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BRIEF

National Product Liability Association

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Contents

ACCC "Gloves" a pragmatic settlement opportunity	1
Andrew Morrison, Clayton Utz	
National Product Liability Association - Annual General Meeting 2003: Keynote Address	2
Louise Sylvan, Deputy Chair of the ACCC	
Fast food marketers spared the force of law	13
Peter O'Donahoo, Tami Dower, Allens Arthur Robinson	
Tort law reform in Victoria	15
Miriam Morgan-Hobbs, Bronwyn Byrnes, Allens Arthur Robinson	

ACCC “GLOVES” A PRAGMATIC SETTLEMENT OPPORTUNITY

ANDREW MORRISON, PARTNER, CLAYTON UTZ

The ACCC’s recent out of court settlement with rubber glove manufacturer Ansell Ltd, received media coverage as a commercially pragmatic settlement brokered by the “new guard”. Ansell’s CEO, Harry Boon, was quoted as saying:

“Today’s result is a tribute to Graeme Samuel’s pragmatic approach.”

The case revolved around disposable rubber gloves manufactured for consumers by Ansell’s corporate predecessor Pacific Dunlop before 1998. In 1998 Ansell agreed to put warnings on its domestic gloves concerning the risk of latex allergies. However, as no recall was implemented some pre-warning gloves remained on store shelves.

Latex allergy litigation was a major source of product liability litigation in the US during the 1990s and, in particular, against Ansell’s American parent company. As with many issues in product liability, the scientific community is divided over the relative risks of latex allergies.

In January 2000 a consumer commenced a failure to warn action against Pacific Dunlop (now Ansell) in the Victorian County Court, relying on ss52 and 75AD of the TPA. In June 2001 the ACCC used its power under s75AQ of the TPA to commence a representative proceeding in the Federal Court on behalf of that consumer. The ACCC sought a declaration that Ansell was in breach of s52 (misleading or deceptive conduct) and an injunction requiring it to implement a trade practices compliance program. The County Court claim was transferred to the Federal Court and run by the ACCC. The action on behalf of the consumer was settled privately in December 2001.

The ACCC then continued with the s52 action. Interestingly, the concessions made by Ansell as part of the settlement appear to mirror the declarations that the ACCC had sought through the Court over the last 18 months. However, Ansell made no admissions and the Court made no findings against it, essentially walking away with its share value and consumer confidence intact. As part of the settlement, Ansell agreed to continue with its warning program as well as a “new commitment to compliance”. The rest of the settlement details remain confidential, although it is believed that Ansell made some contribution to the ACCC’s legal costs.

Reports of the settlement from both the ACCC’s press release, the comments made by Ansell and the general media coverage trumpet a “win win” situation. Of course, as outsiders we are not privy to what may be the internal views of the Ansell Board or, more importantly, the inner sanctum of the ACCC. Perhaps the ACCC agreed to settle because the “new guard” is more welcoming of pragmatic settlements. An alternative view might be that the ACCC has recently sustained some significant and, no doubt, costly losses with substantial media interest. We can only speculate. However, what is certain is that manufacturers can take note that as far as the ACCC is concerned, settlement remains an option.

NATIONAL PRODUCT LIABILITY ASSOCIATION – ANNUAL GENERAL MEETING 2003

LOUISE SYLVAN DEPUTY CHAIR OF THE ACCC – KEYNOTE ADDRESS



*Louise Sylvan Deputy Chair of the ACCC
Photo courtesy of Sandy Scheltema, The Age*

INTRODUCTION

Thank you very much for your invitation to join your Association this evening and to Bob Baxt for the idea.

I have picked product safety and product liability as one of the first issues for me to speak on because I think it's such an important issue for consumers and also in part because it's rarely seen as the "sexy" part of the Commission's work. In fact product safety is as important, or possibly more crucial to consumers than, for example, stopping a merger or taking companies engaged in price fixing to the courts. Certainly it is a lot more "individual" and that's especially the case in situations of personal injury. Which raises the closely related issue of product liability, of even more interest to you, and which I'll talk about as well, especially in view of some of the proposed changes to the Act.

I belatedly read your flyer for this evening which said that I was also going to talk about the ACCC's priorities for consumer protection. So, I've added a couple of slides on these priorities since I didn't want the Association to be guilty of misleading conduct!

When I used to speak from ACA-CHOICE, this opening part of a speech was always an opportunity to do a bit of marketing on the products, especially CHOICE and CHOICE Online.

I don't think I need to spend too much time "marketing" the ACCC to you – I imagine most of you know the organisation. But because of some public commentary over the past year or so, I would like to briefly restate what the ACCC is about and the way we do our work.

COMPLIANCE - GENERAL AIMS AND STRATEGIES OF THE ACCC

Many if not most of you are aware of the ACCC through the publicity associated with its enforcement activities.

The ACCC administers the Trade Practices Act 1974 (TPA). The object of the TPA is:

"...to enhance the welfare of Australians through the promotion of competition and fair trading and the provision for consumer protection..."

Put another way, this means the ACCC's job is to protect consumers and make markets work more effectively. As we all know, perfect markets do not exist due to things such as unequal power and unfair or misleading business practices.



Competition and consumer protection laws therefore provide a framework around the market to protect consumers from personal and financial injury and businesses from false, misleading or sharp practice, so that they are able to compete effectively.

It is the ACCC's job to prevent and/or deal with conduct that is likely to contravene the TPA. The ACCC is the only national agency dealing generally with competition matters and the only agency responsible for enforcing the TPA. We do this in a way which:

- is independent and fair;
- is performed in an ethical, professional and timely manner in accordance with the law to produce results in the public interest;
- is scrupulously even-handed; and
- applies the TPA to all, for the benefit of all.

As you know, the ACCC can enforce the provisions of the TPA through court action. However, this is not the only option available.



