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# BRIEF

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# TRANS-TASMAN JOINT SCHEME FOR REGULATION OF THERAPEUTIC PRODUCTS

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The Australian and New Zealand governments have formally agreed to establish a single trans-Tasman therapeutic goods agency, using the model of Food Standards Australia New Zealand.<sup>1</sup> This article examines the new regime and its likely impact.

## 1. THE CURRENT REGULATORY LANDSCAPE

Therapeutic goods, including medicines and medical devices, are regulated under separate regimes by the Therapeutic Goods Administration (**TGA**) in Australia and the Medicines and Medical Devices Safety Authority (**Medsafe**) in New Zealand. The TGA is responsible for administering the *Therapeutic Goods Act 1989* (Cth) (**TG Act**), which provides a framework for the regulation of therapeutic goods in Australia. Under the TG Act, any product for which therapeutic claims are made must be entered in the Australian Register of Therapeutic Goods before it can be supplied. The TGA carries out assessment of products and monitoring activities to ensure that therapeutic goods are of an acceptable standard. Medsafe is responsible for regulating products used for a therapeutic purpose in New Zealand, and administers the *Medicines Act 1981* (NZ) and parts of the *Misuse of Drugs Act 1975* (NZ).

## 2. THE TREATY

The Australian and New Zealand governments signed the *Agreement for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products* (the **Treaty**) on 10 December 2003. The Treaty requires Australia and New Zealand to adopt a Joint Scheme (the **Scheme**) to regulate the quality, safety and efficacy or performance

of therapeutic products. It is expected that the Scheme, which will be administered by a new Joint Agency (the **Agency**), will begin operating in July 2005.

## 3. WHY ESTABLISH THE SCHEME AND THE AGENCY?

The motivations for the Scheme and the Agency relate to both consumer welfare and trade. The Treaty states that its primary objective is:

*to safeguard public health and safety in Australia and New Zealand by establishing and maintaining a joint scheme consistent with international best practice for the regulation of the quality, safety and efficacy or performance of therapeutic products, and of their manufacture, supply, import, export and promotion.*

The assessment of new and increasingly complex therapeutic products requires a high level of expertise, and places considerable strain on both Australian and New Zealand resources. The pooling of resources to create the Scheme and the Agency should allow each country to deal more effectively with such products, ensuring that high standards are maintained but that applications are processed expediently so that consumers have faster access to new products.

Another key motivation is the push to enhance the Closer Economic Relations Agreement between Australia and New Zealand. Due to differences between the regulatory regimes of each country, therapeutic goods are currently exempt from the Trans-Tasman Mutual Recognition Arrangement (**TTMRA**), which aims to remove regulatory barriers and facilitate trade between Australia and New Zealand. The Scheme and the Agency will promote the Australian and New Zealand governments' objective of further integrating the Australian and New Zealand economies. Indeed,

<sup>1</sup> The information used in this article is taken from the Trans-Tasman Therapeutic Products Agency Project website. For more details, go to [www.jtaproject.com](http://www.jtaproject.com).

the New Zealand Health Minister, Annette King, has noted that the signing of the Treaty "demonstrates a strong commitment by both countries to the continuation of our long-standing relationship and is a further step in the development of a more integrated trans-Tasman economy".<sup>2</sup>

#### 4. EXPECTED IMPACT OF THE SCHEME AND THE AGENCY ON BUSINESS

By harmonising regulatory requirements and standards, the Scheme should reduce compliance costs for businesses. Under the present regime, companies must comply with separate processes and deal with separate bodies in each country. This affects many aspects of their businesses, including bringing products to the market, labelling and packaging, and promotion. Complementary medicines, in particular, are subjected to different treatment in Australia and New Zealand. The implementation of consistent rules will allow businesses with operations in both countries to function more effectively. It is thought that businesses will also benefit from increased administrative efficiency and a greater depth of technical expertise. The Agency's increased resources should result in the faster evaluation of products, ensuring the consistent and timely availability of therapeutic goods on the market.

Businesses will continue to pay fees and charges to the Agency, as they are currently required to do under the TG Act. While initial funding is to be provided by both governments, the Agency's ongoing funding cost will be recovered from industry.

#### 5. HOW WILL THE SCHEME BE IMPLEMENTED?

The Scheme will be implemented through:

- legislation in both countries;
- a set of Rules developed by the Ministerial Council (comprising the Health Ministers of Australia and New Zealand); and
- technical Orders made by the managing director of the newly established Agency.

Either nation will be able to depart from the Scheme in extraordinary circumstances, or where it is considered desirable in light of the public health, safety, environmental or cultural circumstances of each country.

#### 6. WHAT IS THE AGENCY'S ROLE?

The Agency administering the Scheme will be accountable to both governments. The Agency's functions will include:

- setting standards for the manufacture, supply, import, export and promotion of therapeutic products;
- pre-market evaluation and assessment;
- product licensing;
- post-market monitoring and surveillance; and
- providing information to the public in relation to therapeutic products.

The Agency's decisions will also be subject to common regulatory review and appeal processes that will be accessible to industry in both Australia and New Zealand.

#### 7. CONCLUSION

The therapeutic products industry and its customers should benefit from the implementation of a single trans-Tasman therapeutic goods regulatory regime. The elimination of duplication will reduce compliance costs for businesses, allowing companies to effectively take advantage of the broader trans-Tasman market. Although the Treaty has been finalised following years of collaboration and consultation with key players in the industry, stakeholder consultation will continue as the Agency is implemented and legislation is developed.

<sup>2</sup> The Hon Annette King and the Hon Trish Worth MP, 'Australia and New Zealand sign treaty to regulate medicines & therapeutic products' (Joint Media Statement, 10 December 2003).

# FURTHER CONSEQUENCES OF THE IPP REPORT: PROPOSED AMENDMENTS TO THE TRADE PRACTICES ACT

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## 1. THE IPP REVIEW

In July 2002 the Federal Government appointed an expert panel to review the law of negligence (***Ipp Review***). A part of the Ipp Review's reference was to consider the interaction of the *Trade Practices Act 1974* (Cth) (***TPA***) with the law of negligence. The Ipp Review was asked to consider and recommend amendments required to the TPA that would prevent actions being brought under the TPA for the recovery of damages in cases of 'personal injuries and death'.

In its report, the Ipp Review concluded that in many cases, claims under the TPA were a real alternative to a cause of action in negligence. Thus, statutory reforms by the States and Territories of the common law of negligence could be undermined unless the Federal Government effected complementary changes to the TPA.

