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National Product Liability Association
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BRIEF

National Product Liability Association

The views expressed in BRIEF are those of the authors of the articles and do not necessarily represent those of the editors or of NPLA. BRIEF aims to keep NPLA members informed on current issues and developments in Product Liability. It should not be used or relied on as a substitute for legal advice. Members and readers should seek professional advice on any specific product liability issues.

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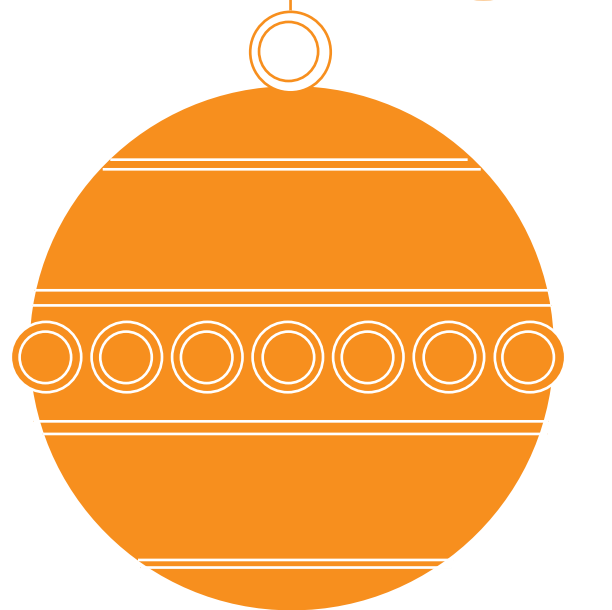
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PRESIDENT'S REPORT 2004

DAVID POULTON, PRESIDENT, NPLA

2004 has been another year of solid performance by the National Product Liability Association. In my first annual report as National Product Liability Association President I am pleased to be able to say that I believe the Association is in a good position to meet the challenges ahead.

EXECUTIVE COMMITTEE

In 2004 the Executive Committee consisted of:

David Poulton – President
Peter Holloway – Vice President
Melissa Daly – Treasurer
Derek Begg – Secretary
Andrew Morrison – Immediate Past President

and Committee Members:

Pam Madafiglio (NSW)
Annette Hughes (Joint Brief Editor)
Belinda Thompson (Joint Brief Editor)
George Karalis
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Peter O'Donahoo
Jane Wilhelm

BRIEF

As always, a major focus of activity has been our periodical, *Brief*. Under the energetic editorship this year of Annette Hughes and Belinda Thompson we have moved to quarterly issues and accordingly have published three issues so far in 2004 with a bumper Christmas number to come. As in previous years, the standard of contributions to *Brief* has been uniformly high. We continue to encourage members and external contributors to submit articles to this excellent publication. Thanks go to all of the contributors this year. I am pleased that Annette and Belinda will continue as joint editors in 2005.

TORT LAW REFORM/EMERGING LEGAL ISSUES

In his President's Report last year, my predecessor Andrew Morrison noted that the codification of Australian tort law was 'finally making its presence felt in the southern states'. Tort law reform has

certainly dominated much of the discussion in the area of product liability this year, and looks set to continue to do so. Reforms to the *Trade Practices Act 1974* (Cth) restricting entitlements to personal injuries damages look certain to have an effect on product liability litigation for years to come. Nevertheless, significant areas of potential exposure remain for Australian corporations. It has been particularly interesting to observe the developments which have occurred in the field of asbestos litigation. Asbestos liability again looks likely to be a significant area for discussion in 2005.

The NPLA will continue to monitor and report on legal developments of interest to our members.

SECRETARIAT

I would like to take this opportunity to acknowledge the excellent assistance provided this year by Athena Tashevskva, the hardworking manager of our Secretariat, the Australian Industry Group. Following our review of the role of the Secretariat last year, Athena has worked closely with me and other members of the Executive Committee. As well as assisting in the organisation of functions and seminars, Athena has been instrumental in the efficient running of the Executive Committee, including the provision of agendas and minutes of meetings on a timely basis.

SEMINARS

As in previous years, the Back to Basics seminar series was an important component of the seminars run by NPLA. In spite of the continuing competition from an increasingly crowded seminar market, our Back to Basics seminars were quite well attended this year.

Early in the year, we also organised a presentation by Sydney academic, Dr Luke Nottage on a comparative analysis of Australian and Japanese product liability law, which also included a presentation by barrister, Michael Wheelahan on the practical aspects of running international product liability claims.

Our thanks go to all of our speakers at our seminars so far this year, as well as the various legal firms which provided speakers and venues for the Back to Basics series.

The NPLA is also pleased to be supporting the upcoming seminars in Melbourne and Sydney entitled 'International Liability: New Theories of Liability from the United States - Will you be Ready?' organised in conjunction with the Defence Research Institute, a very large association of US and international defence lawyers, as well as our colleagues at Australian Insurance Law Association and the Australian and New Zealand Institute of Insurance and Finance.

Looking forward to next year, our aim is to develop some new seminar programs, focused on specific industries, or specific emerging issues in product liability. In developing these seminars, we propose to look for programs which have the potential to be run in both Melbourne and Sydney. We are looking to expand the Association's profile in interstate venues, and with our existing Sydney representation we consider this to be the logical place for special focus.

