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207 Barclay Oysters argued that it was not reasonable for the consumer to rely on its skill and judgment to ensure that the goods were reasonably fit for the purpose of consumption given the practical impossibility of the testing oysters for the presence of viruses, the farmer's inability to know that the oyster leases had been subjected to viral contamination, and the farmer's inability to control the environment in which the oysters grow (with reference to contact with contaminants from private land or council stormwater). This argument was rejected. In the absence of obvious defect or special circumstances or a warning of the possibility that the oysters might contain viruses that could not be detected, a consumer will reasonably assume that goods are fit for the purpose they were intended.

On appeal to the Full Court of the Federal Court,; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 591 the oyster farmer submitted that whether or not it was "unreasonable for the consumer to rely on the skill or judgment of the corporation" under section 74B(2)(b) was to be assessed objectively, with the result that it must be hypothesised that consumers knew all the relevant facts, including what the manufacturer knew or should have known, the circumstances in which the manufacture took place, and the steps available or otherwise to the manufacturer to ensure that the goods were reasonably fit for the purpose they were intended. The Court rejected this construction holding that special technical knowledge touching the process of manufacture of the goods should ordinarily not be imputed to the consumer.

<sup>96</sup> *Bethune v QConn Pty Ltd (t/as Case Adelaide)* [2002] FCA 1485: The Applicant was aware of and willing to take the machine in its condition. Even if the absence of the sidescreens was a "defect", the Court held that the Applicant was well aware of the defect and so an implied warranty did not arise where it was causative of the accident.

<sup>97</sup> *Bright v Femcare Ltd* [2000] FCA 742; *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; *Courtney v Medtel Pty Ltd* [2003] FCA 36; [2003] 130 FCR 182; [2003] HCA Trans 496 (2 December 2003); *Effem Foods Ltd v Nicholls* [2004] NSWCA 332; *Leeks v FXC Corporation and Others* [2002] FCA 72; (2002) 118 FCR 299; *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168 (unreported 6 September 2005, BC200506537).

<sup>98</sup> At first instance, in *Courtney v Medtel Pty Ltd* [2003] FCA 36, Sackville J said that in considering the meaning of merchantable quality in respect of the statutory cause of action under section 74D it was "unnecessary and undesirable" to look at the common law definition of merchantability as the relevant decisions referred to the tests of merchants and were appropriate to commercial sales (at 263). See also *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323, 96 ALR 375, [1991] ASC 56,585 (56-036), [1991] ATPR (Digest) 53,153.

commonly bought to be relevant.<sup>99</sup>

Whether goods are of merchantable quality or fit for purpose will be determined upon the facts of each case. It is not determinative that the goods have not yet failed.<sup>100</sup> The general purpose of the goods is relevant.<sup>101</sup> The question is to be answered not only by reference whether or not the goods failed to accomplish their purpose, but also by reference to what a consumer could reasonably expect from the goods. For example, medical devices are not unfit for purpose if it is unreasonable for the Applicant to have expected an absence of complications considering the advice given by the medical practitioners.<sup>102</sup> A product that is subject to a significant additional risk of premature failure by reason of the materials used in the manufacturing process may not be reasonably fit for its intended purpose.<sup>103</sup> The fact that a product is included in a hazard alert or product recall notice alone is not sufficient to render a product unmerchantable.<sup>104</sup> Similarly it is not appropriate to attribute to one item any qualities derived by statistical analysis of the total batch of goods from which the goods came.<sup>105</sup>

Under sections 74B and 74D of the TPA, it is a defence to prove that goods were not reasonably fit for purpose or were not of merchantable quality because of an act or default of a person not being the manufacturer or a cause independent of human control occurring after the goods left the control of the manufacturer. The manufacturer bears the legal and evidentiary burden of proof to establish the existence of any of the circumstances.<sup>106</sup>

In addition, under section 74B in respect of goods not reasonably fit for purpose, it is a defence if the circumstances show that the consumer did not rely or that it was unreasonable for the consumer to rely on the skill or judgement of the manufacturer.

---

<sup>99</sup> See *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323, 96 ALR 375, [1991] ASC 56,585 (56-036), [1991] ATPR (Digest) 53,153, declining to follow *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1. Section 74E, however, may provide an exception to this rule - see the concluding remarks of Cooper J in *Rasell v Cavalier Marketing (Australia) Pty Ltd*.

<sup>100</sup> In *Courtney v Medtel Pty Ltd* [2003] 130 FCR 182 the Full Court of the Federal Court stated that the fact that it is known at the time of the trial that goods had not failed did not compel a conclusion that they were of merchantable quality.

<sup>101</sup> *Action Paintball v Clarke* [2005] NSWCA 170: The relevant purpose for which goods must be reasonably fit should not be determined generally and not by reference to the particular facts of a case.

<sup>102</sup> *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; ATPR 42-014.

<sup>103</sup> *Courtney v Medtel Pty Ltd* [2003] 126 FCR 219.

<sup>104</sup> In *Courtney v Medtel Pty Ltd* [2003] FCA 36, Sackville J made clear that Courts would be reluctant to impose liability on a manufacturer because of a hazard alert or warning to consumers as it would discourage manufacturers from disclosing possible defects to consumers (at 272).

<sup>105</sup> *Courtney v Medtel Pty Ltd* [2003] 130 FCR 182; 198 ALR 630 (Full FC).

<sup>106</sup> *Effem Foods Ltd v Nicholls* [2004] NSWCA 332; ATPR 42-034.

Further, in relation to section 74D and goods which are not of merchantable quality, there is a defence regarding defects specifically drawn to the consumer's attention before the making of the contract for the supply and if the consumer examines the goods before supply, in relation to any defects that the examination ought to have revealed.

Part V Division 2 operates by implying warranties into the contract for the supply of goods to the consumer. In contrast, Part V Division 2A creates a statutory cause of action.<sup>107</sup> The distinction has a practical effect. Claims based on Part V Division 2 are actions for breach of contract and the damages awarded are assessed according to the contractual measure. Claims for compensation brought under Part V Division 2A are not based upon section 82 although the measure of damages seems likely to be similar given the similarity in wording of the different provisions.<sup>108</sup> Section 82 which provides for actions for damages in contravention of Part V of the TPA is therefore (with the one exception of section 74H (Right of seller to recover against manufacturer or importer)) not relevant.<sup>109</sup>

Under section 75A of the TPA, consumers also have a statutory right to rescind a contract where there is a breach of a condition implied by Part V Division 2,<sup>110</sup> providing that a notice of rescission is given within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods.

Under section 74H of the TPA, where a seller is under a liability to a consumer in respect of loss or damage suffered by the consumer as a result of a breach of Part V Division 2 and the manufacturer is liable to compensate the consumer in respect of the same loss or damage, the manufacturer is liable to

---

<sup>107</sup> At first instance, in *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at [261] Sackville J recognised that claims under Pt V Div 2A are founded upon an anomaly. Although it gives consumers statutory causes of action with a contractual flavour, that is, when goods are not of merchantable quality or are unfit for purpose such claims are generally not predicated on the basis of there being either an implied warranty (such as under Pt V Div 2) or a notional contract (eg, under the Manufacturers Warranties Act 1974 (SA)) (but cf s 74H of the TPA which gives a seller the right to recover against a manufacturer or importer 'as . . . if the liability . . . had arisen under a contract of indemnity'). See G Gregg and T Tzovaras, 'The Liability of Manufacturers and Importers under the Trade Practices Amendment Act 1978' (1979) 10 Fed L Rev 39; and S Ahmed, 'Products Liability in Australia' (1979) 6 *U Tas L Rev* 189.

<sup>108</sup> In *Courtney v Medtel Pty Ltd* [2003] FCA 36, Sackville J also noted the difference in wording between section 74D of the TPA and section 82. An entitlement to compensation arises under section 74D of the TPA if the consumer "*suffers loss or damage by reason that the goods are not of merchantable quality*". This is different to the wording of section 82 which provides that a person who suffers "*loss or damage by conduct of another person*" in contravention of a provision of the Act may recover compensation. His Honour expressed the view that the wording of section 74D conforms more closely to how notions of causation should be expressed (at 265).