## 2. THE FEDERAL GOVERNMENT RESPONSE

In response to the Ipp Report, the Federal Government separately introduced the Trade Practices Amendment (Personal Injuries and Death) Bill 2003 and the Trade Practices Amendments (Personal Injuries and Death) Bill (No. 2) 2004. Although similarly named, they address different issues.

The Senate amended both Bills and they were returned to the House of Representatives on 11 February 2004 and 12 May 2004, respectively. The Bills are currently awaiting the House of Representatives' 'concurrence' or 'return'.

## 3. TRADE PRACTICES AMENDMENT (PERSONAL INJURIES AND DEATH) BILL 2003 (TPA BILL NO.1)

*This Bill will amend the Trade Practices Act 1974 to prevent individuals, and the Australian Competition and Consumer Commission in a representative capacity, from bringing actions for damages for personal injuries or death resulting from contraventions of Division 1 of Part V of the Trade Practices Act 1974.<sup>1</sup>*

In introducing this amendment, the Federal Government stated its objective to be to:

*encourage nationally consistent reform of the law of negligence by State and Territory Governments. [As such] the Commonwealth's reforms will ensure that Division 1 of Part V of the Trade Practices Act 1974 cannot be used to undermine State and Territory civil liberty reforms in relation to claims for damages for personal injuries or death.<sup>2</sup>*

TPA Bill No. 1 seeks to insert a new sub-section 82(1A) into s82. If enacted, sub-section 82(1A) would prevent a person from taking civil action to recover damages from another person for loss or damage. This statutory bar would be to the extent which an action is based on provisions contained within Division 1 of Part V and where the loss or damage is, or results from, death or personal injury.

This is particularly significant as division 1 of Part V includes s52 and s53 which prohibit misleading or deceptive conduct by corporations in trade and commerce. These provisions have played a significant role in complex multiple Plaintiff claims

<sup>1</sup> Explanatory Memorandum for the Trade Practices Amendment (Personal Injuries and Death) Bill 2003, circulated by authority of the Minister for Revenue and Assistant Treasury, Senator The Honourable Helen Coonan.

<sup>2</sup> *Ibid*, 3.

over many years. They are the usual alternative approach in substantial product liability cases. The Ipp Report was relatively clear in its view that this alternative approach was not appropriate in the context of personal injury claims.

The Bill would also insert a new sub-section 87(1AB), to prevent the Court from ordering ancillary or other compensation for a person for loss or damage to the same effect.

TPA Bill No. 1 also sought to prevent the ACCC from applying to the Court on behalf of a person for compensation in line with the above.

Contrary to the Ipp Report, the Senate concluded that TPA Bill No. 1 should reflect the various States' and Territories' tort reform legislation. The Senate has proposed to allow damages up to the amount 'recoverable under the civil liability law of the State or Territory where the event giving rise to the loss or damage occurred'. These proposed changes are intended to affect personal actions, Court ordered compensation and actions brought by the ACCC on behalf of an individual in this context.<sup>3</sup>

#### 4. TRADE PRACTICES AMENDMENT (PERSONAL INJURIES AND DEATH) BILL (NO. 2) 2004 (TPA BILL NO. 2)

*This Bill will amend the TPA to provide that the rules relating to limitation of actions and quantum of damages recommended by the Review, apply to any claim for personal injuries or death brought under Part IVA in the form of an unconscionable conduct claim, Part V Division 1A, Part V Division 2A or Part VA*<sup>4</sup>

TPA Bill No. 2 seeks to assist with a nationally consistent approach to the limitation periods and constraints on damages arising from personal injury or death. It establishes limitations and caps on the amount of damages that can be claimed under different heads of damages in relation to personal injuries and death in respect of claims brought pursuant to:

1. unconscionable conduct (Part IVA);
2. the product safety and information provisions (Part V, Division 1A);

<sup>3</sup> Schedule of the amendments made by the Senate, 1 December 2003.

<sup>4</sup> Explanatory Memorandum, Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004, as circulated by the authority of the Minister for Revenue and Assistant Treasurer, Senator, The Honourable Helen Coonan, 1.7.

3. a supply by a manufacturer or importer of unsatisfactory consumer goods (Part V, Division 2A); or
4. a supply by a manufacturer of defective goods (Part VA).

When moving TPA Bill No. 2, Mr Ross Cameron MHR stated:

*The Australian Government has taken action to amend relevant parts of the [Trade Practice] Act to apply limitation periods and constraints on damages arising from personal injuries and death actions consistently across the country. As a result, this bill will ensure that the Act will not be used to undermine State and Territory laws in relation to actions for damages for personal injuries or death.*<sup>5</sup>

Accordingly, TPA Bill No. 2 seeks to introduce new arrangements for the limitation periods and mechanisms for establishing damages for loss of earnings capacity and damages for gratuitous attendant care services. Specifically, Part VIB proposes a framework for non-economic loss damages, depending on the severity of the injury.<sup>6</sup>

In effect, in TPA Bill No. 2, the Federal Government has generated its own version of tort law reform. It has done so by borrowing from the various States and Territories, particularly the *Civil Liability Act 2002* (NSW).

#### 5. THE KEY PROVISIONS OF TPA BILL NO. 2

TPA Bill No. 2 proposes a definition for personal injury including pre-natal injury, impairment of a person's physical or mental condition, or disease. The Bill seeks to limit the maximum damages payout for non-economic loss to \$250,000 in the year of commencement, with this maximum amount increasing by the CPI every year. Further and most notably, the Bill seeks to impose limits on personal injury damages for:

- (a) non-economic loss;
- (b) loss of earning capacity;
- (c) gratuitous attendant care services;
- (d) plaintiff's capacity to provide gratuitous attendant care services; and
- (e) other limits on personal injury damages.

<sup>5</sup> Second reading of Bill No. 2.

<sup>6</sup> Ibid.

TPA Bill No. 2 also includes the so called 'basic rule' in relation to limitation periods. In effect, the limitation period is the later of the 3 years after the date of discovery or the long-stop period.

The proposed date of discoverability for the death or injury is when the plaintiff in the proceeding knows or ought to have known that the death or personal injury has occurred and was attributable to a contravention of the TPA. In the case of personal injury, the injury would need to be significant enough to justify bringing the action.

The proposed 'long-stop period' is 12 years following the act or omission alleged to have caused that person's death or injury. The Bill seeks to allow this time frame to be extended by the Court. However, TPA Bill No. 2 states the Court must not extend the period by more than 3 years beyond the date of discoverability for the death or injury.

TPA Bill No. 2 would also allow for constructive knowledge to be established if the plaintiff ought to have known a 'fact'. The criterion is satisfied if the plaintiff would have ascertained the fact had they taken reasonable steps before the date in question to ascertain the fact.