In general terms, the ACCC's work can be described by reference to the "compliance pyramid", which is aimed at maximising the benefits and minimising the costs of government regulation. It is a hierarchy of escalating actions by not only the ACCC, but any regulator:

- At the base of the pyramid are compliance activities devoted to education, advice and persuasion, aimed at informing businesses about their rights and obligations under the TPA.
- Moving up the pyramid are further compliance strategies which emphasise increased industry participation through voluntary compliance programs and codes of conduct.
- The next level in the pyramid is more formal, and involves an ACCC investigation of market conduct culminating in the person/company under investigation providing the ACCC with an undertaking to the effect that:

- they did something likely to have breached the TPA;
 - they will remedy that conduct to the extent necessary; and
 - they will seek to ensure it doesn't happen again.
- The apex of the pyramid is enforcement. While this is not the ACCC's preferred option, the ACCC will not hesitate to take this option where there is blatant disregard for the TPA, there has been severe detriment to the public, or where the ACCC wants to send a clear signal to those being regulated.

The outcomes are to some extent similar to the undertaking option, but in most cases will also include significant resource and financial costs, a far more public process and court orders in relation to the conduct. And the penalties are, of course, significant. In relation to a breach of competition provisions, up to \$10 million for companies and \$500,000 for individuals. And in relation to areas we'll be talking about tonight, up to \$1.1 million for companies and \$220,000 for individuals.

Enforcement activities are, and always will be, a fundamental part of our compliance tool-box. As important as education is, it would not operate effectively (and may even be pointless) if business perceived they could ignore the TPA and get away with warnings and education. The ACCC's effectiveness is underwritten by its court activities.



So to sum up this point, the ACCC aims to make markets work more effectively through an integrated approach of education, information and enforcement.

Two further points before I move onto product safety more specifically:

1. First, despite the media portrayal, no member of the ACCC is in a position to simply drive a specific agenda where that is not widely agreed. So, for example, it isn't the case that either the Chairman, or myself or any of the other Commissioners can decide to commence a court action or to desist, or decide that an authorisation should be permitted or not, or a myriad of other matters which only the Commission – meaning its current five members – are charged with finally deciding. The ACCC is set up to ensure that a group of people makes those crucial decisions – irrespective of the way in which the media describes this.

2. Secondly, in case there is any doubt, it should be clear from all this that the ACCC is not out to “go after business” in the pursuit of advancing competition and consumers.

In fact, one of the major beneficiaries of ACCC activity is business. If a business unfairly gets a marketplace advantage through unscrupulous or misleading conduct, it doesn't just hurt consumers, it hurts those businesses who act fairly yet lose customers to the misleading trader.

ACCC ROLE IN PRODUCT SAFETY

Turning now to the ACCC's role in product safety and in product liability, from my perspective, the TPA is an economic law, not simply on the Part IV side, but also on the consumer protection side. The consumer protection provisions in Part V, VA and VC impose requirements for fair trading, and place responsibility and liability – either for unsatisfactory products or for defective products – in a way that enhances economic efficiency. I'll come back to this point later.



On product safety specifically, the ACCC's role is to:

- maximise compliance with the product safety provisions in Part V Division 1A of the TPA, expressly for standards mandated and bans declared by the federal minister;
- ensure unsafe goods subject to these provisions are removed from the marketplace and recalled where necessary; and
- promote consumer safety through awareness of the product liability provisions under Part VA, with the aim of:
 - providing redress for consumers and, perhaps more importantly,
 - providing incentives for suppliers to make and sell safe goods.

For those of you in the room who form part of the top team at companies producing products, I am quite sure that if I asked you individually “do you want to be known or perceived as a provider of unsafe products?”, I wouldn't get a lot of hands raised.

The ACCC's philosophy, and I would hope that this is a philosophy that is mostly shared, is that consumer safety is best addressed by prevention – first and foremost – preventing unsafe goods from making it into the market.

“Prevention is better than the cure” is a bit of a hackneyed and overused saying these days, but when it comes to consumer safety, prevention of the problem has to be the key attitude of any responsible firm.

For the ACCC, and for the people involved day to day in this area of work, it's one of the driving philosophies.

PART V, DIVISION 1A - STANDARDS AND BANS

In the spirit of first and foremost preventing loss or damage, the ACCC takes a proactive approach to achieving compliance with the provisions of Part V Div 1A – Standards and Bans. This is on the basis that in relation to more hazardous products where there is a higher risk of physical injury, more stringent action is required by regulators to protect consumers than waiting for a complaint or for harm to be brought to our attention.



A fair amount of market monitoring takes place, based on a risk-management program which involves all of the regional offices of the ACCC and often the Fair Trading Offices of the States and Territories as well. These surveys of the market often result in discovering products that don't meet mandatory standards; and sometimes, they lead to discovering products on the Australian market that are actually banned. More than half of the enforcement actions taken by the ACCC for product safety breaches have resulted from surveys.

While the focus of the surveys is on retail outlets, staff also target those up the supply chain, plus internet sales and direct marketing. The product safety provisions for standards and bans do not differentiate between levels in the supply chain. All suppliers from manufacturers to retailers must comply and the ACCC takes action across the board.

Section 85(4) provides a defence to an action brought in relation to a breach by the supplying of goods that do not comply with a consumer product safety standard. Suppliers may rely on the defence under section 85(4) where they establish that the goods were acquired by them for the purposes of re-supply and that they did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with that standard. The defence will not, however, apply where the goods were acquired through an agent of an overseas entity, irrespective of whether the agent has a place of business in Australia, or where the goods were acquired from an entity located overseas without a place of business in Australia.

What might this mean in practical terms? Can a retailer rely on, say, verbal assurances from their supplier that they have done everything necessary to comply?

From the ACCC's perspective, the 'reasonableness' of a supplier's diligence would depend on factors including:

- the ability to assess compliance visually;
- having written proof of compliance; and
- the nature of the supplier relationship, eg. length of dealings and record of reliability.

With many standards requirements, for example labelling and dimensional specifications, simple visual inspection is enough to assess compliance. In these cases, we do not believe that traders down the supply chain should absolve themselves of their responsibility, nor that a court would allow a defence.

In standards, the specifications of the standard require technical assessment of a product. Test reports from reliable, qualified test companies are necessary to establish compliance. Provision of such proof can be made an element of a supply contract.