<sup>109</sup> Section 82 may have one limited application under Part V Division 2A, that is, to claims under section 74H (see *White v Eurocycle Pty Ltd* (1994) ATPR 41-390; (1995 64 SASR 461)).

<sup>110</sup> In respect of the right to rescind in the context of an alleged offence under s 75AZC of the TPA, see *ACCC v Skippy Australia Pty Ltd* [2006] FCA 1343 (unreported, 18 October 2006, BC200608295).

indemnify the seller in respect of its liability.<sup>111</sup> This right is enforceable as if it were a right arising out of a contract of indemnity between the seller and the manufacturer.<sup>112</sup>

## Part VA

Part VA of the TPA is based upon the *EC Product Liability Directive* 1985. It is a statutory cause of action.<sup>113</sup> Its provisions apply only to goods supplied after 9 July 1992. The application of the provisions cannot be excluded or modified.<sup>114</sup> There is now a body of Australian case law considering its application.<sup>115</sup>

If a plaintiff is having difficulty identifying the manufacturer of a defective product, section 75AJ (Unidentified Manufacturer) of the TPA provides a mechanism for a plaintiff to make a formal request of supplier to identify the name of the manufacturer that supplied the goods.<sup>116</sup>

---

<sup>111</sup> However, while Part VA provides that if two or more corporations are liable under Part VA, then they are jointly and severally liable under section 75AM, a mechanism allowing the attribution of proportionate responsibility is not given. Part VA is also silent as to responsibility between “manufacturers” and other persons who may be liable in respect of the same loss.

<sup>112</sup> See *White v Eurocycle Pty Ltd* (1994) ATPR 41-390; (1995) 64 SASR 461; *Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd* [1998] 1 Qd R 149; (1997) 146 ALR 120; ATPR 41-565.

<sup>113</sup> Query whether a claim under Part VA involves a “tortious act or omission” for the purposes of leave to serve out of the jurisdiction - see *Borch v Answer Products Inc* [2000] QSC 379.

<sup>114</sup> Section 75AP (Application of provisions not to be excluded or modified).

<sup>115</sup> See Appendix A for full detail regarding the Australian case law in this area; See also *Newcombe v Ame Properties Ltd* (1995) 125 FLR 67; *Brooks v R&C Products Pty Ltd* (1996) ATPR 41-537; *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) ATPR 41-632; (1998) 90 FCR 40; (1999) ATPR 41-672; *Stegenga v J Corp Pty Ltd & Ors* (1999) ASAL 55-025; ATPR 41-695; *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* [2002] HCA 54 (2002) 211 CLR 591; *Canberra Furniture Manufacturing Pty Ltd v White* [1999] ACTSC 53; *Borch v Answer Products Inc* [2000] QSC 379; *Bright v Femcare Ltd* [2000] FCA 742; *Eastley v Mauger* [2000] FCA 266; *Lanza v Codemo Management Pty Ltd & Ors* [2001] NSWSC 845; *Australian Competition and Consumer Commission v Pacific Dunlop Ltd* [2001] FCA 740; *Leeks v FXC Corporation and Others* [2002] FCA 72; (2002) 118 FCR 299; *Forbes v Selleys Pty Ltd* [2002] NSWSC 547; [2004] NSWSC 149; *Courtney v Medtel Pty Ltd* [2003] FCA 36; [2003] 130 FCR 182; [2003] HCA Trans 496 (2 December 2003); *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881; *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) ATPR 41-923 [2003] FCA 151; *Roots & Raydene Pty Ltd v Trussmaster Pty Ltd* [2003] QSC 348; *Stewart v Pegasus Investments and Holdings Pty Ltd* [2004] FMCA 712; *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34;; *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; *Effem Foods Ltd v Nicholls* [2004] NSWCA 332; *Fitzpatrick v Job (t/a Job's Engineering)* [2005] ALMD 2321; *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168; *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd* [2006] FCA 875; *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512; *Hamilton v Merck and Co Inc* [2006] NSWCA 55; *Mayes v Australian Cedar Pty Ltd t/a Toronto Timber and Building Supplies* [2006] NSWSC 597; *Laws v GWS Machinery Pty Ltd* [2007] NSWSC 316; *Elms v Ansell Ltd* [2007] NSWSC 618.

<sup>116</sup> In *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881, the Plaintiff's solicitor knew shortly after the accident that retreading of a tyre had been done by “Vulcap”. However, Vulcap conducted its business through more than one corporate entity containing in its name the word “Vulcap”. The Plaintiff took steps to identify which corporate entity was involved by issuing a subpoena upon Vulcap. The Court took the view that the time of awareness of the identity of the manufacturer includes a measure of

Under Part VA of the TPA, goods have a defect "if their safety is not such as persons generally are entitled to expect".<sup>117</sup> The test is objective, based on community knowledge and expectations.<sup>118</sup> The product must be actually unsafe, not just of poor quality or inoperative.<sup>119</sup>

---

reasonableness and where there are a number of companies in a corporate structure, "it is unreasonable to expect the outsider to penetrate the veils and find the right corporate defendant unless there is prompt, frank and adequate disclosure". This only happened some 4 years after the accident.

<sup>117</sup> Section 75AC. See R Travers, 'Australia's New Product Liability Law' (1993) 67 *ALJ* 516 at 519ff. Jane Stapleton observes that the circularity of the definition of 'defect' in the EU Directive and the TPA is not fatal to the coherence of the legal rule, referring by example to Lord Atkin's well worn definition of the class of those in the tort of negligence whom 'we ought reasonably to have in contemplation': *Donoghue v Stevenson* [1932] AC 562, referred to in J Stapleton 'The Conceptual Imprecision of "Strict" Product Liability' (1998) *TLJ* 260.

<sup>118</sup> *Campomar Sociedad Limitada v Nike International Ltd* 202 CLR 45<sup>1</sup>, 74 ALJR 573, 169 ALR 677, 46 IPR 481, [2000] ATPR (Digest) 50,336 (46-201), [2000] ASAL 57,789 (55-043) (Digest), [2000] AIPC 37,148 (91-540), [2000] HCA 12: In this case involving an alleged trade mark infringement, passing off and section 52 of the TPA, the High Court said that consideration of the connection between the conduct and any actual or likely misleading or deception of the public was to be approached at a level of abstraction. In determining whether the conduct has caused an erroneous assumption, the court must assess the reactions or likely reactions of ordinary or reasonable members of the class to whom the conduct was addressed, and might disregard any extreme or fanciful reactions. The High Court stated: "It is in these cases of representations to the public,...., that there enter the "ordinary" (The phrase "ordinary purchaser" was used by Mason J in *Puxu* (1982) 149 CLR 191 at 210.) or "reasonable" (The term used by Gibbs CJ in *Puxu* (1982) 149 CLR 191 at 199) members of the class of prospective purchasers. Although a class of consumers may be expected to include a wide range of persons, in isolating the "ordinary" or "reasonable" members of that class, there is an objective attribution of certain characteristics".

"Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class. The inquiry thus is to be made with respect to this hypothetical individual why the misconception complained has arisen or is likely to arise if no injunctive relief be granted. In formulating this inquiry, the courts have had regard to what appears to be the outer limits of the purpose and scope of the statutory norm of conduct fixed by s 52. Thus, in *Puxu*, Gibbs CJ observed that conduct not intended to mislead or deceive and which was engaged in "honestly and reasonably" might nevertheless contravene s 52. Having regard to these "heavy burdens" which the statute created, his Honour concluded that, where the effect of conduct on a class of persons, such as consumers, was in issue, the section must be "regarded as contemplating the effect of the conduct on reasonable members of the class". ...Nevertheless, in an assessment of the reactions or likely reactions of the "ordinary" or "reasonable" members of the class of prospective purchasers of a mass-marketed product for general use, ..., the court may well decline to regard as controlling the application of s 52 those assumptions by persons whose reactions are extreme or fanciful. ... Further, the assumption made by this witness extended to the marketing of pet food and toilet cleaner. Such assumptions were not only erroneous but extreme and fanciful. They would not be attributed to the "ordinary" or "reasonable" members of the classes of prospective purchasers ... The initial question which must be determined is whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary or reasonable members of the classes of prospective purchasers".