LOBBYING COMMITTEE

The lobbying committee has continued to monitor developments of interest to members.

In February 2004 a submission was made to the Product Safety Unit of the Queensland Office of Fair Trading concerning infant bathing aides. The Office of Fair Trading was conducting an inquiry into the safety of these products following upon a number of infant deaths in Australia and overseas.

More recently, a paper is being prepared for submission in response to a review of the Australian consumer product safety system being conducted by the Ministerial Council on Consumer Affairs. A discussion paper has been published by the Council which canvasses possible reforms to consumer product safety laws in Australia. Comment has been sought on a variety of issues, including whether a "general safety provision" should be introduced to impose a legal obligation on businesses to only place "safe" consumer products on the market.

Specific issues about which comment is sought include:

- the major problems confronting Australia's consumer product safety system;
- how governments should address these problems;
- whether "services" should be covered by the TPA product safety provisions?
- whether consumers receive sufficient product safety information;
- whether businesses should be required to report unsafe products; and
- whether a product safety "early warning system" should be developed in Australia.

A copy of the submission will be available on the NPLA website in November 2004.

LOOKING FORWARD TO 2005

Apart from the seminar program mentioned above and our other ongoing activities, we will also be making further enhancements to our website over the coming year.

I would like to thank all members of the Executive Committee for their assistance this year, and look forward to working with them again next year.

I hope many members have the opportunity to attend the upcoming DRI/NPLA/AILA/ANZIIF seminar referred to above and I look forward to catching up with as many members as possible at the Melbourne seminar. Otherwise, I would like to take this opportunity to wish all of our members compliments of the season.

HEALTH CLAIMS ON FOOD LABELS

BELINDA THOMPSON, PARTNER AND KATHRYN PARKER, LAWYER,
ALLENS ARTHUR ROBINSON

Food Standards Australia New Zealand (**FSANZ**) has completed its first round of public comment on a proposed major new food standard for nutrition, health and related claims, following a recent Ministerial Council policy guideline that foreshadows allowing health claims on food labels. Implementation of the proposed standard would constitute one of the biggest changes to food labelling in Australia and New Zealand in recent years.

INTRODUCTION

Currently health claims that refer to a serious disease or condition, for example claims that state the product *'reduces your risk of heart disease'*, are not permitted on food labels. These 'high level claims' are only permitted on medicines.

General claims such as *'good source of calcium'* are currently allowed on food labels. However, most of these 'general level claims' are covered by an industry code of practice rather than the FSANZ code.

FSANZ prepared an Initial Assessment Report¹ and sought public comment to assist in determining:

- 1 whether the current situation (that high level health claims are disallowed and most general level claims are regulated by an industry code of practice) should remain the same; or
- 2 whether regulation of health claims should change so that:
 - (a) high level claims are covered by a standard and general level claims are covered by a guideline, regulated by FSANZ; or
 - (b) both high level and general level claims are covered by a single food standard, regulated by FSANZ.

POLICY

The policy guideline describes nutrition, health and related claims as 'all claims referring to the nutrient

content, nutrition function, enhanced function, reduction of disease risk or maintenance of normal health'. These claims can range from a simple nutrition content message to claims about a serious disease.

The conceptual framework for the regulation of these claims is based on the principle that regulatory intervention is warranted where without regulation there are greater risks to public health or safety or a greater potential for consumers to be misled, or both.

THE FRAMEWORK

The proposed framework consists of a classification framework, a model for regulating the claims once they are classified and a substantiation framework to ensure that claims are scientifically valid.

CLASSIFICATION

Classification distinguishes between *high level* and *general* claims, based on the degree to which the potential health benefits of the product are balanced against the potential risks of adverse outcomes resulting from misinterpretation of the claim or inappropriate use of the product. The level of the claim will determine the degree to which it is regulated.

High level claims are those which refer to a biomarker or serious disease. A biomarker is a measurable biological parameter that predicts the risk of human disease, for example blood cholesterol level. A serious disease is one which cannot be appropriately diagnosed or treated without consulting a suitably qualified health professional. High level claims include:

- Biomarker maintenance claims. These claims describe the biological role of a food in maintaining a normal level of a recognised biomarker;
- Biomarker enhancement claims. These claims describe the biological role of a food in reducing or increasing the level of a recognised biomarker; and

¹ This report can be accessed electronically at www.foodstandards.gov.au

- Risk reduction claims. These claims describe the biological role of a food in reducing the risk of developing a serious disease.

General level claims are those which do not refer to a biomarker or a serious disease and include:

- Content claims. These claims describe the presence or absence of energy or a nutrient in a food;
- Function claims. These claims describe the biological role of a food in growth, development, maintenance and other like functions of the body;
- Enhanced function claims. These claims describe the biological role of a food beyond growth, development, maintenance and other like functions of the body; and
- Risk reduction claims. These claims describe the role of a food in reducing the risk of developing a non-serious disease.

REGULATION

One of the main features of the proposed regulation is the pre-requisite that all claims, whether general level or high level, must be scientifically substantiated.

All claims will also have to meet certain necessary 'qualifying criteria', depending on the type of claim, and not have any 'disqualifying criteria'. For example, where a claim includes a reference to high fibre the qualifying criteria will directly relate to the amount of fibre present in the food while a disqualifying criteria might relate to other compounds in the food such as the amount of saturated fat or sodium or sugar.