Unlike TPA Bill No. 1, the Senate's concern with TPA Bill No. 2 was with the long-stop period and the imposition of limits for personal injury damages in circumstances relating to injury or death related to tobacco products. The Senate's amendments alter TPA Bill No. 2 so that it does not 'apply to any proceeding in respect of the death of or a personal injury to a person resulting from smoking or other use of tobacco products'.<sup>7</sup>

## 6. CONTENTION BETWEEN THE BILLS

Arguably there is tension between the two Bills as they lie in the House of Representatives. If enacted, this tension could regrettably mean that the assessment of damages, in cases of personal injury or death, would be assessed differently depending on which section of the TPA is the basis for a finding of contravention.

Under Division 1 of Part V the damages awarded would be in line with the appropriate legislation of the State or Territory where the event giving rise to the loss or damage occurred. However, there would

be a different assessment for damages under Part 5, Division 1A, Part IVA, Part V, Division 2A and Part VA because the TPA Bill No. 2 adopts its own statutory limitations and amounts.

Of course, this assumes that the Federal Government is willing to accept the Senate's rejection of a substantial recommendation in the Ipp Report. Moreover, will this be done before the next election?

<sup>7</sup> Schedule of amendments made by the Senate, 11 May 2004

# THE RISE OF OBESITY, MORTALITY AND LIFE-INSURANCE PREMIUMS

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According to analysis by global reinsurer Swiss Re, the financial implications of obesity are becoming too significant for the insurance industry to ignore, and consumers will bear the ultimate cost if obesity is not brought under control. This raises important legal, social and scientific questions.

## 1. BACKGROUND

Obesity has increasingly become a headline issue, due to growing litigation against fast-food companies, strong statistical data indicating a rise in obesity levels and various high-profile research papers on the topic. Comments by Swiss Re's Life and Health Business global head of pricing, Ronald Klein, indicate that, unless the prevalence of obesity in society is brought under control, consumers will bear the ultimate cost.<sup>1</sup>

Official policy makers at governmental and international levels are confronting the issue head-on, with bodies such as the International Obesity Taskforce, the National Obesity Taskforce and the World Health Organisation all moving to investigate further obesity and its related economic, social and legal implications.

The costs of obesity to government and the insurance industry also continue to rise. About 60% of the United States' health-care dollar is spent on obesity-related illnesses,<sup>2</sup> and the figures in other developed countries are similar. Given this, it seems reasonable to assume that some of these costs will ultimately be passed back to taxpayers and consumers.

Swiss Re's decision to publicly discuss the possible need for, and associated virtues of charging, higher life insurance premiums for obese people,

appears to be based on research indicating a loss of mortality benefits between 1979 to 1999 as a result of increasing obesity.<sup>3</sup> Swiss Re also relied on statistics such as the doubling of the rate of obesity occurrence in the developed world in the past 20 years, as well as the reported link between obesity and about 300,000 deaths per year in the US.<sup>4</sup> The Swiss Re report concludes that a future increase in obesity will ultimately result in a need to charge greater premiums for life insurance products for obese people.<sup>5</sup>

## 2. RESPONSIBILITY, REACTIONS AND DISCRIMINATION?

The idea that people should be charged higher insurance premiums because they are obese has, not surprisingly, generated heated debate. On one hand, some believe the issue is essentially one of personal responsibility. Others argue, however, that a propensity for obesity may be genetic and/or the result of unduly constrictive work and lifestyle pressures.<sup>6</sup> In Australia, such controversy has ultimately resulted in a joint report, titled *The Protection of Human Genetic Information*, being compiled by the Australian Law Reform Commission and the Australian Health Ethics Committee.<sup>7</sup>

Although these latter arguments are not necessarily consistent with recent research, they nevertheless represent legitimate social concerns. There are also fears that allowing insurance companies to calculate and charge premiums on the basis of physical characteristics is the thin end of the wedge in ultimately giving them free reign to

<sup>1</sup> See generally [www.swissre.com](http://www.swissre.com) [site last accessed 20 May 2004 – query search: 'mortality trends obesity'].

<sup>2</sup> Chatterjee, Knight & Ridder, 'Obesity: Effects on Industry, Public Policy Examined' *Kansas City Star: American Health Line*. National Journal Group, Inc (Kansas City), 20 April 2004.

<sup>3</sup> Eng, Ernest, 'Hard Facts to Stomach?' (2003) November *Technical Report - Life Cover; Reinsurance* 20.

<sup>4</sup> Klein, Ronald, 'A Matter of Life and Death: Special Report: Mortality Risk' *The Review: Worldwide Reinsurance* (2003) March 12.

<sup>5</sup> See generally [www.swissre.com](http://www.swissre.com) [site last accessed 20 May 2004 – query search: 'obesity'].

<sup>6</sup> See comments posted at [www.insurancejournal.com/news/international/2004/04/08/41064.htm](http://www.insurancejournal.com/news/international/2004/04/08/41064.htm) [Site last accessed 5 May 2004 – query search 'obesity'].

<sup>7</sup> Report available at <http://www.alrc.gov.au/inquiries/title/alrc96/index.htm> [Site last accessed 20 May 2004]. The report is advisory only and its recommendations are not legally binding.

determine premiums using individuals' genetic and physiological information.

Despite the fact that charging higher premiums for persons determined to be obese has been justified on the basis of relative statistical risk assessments (eg higher risk of premature death, etc), it does not necessarily follow that such measures will be either socially acceptable or politically feasible. Public acceptance of the concept may ultimately depend on what science says about the causes of obesity. For example, if, as many claim, obesity is genetic in origin, charging obese people higher premiums would likely be less acceptable than if obesity was proven to be the result of lifestyle choice.

At present, there are no clear answers about the cause of obesity: journal reports conflict as to the importance of genetic and lifestyle factors. Although some rare forms of obesity are possibly the product of genetic defect,<sup>8</sup> common obesity lacks a traceable origin and a 2002 study, published in the *International Journal of Obesity*, found that, out of a possible 30,000 human genes, only slight variations in one gene could contribute to weight gain susceptibility.<sup>9</sup> This tends to indicate that obesity may be more strongly linked to lifestyle than genetics.

### 3. MOVING FORWARD WITH OBESITY

Swiss Re's predictions of increased premiums payable by obese persons may yet be proven wrong. Given the attention obesity currently receives at governmental and upper corporate levels, however, it seems probable that attempts will be made to implement the changes in the near future. If this occurred, there would likely be challenges to the validity of the higher premiums.