In these circumstances, all suppliers are responsible for compliance and should be held accountable. Including this level of the supply chain adds to a potential compliance 'ripple effect'. The ACCC guides to the standards are aimed at retailer level with this in mind.

One thing I would note, is that it is not uncommon for complaints to come in from a company's competitors. While this might seem like a purely competitive matter, many suppliers who do the right thing and comply resent losing market share to competitors who can undercut them by selling non-compliant goods, often more cheaply.

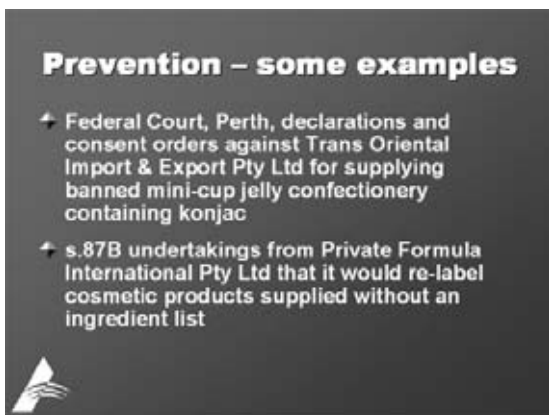
Other avenues for becoming aware of breaches include consumer representative organisations. For example, the recent action we took against car manufacturers for non-compliant vehicle jacks was sparked by a consumer complaint submitted through the RACQ. The Australian Consumers Association is another organisation that alerts us to product breaches through testing reported in CHOICE magazine and CHOICE Online.

Products which are suspected of breaching the product safety provisions – however these are discovered – are investigated, and the ACCC is very active in achieving enforcement outcomes and remedial action in the interests of consumers.

Some recent examples of enforcement action by the ACCC include:



- A s87B undertaking accepted from Minmetals to cease supplying banned dart gun sets which were found in toy stores during a joint product safety survey by the ACCC and Vic CAV.
- Federal Court, Melbourne, declared that BMW (Australia) Ltd had supplied vehicle jacks and owner manuals that failed to comply with the safety standards for vehicle jacks. An appeal hearing is listed.



- The ACCC obtained declarations and consent orders in the Federal Court, Perth, against Trans Oriental Import & Export Pty Ltd for supplying banned mini-cup jelly confectionaries containing the ingredient konjac – also known as glucomannan. These confectionaries can get stuck in your throat and have killed a few people overseas, mainly small children or elderly people.
- A s87B undertaking from Private Formula International Pty Ltd that it would re-label cosmetic products supplied without ingredient listings which are required under the mandatory cosmetics and toiletries information standard. Private Formula also published corrective advertising and implemented a trade practices compliance program. This enforcement resulted from a consumer complaint – specifically an adverse reaction.

A couple more examples:



- A s87B undertaking to cease supply and recall non-complying baby cots, from Lane Wrigley, for which Australia has a mandatory safety standard. The company published recall notices and also established a trade practices compliance program.
- And lastly, a s87B undertaking from Bikes Direct, an internet trader, to recall and rectify defects and provide new instruction manuals to all past purchasers – and to implement a trade practices compliance program.

Recalls can happen either voluntarily or compulsorily. In the example, Lane Wrigley, the ACCC pointed out to the company the non-compliance with a mandatory standard and it immediately conducted a voluntary product recall.

As did Bikes Direct – and I should note that because internet customers cannot personally inspect goods, there is a greater obligation on internet traders to ensure that the information on their website is accurate. Bikes Direct has since had all of its bikes tested for compliance with the safety standard.

Not surprisingly, a fair few of the goods for which there is a mandatory standard – rather than a voluntary standard – in Australia, are to do with children's products, since these consumers are in the least able position to protect themselves. But there are mandated standards for products as wide ranging and diverse as bean bags to tobacco to toys.

The ACCC is also active in the development and revision of standards as it is critical for effective enforcement and compliance that the standards remain current and meaningful to suppliers to ensure consumers are protected.

WORKING WITH OTHERS



It's important that I mention that the responsibility for product safety in Australia is not only the ACCC's. Policy responsibility rests with The Treasury, which also has responsibility for advising the Minister. Due in part to the constitutional limitations of the TPA (which limits its coverage mainly to incorporated businesses), each of the State and Territory offices of consumer affairs or fair trading have responsibilities in product safety. All these agencies (plus New Zealand) are members of the Consumer Product Advisory Committee which advises senior officials and the Ministerial Council. And of course, the specific regulatory authorities for therapeutic goods, food, and so on, also have a major role.

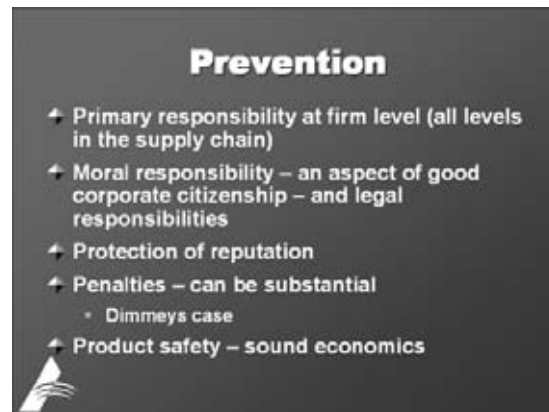
The good news is that every recall, voluntary or mandated, that is done in Australia is collected into a single information website – the initiative of The Treasury – and it's one of the more used websites by consumers in Australia.

Furthermore, the consumer protection agencies are emphasising uniformity of legislation with a view to developing a national model and are co-ordinating on enforcement and operational issues (such as surveys, testing and investigations).

TRIPARTITE APPROACH

The underpinning philosophy in all the consumer protection agencies is that consumer safety involves a tripartite approach where government, suppliers and consumers all have a role to play. An example will serve to illustrate this. Bunk beds, which can be a fairly dangerous product, have a government-mandated standard for the critical parts related to safety; suppliers are expected without fail to meet that mandated standard, plus voluntarily to meet or exceed other parts of the

standard; and consumers need to ensure safe use, for example, not allowing children to use bunks as a play gym.