SUBSTANTIATION

Regardless of the level of a claim, a set of principles will apply to determine whether a claim has been scientifically substantiated. Evidentiary requirements for determining that the principles have been met will be tailored according to the level of the claim but will be tailored in a way that will ensure all claims are substantiated scientifically.

PUBLIC CONSULTATION

The first round of public consultation concluded on 13 October 2004. The second round is intended to commence in May 2005 and the final standard is due for completion in December 2005.

DOCUMENT RETENTION POLICIES - LATEST DEVELOPMENTS

DAVID POULTON, PARTNER AND SANDIP MUKERJEA, ARTICLED CLERK, MINTER ELLISON

In the previous edition of *Brief*, Peter Holloway of Freehills outlined proposed changes to the law, procedure and practice relating to discovery in Victoria. The proposals had been made by Professor Peter Sallman (Crown Counsel for Victoria) in his Report on Document Destruction and Civil Litigation in Victoria, which had been commissioned by the State Attorney-General in the wake of the case of *McCabe v British American Tobacco Australia Services*.¹

In the time since the previous edition of this publication was released, the Attorney-General has announced his intention to implement all of Professor Sallman's proposals. This article attempts to briefly raise some of the practical considerations that legal practitioners and their clients will need to have regard to when attempting to adapt their existing practices to ensure compliance with the new document destruction laws, assuming they are enacted in precisely the same form proposed by Professor Sallman.

But first, it makes sense to briefly recap the recommendations in the Sallman report.

PROPOSALS FOR REFORM

The Sallman Report makes three broad recommendations aimed at ensuring that courts are able to decide cases on the basis of as much relevant evidence as possible, and that appropriate penalties are in place where relevant evidence is unavailable. The Sallman Report proposes:

- (a) enactment of a new statutory provision granting judicial officers a discretion to draw adverse inferences, reverse the onus of proof on a particular matter, or strike out parts of a statement of claim or defence, where a document relevant to an existing proceeding was destroyed by a party either prior to or after the commencement of the proceeding;
- (b) enactment of a new statutory criminal offence dealing with the intentional or negligent destruction of documentary material relevant to judicial proceedings (both pre- and post-commencement of those proceedings); and
- (c) introduction of a new professional conduct rule for legal practitioners, requiring them to refrain from destroying, or advising clients to destroy, documents relevant to existing or anticipated proceedings.

EFFECT OF PROPOSED REFORMS ON CONDUCT OF LEGAL PRACTITIONERS AND CLIENTS

If the Victorian Government carries out its plan to implement Professor Sallman's recommendations, the immediate consequence for practitioners will be the need to advise clients of the new, definitive and unambiguous provisions relating to document management and retention. Both the new judicial discretion and the criminal offence are worded broadly, so as to potentially encompass any manner of document that is relevant to legal proceedings. Clients will therefore have to give careful consideration to the formulation of effective document retention policies in relation to expert reports, internal research, tax returns, invoices, employee records and the list goes on.

Obviously, clients must be warned of the criminal consequences for intentional destruction of documents to subvert the judicial process. More difficult for clients will be avoiding inadvertent destruction of documents which become relevant to future legal proceedings. Presumably, in such cases, the courts will be able to exercise their proposed new judicial discretion to limit the client's ability to present their case in the ideal fashion (eg by striking out parts of a defence, or shifting the onus of proof on a particular point). The proposed discretion is extremely broad in that it is intended to grant a court power to simply do justice, with a focus on 'fairness'.

¹ The first instance decision of Justice Eames and the decision of the Court of Appeal are reported in [2002] VSC 73 and [2002] VSCA 197 respectively.

The foresight that will be required on the part of clients is likely to lead to increased management costs. Practitioners may find that clients will proactively seek advice from them with increasing regularity on whether a particular document can be safely destroyed. Indeed, it may be wise for practitioners to give their clients 'standing orders' to consult them prior to making any decision to destroy particular documents.

All that being said, practitioners must be equally careful not to hold themselves out to a finding of misconduct under the proposed new professional conduct rule. Accordingly, any advice given in relation to document destruction must be carefully considered, and should preferably err on the side of conservatism.

THE NEXT PHASE

The preceding discussion assumes that the proposed reforms are enacted in the precise form that they appear in the Sallman report. Whether this actually happens is another story. In addition to the vagaries of parliamentary debate and legislative drafting, the content of the proposed legislation is likely to be influenced by ongoing public debate.

In particular, the president of the LIV, John Cain, has made it clear that any legislation proposing to ban document destruction needs to be carefully drafted to avoid placing undue burden on businesses. Mr Cain has noted that the reforms scoped by Professor Sallman, particularly the

proposed criminal offence, go well beyond those adopted in New South Wales two years ago, and may be too onerous for businesses. Document retention reform in NSW was limited to the introduction of a professional conduct rule, similar to the one canvassed in the Sallman Report. The LIV will seek talks with the government to argue that any new regulation mirrors that introduced in NSW.

A further issue that will require resolution is the potential for extra-territorial application of the proposed reforms, that is, will they apply only to documents destroyed in Victoria, or any documents which relate to Victorian proceedings? The Sallman report does not comment on this issue, though the thrust of the report would appear to favour the latter, more restrictive approach.