<sup>119</sup> Hammond, M "Defect Test in Pt VA Trade Practices Act 1974 (Cth): Defectively Designed?"(1998) 6 *Torts Law Journal* 29; Olsson, E "Liability for Defective Goods – Limiting the Parameters of Part VA" (2003) 11(1) *Trade Practices Law Journal* 51; Kellam J & Kearney M "Product Liability – Decade of Change" (2001) 12(4) *Australian Product Liability Reporter* 49.

Just because goods may cause injury, however, does not mean they are defective. Goods may be harmful not due to a defect in them but simply because of their inherent nature.<sup>120</sup> Similarly, just because goods operate as intended does not mean that they are not defective if they cause personal injuries, for example, because of inadequate warnings or instructions for use.<sup>121</sup>

All circumstances are to be taken into account including the manner in which the goods have been marketed, their purposes, packaging, the use of any mark in relation to them, what reasonable might be expected to be done or in relation to them, any instructions for use or warnings,<sup>122</sup> and the time when they were supplied. An inference that goods have a defect is not to be made only because of the fact that safer goods have been subsequently supplied.<sup>123</sup>

The list of circumstances in subsection (2) is inclusive. It neither sets outer parameters of the relevant circumstances nor specifies a minimum qualification to be met.<sup>124</sup> The test of whether a product was defective was to be applied by reference to the public at large rather than any particular individual.<sup>125</sup> This is notwithstanding that consumers generally may have either a low or high expectation of safety due to a lack of information needed to accurately assess risk.<sup>126</sup>

Goods also do not have to be absolutely safe. However, persons generally, or the "public at large", are entitled to expect that a gas heater will not operate so as to cause significant damage.<sup>127</sup> A product can be

---

<sup>120</sup> See Lindgren J in *Cook v Pasmenco* [2000] FCA 677 - "it is a poison that does not do its deadly work that is defective rather than one that does".

<sup>121</sup> *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) ATPR 41-632.

<sup>122</sup> Regarding the adequacy of the warning labels and the role of expert evidence, Emmett J noted in *Glendale Chemical Products Pty Ltd v ACCC* (1998) 40 IPR 619; ATPR 41-632:

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

<sup>123</sup> Section 75AC (3).

<sup>124</sup> *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) ATPR 41-923; [2003] FCA 151; 90 FCR 40.

<sup>125</sup> *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) 90 FCR 40; (1999) ATPR 41-672.

<sup>126</sup> Kellam J and Arste B, "Current Trends and Future Directions in Product Liability Legislation and Litigation in Australia" *William Mitchell Law Review*, Vol 27: 1 at 149.

<sup>127</sup> See *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34 (unreported, 16 February 2004, BC200400317). Compare the escalating controversy in Japan about defective gas fan heaters, resulting in amendments to its Consumer Product Safety Law in late 2006: L Nottage, 'Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?' (2008) 2 *Yearbook of Consumer Law* forthcoming.



defective even if it operates as intended if the warnings are insufficient to alert consumers of the possible dangers of using the product.<sup>128</sup> It may be sufficient for a third party to rely on an inadequate warning, even if the plaintiff has not seen it.<sup>129</sup> A defect also need not exist at the time of supply by the manufacturer.<sup>130</sup>

Under the TPA a defect must not be inferred only from the fact that after the product was supplied, a safer good was supplied by the manufacturer. If there was compliance with a (rare) minimum product safety standard mandated by the Australian Federal Government (not by the States and Territories), and that standard was unsafe at the time of supply, the Government can be substituted as defendant in the proceedings.<sup>131</sup>

### **Damages under the TPA**

The basis upon which a plaintiff is entitled to claim compensation for a breach of a provision of the TPA varies according to the claim:

First, Part V Division 2 of the TPA implies statutory warranties into contracts and accordingly the relevant cause of action, is a claim for breach of contract governed by state law.<sup>132</sup> Second, claims for

---

<sup>128</sup> *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) 90 FCR 40; (1999) ATPR 41-672.

<sup>129</sup> By analogy with *Hampic Pty Ltd v Adams* (1999) NSWCA 455; ASAL 55-035; [2000] ATPR 40,545 (41-737) which concerned a claim under sections 52 and section 82 of the TPA. Adams had not seen the label. In circumstances where compensation is payable when loss or damage has been suffered “by conduct of another person that was done in contravention of a provision” in Part V, however, direct reliance on the warning was not necessary. This is consistent with other dicta. For example, in *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1 at 89. Wilcox J noted that it is not essential for the causal relationship to be established by proof that the Applicant relied on an act or statement of the Respondent. Similarly, Wilcox J noted that in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526, Lockhart J held good a company’s claim to recover damages for losses sustained by it as a result of a competitor’s allegedly misleading advertising. The company contended the advertising caused it to lose sales it otherwise would have made because purchases relied on the competitor’s advertising. His Honour at 530 referred to the use of the preposition “by” and noted: “Loss or damage must directly result from or be caused by the Respondent’s conduct. The Respondent’s conduct must be the real or direct or effective cause of the Applicant’s loss; it must have been ‘brought about by virtue of’ the conduct which is in contravention of s 52.”

<sup>130</sup> See, eg, *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* (2001) 34 MVR 359. No evidence was adduced that suggested the operations of the tyre manufacturer (Vulcap) did not comply with the relevant Australian standard. The court found that the totality of the evidence did not establish that the defect was in existence at the time of retread by the manufacturer or that there was any indication of underlying defect which ought reasonably to have been picked up and responded to by Vulcap. It found it equally probable that the tyre was damaged subsequently. However, the court noted that s 75AC of the TPA provides that there is a relevant defect if the tyre is deficient as to safety in terms of what persons generally are entitled to expect, and that s 75AK(1) provided an affirmative defence only if the manufacturer can establish that the defect did not exist at the supply time. In a negligence claim, by contrast, the burden of proof in these (quite rare) marginal cases rests with the plaintiff.

<sup>131</sup> Section 75AK of the TPA. In respect of ‘electricity’, supply time means the time at which it was generated being a time before it was transmitted or distributed. However, s 53 of the *Electricity Supply Act 1995* (NSW) provides that distributors of electricity are not liable for loss in certain circumstances.

<sup>132</sup> In negligence at common law, see *Tame v New South Wales* (2002) 211 CLR 317; 191 ALR 449: the central question was whether in all circumstances the risk of the plaintiff sustaining a recognisable psychiatric illness was

compensation may be made under Part V Division 2A. Third, if a claim is made for property damage or economic loss alleging misleading or deceptive conduct pursuant to section 52 or 53 of the TPA, compensation can be ordered under section 82 of the Act.

In relation to claims under section 82, the High Court has made clear in a number of cases that there is no stated limitation on the kinds of loss or damage for which compensation may be recovered.<sup>133</sup> Analogies with the law of contract or tort are not generally thought to be useful to limit awards. However, generally in assessing damages a comparison will be made between the position in which a person who suffered loss or damage is in and the position the person would have been if there had been no contravention. However, it is not an exclusive test.

Sections 75AD through to 75AG enable a claim for compensation for loss or injury caused by defective goods, namely, personal injury (by the injured individual and a person other than the injured individual not as a result of a business relationship),<sup>134</sup> loss relating to other goods and loss relating to land, building or fixtures ordinarily acquired for private use. Compensation to relatives claims are brought under section 75AE.<sup>135</sup> However, Part VA does not apply to a loss in respect of which an amount could be

---

reasonably foreseeable. An objective test is applied, that is, whether a person of ordinary fitness and mental stability would suffer the illness. Where the plaintiff's response to the defendant's conduct is so extreme or idiosyncratic as to be fanciful, the defendant is not required to guard against the risk. In *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, Sackville J at first instance declined to award damages for worry and anxiety to the applicant under Pt V Div 2A of the TPA but noted that such damages may be available in appropriate cases. Claims for mental stress have been awarded in some instances under s 82 of the TPA: *Steiner v Magic Carpet Tours Pty Ltd* (1984) ATPR 40-490; *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-009 and on appeal at (1990) ATPR 41-058 but cf *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; 94 ALR 719. It is questionable whether the definition of 'personal injury' in s 4KA of the TPA now prevents such claims being brought. Also query whether compensation for the breakdown of a marriage is payable: in *Crago v Multiquip Pty Ltd* (1998) ATPR 41-620, Lehane J was not prepared to exclude that such damages would never be awarded in negligence (*Lampert v Eastern National Omnibus Co Ltd* [1954] 2 All ER 719; [1954] 1 WLR 1047) or under s 82 of the TPA (cf *O'Loughlin J in Pritchard v Racecage Pty Ltd* (1996) 64 FCR 96; 135 ALR 717—reversed on other grounds (see (1997) 72 FCR 203; 142 ALR 527) or possibly even in contract (although his Honour noted that the remoteness of the damage would be an obvious difficulty given the nature of the contract in question which was for the supply of an ostrich egg incubator).