In the final analysis, however, it's the firms that produce the products and where the primary responsibility for product safety rests. From my point of view, providers in the market have both a moral responsibility in relation to product safety, as well as their legal responsibilities quite apart from sensible risk-aversion behaviour to protect the reputation capital of the firm. And as I've mentioned, the penalties are not insignificant if a prosecution results from an ACCC investigation.

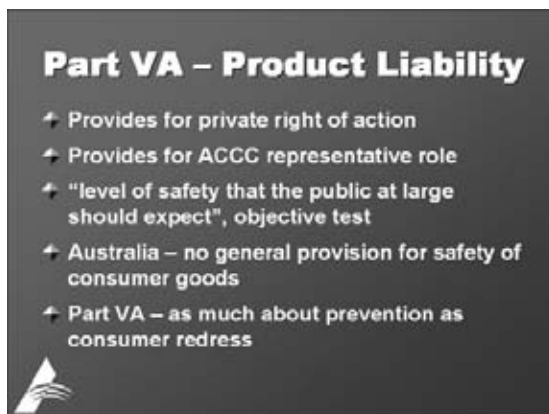
I must say in looking over the ACCC's recent work, it's quite clear that wilful non-compliance by business is not common in product safety breaches – usually the problem is carelessness and poor attention to addressing the risks. However, sometimes it's necessary to take a supplier to court.

In the Dimmeys case, the ACCC – responding to a consumer complaint – found children's pedal bicycles which did not comply with the mandatory standard. The court fined Dimmeys \$60,000, in addition to requiring them to withdraw the bicycles from sale, publish recall notices for those already sold, and pay the legal expenses of the ACCC. The retailer had not stocked bicycles previously and the importer had not previously imported them, yet Justice Weinberg of the Federal Court declared that inexperience did not absolve either party from their obligations to ensure that products are safe – both the importer and the retailer were aware of other product safety standards applying to merchandise they handled, but failed to make appropriate inquiries.

The following year, 2000, Dimmeys was found, during a regular retail store survey in Townsville, to be selling children's nightwear without the mandatory labelling in relation to fire hazard. Dimmeys did a public recall, but later in the year, was found to be selling similar garments in Melbourne. The court fined Dimmeys \$160,000 in March 2001. I guess there's a general question of whether those pecuniary penalties are sufficient to have the necessary effect – and that's a question in need of additional study. But certainly, there are good financial reasons to comply with the product safety standards if a firm has not been persuaded by other considerations.

Now, let me turn to a more contentious area, that of liability for defective goods.

PART VA - PRODUCT LIABILITY



Part VA of the TPA, which was inserted in 1992, provides for a private right of action. It imposes strict liability on manufacturers, deemed manufacturers and importers of products to compensate consumers who suffer loss as a result of defective goods. Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances. This Part applies, at the moment, in addition to any other cause of action that a plaintiff may have, such as negligence, breach of contract or breach of the statutory implied warranties. Under s75AQ, the ACCC can also take representative actions on behalf of those who have suffered loss, but it is the private sector which largely takes up this role.

Under Part VA, the test of whether goods are defective focuses on the reasonable expectations of the community – so it is an objective test for the court to decide, and the focus is not on what is appropriate in an individual circumstance.¹

Action under Part VA of the TPA may be a way of prompting a whole of industry response to ensure product compliance and safety.

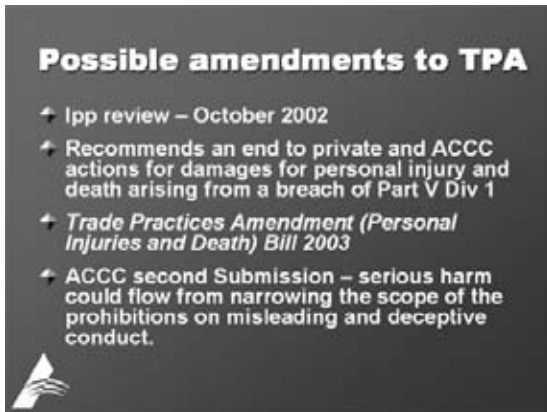
It's important to note that Australia, unlike Europe and some other regions, does not have a 'general provision for safety' – there is no law prohibiting suppliers from knowingly selling unsafe goods. In the absence of such a provision, protection in consumer product safety is all the more reliant on the product liability scheme, in particular on the provisions of Part VA. Raising awareness of Part VA forms part of the ACCC's overall product safety education strategy.

The ACCC and other agencies also use the existence of Part VA to help negotiate for the removal of unsafe goods in the marketplace; reluctant suppliers can be reminded of the liability risk they are taking. There seems to have been an effect in this regard: over the past 10 years, recalls conducted on general consumer goods have increased more than 300 per cent – so some incentive seems to be at work. Also, I think, the additional awareness is helpful. While agencies have the option of seeking an order to recall by the Minister or the courts, this has rarely been needed as I mentioned earlier. The recalls notified under section 65R of the Act and placed on the recalls website are generally either done voluntarily by suppliers or on negotiation with regulatory agencies. Either way, product liability appears to be providing an incentive to suppliers to ensure that any potentially unsafe goods are removed, and that's good.

So, I would argue that Part VA is really as much about prevention of injury as it is about consumer redress. If so, then those advising supplier companies on how to minimise liability have a key role to play in promoting a corporate culture of compliance and safety and in actively feeding back to a client, and to the broader business community, the value of proactive approaches to sourcing reliable raw materials, design, complaint-handling, recalls, and so on.

¹ ACCC v Glendale Chemical Products

POSSIBLE AMENDMENTS TO PART V, DIVISIONS 1 AND 1A, AND TO PART VA



Let me now move on to tort reform, on which there has been rather a lot of attention recently. I'm sure I don't need to talk too much to most of you about the origins and outcomes of the Review of the Law of Negligence – or Ipp review – I note that your Association made a submission.

Among other aspects which it addressed, the Review Panel considered what steps should be taken to ensure that actions under the TPA were not more attractive or available than actions under the general law of negligence as proposed to be amended.

In relation to the TPA, the Review Panel recommended that individuals should be prevented from bringing actions for damages, and the ACCC from bringing representative actions for damages, for personal injury or death arising from a contravention of the provisions in Part V Division 1. A Bill to that effect was introduced in March 2003.