In such a scenario, the recommendations of the *The Protection of Human Genetic Information In Australia* report may provide guidance as to how these challenges will be played out. The report recommends (among other things) that the insurance industry be required to adopt a range of improved consumer protection policies and practices for the use of genetic information and

that new laws should be enacted to ensure genetic information is only used in a scientifically reliable and actuarially sound manner.

These recommendations seem to approve of increased premiums where the increases are based on clear science. It also recommends that ongoing assessment of the interplay between human genetic information and the insurance industry should occur, ostensibly to protect both the industry and individuals' genetic and biological privacy rights.

<sup>8</sup> Boutin P, & Froguel P, 'Genetics of Human Obesity' (2001) 15(3) *Best Practice & Research Clinical Endocrinology & Metabolism* 391.

<sup>9</sup> Van Rossum C T M, Hoebbe B et al, 'Genetic Factors as Predictors of Weight Gain in Young Adult Dutch Men and Women', 26(4) *International Journal of Obesity* 517.

# FROM MINAMATA TO MAD COWS – AND MITSUBISHI: COMPARING PRODUCT SAFETY AND LIABILITY LAW IN JAPAN

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One of Japan's premier brand names, Mitsubishi, is severely threatened. On 24 March 2004, the Mainichi newspaper reported that Mitsubishi Fuso Truck and Bus Corporation (until recently part of Mitsubishi Motors Corporation) had announced the recall of an astonishing 113,000 large vehicles, admitting that defective hubs were the cause of wheels coming off and dozens of accidents. On 6 May, seven former and current senior Mitsubishi executives were arrested on charges of false reporting to regulatory authorities and professional negligence causing death.<sup>1</sup> Déjà vu?

Pressure had actually been building on Mitsubishi Motors from July 2000 when, after an insider tip-off, Japan's Transport Ministry conducted a spot inspection. Officials uncovered evidence suggesting that for decades the company had hidden claims regarding its automobiles, and had conducted clandestine recalls of automobiles claimed or found to be defective. The Ministry passed on information for prosecutors to bring charges regarding the former breach of the Road Transportation Vehicles Law (fines of 0.4 million yen against the company, and 0.1 million yen against four company officers), and for the Tokyo District to enforce fines regarding the latter (totalling 4 million yen). Although the amounts were small, these actions confirmed a reconfiguration in the cosy relationships between the automobile industry and its main regulator. This had begun with warnings given to Daihatsu in late 1998, followed by fines amounting to 1.4 million yen against Fuji Heavy Industry in March 2000. From mid-2000, Mitsubishi Motors recalled 620,000 vehicles, losing significant market share. In addition, no doubt in the shadow of warranties or representations by Mitsubishi when agreeing that month to take a 34 percent shareholding

for US\$2.1 billion, DaimlerChrysler announced in September 2000 that it would only pay US\$1.9 billion, and appointed a key executive to the No. 2 position in Mitsubishi after its president resigned.<sup>2</sup>

In the wake of this year's recalls and recent arrests, the Kyodo news service reported on 11 May that the Japan Business Federation (Nippon Keidanren), Japan's most powerful business lobby, had barred Mitsubishi Motors from its activities and may impose further sanctions.<sup>3</sup> In addition, a proposed reconstruction of the firm has been put into disarray. Despite being the largest shareholder now with 37 percent, DaimlerChrysler announced on 24 March 2004 that it would not inject funds into loss-making Mitsubishi Motors. Other shareholders within the Mitsubishi group (notably Mitsubishi Heavy Industries, general trading company Mitsubishi Corporation and the Bank of Tokyo-Mitsubishi) have reiterated their continued support for the automaker's reconstruction.<sup>4</sup> But throwing (increasingly scarce) "good money after bad" risks severely affecting the entire group, in an increasingly cut-throat Japanese market. Completing the circle, on 2 June 2004 Mitsubishi Motors is reported to have confessed that it "hid 26 defects in its cars from regulators – in addition to four problems it publicised in 2000 – to avoid issuing recalls for the vehicles".<sup>5</sup>

<sup>2</sup> Nottage, Luke R, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows*, (2004) 2-3.

<sup>3</sup> "Keidanren bars scandal-tainted M'bishi Motors from group activities", reported at [http://home.kyodo.co.jp/all/news.jsp?news=business&an,10 May 2004](http://home.kyodo.co.jp/all/news.jsp?news=business&an,10%20May%202004). Summaries of a press conference that day published by the Federation state instead that "Mitsubishi Motors Corporation informed Keidanren today that for the time being it wishes to abstain from membership activities and withhold from the post of a member of the Board of Directors as well as the Board of Executive Directors", and that this "request" was met (<http://www.keidanren.or.jp/english/speech/press/2004/0510.html>).

<sup>4</sup> Above, note 1.

<sup>5</sup> 'Mitsubishi Motors Hid 26 Other Defects In Cars – Report', *Dow Jones International News*, 2 June 2004.

<sup>1</sup> See the news archives searchable at <http://mdn.mainichi.co.jp>.

How should we assess these disastrous events afflicting some of Japan's most well-known companies, beginning with "the summer of living dangerously" in 2000, when Mitsubishi Electric also had to withdraw thousands of television sets and the first case of Mad Cow Disease (**BSE**) was discovered? Is Japan still a "producers' paradise", as in the 1950s and 1960s when economic growth was the top priority for the re-industrialising nation, even at the expense of large-scale injuries caused by defective products or environmental pollution in places like Minamata? Or do recent events point to more awareness and willingness to complain about and resolve these sorts of problems? The analysis presented in my new book<sup>6</sup>, and summarised for the National Product Liability Association seminar in Melbourne on 30 March 2004, tends towards the latter interpretation. I still view these events in a cautiously positive light, as a significant "re-orientation" of Japanese law and society towards a more appropriate balance between producer and consumer interests for the 21st century.

Chapter Two<sup>7</sup> compares the historical trajectory of product liability (**PL**) law in Japan. Despite early mass-torts litigation over the 1960s, PL experienced more of a "still-birth" from the early 1970s, compared to the EU and especially the US. Judicial innovation slowed, perhaps due to more general conservative reactions both within judicial administration as well as a society afflicted by the first Oil Shock; but also because legislators and bureaucrats did strengthen some product safety regulation, and industries introduced better product safety mechanisms. From the late 1980s, however, PL went through a "re-birth". Reports of product defects emerged, and in 1993 the conservative Liberal Democratic Party lost its virtual monopoly on political power since 1950. These developments coincided with external pressures. Trade liberalisation accelerated, and the European Community's PL Directive of 1985 proved popular even beyond Europe (eg in Australia, when Part VA was added to the *Trade Practices Act 1974* (Cth) in 1992), despite PL's retrenchment in the US (reflected and further cemented by the Restatement Third promulgated in 1998). On 22 June 1994, Japan enacted its Product Liability Law (the **Law**), modeled on the Directive and adding a new strict liability cause of action to the tort regime in the venerable Civil Code.