<sup>133</sup> See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; (1998) CLR 494; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; (2004) 204 ALR 26; *Zaravinos v Dairy Farmers Co-Operative Ltd & Pure-Pak Australia* (1985) 7 FCR 195; 59 ALR 603; 60 LGRA 152; *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537; *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219.

<sup>134</sup> In effect reversing the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; 192 ALR 1, which held that contributory negligence was not available in damages claims under s 82 of the TPA.

<sup>135</sup> However, section 75AE (Liability for defective goods causing injuries - loss by person other than injured individual) does not allow claims for contribution notwithstanding that assigning the facts of a case may satisfy the literal words of the section. In *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881, the Court rejected the argument and said that a claim under the section was available only to those who have suffered loss derived from the injuries as distinct from a loss suffered by being required to meet a judgment entered by reason of that person being a cause of the injuries. Similarly in *Stegenga v J Corp Pty Ltd & Ors* (1999) ASAL 55-025; ATPR 41-695 the Court held that Part VA of the TPA was intended to create a strict liability regime for use by private individuals as opposed to commercial entities and it would be inconsistent with that purpose to interpret "person", within section 75AE, as including corporate entities. Accordingly, section 75AE does not create a right of action in a commercial party allowing it to make a claim for indemnity from the

recovered under a workers compensation statute,<sup>136</sup> or which gives effect to an international agreement. Under section 75AN of the TPA, in assessing the level of compensation payable to a plaintiff, the Court will take into account the extent to which the acts or omissions of the plaintiff contributed to the cause of the loss.

### Damages for personal injury under the TPA

Part VIB (Claims for Damages or Compensation for death or personal injury) of the TPA took effect on 13 July 2004. The provisions apply to claims for personal injury and death under Part V Division 1A, Part V Division 2A and Part VA. "Personal injury" includes pre-natal injury, impairment of a person's physical or mental condition (which is a recognised psychiatric illness) or disease.<sup>137</sup>

The main limitations on recovery of compensation are as follows:

- General damages are capped at \$250,000, the threshold is 15% of a most extreme case, with a deductible operating to 33% of a most extreme case;<sup>138</sup>
- Damages for gratuitous services are limited on a similar basis to NSW;<sup>139</sup>
- Damages for future economic loss are capped at 2 times average weekly earnings;<sup>140</sup>
- A discount rate of 5% will apply in relation to damages for losses which occur in the future;<sup>141</sup>
- Structured settlements are permitted;<sup>142</sup>

Formatted: Indent: Left: 0", Hanging: 0.67", Bulleted + Level: 1 + Aligned at: 0" + Tab after: 0.25" + Indent at: 0.25", Tabs: Not at

manufacturer. The section overcomes difficulties that might otherwise exist under the Act in relation to compensation to relatives claims. For example, section 82 of the TPA may not allow claims by relatives, the reference to "a person" possibly not extending to or including the estate of a deceased person or the representative of that estate (see *Pritchard v Racecage Pty Ltd* (1996) FCR 96 per O'Loughlin J at 114 (reversed on other grounds) and Full Court at 72 FCR 203, 142 ALR 527, 25 MVR 17, [1997] ATPR 43,657 (41-554), [1997] Aust Torts Reports 64,024 (81-421)).

<sup>136</sup> The section overcomes difficulties that might otherwise exist under the Act in relation to compensation to relatives claims. For example, Pt V Div 2A and s 82 of the TPA may not allow claims by relatives, the reference to 'a person' possibly not extending to or including the estate of a deceased person or the representative of that estate: see *Pritchard v Racecage Pty Ltd* (1996) 64 FCR 96 at 114 per O'Loughlin J; 135 ALR 717. In contrast, Pt VA contains specific provisions in s 75AH (Survival of Liability Actions) and to save such claims. Others have identified further limitations of Div 2A, such that bystanders who are injured by products cannot rely upon it: eg, J Stapleton, 'Product Liability: Comparing Australia with the EU and US' (2000) 11(6) *APLR* 71.

<sup>137</sup> Section 4KA of the TPA; See also Emmett J in *ACCC v Glendale Chemical Products; Barnes v Glendale Chemical Products* (1998) 40 IPR 619; ATPR 41-632, where the application for an injunction was linked to the breach of s 52 of the TPA, not the claim under Pt VA.

<sup>138</sup> Section 87M, 87Q, 87R, 87S of the TPA.

<sup>139</sup> Section 87W of the TPA.

<sup>140</sup> Section 87U of the TPA.

<sup>141</sup> Section 87Y of the TPA.

- The limitation period is 3 years from the date of discoverability (the current limitation period is 3 years from the date of the event).<sup>143</sup>

Claims for breach of warranties implied under Part V Division 2 do not fall within the scope of Part VIB of the TPA as such claims are actions for breach of contract.<sup>144</sup>

Exemplary and punitive damages are not awarded in claims brought under the TPA, as these are not compensatory in nature.<sup>145</sup>

## Remedies

The availability of other remedies under Part VA, such as injunctions or declarations, is also in some doubt. Section 80 (Injunctions) and 87 (Other orders) are available on the application of a person who has suffered loss or damage by conduct of another person in contravention of Part V.<sup>146</sup> Accordingly, while such remedies could be sought in conjunction with claims pleading a breach of Part V Division 2 and 2A, they are not available in claims which plead only Part VA of the TPA.

The defences under Part VA of the TPA are also equivalent, with minor drafting disparities, to those under the 1985 *Product Liability Directive*:

- the alleged defect did not exist when the goods were supplied by the manufacturer;<sup>147</sup>
- the goods were defective only because there was compliance with a mandatory standard;
- the state of scientific or technical knowledge at the time the goods were supplied was not such as to enable the defect to be discovered (also referred to as the "development risk defence"),<sup>148</sup> and

Formatted: Indent: Left: 0", Hanging: 0.67", Bulleted + Level: 1 + Aligned at: 0" + Tab after: 0.25" + Indent at: 0.25", Tabs: Not at

<sup>142</sup> Section 87ZC of the TPA.

<sup>143</sup> Section 87F of the TPA.

<sup>144</sup> Above n 70.

<sup>145</sup> Section 87ZB TPA; this provision codified case law - see *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251; *Munchies Management Pty Ltd v Belperiod* (1989) 84 ALR 700; *Marks v GIO Holdings* [1998] HCA 69 per Gaudron J. It is unclear whether such damages could be awarded in cases under the TPA not involving personal injury - see *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107. For interrelationship with state law see *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512.

<sup>146</sup> See Emmett J in *ACCC v Glendale Chemical Products; Barnes v Glendale Chemical Products* (1998) ATPR 41-632 where the application for an injunction was linked to the breach of section 52 of the TPA, not the claim under Part VA.

<sup>147</sup> See eg *Effem Foods Ltd v Nicholls* [2004] NSWCA 332 [noted for this database]. The manufacturer unsuccessfully tried to invoke this defence by setting up two possibilities – inadvertent problem in the factory making the chocolate bar that ended up with a safety pin, versus sabotage by employee of retailer – but the Court applied the presumption against criminality in civil cases to disfavour the second possibility and reject the defence.