If that were so, and assuming that the Victorian reforms do not reflect the current position in NSW, a company based in NSW that adopts a document retention policy which is compliant with the law in that state, may still fall foul of the Victorian reforms, where it becomes involved in Victorian proceedings.

This issue should be cause for concern for businesses throughout Australia. Any lack of uniformity in document retention rules across the states is likely to lead to confusion, uncertainty, and perhaps most importantly, increased costs. Accordingly, we can expect this issue to be central to the legal and political discourse concerning the proposed reforms.

REVIEW OF THE AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM

SUBMISSION TO THE MINISTERIAL COUNCIL OF CONSUMER AFFAIRS

WHAT IS THE NATIONAL PRODUCT LIABILITY ASSOCIATION?

The National Product Liability Association Inc (**NPLA**) is an organisation which represents the interests of members, all of whom have an interest in product liability issues. Members include:

- product manufacturers, retailers, wholesalers and distributors;
- participants in the insurance industry; and
- advisers, including:
 - risk managers,
 - insurance brokers; and
 - legal practitioners.

WHAT ARE THE OBJECTIVES OF NPLA?

The objectives of the NPLA include:

- promoting a better understanding and awareness of product safety issues generally;
- promoting a better understanding of the potential costs of unsafe products and promoting measures to minimise those costs, including insurance, liability prevention and risk management;
- evaluating current and proposed Australian and international product liability laws and regulations; and
- making representations where appropriate to other associations, government and semi-government bodies and other persons to further the common interests of members.

SUMMARY OF SUBMISSION

NPLA considers that:

1. The present consumer product safety system is basically sound and does not require broad-based reform.
2. Rather than introducing a general safety provision (**GSP**) with broad application, consideration should be given to addressing the particular problems that have been identified with the present system, such as the perceived limitations on the powers of authorities to move quickly to remove products that have been identified as unsafe. This could be achieved by conferring specific powers capable of being invoked in the limited number of situations when quick action is considered necessary to protect consumers from products that are considered unsafe.
3. In the event that a GSP is to be given further consideration, particular attention will need to be given to key definitions that will give any such provision its effect, in particular the definition of what constitutes a "safe" or an "unsafe" product.
4. NPLA expresses some reservation at any additional obligation being imposed upon businesses to report product safety issues to government agencies, beyond the obligations that presently exist under the *Trade Practices Act (TPA)*. (Those obligations include the requirement to notify authorities within 2 days of any action taken to voluntarily recall a consumer product). The suggestion that a notification obligation should exist where, for example, a product is "under investigation" for "possible safety risks" is considered to be too broad and imprecise to be capable of application, either by businesses in attempting to comply with such an obligation, or by

government agencies, which could be faced with difficulties in interpretation and application of vague notions of "safety" and of when a product is "under investigation".

5. The review by the Ministerial Council of Consumer Affairs (**MCCA**) should address inefficiencies created by the overlapping jurisdictions of the States, Territories and Commonwealth and the consequent duplication of regulation and supervision by government agencies. There is a need to reduce or eradicate this duplication, which would reduce the cost to business of complying with applicable laws and also optimise the allocation of government resources.

ASSUMPTIONS AND QUALIFICATIONS

The views expressed above, and elaborated upon below, are subject to the following assumptions and qualifications:

1. The matters identified in the Discussion Paper are expressed to be options for enhancing the product safety system in Australia. There is much detail that is yet to be developed, considered and analysed. Most of the options that are identified for possible reform are difficult to analyse in the absence of detailed proposals, such as definitions of "safety" and when a product will be considered to be "under investigation". NPLA will comment with more precision upon any proposals for reform if and when those proposals are developed and released for public comment.
2. The comments that are made in this submission apply to general consumer products. Some products are subject to particular and specialised regulation- such as pharmaceuticals and foods. An issue arises as to whether it is envisaged that some or all of the reforms that are canvassed in the Discussion Paper will apply to these products. Further consideration would need to be given to the potential ramifications if this is envisaged.

OVERVIEW

The Discussion Paper identifies the two most significant challenges facing Australia's consumer product safety regulatory system as being:

1. the need to deal more swiftly, and less reactively, with emerging product safety problems; and
2. the need to ensure that government regulation does not interfere unnecessarily with trade in consumer products and that government regulatory resources are used as efficiently as possible.

Comment is made that the current system places the onus on governments to identify, assess and regulate each product hazard amongst the large and ever-increasing number of products which consumers can purchase. This is said to be exacerbated by limitations on government resources and the substantial time and effort required to implement, enforce and review product-specific regulations.

Reference is also made to suggested limitations imposed by legislative and structural restrictions, said to include:

1. under the TPA, goods can only be subject to a compulsory ban or recall where they are considered defective and not because they are likely to be used in an unsafe way;
2. the lack of clarity as to legislative coverage of services and second-hand goods;
3. an inability, due to lack of access to timely and adequate information on product safety problems, to detect unsafe products at an early stage;
4. inconsistencies in laws and regulations in different jurisdictions- State, Territory and Commonwealth, compounded by differences in the manner in which different jurisdictions administer and enforce similar legislative provisions; and
5. allocation of responsibility between the Minister and the Australian Competition and Consumer Commission (**ACCC**).