<sup>6</sup> Nottage, Luke R, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows*, (2004).

<sup>7</sup> Ibid.

Chapter Three compares the Law primarily with these regimes in Europe, Australia and the US. As was illustrated by the case study discussed at the 30 March seminar, the scope of liability under the Law is quite expansive. Sometimes, this is true even relative to the US, especially as further reined in by "tort reforms" through state legislation. Japan's expansive tendency has been advanced by most judgments there since 1999, rendered quite quickly compared to the "lead-in" time for the Directive in Europe or Part VA in Australia. No litigation explosion is evident or expected, given the constraints of Japan's broader civil justice system. However, those constraints are often shared especially by continental European legal systems, which continue to influence Japan's private law. Also, barriers to suit are being reduced following the recommendations of the blue-ribbon Judicial Reform Council presented to the Prime Minister in 2001. Recent measures to improve access to justice include the establishment of graduate "law school" programs aimed at more "professional" legal education; significant increases in the numbers of judges, lawyers and prosecutors; more competition from "quasi-lawyers", like patent attorneys; parallel strengthening of Alternative Dispute Resolution (**ADR**) processes (such as enactment of a new *Arbitration Act*, in force from April this year); and reintroduction of a "lay assessor" scheme in serious criminal cases.

Chapter Four turns to the "PL Law in action" at various levels. As well as somewhat more judgments annually, the data shows significantly more suits filed from the mid-1990s, and settlements seemingly more in favour of plaintiffs, albeit from a low base (as in continental Europe and Australia even in the 1990s). In addition, Japan has seen considerable activity in ADR. Rather than formal mediation services, PL ADR Centres established by industry associations have mainly provided a further avenue to obtain legal and technical advice for those with possible claims about product safety, including borderline situations involving just quality of the goods themselves or related services. Local government funded consumer counselling services showed parallel growth. The net result, unsurprisingly, is widespread survey and more anecdotal evidence of a considerable ratcheting up of product safety activities on the part of Japan's manufacturers since the mid-1990s.

Chapter Five concludes with some questions and challenges for the “Future of PL in Japan”, particularly relevant in light of this year’s events involving Mitsubishi and Japan’s still-shaky economic recovery. No doubt there will be further calls to reform Japan’s Product Liability Law itself, for example by extending coverage to primary (unprocessed) agricultural produce, as occurred in 1999 with the EC Directive in the wake of Europe’s much more extensive Mad Cow Disease epidemic. As in Europe, however, most focus will instead be directed on broader reforms in access to civil justice. Those reforms will provide additional scope for judges and commentators to restate or reformulate a growing corpus of Product Liability law. Already, however, there has been and will be significant re-regulation, bolstering the substantive requirements and enforcement mechanisms in product safety regulation. So far, this has occurred on a product- or industry-specific basis in Japan. However, a new regulatory framework on product safety generally can be expected, probably again along EU lines, namely its recently revised Product Safety Directive. Such regulatory schemes offer considerable potential for synergy with – not just substitution for – private law liability regimes, to address appropriately the increasingly complex problems thrown up by the likes of Mad Cow Disease.<sup>8</sup> That becomes a more theoretical or policy-oriented reason for monitoring and comparing Japan nowadays, as well as the more immediately practical need to be aware of its ongoing re-birth in PL.

<sup>8</sup> Luke Nottage and Melanie Trezise, ‘Mad Cows and Japanese Consumers’ (2003) 14(9) *Australian Product Liability Reporter* 125.

# PRODUCT REFUNDS UNDER THE *TRADE PRACTICES ACT*: RETAILER DUTIES & CONSUMER RESPONSIBILITIES

ALEX DANNE, ARTICLED CLERK, ALLENS ARTHUR ROBINSON

The 2003 Federal Court decision in *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd*<sup>1</sup> addressing Courts' powers to order refunds, combined with the ACCC's release of a revamped brochure addressing businesses' refund obligations, presents an opportune chance to review the law relating to consumer protection and refunds as it exists under Part V of the *Trade Practices Act 1974* (Cth) (the **Act**).

## 1. CONSUMER TRANSACTION CONTRACTS

Consumers are defined in section 4B of the Act as comprising two classes of persons. The first are those who have acquired particular goods, either for ordinary personal, domestic or household use (including commercial road vehicles) or valued at less than the prescribed amount.<sup>2</sup> The second class of consumers are similar, except the requirements for ordinary use and the prescribed amount are in relation to the acquisition of services, rather than goods. Both classes cease to be consumers under the Act, however, if the goods or services were acquired for the purpose of re-supply, transformation in the course of trade or commerce, production or manufacture, or repairing or treating other goods or fixtures on land.

The majority of sellers' duties owed to consumers are contained in the statutory rights set out in Division 2 of the Act's consumer protection provisions under Part V<sup>3</sup>. These in turn are divided into those which imply contractual conditions into consumer transactions and those which imply contractual warranties. Where a corporate seller

is faced by one or more disaffected consumers, liability to refund will depend both on the term breached, and the nature of the breach. Section 68 of the Act makes it clear that none of the implied statutory rights are able to be excluded, restricted or modified by either party, and that any attempt to do so will be void.

### 1.1 The Consumers' Right to a Refund: Statutory Conditions Under the Act

The Act provides for five contractual conditions to be implied into all relevant consumer transactions.

#### (a) The consumer must gain clear title Section 69(1)(a)

There is an implied condition that a seller selling goods must have the right to sell the goods and that title will clearly pass to the purchaser.

#### (b) Goods must match the description Section 70(1)

Where a corporation is supplying goods to a consumer by description, there is an implied condition that the goods will correspond with the description, regardless of whether they correspond with any sample that was used by the seller.

#### (c) Goods must match the sample Section 72

Under this section, where a corporation supplies goods to a consumer by contractual reference to a sample, there are implied conditions that; (1) the bulk will correspond with the sample; (2) the consumer will have reasonable opportunity to compare the bulk with the sample and; (3) the goods will be free from any defect rendering them unmerchantable and which is not apparent on reasonable examination of the sample.

<sup>1</sup> [2003] FCA 881.