- (in the case of a manufacturer of a component part used in the product) the defect is attributable to the design of the finished product or to any markings, instructions or warnings given by the manufacturer of the finished product, rather than a defect in the component.

It has been suggested that the development risk defence<sup>149</sup> in the EC Directive may be viewed in two ways. First, that it retains a measure of strict liability, its reference point being the existence of knowledge in the world at large. Second, that it includes a relative element of what the defendant manufacturer might be expected to discover. The approach in Australia adopts the second view and is different to that adopted overseas.<sup>150</sup>

---

<sup>148</sup> In *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* [2002] HCA 54 (2002) 211 CLR 591, the oyster farmer was entitled to rely upon the development risks defence in section 75AK(1)(c), namely that “the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered”.

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

In this case it seems, the Federal Court may also have been influenced by the fact that the only test for contamination gave “false negatives”, and results from a test applied to the sample could not be extrapolated to the whole batch – so even if negatives had been reliable, one would have to test and thereby destroy each oyster.

On appeal Lindgren J observed (obiter, at para 549): “*If the problem of the ‘false negative’ had not existed and if it had been appropriate to test by sample, an interesting question would have arisen as to whether the expression ‘such as to enable that defect to be discovered’ in section 75AK(1)(c) was to be construed as importing a modifying notion of reasonableness or practicability. Let it be assumed that extrapolation from sample to bulk was valid, but that the testing of the sample had to take place at a laboratory a considerable distance from the grower’s establishment, the cost of the testing was great and the results could not be known for some days. A question would have arisen whether it could be truly said in these circumstances that the state of scientific or technical knowledge enabled the defect to be discovered.*”

<sup>149</sup> See Newdick C “Risk, Uncertainty and ‘Knowledge’ in the Development Risk Defence” (1991) 20 Anglo-American LR 309 and Newdick C “The Development Risk Defence of the Consumer Protection Act 1987” (1988) 47 Camb LJ 455; also Schubert M “Verschuldenselemente im Fehlerbegriff des neuen Produkthaftungsrechts” PHI 1989, 74.

<sup>150</sup> The approach taken in *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* [2002] HCA 54 (2002) 211 CLR 591 by the Federal Court both at first instance and on appeal contrasts with other Courts in other jurisdictions applying quite similarly worded defences. For example, in England, *A and Others v National Blood Authority* [2001] 3 All ER 289). In this decision Mr Justice Burton note that the safety in question was not what was actually expected by the public at large, but what they were entitled to expect with the Judge acting as the “*informed representative of the public at large*”. It was noted that the level of safety which persons generally are entitled to expect may differ from that of someone with medical knowledge and also that in some circumstances that the public has no expectation at all as to the level of safety. In the circumstances, the Judge did not consider that there was any public knowledge or acceptance of the risk of contamination of blood products with hepatitis C and he did not consider it to be a product which by its very nature contained a risk. In all of the circumstances, Burton J held that “*the public at large was entitled to expect that the blood transfused to them would be free from infection*”. The defendant argued that the development risks defence applied to it in that it was not possible to identify the individual bag(s) of blood which contained the virus. However, in circumstances where the risk of hepatitis C was known, the Court held that the defence did not apply.

The need for an express defence has also been queried. The definition of "defect" in section 75AC requires all relevant circumstances to be taken into account, which would presumably include the "state of the art".<sup>151</sup> On one view, it only makes explicit that which is implicit in the definition of "defect".

#### **IV. Practice and Procedure**

##### **Proof on the "Balance of Probabilities"**

In all civil claims in Australia, the onus is upon plaintiffs to prove their case "on the balance of probabilities".

In Australia in negligence cases, the doctrine of *res ipsa loquitur* assists plaintiffs by allowing an inference to be drawn against the Defendant by the mere fact that the accident occurred, if in the ordinary affairs of mankind, such an incident is unlikely to occur without want of care on the part of the person being sued. In Australia, this is a permissive inference. It does not give rise to a presumption of negligence.<sup>152</sup>

A distinction is to be drawn, however, between a legal burden of proof imposed by the law itself and the shifting of inferences of fact, as evidence is tendered, which may give rise to inferences unless further evidence is adduced.<sup>153</sup>

Australian law has not adopted a formal reversal of onus of proof of causation in negligence, although a robust and pragmatic approach to proof permits but does not compel a favourable finding in particular circumstances.

A Court may infer causation if the breach is such that in the ordinary course of events as perceived by the Court, that type of harm is a consequence of the breach. In such a case, unless the Defendant can point to

---

<sup>151</sup> See Howes, G "The New Product Liability Law: the Relevance of European and United Kingdom Reforms for the Development of Australian Law" (1996) 4 Competition and Consumer Law Journal 102 at 112-113 at footnote 50 which refers to the late Professor David Harland's view that the development risk defence only makes explicit that which is implicit in the defectiveness standard, that is, a producer cannot be expected to make a product safer than the state of scientific and technical knowledge allows him to.

<sup>152</sup> The case of *Kilgannon v Sharpe Bros Pty Ltd* [1986] 4 NSWLR 600 considered the application of the doctrine. The decision assumed some prominence in the debate about law reform in Australia. It was described as a case where "the status of the Plaintiff as a non-buyer had made it more costly and more difficult if not impossible to obtain compensation, when if the Plaintiff had been the buyer there would have been no argument about liability" (Australian Law Reform Commission "Product Liability" Final Report No 51 AGPS Canberra 1989 at 34). In this case, a child was injured by an exploding soft drink bottle. The Plaintiff sued the manufacturer of the bottle, the bottler of the beverage and the distributor. The Plaintiff relied in part on the doctrine of *res ipsa loquitur* but was unsuccessful. The majority of the Court of Appeal held that to succeed a plaintiff had to prove on the balance of probabilities that a particular defendant was negligent and it was not sufficient for a defendant to allege that "one of them must have been and all of them may have been negligent".

<sup>153</sup> See *Brown v Rolls Royce Ltd* (1960) 1 All ER 577 at 581 per Denning LJ in relation to a claim in negligence.

some particular reason why the instant case is outside the norm, causation may (but not must) be inferred.<sup>154</sup>

Part V Div 2A and Part VA of the TPA are referred to as "strict liability" provisions. In a claim under Part V Div 2A the plaintiff is not required to prove fault on the part of the defendant but must establish, on the balance of probabilities, that the goods in question were not fit for purpose or were not of merchantable quality in the circumstances.

In a claim under Part VA, a claimant is required to prove that on the balance of probabilities,<sup>155</sup> the existence of a defect in the good, injury and causation.<sup>156</sup> There is no doubt that inferences of defect can also be drawn from the evidence under Part VA of the TPA. For example, section 75AC(3) provides that an inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were put on the market. It is open for an Applicant to establish that the goods were defective by inference from the evidence, in particular given the consumer protection character of the Part.<sup>157</sup> A claimant is not required to prove the existence of a defect at the time of supply.<sup>158</sup> The NSW Court of Appeal has noted that a plaintiff may be assisted by a shifting in the evidentiary burden in relation to causation and that a robust and pragmatic approach to proof permitted.<sup>159</sup> If a link was established between the defect and injury, it was to be inferred that the defect was present at the time of the injury, unless the manufacturer proved otherwise.<sup>160</sup>

In relation to the defence under Section 75AK(1)(a) (that is, that the defect in the goods that is alleged to have caused the loss did not exist at the time of supply), it is sufficient for the manufacturer to show that any defect at the time of supply would have been detected. It is not necessary that the manufacturer

---

<sup>154</sup> Mason P in *Forbes v Selley's Pty Ltd* [2004] NSWSC 149 quoted with approval dicta of Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 at 649 that "...the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty".

<sup>155</sup> See *Seltsam Pty Ltd v McGuinness* [2000] 49 NSWLR 262: the Courts must determine the existence of a causal relationship on the balance of probabilities quoted with approval by in *Forbes v Selley's Pty Ltd* [2004] NSWSC 149 which noted that an inference as to the probabilities may be drawn from a number of pieces of particular evidence, notwithstanding that each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form "strands in a cable" of circumstantial evidence.