As a result of these matters and issues, a number of options for reform are identified. These include (amongst others):

1. the introduction of a GSP, which would impose a legal obligation on businesses to only place "safe" consumer products on the market;
2. the introduction of more flexible wording in the TPA instead of the present wording, being the phrase "...will or may cause injury";

3. the introduction of a requirement that businesses monitor the on-going safety of their products and report to governments about any products which:
 - are under investigation for possible safety risks;
 - have been associated with serious injury and death; or
 - have been the subject of a successful product liability claim;
4. the introduction of a requirement for businesses to recall products which they find to be unsafe.

NPLA considers that there is much about the present product safety system that is functional, and that in the main it achieves a desirable balance between allocation of responsibility between business and government. NPLA therefore considers that reform to the current system, particularly wholesale reform, should be considered with care and from the starting point that the present system is not in need of wide-scale reform.

Having made that point, NPLA does consider that there are aspects of the current system that warrant review and possible reform. In the main part, these aspects relate to the diversity of and sometimes disparity between laws and regulations among States, Territories and the Commonwealth that apply to general consumer products, with the consequent difficulties that are experienced in ascertaining all applicable or potentially applicable laws and regulations, and then dealing with the sometimes subtle differences in law and approach taken across jurisdictions.

A positive development would be to somehow centralise these laws, with consequent reduction in compliance costs and more efficient use of governmental resources.

This is not to necessarily suggest that the powers of the ACCC should be increased. NPLA considers that there should be separation between those aspects of government charged with the responsibility to set policy and introduce laws and regulations concerning consumer products (a function to which organisations like Standards Australia should play a significant part) as compared to investigation, enforcement and prosecution.

In particular, NPLA wishes to emphasise the following:

1. The current system has a structure to address product safety issues and provides incentives for businesses to take their responsibilities seriously and to ensure, as far as possible, that only safe products are released to the market.

The structure of the present product safety system has been in place for some time and has generally served Australian businesses and consumers well.

The incentives that are built into the system to encourage businesses to take their responsibilities seriously include:

- (a) the civil justice system, through which businesses can be subjected to legal claims in the event that an unsafe or defective product has been supplied which has caused physical injury or loss or damage to property. The laws that apply to such claims range from the well entrenched common law notions of negligence or breach of contract, to statutory causes of action that exist under the TPA or the State or Territory equivalent consumer protection or fair trading legislation.

Furthermore, the advent in recent years of representative proceedings both in the Federal Court and in State Supreme Courts has the effect that the potential liabilities on businesses who fail to take their responsibilities concerning safe products sufficiently seriously can be very significant indeed.

- (b) the criminal justice system, through which businesses that manufacture or supply unsafe products might be faced with prosecution by the ACCC or a consumer protection agency.

The consequences of such prosecutions can be financially significant.

- (c) exposure to procedures including:
 - compulsory recalls;
 - product bans;
 - imposition of mandatory standards;
 - voluntary standards and codes of practice, which are common place in Australia.

The trigger for many of these outcomes is the phrase which appears in the TPA, namely, that a product "will or may cause injury".

Some might regard this phrase as too imprecise as to be capable of meaningful application. However, it is a phrase which has become well known in product liability circles and allows a degree of flexibility to businesses and government agencies in complying with and enforcing the laws that regulate products.

- (d) perhaps one of the most significant incentives of all is the desire of businesses to avoid adverse media scrutiny. Australia has a lively and vigorous media. Products that are regarded as being unsafe will attract media attention. This media attention can have a devastating impact upon the marketability of products and, more widely, upon the reputation of a business or corporation. There have been many recent examples of this.

All of the above incentives are well known in Australia and their operation and effect as part of the product safety system is both accepted and expected.

This is not to say that there are other aspects that might warrant separate review – such as the cost and delays that beset the Australian legal system. However, these are matters that are probably beyond the reach of the current review.

2. In the event that an unsafe product is identified, it is NPLA's experience that businesses will take action to address the situation, whether that be by way of voluntary recall or other appropriate action. Probably by reason of the matters stated above, it is NPLA's experience that businesses that find themselves exposed to the risks and potential liabilities associated with a potentially unsafe or defective product will move quickly to take appropriate action to address that risk. Often times, this will be done by a voluntary recall of a consumer product. One only has to have regard to the number of recall notices that are published in newspapers to know that this is a reality. Obviously, there will be exceptions to this 'best practice'. It is suggested however that the exceptions are relatively few in number and that these exceptions can be dealt with by specific improvement of powers

of government agencies rather than the imposition of a general safety provision such as that canvassed in the Discussion Paper.

3. The present system allows businesses a degree of flexibility in addressing product safety issues, whilst at the same time having regard to the incentives identified above, and a "GSP" may well not introduce any greater degree of certainty of outcome - either to those who may be charged with the responsibility of enforcing such a provision and those who are faced with the responsibility of implementing or conforming to it.

It should not be overlooked that the existing product safety system contains what might be regarded by some as the equivalent of a general safety provision, with the effect that businesses in Australia are already subject to an obligation to only manufacture or distribute safe products.