In October, an Opposition amendment to the Bill was moved to allow for claims to be made for loss or damage but to ensure that the amount of damages recoverable must not exceed the amount of damages recoverable under the civil liability law of the State or Territory which had the closest connection to the event giving rise to the loss or damage or where the person sustained the loss or damage. The amendment also proposed to ensure that a person may not recover the amount of the loss or damage to the extent to which the death or personal injury is attributable to any act or omission of the person who suffered the loss or damage. I'm advised that these amendments passed through the Senate last night.

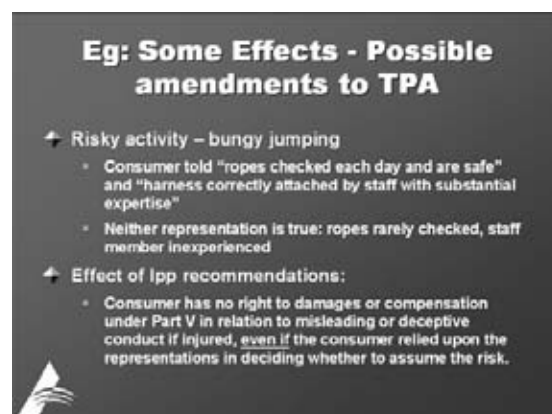
In the ACCC's second submission to the Ipp Review, the ACCC stated that it considered that serious harm would flow from any proposal that narrowed the scope of the provisions prohibiting misleading and deceptive conduct. The ACCC then commented that one of the least harmful options would be to minimise the 'incentives' which might otherwise exist to bring personal injury based claim for damage caused by contravention of provisions of Part IVA and V by:

- (a) restricting (for example, using thresholds and caps) the damages recoverable for personal injuries in a manner which is broadly consistent with restrictions under State and Territory personal injury law regimes; and
- (b) requiring "contributory" conduct, especially on the part of an applicant, to be factored in to awards of damages under the Act.²

Basically, the proposed amendment in effect implements this option.

The Ipp Review also recommended that the TPA be amended to provide that the rules relating to limitations of actions, quantum of damages and other limitations on liability recommended in the Report apply to any claim for negligently caused personal injury or death that is brought under Part V Div 1A – product safety and product information, Part V Div 2A – manufacturer liability for unsuitable goods, Part VA, and Part IVA – unconscionable conduct. No amendments have been introduced into Parliament at this point in relation to these recommendations.

I would note that, also in the ACCC's second submission, that the ACCC strongly opposed changes which would reform Part VA of the TPA, especially since there was considerable debate at the time of its introduction and this Part was introduced to overcome deficiencies in the protections afforded consumers by the common law.



² Second Submission , Exec Summary p.3, point 1

I want to illustrate a couple of examples of the effects of the Ipp Review recommendations – just to clearly point out possible scenarios when such changes to the law would matter. I’m using a risky activity as an example, because the Trade Practices Act 1974 (Liability for Recreational Services) Bill has been passed. On the slide, you can see the scenario outlined with the consumer deceived about the due care and skill of the provider.

Consumers now take on much more risk in relation to such activities. Assuming the proposed amendment in relation to Part V, Division 1 is passed as proposed (and not amended), a consumer – although basing their decision and their choice to participate in a risky activity on false and misleading representations – still would have no right to sue for damages under Part V Division 1. For me, and I would have thought for most people, this rather raises very substantial issues about fairness in the marketplace.

Eg: Some Effects - Possible amendments to TPA

- ➔ Granny buys baby cot on basis:
 - "this is the safest cot you can buy in the marketplace"
- ➔ Cot actually fails to meet mandatory standards for head entrapment – baby injured
- ➔ Granny – no right to damages for breach of Part V Div 1

Taking a bit less straightforward example – of a granny purchasing the “safest baby cot” for her new grandchild. This again illustrates why it seems unusual that one would want to create a situation in the market where misleading conduct could not be adequately addressed by a consumer. Whether the consumer would have decided to pursue an action under Part V Division 1 is, of course, up to them. This example is a bit unusual as it is rare for consumers to go to the courts at all for this type of thing; but it is rather odd, it seems to me, that any arrangements in our law would allow misleading and deceptive conduct to appear not so much as ‘more permissible’ (note that the ACCC can still take action) but at least less punishable by the consumer and more generally. A better example might be a small business man buying an expensive welding machine. Let’s say the seller

– who has a few of these and knows that he has imported a poor product – conspires with his salesman to demonstrate a replica model which performs excellently. The small businessman who owns a welding shop purchases the machine for \$10,000 which subsequently misperforms and injures him. Why shouldn’t this small businessman have a right of action under Part 5 Division 1, especially in a case of such egregious behaviour as what appears to be a conspiracy to deceive?

Which brings me full circle to my initial point – that the TPA – even on its consumer protection side – is a law designed to enhance economic efficiency.

Economic Efficiency

- ➔ Part VA – who can most easily avoid losses?
- ➔ Manufacturer
 - Controls processes of manufacture
 - Has superior information of risks than consumer
 - Therefore, manufacturer should bear the loss

Part VA was drafted on the premise that in relation to most consumer goods, it is the manufacturer, and not the consumer, who can most easily avoid losses because the manufacturer has control of the process of manufacture and also has far better information than the consumer about the risks associated with using a product. To the extent that producers can more cheaply assess information about the risks of their products, then economic efficiency suggests they should bear the costs for losses caused by the characteristics of the goods. Of course, that doesn’t mean that consumers do not need to exercise care, and s75AN makes it quite clear that if the loss was caused by both an act or omission of the consumer and a defect, the assessment of the loss can be reduced as the court thinks fit.