<sup>2</sup> Section 4B(s) sets the prescribed amount as \$40,000, or a greater amount if it is prescribed for the purposes of that paragraph.

<sup>3</sup> Conditions and Warranties in Consumer Transactions.

(d) Goods must be of merchantable quality  
Section 71(1)

Where a corporation supplies goods (unless by way of sale by auction), there is an implied condition that the goods are of merchantable quality. No such condition will be implied, however if defects are drawn to the consumer's attention before the transaction, or if the consumer examines the goods before the transaction and the defects which are later relied upon ought to have been revealed by such examination. The Act provides further guidance under section 66 by stating that goods will be of merchantable quality if they are fit for the purpose or purposes for which the goods of that kind are commonly bought.

(e) Goods must be fit for their purpose  
Section 71(2)

Where a consumer makes it clear to the corporation or the person with whom antecedent negotiations are occurring, that there is a particular purpose for which the goods are being acquired, there will also be an implied condition in the subsequent contract that the goods must be reasonably fit for that purpose. This condition will not apply, however, where it is shown that the consumer did not rely, or it was unreasonable for him to rely, on the advice of the party with whom negotiations occurred.

At common law, breach of a contractual condition gave rise to a right to terminate the contract. This position is continued under section 75A of the Act, which expressly permits consumers to rescind the contract (thereby obtaining full refund) where there has been a breach of one or more of the statutorily implied conditions. It should be noted though that a number of requirements exist which must be observed by the consumer to make such rescission effective. These include the requirement to serve notice on the seller within a reasonable time, to retain the goods without inflicting additional damage on them and to not use the goods for an abnormal use.

## 1.2 The Consumers' Right to Damages: Statutory Warranties Under the Act

The statutory warranties implied into contracts for supply of goods or services are also protected from restriction or removal by section 68 of the Act, although regardless of this, breach of a statutory warranty will not give rise to an immediate right to

terminate the contract. The Act implies four basic warranties, where appropriate, to all consumer transactions.

(a) Consumer must enjoy quiet possession  
Section 69(1)(b) & (3)(b)

There is an implied warranty that the consumer will be able to enjoy quiet possession of the goods, except to the extent that the consumer may be lawfully disturbed by the seller or another person.

(b) Goods must be free from charges  
Section 69(1)(c) and (3)(a)

There is an implied warranty that the consumer's goods will be free from any charges or encumbrances (except floating charges) not disclosed or known to the consumer before the contract is made.

(c) Services must be carried out with care and skill  
Section 74(1)

There is an implied warranty that any services rendered to the consumer by a corporation will be rendered with due care and skill and any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(d) Services must be fit for their purpose  
Section 74(2)

Where a consumer makes known to a corporation that supplies services, that the services are required for a particular purpose or the result that is desired from the services, there is an implied warranty that the services supplied will be reasonably fit for that purpose. This does not apply where the consumer does not rely, or it is unreasonable for the consumer to rely, on the corporation's skill or judgment.

Breach of a statutory warranty will not give a consumer an immediate right to terminate the contract. Despite this, such a breach will give rise to a right to claim damages. In practical terms, this could manifest itself in an award to the consumer for repair costs (or free repair by the seller), replacement of goods, performance of the services again, or actual damages.<sup>4</sup> In effect, therefore, although a full right to a refund may not exist at law, in practice, breaching a statutory warranty may in fact have the effect of allowing a consumer to receive a full or limited refund. To avoid this situation, sellers should ensure they take the

<sup>4</sup> ACCC, *Warranties and Refunds* [Public Brochure: 4th edition] 2001 ACT.

statutory warranties just as seriously as they do the conditions.

### 1.3 Conditions, warranties and intermediate terms at common law

Sellers should also be aware that in addition to terms implied by statute, consumers may have a right to a refund based on conditions and warranties expressly imported into the contract for supply of goods or services. These terms would arise by either the words, actions or both, of the seller or consumer during negotiations antecedent to contract formation. An example of where a seller and buyer could be said to have inserted such terms into the contract is where the seller made a specific and focussed assertion about a particular attribute of the supplied goods or services and the consumer placed significant reliance on this when entering the contract, only later to find it had been breached.

A contractual term in a consumer transaction will become a condition (and accordingly provide consumers a right to refund through rescission) when it is an essential or fundamental term. Some guidance on what could constitute an extra-statutory condition is gleaned by reference to the nature of the statutorily implied conditions. In short, a term claimed to be a condition must be absolutely germane to the existence of the consumer transaction.

Some terms of the purchase contract may be *intermediate terms*, rather than conditions or warranties. Breach of these terms will usually give rise to a right to claim damages, although depending on the nature of the breach and its foreseeable and actual consequences, breach of an intermediate term may give rise to a right to terminate the contract (and obtain a refund).<sup>5</sup> Thus if an expressly included term existed which was not clearly a condition and not clearly a warranty (ie. it was important to the contract, but not overly important), and a serious breach occurred, at common law the consumer may have an action in contract to terminate the contract and seek a refund.

<sup>5</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

## 2. REFUNDS IN THE COURTS

### 2.1 Misleading or deceptive representations Section 53(g)

Section 53(g) of the Act prohibits a corporation from making false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, in connexion with the supply or possible supply of goods or services. Strict judicial interpretations of the section in relation to refunds has placed a heavy onus on sellers to ensure that they comply with the law.

In *Miller v Fiona's Clothes Horse of Centrepoint Pty Ltd*<sup>6</sup> (**Miller**) the Federal Court found that a business which had practiced a no-refund policy using oral representations, signage and labelling on receipts was in breach of section 53 of the Act. The company had engaged in behaviour which would be likely to mislead many customers about their rights and deter some from seeking a refund where a refund was appropriate. In making his orders, von Doussa J imposed a penalty of \$15,000.

The decision in *Miller* was further developed in *Trade Practices Commission v Radio World Pty Limited*.<sup>7</sup> In that case, the Federal Court was faced with a company which had acknowledged to consumers, in signage, that the Act provided them with rights in relation to refunds. The acknowledgement, however, was severely limited (in that it provided no detail whatsoever), and further was deeply embedded in surrounding text which specifically denied consumers any right to a refund. Ultimately, the Court found the company in breach of both section 53(g) and section 52 of the Act<sup>8</sup> and granted injunctive relief<sup>9</sup> restraining the company from continuing to display the signs. This decision was an important reminder to corporations of the necessity to ensure consumers are aware of the protection afforded to them by the Act.

More recently in *Australian Competition and Consumer Commission v Westco Jeans (Aust) Pty Ltd*<sup>10</sup> the Court found<sup>11</sup> that a similar breach

<sup>6</sup> (1989) ATPR 40-963.