This is derived not only by reference to common law notions that a business which manufactures or distributes an unsafe product might be exposed to civil action – the definition of an unsafe product being one that might be informed by notions of unfitness for purpose or lack of merchantability, there is also the general statement contained in Part VA of the TPA. Part VA provides rights of action against a manufacturer of a product which suffers a "defect" which is defined very broadly to exist if the safety of the product is "not such as persons generally are entitled to expect".

To this can be added various other statutory rights of action which are not limited in their application only to manufacturers.

4. There is a real issue caused by the fragmentation of responsibility between different jurisdictions, which has the result that difficulties are encountered in readily identifying all relevant laws and obligations concerning consumer products.

One of the real issues that causes concern (and consternation) is the difficulty encountered in identifying all applicable laws and regulations that might apply to the regulation of a particular product or product category. This is brought about by the fragmentation of responsibility between the

various State, Territory and Commonwealth governments and government agencies which, in many instances, have subtle differences in applicable laws and also demonstrate subtle differences in the application of those laws.

This gives rise to a variety of problems:

- (a) identifying the appropriate or applicable laws and regulations;
- (b) identifying any differences between laws between each jurisdiction;
- (c) identifying and understanding any differences in approach or interpretation that exist between government agencies in different jurisdictions; and
- (d) plotting a course ahead.

What often transpires as a result is that a "lowest common denominator" approach is taken which is driven more by administrative compliance than by a more purposive approach to ensuring product safety.

This is particularly a problem in relation to labelling laws.

If one of the outcomes of the current review is a consolidation of the various sub-systems that exist in relation to consumer product safety, that alone would be a welcome development.

5. Care should be taken to ensure that there is a sufficient separation of power between those involved in the setting of policy and regulation on the one hand and the enforcement of the law on the other.

Comment is made in the Discussion Paper to the effect that a single product safety regulator could be established to enforce product safety laws.

It is suggested that this could be achieved by all jurisdictions developing or adopting identical legislation, uniform legislation such as a national scheme or an approach of all jurisdictions enacting "consistent to central (core) legislative provisions".

NPLA does not have a firm view as to which of these models should be pursued. However, if any of these models is ultimately to be implemented, a key point that NPLA would be concerned to observe would be a sufficient separation of power between those involved in the setting of policy and

product regulation on the one hand, and the agency involved in enforcement of the law on the other. NPLA considers that this separation is important to achieve an optimal balance between policy setting and enforcement. It would be an unwelcome development if both powers were to reside within the single agency.

SPECIFIC QUESTIONS POSED BY MINISTERIAL COUNCIL OF CONSUMER AFFAIRS

What, if any, are the major problems confronting Australia's consumer product safety system?

With powers vesting in the Commonwealth, States and Territories, product safety requirements (whether information or design based) can differ from jurisdiction to jurisdiction. Identifying and understanding the differing requirements imposes an additional and unnecessary compliance burden on businesses and does not ensure greater product safety for consumers- to the contrary, it creates a tendency for confusion and seeking out the 'lowest common denominator'. Whilst understanding the constitutional and political issues that make this a current reality, from a public policy standpoint, it would surely be economically more efficient and indeed give rise to greater product safety, if a more unified approach was taken so that differing requirements did not exist.

By way of example, Western Australia is the only State not to have moved to the uniform trade measurements regime, with the result that a separate compliance effort must be employed to meet the Western Australian regime.

For some consumer products, such as food, there are detailed and focused regimes. However, whilst the Food Standards Code is the source of the majority of safety requirements that will apply to any given food product, it is also necessary to consider Commonwealth, State and Territory laws which give effect to the Code and other laws such as importation and trade measurements legislation, which impose additional requirements.

Another problem often encountered is of identifying applicable standards. Australian Standards are made mandatory by reference in regulation or by gazettal. Gazette notices can be notoriously difficult

to locate - even when it is known that a standard exists. It is even more difficult to locate gazettals if there is uncertainty about whether a standard for a particular product exists.

How should governments address these problems?

Rather than give attention to the possible introduction of a GSP, NPLA considers that an alternative would be to consider enhancing the powers of the appropriate government agency – whether it be the ACCC or some other body is a separate issue, which can move quickly in appropriate circumstances to ban a product or to order a compulsory product recall.

It is suggested that the need to exercise such powers would arise on few occasions.

The advantage of this approach is to avoid imposing a potentially onerous obligation on businesses “across the board”, when there is little empirical evidence to suggest that there is a need for it.

Would a GSP be of benefit to Australia’s consumer product safety system?

It is said in the Discussion Paper that a GSP would impose a legal obligation on businesses to only place safe consumer products on the market. It is also said that:

- a GSP may involve a range of “ancillary obligations”, such as requirements for businesses to provide consumers with information on product risks, monitor the ongoing safety of products, take corrective action in the event that a product proves unsafe, and notify regulators of product safety problems and the action the business has taken to correct them;
- there may be some product categories that should be excluded from a GSP or subject to a distinct regulatory regime for reasons of public policy;
- decisions would have to be made as to whether and to what extent services and second-hand goods would be subject to a GSP;
- for a GSP to operate smoothly, it would be important for its scope to be clear and well defined;

- the standard of safety to which businesses would be held under a GSP would be central to its effectiveness;
- a major consideration in framing a GSP is the extent to which obligations should be imposed on businesses throughout the product supply chain, beyond the original manufacturer or importer of the product.