So, it’s important in relation to the laws to give the right signals to manufacturers and consumers about products and product safety. What are we as regulators to tell consumers about a marketplace where deceptive conduct is less punishable? At the moment, consumers have great confidence in the Australian market generally and they have become used to having clear rights as well;

In general, consumers believe that they can have confidence in the claims that are made by suppliers and they know, largely because of the high public profile of the ACCC, that deceptive and misleading claims are not permissible. It is widely recognised in economics that when misleading or deceptive claims are permitted in commerce, the consequence is to increase the long run cost of supply, as consumers seek to protect themselves from transactions that, given correct information, they would not have entered into. To these direct costs must be added the costs that come from the fact that – in any environment where poorly based claims can be made – the competitive mechanism cannot work as effectively as it otherwise would to ensure that less efficient suppliers are displaced by more efficient suppliers. Basically, these types of proposals undermine, in my view, the central objects of the TPA which are to promote competition, and fair trading and consumer protection.

It isn't just economic theory that says these aspects of markets are important, it's also the empirical evidence on the ground, produced by, amongst others, the world's foremost economic guru, Michael Porter from Harvard.

A great part of the framework for product safety rests on standards – both for products and in terms of behaviour in the market. Here is Michael Porter on standards generally - I've deliberately chosen one of the earlier Porter works, because I think he articulated the concepts particularly well in *The Competitive Advantage of Nations*.

"It might seem that regulation of standards would be an intrusion of government into competition that undermines competitive advantage. Instead the reverse can be true... Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage."

Here's a further quote, which reframes the issue much more broadly and in terms of the competitive nation.

"Firms, like governments, are often prone to see the short-term cost of dealing with tough standards and not their longer-term benefits ... Such thinking is based on an incomplete view of how competitive advantage is created and sustained. Selling poorly performing, unsafe,

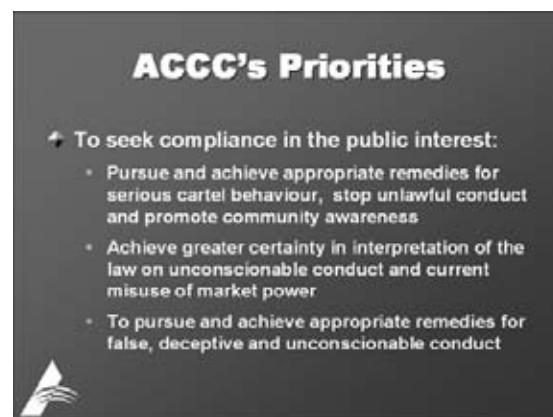
or environmentally damaging products is not a route to real competitive advantage ... especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations."

The Competitive Advantage of Nations, 1990

So, the "message" from the laws of the land in terms of what standards exist and who bears the loss if such standards aren't met, are not an important question just for individual suppliers and consumers, they are also important in terms of the attitude (of firms and competitors generally) which prevails in an economy.

One thing appears to be quite clear, low standards – or poor laws that do not direct the liability appropriately so that standards are not taken sufficiently seriously – don't just affect individual firms or people in an economy. Ultimately, it's these types of factors that contribute to how competitive a nation will be globally.

Finally, a few quick words on the ACCC's priorities,



The ACCC has three main priorities:

1. To pursue and achieve appropriate remedies for serious cartel behaviour such as price fixing or market sharing. Such conduct can have significant economic detriment and the ACCC takes action to ensure unlawful conduct ceases and that the community is aware of the results of its compliance activities.
2. To achieve greater certainty in interpretation of the law on unconscionable conduct and current misuse of market power matters. Businesses and individuals as well as governments can act more confidently from knowing the courts' interpretation of existing laws.

3. To pursue and achieve appropriate remedies for false, deceptive and unconscionable conduct. This priority particularly benefits small business as well as consumers. Through strategies including court action, education, and consultation, the ACCC helps individuals and businesses comply with the law.

With these priorities in mind and specifically in terms of consumer protection priorities, on 2 June this year [2003], the ACCC and its Consumer Consultative Committee (CCC) launched a campaign that focuses on commercial and business practices that target or seek to exploit disadvantaged or vulnerable consumers. Characteristics that may suggest disadvantage include: low income; disability (whether intellectual, psychiatric, physical or sensory); illiteracy; indigenouness; homelessness; remoteness or chronic ill-health for example.

The ACCC regards the campaign as an important part of our consumer protection work. While not all disadvantaged or vulnerable consumers will be at risk in all market situations, it is fact that:

- the information asymmetry that is present between almost all consumers and traders is often greater between disadvantaged consumers and traders;
- disadvantaged and vulnerable consumers have fewer tools with which to address the problems they may experience in the marketplace – whether through lack of mobility, lack of education, a language barrier or other reason; and
- unlawful conduct can have a disproportionate impact on this group of consumers. For example, a financial loss that may be relatively small for a consumer on an average income may be very significant for a consumer on a low or fixed income.

As we focus on this, it is the case that some unscrupulous players in the marketplace specifically set out to exploit the disadvantage or vulnerability of others. Some examples are unconscionable selling tactics directed at intellectually disabled, impaired or infirm consumers, 'miracle' cures marketed to people with serious or terminal illness, 'wonder, no exercise involved' weight loss solutions and metropolitan car dealers going into indigenous communities and offering unroadworthy vehicles for sale at inflated prices.

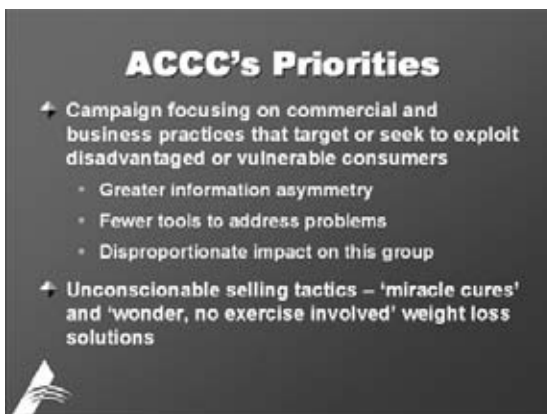
This campaign is an important initiative for the ACCC and we are actively investigating a number of cases at the moment – watch this space.

So in summing up, I have spent a bit of time on compliance with the TPA, and the whys and wherefors of our product safety work and the TPA's priorities more generally.

I hope you will also take the long term view on these issues so that we have a better compliance culture and better society as a result.