<sup>7</sup> (1989) ATPR 40-973.

<sup>8</sup> For engaging in misleading or deceptive conduct as prohibited under the Act.

<sup>9</sup> Using its powers under section 80.

<sup>10</sup> (unreported) Federal Court, 13 February 1998, per North J.

<sup>11</sup> As discussed in: Evans, K., *Retailers Still Continue to Refuse Customers' Refunds: ACCC v Westco Jeans (Aust) Pty Ltd*. 6 TPLJ 174 (original judgment not obtainable).

of section 53(g) had occurred and ordered the company to take specific actions in order to alert consumers as to their rights under the Act. These actions included the following:

- (a) prominently placing a sign in all its stores advising consumers of the circumstances where refunds would be available;
- (b) printing a pamphlet containing detailed information about the company's refund policy and specific instances where a cash refund would be given; and
- (c) implementing a two year trade practices compliance program for the company's staff and management.

It is unclear whether the orders of North J in imposing these measures should be seen as being specifically of a punitive nature against Westco, or rather as a statement of law regarding sellers' legal obligations generally. Under either interpretation however, there is an affirmation of the duty courts place on sellers to take positive action to educate consumers about their statutory rights. Corporate sellers wishing to comply with section 53(g) should take positive steps to comply with these orders.

## 2.2 Refunds as a remedy Section 87(2)(c)

In addition to the right of rescission for contractual breach, any breach of the consumer protection provisions<sup>12</sup> can give rise to an order for refund by the Court under section 87(2)(c) of the Act.

### (a) Jurisdiction for refund orders

Section 87(2)(c) permits a Court to direct a seller in breach of its consumer protection obligations under the Act, to either refund the money or return the property to an aggrieved consumer. The remedy achieves a similar result to an order for damages (also awardable under the Act), and for this reason Courts have tended to shy away from its use.<sup>13</sup>

Despite this, Brennan J has described<sup>14</sup> the remedy as being one which does not depend upon the validity of the contract in question. This indicates that if a commercial transaction lacked contractual validity, thereby denying a consumer access to the protective provisions discussed above, that consumer may still be

able to be granted a refund if so directed by the Court. The flexibility of operation under section 87(2)(c) could potentially result in increased usage of it in refund-centred commercial disputes.

### (b) Limits, Subrogation and Penalties

Despite a relative paucity of case law examining the usage of statutory refunds as a means to ensure consumer protection, some key cases in recent years have contributed to a further demarcation of the limits of the remedy, resulting in the following propositions.

- (i) Goods which have breached a statutorily required standard (for example non-compliance with the safety standards incorporated into law by section 65C of the Act) may be subjected to a general refund order applying to all of the non-compliant goods, in general and regardless of consumers' awareness of the non-compliance. Before any such order can be made however, the factual basis of non-compliance must be clearly made out at court.<sup>15</sup>
- (ii) If a refund order is sought by a consumer seeking to escape his contractual obligations without lawful reason, then judicial use of the remedy is not permitted.<sup>16</sup>
- (iii) If a refund order is sought, before it can be granted, the Court must identify a clear causal connection between the contravening conduct and the loss or damage.<sup>17</sup>
- (iv) Under section 75AQ of the Act, the ACCC is able to subrogate itself (with written consent of a disaffected consumer) into the consumer's cause of action. Given the interventionist character that the regulator has acquired in recent years, further cases cannot be ruled out as a possible method of alerting corporate sellers as to their legal refund responsibilities to consumers.

In addition to the above propositions, in *Australian Competition & Consumer Commission v Purple Harmony Plates Pty Ltd*<sup>18</sup> the Court was prepared to extend the sellers' obligations to offer full refunds to any consumer suffering loss or damage

<sup>12</sup> Part V, although breaches of Part IV, IVA, IVB and VC can also incur the section 87(2)(c) remedy.

<sup>13</sup> Skapinker, Diane., 'Other Remedies' Under the Trade Practices Act – the Rise and Rise of Section 87 *MULR* [Vol 21, No 2, 1995].

<sup>14</sup> *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144, at 163.

<sup>15</sup> *MHG Plastic Industries Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 1069.

<sup>16</sup> *Todarello v Martin & Luscombe Pty Ltd* [2002] NSWSC 71.

<sup>17</sup> *Australian Competition and Consumer Commission v Black on White Pty Ltd (t/a Australian Early Childhood College)* [2002] FCA 739110 of 1997 (unreported).

<sup>18</sup> [2001] FCA 1062.

as a result of a similar breach of the consumer protection provisions and who had specifically requested a refund. However, in *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd*<sup>19</sup> (**Danoz**) the Court specifically denied refund rights to non-party consumers. In his decision, Dowsett J held that:

*The Court has no power to make an order for refund in favour of a person who is neither a party nor a person on whose behalf the applicant has claimed pursuant to the TPA.*<sup>20</sup>

The *Danoz* decision effectively nips in the bud any rule of law that might have existed after the *Purple Harmony* case which may have allowed Courts to enunciate a blanket order outlining refund liabilities to a perceived "class of consumer". After *Danoz*, it would seem that if an aggrieved consumer was not part of an initial contractual action, she would have to seek independent recourse to the seller for the loss or damage she had suffered.

### 3. CONCLUSION

In view of the strictness of the law, the demonstrated assertiveness of both the Courts and ACCC in upholding consumer protection provisions and the possibility of further cases being brought to clarify potentially controversial legal issues, corporate sellers should ensure they take positive steps to educate consumers as to their legal rights to refunds under the Act. Although such steps may not necessarily go as far as the orders of North J in *Westco* (outlined above), those orders nevertheless provide useful guidance on the standards sought to be set by the courts.

<sup>19</sup> [2003] FCA 881.

<sup>20</sup> [2003] FCA 881 at [275].

# NEW STATUTORY CRIMES PROPOSED IN VICTORIA FOR SUPPLIERS, DESIGNERS AND MANUFACTURERS

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The review of the *Occupational Health and Safety Act 1985 (Vic) (Act)*, undertaken by Chris Maxwell QC was recently published.<sup>1</sup> Maxwell makes recommendations that will, if implemented, change the liabilities of providers of goods and services to workplaces in Victoria—upstream providers.<sup>2</sup> The recommendations would not only modify the nature of the duties imposed but also impose duties on a wider group of upstream providers.