The Discussion Paper then identifies perceived potential benefits of introducing a GSP into the Australian consumer product safety system:

- a GSP has the potential to substantially enhance the ability of Australia’s consumer product safety system to prevent unsafe products from reaching the market and ensure that consumers receive adequate product safety information;
- a GSP can provide uniform and comprehensive cover of a wide range of consumer products, whereas under the current regulatory system governments expend significant resources on mandatory standards which cover a small proportion of the consumer products on the market;
- the general nature of the obligation on businesses should reduce or eliminate current gaps and inconsistencies in the regulatory treatment of consumer products (for instance, a GSP could cover products that are dangerous due to foreseeable misuse, which could allow the Australian government to protect consumers through product bans or compulsory recalls in cases where this is currently not possible);
- the introduction of a GSP could reduce the need to create new mandatory standards, which could reduce pressure on regulatory resources;
- the introduction of a GSP may provide businesses with greater flexibility in the delivery of safe products to consumers and result in fewer impediments to product innovation (because a GSP would focus on the desired safety outcome for consumers, rather than on the specific means of achieving a safe product);
- a GSP would seek to address the reactive nature of the current regulatory system under which governments deal with product safety hazards as they come to the attention of regulators;

- when potential problems are identified, a GSP could allow governments to take more effective precautionary action to protect consumers than is now the case (governments could act once a product is determined to be unsafe, regardless of whether the product had yet caused injury).

The Discussion Paper identifies the following potential challenges in introducing a GSP into the Australian consumer product safety system:

- businesses may be uncertain about the precise application of a GSP (this uncertainty could relate to the interpretation of the safety standard in the GSP or to the application of the GSP to individual businesses or products);
- the uncertainty associated with the application of a GSP may increase the costs to businesses of complying with government safety regulation, and could restrict product innovation;
- the advantage of a GSP in providing uniform and comprehensive cover of a wide range of consumer products would be diminished if a significant number of products were excluded from the operation of a GSP;
- significant resources may be involved in data gathering, information assessment and facilitation of voluntary standards under a GSP.

In determining whether the introduction of a GSP would be of benefit to the Australian consumer product safety system, it is necessary to assess whether its potential benefits would outweigh its potential disadvantages.

The Discussion Paper identifies the reduction or elimination of gaps and inconsistencies in the regulatory treatment of consumer products as a potential benefit of introducing a GSP. However, the Discussion Paper does not fully examine the effect of those gaps and inconsistencies on the objectives of Australia's consumer product safety system.

In particular, the Discussion Paper does not acknowledge the generally comprehensive application of existing legislative product liability regimes and common law rights of action available to consumers – see item 1 of the overview above. Contractual terms implied by statute and common law rights of action such as negligence mean that Australian businesses already operate under a legal obligation to only place safe consumer products on the market. The prospect of suit by consumers (for example, in contract or negligence) currently

provides a strong financial incentive for businesses to ensure that their consumer products are safe.

Further, NPLA considers that the Discussion Paper does not identify gaps and inconsistencies in the regulatory treatment of consumer products that could not be addressed by more subtle legislative reform than the introduction of a GSP. The Discussion Paper notes that provisions in the TPA might be amended in order to enable the responsible Minister to ban or compulsorily recall goods that are unsafe as a result of foreseeable misuse. It also notes that the consumer safety provisions in the TPA and State Fair Trading Acts might be amended to specifically cover services and second-hand goods.

Consumer information and product design objectives will not be achieved by simply introducing a GSP. Rather than simply introduce such a provision (which in effect may not be a significant change from the way the current regime operates), resources would be better spent to rationalise current requirements ensuring consistency across the jurisdictions taking into account the lessons learned from the past and following a common view of how to prevent those specific problems in the future. Such an approach will require a more co-ordinated approach between governments. The rationalisation project (and subsequent communication with industry and consumers) could be done by way of a central web based portal such as that which was previously envisaged by the then Department of Industry Science and Resources.

As has been acknowledged in the Discussion Paper, product design and consumer information are two important determinants of the safety of consumer products.

Legal requirements for product design are commonly addressed by introduction of mandatory standards. However, the number of mandatory standards is only a small fraction of the total number of Australian Standards- most of which are voluntary standards. These are also supplemented by many industry codes of practice concerning product safety.

The rationale for making only some standards mandatory needs to be further explored in the context of the review being undertaken by MCCA.

Compliance with standards, whether mandatory or voluntary, is often the first point of reference when considering whether a product should be subject to further investigation. Standards are often a representation of "best practice".

Product information

Consumer information can be provided through the use of product specific instructions, warnings and labels. Specific legal requirements for this type of consumer information have built up over time based on actual or perceived safety issues. The legal requirements can be very specific as to wording, format and location of the information and can be found in various Acts, Regulations, gazettes and mandatory standards. There are at present in excess of 800 laws imposing labelling obligations.

Even where Australian Standards are made mandatory, they are not necessarily adopted without amendment nor is the entire Standard always adopted.

For example:

- a number of amendments were made to AS/NZS 1249:1999: "*Children's nightwear and limited daywear having reduced fire hazard*" when it was made mandatory at both Commonwealth and State level; and
- only parts of the Standards relating to the safety of toys (AS/NZS 1647-1992 and AS/NZS ISO 8124.1:2002) have so far been made mandatory.