<sup>156</sup> See eg *Forbes v Selley's Pty Ltd* [2004] NSWSC 149 (claim denied). Contrast eg *Effem Foods Ltd v Nicholls* [2004] NSWCA 332 (claim upheld after defendant failed to discharge its burden to prove that the defect arose after its supply).

<sup>157</sup> *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) ATPR 41-923 [2003] FCA 151.

<sup>158</sup> *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853.

<sup>159</sup> *Forbes v Selley's Pty Ltd* [2004] NSWSC 149.

<sup>160</sup> *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853.

establish that the defect had occurred at a later time than the time of supply.<sup>161</sup> However, speculation or proof of mere possibilities is not enough.<sup>162</sup>

### **Proceedings (including Class Actions)**

In Australia, product liability litigation is generally commenced in either the Federal Court of Australia or the Supreme or District Courts of one of the States or Territories.<sup>163</sup> Recent reforms also now allow proceedings to be commenced in the Federal Magistrates Court.<sup>164</sup>

The effect of section 75AS of the TPA is that the Federal Court and State Courts have jurisdiction to hear and determine proceedings brought under Part VA. Section 86A of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) allows the transfer of matters by the Federal Court of Australia to a Court of a State or Territory. However, it provides that the Federal Court shall not transfer a matter to another Court unless the other Court has power to grant remedies sought before the Federal Court in the matter. If, for example, declaratory relief is sought, a transfer to the District Court of New South Wales would be refused as it does not have the power to grant declaratory relief.<sup>165</sup>

The Federal Court has recognised that State Courts are well suited to determine personal injury claims<sup>166</sup> and in many applications such an order will be made by consent. The Judges of State Courts are familiar with handling personal injury claims and the Court rules tailored for dealing with these claims. In addition, if the proceedings concern a pharmaceutical product or medical device, it may be a relevant

---

<sup>161</sup> *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881.

<sup>162</sup> *Effem Foods Ltd v Nicholls* [2004] NSWCA 332.

<sup>163</sup> Under section 86(1) of the TPA, the Federal Court has jurisdiction in respect of any civil proceeding instituted under Part VI Enforcement and Remedies, that is, including claims under Part V Division 1 and 1A. Under section 86(2) of the TPA, State and Territory Courts are vested with federal jurisdiction within the limits of their several jurisdiction, although subsection (3) provides that those courts can only grant those remedies it is able to do under the law of that State or Territory. Sections 86 (and 86A) of the TPA have been amended by section 75AS of the TPA to include reference to Part VA. Under section 86A of the TPA matters relating to Part V Division 1 or 1A may be transferred to a State or Territory Court, providing it has the power to grant equivalent remedies. Transfers from the Federal Court to the Federal Magistrates Court may occur under section 32AB of the *Federal Court of Australia Act* 1976. Transfers from the Federal Magistrates Court to the Federal Court may occur pursuant to section 39 of the *Federal Magistrates Act* 1999. See eg *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537. The plaintiff successfully resisted transfer of the case from the Federal Court to a state District Court, mainly on the ground that declaratory relief as well as damages was being claimed.

<sup>164</sup> Under section 86(1A) of the TPA the Federal Magistrates Court has jurisdiction in any matter arising under Division 1, 1A or 2A of Part V or Part VA in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission. (subject to the monetary limit specified in section 86AA). (Part V Division 2A and Part VA added by Jurisdiction of the *Federal Magistrates Court Legislation Amendment Act* 2006).

<sup>165</sup> *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537; Al Tonking, *Brooks v R & C Products Pty Ltd – Product Liability: A Federal Case?* (1997) 5 Trade Practices Law Journal 133.

<sup>166</sup> *Eastley v Mauger* [2000] FCA 266.



consideration that the Applicant intends to join a medical practitioner to the proceedings.<sup>167</sup> There also seems to be an attitude on the part of the Federal Court that claims under Part VA are subsidiary to claims founded on negligence.<sup>168</sup> In these circumstances, it seems likely that the majority of personal injury claims seeking compensation will be heard by State Courts.

Claims heard by Australian Courts are conducted in an adversarial manner, with procedure and evidence rules very similar to those employed in England. Claims before the Federal Court are not heard by a jury, and juries are now rare in civil claims heard by State Courts. In virtually all jurisdictions there is an automatic right of appeal from the judgement of a trial judge. Claims in State Courts may be heard before a jury.<sup>169</sup>

Unlike pre-trial procedure in the United States, depositions are not taken before trials in Australia. In some jurisdictions pre-trial directions will be made, such that witness statements and expert reports (evidence in chief) are to be exchanged prior to hearing. Directions are also frequently made requiring parties to exchange objections to the other side's statements and reports prior to trial. Objections not conceded or otherwise not addressed are argued and the Court rules on the objections prior to the cross-examination of witnesses at trial.

Under Australian pre-trial procedure, parties to a matter are obliged to comply with a process of "discovery" to ensure all documents relevant to the case are disclosed prior to hearing. During this process, the parties identify and allow other parties to the matter access to all documents in their possession, custody or power that are relevant to a matter in issue in the proceedings. This obligation extends to documents previously, yet no longer, in the party's possession. In such circumstances, a description of the document must be provided to the other parties. Any document created or found after providing initial discovery must also be discovered under this obligation.

True class actions (or "representative proceedings") can only be commenced (since 1992) in the Federal Court of Australia and (since 2000) the Supreme Court of the State of Victoria. An action can only be commenced in the Federal Court where it attracts Federal jurisdiction (for example, a claim under the TPA). Representative proceedings by the Commission are also possible under section 87(1B)<sup>170</sup> and section 75AQ of the TPA.<sup>171</sup>

---

<sup>167</sup> *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461.

<sup>168</sup> *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461; *Eastley v Mauger* [2000] FCA 266; *Laws v GWS Machinery Pty Ltd & Anor* [2007] NSWSC 316.

<sup>169</sup> While section 39 of the *Federal Court Act* allows parties to apply to the court for a jury trial, all such applications to date have failed.

<sup>170</sup> Section 87(1B) of the TPA allows the Commission to bring an application seeking compensation on behalf of persons who "have suffered, or are likely to suffer, loss or damage by conduct of another person" in contravention inter alia of Part V of the TPA. Section 87(1B) allows the ACCC to proceed as of right whereas under Part IVA Federal Court Act 1976 (Cth) the party bringing proceedings must have a claim. For an example of such

The three elements of a representative proceeding under Part IVA are:<sup>172</sup>

1. seven or more persons must have a claim or claims against the same person (or persons);
2. the claims of all those persons must arise out of the same, similar or related circumstances; and
3. the claims of all those persons must give rise to a substantial common issue of law or fact and irrespective of the relief claimed.<sup>173</sup>

Class action proceedings conducted in Australia are not subject to a requirement of certification, as imposed upon such proceedings in the United States. Once commenced, the matter is likely to continue unless the respondent seeks to terminate the action, in which case the onus will be on that party to satisfy the Court that the action should be terminated.

The Court has a three-fold discretion to order in the interests of justice that the proceeding no longer continue as a group proceeding under section 33N. First, if the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding.<sup>174</sup> Second, if all the relief sought can be obtained by means of a proceeding other than a representative proceeding under Part IVA. Third, if the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members it is otherwise inappropriate.

Under section 33X(1) of the FCA, notice must be given to group members of the following matters:

---

proceedings see *Australian Competition and Consumer Commission v The Bio Enviro Plan Pty Ltd* 2 ABC (NS) 130, [2004] ATPR 41-998, [2004] FCA 415, [2004] ALMD 6514.

<sup>171</sup> This was the first, and so far the only, case in which the ACCC has brought a claim under Part VA of the TPA on behalf of someone harmed, as is envisaged by section 75AQ was in *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) 40 IPR 619, (1998) ATPR 41-632, [1998] ASAL 57,354 (55-008); (1998) 90 FCR 40; [1999] ASAL 57,529 (55-021); (1999) ATPR 41-672.

<sup>172</sup> Section 33C.

<sup>173</sup> The relief claimed need not only be damages. In *Bray v F Hoffman-La Roche Ltd* [2003] ATPR 41-906, [2002] FCA 1405, injunctive relief was thought appropriate and the Court recognised that there may be instances where an award of injunctive relief binding group members could serve a useful purpose in circumstances where it was possible that not all respondents would have a damages claim against each one of the respondents.