BACK TO BASICS SEMINAR SERIES

Due to popular demand, NPLA will host a 2004 Back to Basics seminar series, kicking off with a 28 April 2004 session on Customer Complaint Handling and Related Liability Issues. Watch for more details!



FAST FOOD MARKETERS SPARED THE FORCE OF LAW

PETER O'DONAHOO, PARTNER AND TAMI DOWER, ARTICLE CLERK,
ALLENS ARTHUR ROBINSON

OBESITY COSTS AUSTRALIA \$1.3 BILLION AND IS "RISING FAST"

In brief: The National Obesity Task Force might have stopped short of regulating fast food advertising but the global outcry against marketing to children is getting louder. Peter O'Donahoo and Tami Dower report.

Fast food marketers and manufacturers can breathe a small sigh of relief – at least for the moment. Despite consistent pressure from health professionals and lobby groups for restrictions on food advertising to children, the National Obesity Task Force has stopped short of recommending regulatory action.

Instead, the Task Force's first report, *Healthy Weight 2008 – Australia's Future: A National Agenda for Young People and Their Families*, outlines a proposal to monitor and assess the effectiveness of the existing Children's Television Standards and revised regulatory framework for food and drinks advertising to children and – if necessary – implement modifications. It also recommends that research be undertaken to assess the impact of advertising practices on obesity levels.

The Obesity Task Force was established by the Australian Health Ministers' Conference in November 2002, in response to mounting evidence of a national obesity crisis.

A MODERN EPIDEMIC

Childhood obesity levels in Australia are now among the highest in the world. The Task Force found that obesity levels of Australian children had trebled between 1985 and 1995, with an estimated 1.5 million Australians under the age of 18 now falling into the categories of overweight or obese. The cost of treating obesity and related health problems is currently putting a hefty \$1.3 billion annual dint in public funds and the bill is steadily rising.

The battle of the bulge is not just being waged in Australia, but throughout the developed world. The International Obesity Task Force estimates that if the current trend continues, by the year 2025 levels of obesity could be as high as 45-50% in the US and between 30-40% in Australia and England.

DOES ADVERTISING ACTUALLY INFLUENCE CHILDREN'S FOOD CHOICES?

While it is true that the burgeoning obesity crisis is multi-faceted, public sentiment is becoming increasingly unforgiving of food industry representatives who attempt to dodge the blame by resorting to arguments of peer group pressure, sedentary lifestyles and parental choice. The evidence of a direct link between advertising and childhood obesity is still open to debate, but the movement against fast food advertising to children is clearly gathering global momentum.

In particular, a recent report commissioned by the British Food Standards Authority – *Does food promotion influence children? A systematic review of the evidence* – concluded that food promotion affected children's eating preferences, consumption and buying behaviour. A team of scientists and nutritionists at Strathclyde University compiled the study, which was the first to claim a direct link between television advertisements and the type and amount of food children eat. One of the options canvassed by the report to deal with the problem was a ban on food ads aimed at pre-school children. The report also suggested setting criteria for commercial broadcasters on the number and types of food adverts for less healthy foods to be shown during children's television programs.

The report has been the subject of much debate amongst the Health Select Committee of the British House of Commons, which has been conducting hearings on the issue of obesity since July last year. The Committee is expected to release a report this month.

The Food Standards Authority report has also given force to a UK Private Member's Bill banning television ads for foods with high fat, sugar or salt content during pre-school television programs. The Children's Television (Advertising) Bill was introduced last year by the Minister for Stourbridge, Debra Shipley. A similar ban has existed for many years in Sweden.

At the international level, the World Health Organisation (WHO) has condemned food and beverage advertisements that 'exploit children's inexperience or credulity'. In its *Draft Strategy on Diet, Physical Education and Health*, released in December last year, the WHO stated that messages that encourage unhealthy dietary practices or physical inactivity should be discouraged. The WHO called upon governments to work with consumer groups and industry to develop appropriate approaches to deal with the marketing of food to children.

PUBLIC PRESSURE PUTTING THE SQUEEZE ON FOOD ADS

In 1996, a Consumers International survey identified Australia as having the highest average number of food ads – 12 per hour – of any Western country. According to the Royal Australasian College of Physicians, young Australians see an average of 75 ads per day, or 27,000 per year. The majority of these are for soft drinks, fast foods, sugary breakfast cereals and confectionary.

However, there are already signs that the Australian food industry is starting to take the hint, with McDonald's taking the lead in shifting industry ethos. In January 2003, McDonald's reduced its advertising during the hours children normally watch television by 40%. The CEO of McDonald's Australia, Guy Russo, introduced the change – along with a range of healthier menu items – in response to the growing public demonisation of fast food operators.

Public relations aside, the industry has been warned that if it does not take the problem of obesity seriously, regulation of advertising could be on the horizon. Speaking at a Kid Power marketing conference in July last year, the Federal Minister for Children and Youth Affairs, Larry Anthony, told the industry, 'If you are not prepared to act responsibly then community pressure will force the government to regulate the industry'.

THE WAY FORWARD

The scope of what is acceptable in marketing to children is clearly on shifting ground, not just in Australia, but internationally as well. The signs are on the wall and food industry leaders are beginning to stand up and take note. In the not too distant future, those who have failed to heed the warnings may be risking a consumer backlash, government regulation or – even worse – they may find themselves on the wrong end of a US-style obesity class action.

SPECIAL SEMINAR

"Minimata to Mad Cows:
Comparing Product Safety and
Liability laws in Japan, Australia,
Europe and the US"

Interested in international product liability litigation issues such as the differing product liability regimes, trends, and the difficulties faced by potential litigants in international cases? Dr Luke Nottage, Senior Lecturer, Faculty of Law, University of Sydney and Mr Michael Wheelahan, Barrister at the Victorian Bar will discuss these issues and more.

When: 30 March 2004

Where: the offices of Mallesons Stephen Jaques, Level 28, Rialto Towers, 525 Collins Street, Melbourne.

To register contact NPLA Executive Officer Athena Tashevskva on (03) 9867 0282 or atashevskva@aigroup.asn.au.