Importantly, the liabilities imposed under the legislative scheme arise from a failure to carry out a duty and do not require any injury or damage to be caused.<sup>3</sup> Failures to perform the duty imposed are criminal in nature and punishable by significant fines and imprisonment.<sup>4</sup> Liabilities would not only fall on the corporate entities subject to the duties, but also on individuals within them. Maxwell's report recommends that any officer<sup>5</sup> or person concerned in the management of a body corporate be put under a duty to take reasonable care to ensure that the body corporate complies with its duties.<sup>6</sup> Failure to perform this duty would subject these individuals to criminal liability also punishable by significant fines and imprisonment.<sup>7</sup>

## 1. PROPOSED DUTY HOLDERS

The Act already imposes duties on designers, manufacturers, importers and suppliers of plant and also on manufacturers, suppliers and importers of substances. This duty is a duty to ensure that plant and substances are free from risk to health and safety as far as is practicable. Those involved in the erection and installation of any plant for use in the workplace are also caught.<sup>8</sup> The review notes two significant areas of deficiency in the current Act. The first relates to the designers of

substances. The second relates to other areas of supply into a workplace.

### 1.1 Designers and substances

Maxwell notes that it is time that the fiction that substances are not designed is dispensed with. While he makes specific reference to genetic and molecular engineering, there is little doubt that this understanding of design would include a very broad range of industrial and domestic chemicals and preparations used in workplaces.<sup>9</sup>

### 1.2 Other supplies

Two areas of supply outside plant and substances are specifically addressed. The review recommends that duties be imposed on designers of packaging and services.<sup>10</sup>

The rationale for the proposal for the imposition of duties on the designers of services is one of legislative consistency. This begs the question of whether the end result may be the imposition of duties on everyone involved in the supply of any goods or services to a workplace.

### 1.3 Designers and control

A further recommendation is made about the duties imposed on designers generally. The review notes that a person who is merely the designer could never be in a position to do something *practicable* to ensure that it was constructed or manufactured as required by their relevant duty. Consequently, Maxwell proposes to limit the duty imposed on a designer to the design of that supply. This is in keeping with recommendations elsewhere in the report to limit duties to areas within the duty holder's control.

## 2. THE PROPOSED SCOPE OF THE DUTIES

### 2.1 What activities must Upstream providers consider

The concept of use, which defines the scope of the duties, is not currently defined within the Act. Maxwell recommends this be remedied.

<sup>9</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [840].

<sup>10</sup> Maxwell above n1, chapter 19: Clarifying s 24, [860] - [863].

<sup>1</sup> Maxwell, C, Occupational Health and Safety Act Review, March 2004.

<sup>2</sup> See Maxwell above n1, Part 4: Upstream Duties.

<sup>3</sup> See Maxwell above n1, Chapter 32: Civil concepts, criminal liability.

<sup>4</sup> See Maxwell above n1, Chapter 35: Penalties.

<sup>5</sup> Maxwell recommends that the definition of officer is defined in the same terms as the Corporations Act 2001 (Cth), see Maxwell above n1, chapter 17: Duties of officers, [769].

<sup>6</sup> See Maxwell above n1, Chapter 17: Duties of officers.

<sup>7</sup> See Maxwell above n1, Chapter 35: Penalties.

<sup>8</sup> Occupational Health and Safety Act (1985) (Vic), s24.

- (a) Use of plant is proposed to include not only the normal operation of the relevant plant within the workplace, but also to such activities as construction, erection, installation, commissioning, inspection, cleaning, maintenance, repair, decommissioning, disposal and dismantling where risks to health and safety may arise in the workplace.<sup>11</sup>
- (b) Use of substances would include the handling, processing, storage, transport and disposal of the substance.<sup>12</sup>

These recommendations significantly broaden the scope of activities that a duty holder must consider in fulfilling its duty.

The scope of the duty recommended for packaging is also broadly defined. This includes the risks associated with a person handling the package having regard to its weight, dimensions and contents and the risks associated with any exposure to the contents.<sup>13</sup>

The review does not address this issue of scope for the supply of services. It merely recommends that the duty be imposed "in connection with the design or development of services which are to be delivered in or in connection with workplaces".<sup>14</sup>

The current duties are also limited to situations where the plant or substance is properly used. The structure of the relevant section of the Act ties this proper use to the information and advice that has been provided about the proper use. This link has enabled suppliers of goods and services to workplaces to fulfil their duty primarily by providing information and advice about the proper use of the goods or services that they provide.

The Maxwell report recommends that this be removed. In its place a purpose test is proposed. This would require a duty holder to ensure, so far as is reasonably practicable, that the supplied goods or services are safe and without risks to health when used for any purpose for which it was designed or for any other reasonably foreseeable purpose.<sup>15</sup> These would clearly need to cover all of the aspects of use noted above.

## 2.2 How can Upstream providers fulfil their duties?

Maxwell's recommended replacement of the *properly* used test with a purpose test appears to

<sup>11</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [843].

<sup>12</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [855].

<sup>13</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [860].

<sup>14</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [863].

<sup>15</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [844] - [846].

increase significantly the obligations of an upstream provider. This is perhaps balanced a little by the changes recommended to the current requirement for the provision of information and conditions. The current provision<sup>16</sup> does not provide clear guidance as to the requirements. Confusion can arise about the nature of the information required. This is due to the inadequate separation of the requirement for information on what is the understanding of the duty holder of the purpose of the supplied plant or substance and the information about precautions for use of the plant or substance.

The changes recommended clearly identify the two types of information required. Firstly, information must be provided about the purpose of the plant or substance. Second, information must be provided about any conditions necessary for use. The proposal restricts the requirement to provide information about use to the purpose for which it was designed or other reasonably foreseeable purpose.<sup>17</sup> However, it should not be forgotten that use is to be broadly defined.

The first change would appear to enable upstream duty holders to confine the purposes for which their supply should be used and exclude purposes for which the supply is not designed. However, caution should be exercised in taking this approach. The purpose test proposed by Maxwell can not be easily limited. The inclusion of 'any other reasonably foreseeable purpose' means that where a particular supply can be used for other purposes then the upstream duty holder will need to consider carefully how to fulfil its duty. While it may be possible to do this by providing information on the conditions required for these foreseeable uses outside the purpose of the supply, the proposal clearly attempts to require that risks associated such foreseeable risks are designed out.

## 2.3 The ongoing nature of the proposed duty

There is one further issue that arises from the recommendations. Maxwell recommends that the duty to provide information would continue, so that a duty holder would be required to provide the information whenever requested, possibly long after the date of supply.

<sup>16</sup> Occupational Health and Safety Act (1985) (Vic), s 24(1)(b).

<sup>17</sup> Maxwell above n1, Chapter 19: Clarifying s 24, [850].

# BRIEF

National Product Liability Association