<sup>174</sup> *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* [1997] ATPR 44,076 (41-585) (Price fixing agreement for supply of pre-mix concrete). The Court held that it was not in the interests of justice for the proceedings to continue as representative proceedings because the costs that would be incurred were likely to exceed the costs that would be incurred if each group member conducted separate proceedings. The applicant was entitled to pursue the respondents for its own losses in an action brought for its sole benefit and such an action would be significantly less costly to all parties than representative proceedings. The court also considered it relevant that there was a lack of interest by all public and private persons and organisations in supporting the representative proceedings suggesting that, if the proceedings continued, the benefits to be derived, which were very likely to be confined to the applicant, would be greatly outweighed by the costs burdens inflicted on the respondents.

- (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);
- (b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
- (c) an application by a representative party seeking leave to withdraw under section 33W as a representative party.

Formatted: Indent: Left: 0", Hanging: 0.69", Outline numbered + Level: 3 + Numbering Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at: 0.67" + Tab after: 1.34" + Indent at:

Notice need not be by way of a press advertisement. Various orders may be made setting out a protocol as to how group members should be located and contacted.<sup>175</sup>

A settlement or discontinuance of representative proceedings must be approved by the Federal Court under section 33V.<sup>176</sup> Settlement of the individual claim of the representative party is required under section 33W. The key question for a Court which is asked to approve a class action settlement is whether the compromise is a fair and reasonable compromise of the claims made on behalf of the class. To the extent possible, the interests of all class members should be served by any settlement.<sup>177</sup>

The *Federal Court Act* contains several specific provisions concerning costs in representative proceedings. Section 43(1A) prohibits an order for costs against a person on whose behalf a proceeding has been commenced (other than the representative party) unless authorised by either sections 33Q or 33R (relating to the determination of issues which are not common to the entire representative group by the Court).

In the case of representative proceedings, the unsuccessful representative applicant must bear the costs of both sides: in the absence of an agreement between group members to share the costs, the representative must pay personally.<sup>178</sup>

Respondents concerned about the solvency of the representative applicant may bring an application for security for costs. However, there has been some resistance to make such orders if they place a barrier in

---

<sup>175</sup> *Darcy v Mediel Pty Ltd* [2001] FCA 1369.

<sup>176</sup> Note, however, the unusual situation in *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927 where leave was sought to approve a settlement reached in a parallel US class action pursuant to section 33V(1) but was not thought to be necessary because the settlements did not entirely resolve the claims of all group members (citing *Courtney v Mediel* (2002) 122 FCR 168 at [45]-[46] per Sackville J with approval). However, leave was granted by Jacobson J to discontinue the proceedings because there were no remaining group member who wished to pursue the litigation in Australia and therefore, there was no utility in continuing the proceedings.

<sup>177</sup> *Williams v FAI Home Security* (2000) 180 ALR 459 at 465-466, [19]; See also Legg, "Judge's role in settlement of representative proceedings: Lessons from United States class actions" (2004) 76 ALJ 56.

<sup>178</sup> *King v AG Australia Holdings Ltd* 121 FCR 480, 191 ALR 697, [2002] FCA 872.

the path of the commencement of representative actions.<sup>179</sup> The effect upon the applicant and group members and whether the litigation would be stifled if security for costs is ordered are relevant considerations.<sup>180</sup> However, such orders have been made. The fact that a proceeding by an impecunious applicant is also brought for the benefit of others is a factor which, in general, weighs in favour of ordering security for costs unless it is established that the order will stifle or stultify the proceeding or will otherwise be oppressive.<sup>181</sup>

### **Limitation periods**

The general limitation period across the various Australian States and Territories for tortious claims is six years from the date the cause of action accrued. However, in the majority of Australian jurisdictions, this period has been reduced to three years for personal injury claims.

Following recent tort reform, many State and Territory *Limitation Acts* which provided a mechanism whereby a plaintiff could apply for an extension of the limitation period have been abolished, or the circumstances in which this can occur have been significantly reduced.<sup>182</sup>

Claims commenced under Part V Div 2A and Part VA of the TPA must generally proceed within three years of the time the claimant becomes aware, or ought reasonably to have become aware, of particular circumstances giving rise to the action.<sup>183</sup> There is also a ten year period of repose, which requires actions to be commenced within ten years of the supply by the manufacturer of the goods.

---

<sup>179</sup> In *Woodlands & Anor v Permanent Trustee Co Ltd & Ors* (1995) 58 FCR 139, Wilcox J rejected the application for security for costs stating that "it be particularly unfortunate if that factor caused the abandonment of litigation that made claims having the potential, if successful, to benefit many thousands of people, most of them likely to be of limited means."

<sup>180</sup> *Milfull v Terranora Lakes Country Club Ltd (in liq)* 214 ALR 228, [2004] FCA 1637, [2005] ALMD 4979, [2005] ALMD 4983.

<sup>181</sup> *Ryan v Great Lakes Council* 154 ALR 584; Similarly, *Woodhouse v McPhee* [1997] 80 FCR 529: the fact that an impecunious applicant is bringing a representative proceeding for the benefit of represented persons, while a relevant consideration in favour of granting security, ought not of itself be as significant a consideration as it might otherwise be in favour of the granting of security.

<sup>182</sup> For example, in NSW extension is limited to circumstances such as where a victim trust fund has been established - see section 26P of the *Civil Liability Act 2002* (NSW) and in Victoria the *Limitation of Actions Act 1958* (Vic) provides that an extension may be granted in circumstances where personal injury occurred at a time when the claimant was suffering a disability - see section 27D.

<sup>183</sup> In relation to when time starts to run under the different statute of limitations, in *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168 the Western Australian Court of Appeal noted that a claim under section 52/section 82 had to be commenced within 3 years of the cause of action accruing: under sections 74B and 74D within three years of the date the owner of the goods first became aware or ought to have become aware that the goods were not reasonably fit for purpose or were not of merchantable quality, and under section 75AD, within 3 years after the time the person became aware, or ought reasonably have become aware of the alleged loss, the defect and the identity of the person who manufactured the goods.

However, under Part VIB (sections 87G-H) personal injury claims under the TPA (with the exception of claims under Part V Division 2 which are actions for breach of contract) must be brought within 12 years of supply, or as extended by the Court (but not beyond three years of newly specified “discoverability”).

## **V. State Liability and Compensation Schemes**

Statutory provision for compulsory insurance in relation to personal injury caused by motor vehicles is in place in each State and Territory of Australia. The regimes are very similar in form, yet not entirely uniform.<sup>184</sup>

Statutory compensation for injuries suffered in the workplace has been enacted throughout the States and Territories of Australia.<sup>185</sup> Injuries considered under this scheme need to have arisen out of, or in the course of, an employee's employment.

Australia also has a social security scheme which may pay benefits for disability, sickness and unemployment to victims of tort under the *Social Security Act* 1991 (Cth). However, the majority of social security benefits are under the statute, not payable to claimants who have received common law damages.

---

<sup>184</sup> See the *Motor Accidents Compensation Act* 1999 (NSW), the *Motor Accident Insurance Act* 19994 (Qld), the *Motor Vehicles Act* 1959 (SA), the *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas), the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) and the *Motor Traffic Act* 1936 (ACT). In Victoria and the Northern Territory motor accidents compensation is regulated by way of no-fault compensation.

<sup>185</sup> See the *Safety, Rehabilitation and Compensation Act* 1988 (Cth), *Workers' Compensation Act* 1987 (NSW), *Workcover Relations Act* 1996 (Qld), *Workers' Rehabilitation and Compensation Act* 1986 (SA), *Workers' Rehabilitation and Compensation Act* 1988 (Tas), *Accident Compensation Act* 1985 (Vic), *Workers' Compensation and Rehabilitation Act* 1981 (WA) and the *Workplace Injury Management and Workers' Compensation Act* 1998 (NT).