TORT LAW REFORM IN VICTORIA

MIRIAM MORGAN-HOBBS, SENIOR ASSOCIATE AND
BRONWYN BYRNES, LAW GRADUATE, ALLENS ARTHUR ROBINSON

In brief: Victoria is one step closer to implementing the bulk of the Ipp Report recommendations, following the 2 December 2003 assent to the *Wrongs and Other Acts (Law of Negligence) Act 2003*. The codification of general negligence and 'nervous shock' principles in the new legislation are of particular interest. Miriam Morgan-Hobbs and Bronwyn Byrnes report.

THE THIRD IN THE SET

The Victorian Government's recent move to implement the *Wrongs and Other Acts (Law of Negligence) Act 2003* (the **Act**) is the third in the State's set of key legislative reforms, complementing reform made by other States and by the Commonwealth.

The legislation follows Victoria's *Wrongs and Limitation of Actions Act* (Insurance Reform) Act in June 2003 and the earlier *Wrongs and Other Acts (Public Liability Insurance Reform) Act* of October 2002.

The latest Act codifies general negligence and 'nervous shock' principles. It does not, however, cover claims under the *Transport Accident Act 1986*, *Workers Compensation Act 1958*, or those arising from dust or tobacco exposure, thereby resulting in a two-tiered structure for indemnity in personal injury claims in Victoria.

KEY ELEMENTS OF THE ACT

The Act seeks to clarify the general law of negligence in Victoria and specifically inserts new Parts 10, 11 and 12 into the Victorian *Wrongs Act 1958*, which:

- **codify** the existing common law position that a person who voluntarily assumes a risk and suffers harm is presumed to be aware of the risk of harm if it was an obvious risk, unless the person can prove that he/she was unaware of the risk;

- **codify** the existing common law position that a person is not liable for harm resulting from an inherent risk – that is, a risk that cannot be avoided by reasonable care;
- **provide** a formula for the duty of care owed by all professionals, so a professional will not be negligent if he/she acted in a way that is widely accepted as 'competent professional practice' in Australia by a significant number of respected practitioners in the field at the time of service. This is subject to a court finding that this opinion is not 'unreasonable';¹
- **introduce** a policy defence for public authorities, so they can defend a claim by demonstrating that their decision was consistent with the public authority's functions and duties, limited by its financial and other resources, broad range of activities, and general procedures and applicable standards. (This may allow the court to consider the economic and social constraints under which authorities perform their public duties and may become a fertile area for litigation.)
- **overturn** the High Court's decision in *Wynbergen v The Hoyts Corporation Pty Ltd* [1997] HCA 52 by allowing an assessment of 100 per cent contributory negligence on the part of the plaintiff to entirely defeat a plaintiff's claim (consistent with NSW and Queensland reforms);
- **limit** the damages that can be awarded for providing and receiving 'gratuitous' care; and
- **increase** consistency of outcomes, by providing, in the main, that the amendments to the *Wrongs Act 1936* apply to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, contract, under statute or otherwise.

THE DUTY OF CARE

In codifying the principles relating to negligence, the Act is designed to encourage plaintiffs to assume greater responsibility for their own safety.

¹ We note that this test differs from the test applicable in New South Wales and Queensland, where courts must uphold professionals' opinion, unless it is found to be 'irrational' rather than 'unreasonable'.

In particular, it provides a test that narrows the circumstances in which a duty of care will be found to exist, so that a person is not negligent in failing to take precautions against the risk of harm unless:

- the risk was foreseeable (that is, it was a risk of which the person knew or ought to have known);
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

This formulation is consistent with legislative reform in New South Wales and Queensland and replaces the common law test of the risk being 'not far-fetched or fanciful'.²

CLARIFICATION OF 'NERVOUS SHOCK' LAW

In addition, the Act seeks to clarify the common law for 'nervous shock' claims, now more appropriately titled 'mental harm', and attempts to codify the *Annets v Australian Stations Pty Ltd and Tame v New South Wales* [2002] 76 ALJR 1348 decision (***the Annets case***).

Duty of care

The Act enshrines the High Court's position in the *Annets* case: that a principled evaluation of all the circumstances of the case must be undertaken to determine whether a duty of care in nervous shock claims exists. Before *Annets*, courts would only uphold nervous shock claims if plaintiffs met certain specified conditions such as either experiencing a sudden shock, or directly witnessing a tragic incident (***control factors***). The Act codifies the *Annets* case by ensuring that the absence of these control factors will not be critical to establishing a duty of care. The Act permits a court to consider a range of factors, as well as whether the plaintiff directly witnessed the tragic incident, or experienced a sudden shock. Consistent with the position in New South Wales and Western Australia, the Act states that a duty will only be owed to persons with 'normal fortitude' unless the defendant knew or ought to have known that the plaintiff is a person of less than 'normal fortitude'. The Act fails to define 'normal fortitude', which may become an issue of some contention in future.

Liability

The Act, however, limits the liability of defendants in nervous shock claims. To recover damages in pure mental harm claims (where there is no physical injury to the plaintiff), the plaintiff must:

- have been present at the scene and witnessed the victim being killed, injured or put in danger; or
- be, or have been, in a close relationship with the victim.

This definition appears to preclude situations where plaintiffs only witness the 'aftermath' of a scene, as well as those claims arising from being told of tragic news. It also appears to limit the practical operation of any duty of care established in other circumstances.

Consequential mental harm

In addition, the Act implements a further change to the common law, by requiring that a plaintiff prove the development of a foreseeable psychiatric illness to recover damages for mental harm suffered as a consequence of physical injury. This foreseeability test again depends on the plaintiff being of 'normal fortitude', unless the defendant knew, or ought to have known, otherwise. This will limit the number of plaintiffs claiming damages for loss of income due to mental harm that falls short of a recognised psychiatric illness.

CONCLUSION

The Act brings Victoria closer to the position other States have adopted subsequent to the Ipp Report and goes some way towards clarifying the law on negligence, and particularly 'nervous shock', claims. Importantly, this further legislative step shifts the onus of responsibility back onto plaintiffs, with industry and some legal commentators remarking that this will restore the balance in negligence claims.

² *Wyong Shire Council v Shirt* (1980) 146 CLR 40

BRIEF

National Product Liability Association