## Legislation

TPA – full text freely available via [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tpa1974149/](http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/)

Formatted: Default Paragraph Font

### PART V--CONSUMER PROTECTION

#### Division 1--Unfair practices

52. Misleading or deceptive conduct

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

53. False or misleading representations

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

#### Division 2--Conditions and warranties in consumer transactions

68. Application of provisions not to be excluded or modified

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

68A. Limitation of liability for breach of certain conditions or warranties

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

74. Warranties in relation to the supply of services

Formatted: Default Paragraph Font

#### Division 2A--Actions against manufacturers and importers of goods

74B. Actions in respect of unsuitable goods

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

74D. Actions in respect of goods of unmerchantable quality

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

74H. Right of seller to recover against manufacturer or importer

Formatted: Default Paragraph Font

74J. Time for commencing actions

Formatted: Default Paragraph Font

74K. Application of Division not to be excluded or modified

Formatted: Default Paragraph Font

74L. Limitation in certain circumstances of liability of manufacturer to seller

Formatted: Default Paragraph Font

74M. The effect of Part VIB [prevails] on this Division

Formatted: Default Paragraph Font

### PART VA--LIABILITY OF MANUFACTURERS AND IMPORTERS FOR DEFECTIVE GOODS

75AA. Interpretation

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AB. Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AC. Meaning of goods having defect

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AD. Liability for defective goods causing injuries—loss by injured individual

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AE. Liability for defective goods causing injuries—loss by person other than injured individual

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AF. Liability for defective goods—loss relating to other goods

Formatted: Default Paragraph Font

75AG. Liability for defective goods—loss relating to buildings etc.

Formatted: Default Paragraph Font

75AH. Survival of liability actions

Formatted: Default Paragraph Font

75AI. No liability action where workers' compensation or law giving effect to an international agreement applies

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AJ. Unidentified manufacturer

Formatted: Default Paragraph Font

75AK. Defences

Formatted: Default Paragraph Font

75AL. Commonwealth liability for goods that are defective only because of compliance with Commonwealth mandatory standard

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

75AM. Liability joint and several

Formatted: Default Paragraph Font

75AN. Contributory acts or omissions to reduce compensation

Formatted: Default Paragraph Font

75AO. Time for commencing actions

Formatted: Default Paragraph Font

75AP. Application of provisions not to be excluded or modified

Formatted: Default Paragraph Font

75AQ. Representative actions by the Commission

Formatted: Default Paragraph Font

75AR. Saving of other laws and remedies

Formatted: Default Paragraph Font

75AS. Jurisdiction of courts

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

**PART VIB--CLAIMS FOR DAMAGES OR COMPENSATION FOR DEATH OR PERSONAL INJURY**

**Division 1--Introduction**

87D. Definitions

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

87E. Proceedings to which this Part applies [personal injury damages under Part IVA, Division 1A or 2A of Part V or Part VA, other than for tobacco]

Formatted: Default Paragraph Font

**Division 2--Limitation periods**

87F. Basic rule

Formatted: Default Paragraph Font

87G. Date of discoverability

Formatted: Default Paragraph Font

87H. Long-stop period [12 years, or as extended (but not more than 3 years beyond discoverability)]

Formatted: Default Paragraph Font

87J. The effect of minority or incapacity

Formatted: Default Paragraph Font

87K. The effect of close relationships

Formatted: Default Paragraph Font

**Division 3--Limits on personal injury damages for non-economic loss**

Formatted: Default Paragraph Font

87L. Limits on damages for non-economic loss

Formatted: Default Paragraph Font

87M. Maximum amount of damages for non-economic loss

Formatted: Default Paragraph Font

87N. Index numbers

Formatted: Default Paragraph Font

87P. Most extreme cases

Formatted: Default Paragraph Font

87Q. Cases of 33% or more (but not 100%) of a most extreme case

Formatted: Default Paragraph Font

87R. Cases of 15% or more (but less than 33%) of a most extreme case

Formatted: Default Paragraph Font

87S. Cases of less than 15% of a most extreme case

Formatted: Default Paragraph Font

87T. Referring to earlier decisions on non-economic loss

Formatted: Default Paragraph Font

**Division 4--Limits on personal injury damages for loss of earning capacity**

Formatted: Default Paragraph Font

87U. Personal injury damages for loss of earning capacity

Formatted: Default Paragraph Font

87V. Average weekly earnings

Formatted: Default Paragraph Font

**Division 5--Limits on personal injury damages for gratuitous attendant care services**

Formatted: Default Paragraph Font

87W. Personal injury damages for gratuitous attendant care services for plaintiff

Formatted: Default Paragraph Font

87X. Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services

Formatted: Default Paragraph Font

**Division 6--Other limits on personal injury damages**

Formatted: Default Paragraph Font

87Y. Damages for future economic loss—discount rate

Formatted: Default Paragraph Font

87Z. Damages for loss of superannuation entitlements

Formatted: Default Paragraph Font

87ZA. Interest on damages

Formatted: Default Paragraph Font

Formatted ... 1]

Formatted ... 2]

Formatted ... 3]



87ZB. Exemplary and aggravated damages

Formatted: Default Paragraph Font

**Division 7--Structured settlements**

87ZC. Court may make orders under section 87 for structured settlements

Formatted: Default Paragraph Font

## APPENDIX A: TPA PART VA JUDGMENTS

4. *Newcombe v Ame Properties Ltd* (1995) 125 FLR 67
5. *Brooks v R&C Products Pty Ltd* (1996) ATPR 41-537
6. *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission & Anor* (1998) ATPR 41-632; (1998) 90 FCR 40; (1999) ATPR 41-672 [first substantive decision]
7. *Stegenga v J Corp Pty Ltd & Ors* (1999) ASAL 55-025; ATPR 41-695
8. *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191; *Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207; *Graham Barclay Oysters v Ryan* [2002] HCA 54 (2002) 211 CLR 591
9. *Canberra Furniture Manufacturing Pty Ltd v White* [1999] ACTSC 53
10. *Borch v Answer Products Inc* [2000] QSC 379
11. *Bright v Femcare Ltd* [2000] FCA 742
12. *Eastley v Mauger* [2000] FCA 266
13. *Lanza v Codemo Management Pty Ltd & Ors* [2001] NSWSC 845
14. *Australian Competition and Consumer Commission v Pacific Dunlop Ltd* [2001] FCA 740
15. *Leeks v FXC Corporation and Others* [2002] FCA 72; (2002) 118 FCR 299
16. *Forbes v Selleys Pty Ltd* [2002] NSWSC 547; [2004] NSWSC 149
17. *Courtney v Medtel Pty Ltd* [2003] FCA 36; [2003] 130 FCR 182; [2003] HCA Trans 496 (2 December 2003)
18. *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881
19. *Morris v Alcon Laboratories (Australia) Pty Ltd* (2003) ATPR 41-923 [2003] FCA 151
20. *Roots & Raydene Pty Ltd v Trussmaster Pty Ltd* [2003] QSC 348
21. *Stewart v Pegasus Investments and Holdings Pty Ltd* [2004] FMCA 712
22. *Thomas v Southcorp Australia Pty Ltd* [2004] VSC 34
23. *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853
24. *Effem Foods Ltd v Nicholls* [2004] NSWCA 332
25. *Fitzpatrick v Job (t/a Job's Engineering)* [2005] ALMD 2321
26. *Trimstram v Hyundai Automotive Distributors Australia Pty Ltd* [2005] WASCA 168
27. *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd* [2006] FCA 875
28. *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512
29. *Hamilton v Merck and Co Inc* [2006] NSWCA 55

30. *Mayes v Australian Cedar Pty Ltd t/a Toronto Timber and Building Supplies* [2006] NSWSC 597
31. *Laws v GWS Machinery Pty Ltd* [2007] NSWSC 316
32. *Elms v Ansell Ltd* [2007] NSWSC 618

**Page 40: [1] Formatted Clayton Utz 9/10/2007 11:27:00 AM**  
Default Paragraph Font

**Page 40: [2] Formatted Clayton Utz 9/10/2007 11:27:00 AM**  
Default Paragraph Font

**Page 40: [3] Formatted Clayton Utz 9/10/2007 11:27:00 AM**  
Default Paragraph Font