Further complicating the issue, different versions of the above Standards have been made mandatory in different jurisdictions.

In order to determine whether a product is safe or unsafe, deviations from the Australian Standard make the process even more difficult. Where a deviation is required, perhaps instead of changing how the Standard is to apply, the Standard itself could be amended. In suggesting this, we are mindful of the collaborative nature of Standards – some are a reflection of the basis on which common agreement can be reached rather than a "best practice" benchmark.

If a GSP were introduced, how should governments address any concerns you may have?

The Discussion Paper notes that businesses may be uncertain about the precise application of a GSP. It is acknowledged that this uncertainty could relate to the interpretation of the 'safety standard' or to the application of the GSP to individual businesses or products. The Discussion Paper also acknowledges that such uncertainty may increase the costs to businesses of complying with government product safety regulation.

As noted above, product liability regimes and common law rights of action mean that Australian businesses already operate under a legal obligation to only place safe consumer products on the market. If a GSP were introduced, it would be desirable from the point of view of businesses for governments to clearly delineate the application of the safety standard in the GSP. It would also be conducive to business certainty for the relationship between the safety standard in the GSP and other statutory and common law standards (such as the standard of care in negligence) to be clearly articulated, either in legislation or in policies on enforcement of the GSP.

What products/services should be exempt from a GSP and why should they receive an exemption?

For the reasons given above, NPLA considers that the current system does not require the introduction of a GSP. If however a GSP was to be introduced, a case might be put that products or services that are already subject to stringent regulation should be exempt.

An alternative approach might be that the level of 'safety' for these products should be judged according to the requirements of those more prescriptive regimes.

This is similar to what is already in place with Part VA of the TPA.

How could a GSP be applied to businesses? For example, what level of safety should businesses be held accountable for under a GSP and to what extent should GSP obligations be placed on businesses throughout the product supply chain?

There are a number of concepts that arise for consideration.

First, there is an issue as to whether the standard of safety or level of safety to which businesses should be held accountable should vary depending upon the role that they play in the supply chain. For example, should a different standard of safety be imposed upon a manufacturer as distinct from a retailer? The answer may depend upon the particular circumstances at hand and whether those "downstream" in the supply chain have had any role in the design or specification of a product.

As to the standard or level of safety that should be imposed, we repeat the comments that have been made above. This is a pivotal issue that will impact upon the application of any GSP. Guidance can be obtained from the existing laws, including in particular Part VA of the TPA.

Should services be covered by the TPA product safety provisions? If so, would you adjust the existing product safety provisions in any way to account for the regulation of services?

From a theoretical point of view, it makes sense for services to be covered by the TPA product safety provisions and to some extent, they already are. Aspects of services are covered under the s52 prohibition on misleading and deceptive conduct and under many of the paragraphs of s53 - the prohibition on certain false or misleading representations. Further, the definition of "goods" under the TPA is one that is wide and covers two particular items that may otherwise be regarded as services, namely gas and electricity. Of course, care would need to be taken so as to adapt the provisions so that they are suitable for services and so as not to cause any unnecessary overlap with existing regimes such as occupational health and safety.

How should the regulation of consumer products and safety be altered to provide for second-hand goods?

How safety issues are dealt with in the second-hand market may vary depending on whether the product safety issue was present in the product when it was originally supplied, arose through information or warnings becoming separated from the product, because of developments in technology meaning that safer products are now available or through some intervening event such as misuse by the original user.

It is also necessary to acknowledge that second-hand goods can change hands in a number of ways, either through retail premises or perhaps more commonly by way of garage sale, car boot sale, fairs and market stalls as well as being handed down from family and friends.

The acquirer of a second-hand good will generally be aware that the product in question is not new and therefore should be taken to know that the product will not be in the same pristine standard as a new item. Furthermore, instructions and warnings may have been removed and thus important consumer information could have been lost. There should be some obligation on the acquirer to inspect the goods and make inquiries about their provenance and any safety issues. Equally, there should be some obligation imposed on the supplier, although the standard required might be less than that of a supplier of a new product. Much will depend on the circumstances. There may be a case for exemptions for such things as garage sales or fetes.

It may be that there should be a general safety warning to purchasers of second-hand products.

Are consumers receiving sufficient product safety information? How should such information be delivered to consumers?

There is an enormous volume of products and information provided on a daily basis to consumers. Debate might be had about the extent to which this information is properly understood. Plain English and simplicity of communication should be paramount objectives.

Education campaigns have certainly been successful in the past in the context of products such as seat belts, the need to fence swimming

pools, etc and thought could be given to extending these sorts of programs – not necessarily by way of television campaigns, but perhaps more targeted campaigns, for example utilising maternal and child health centres, doctors, schools and the like.

Should businesses be required to report unsafe products to governments?

We repeat the comments made in the summary above.

What type of product safety early warning systems should be developed in Australia?

NPLA can see definite advantages in tracking and analysing available data, but does not have a view about how this should occur.

Do you favour the development of a centralised electronic database to achieve product safety goals? How would the type of database you envisage contribute to product safety outcomes?

Again, NPLA can see the benefit of an electronic database, but does not have a view about how this might be implemented.

What type of product safety research would be beneficial?

NPLA considers that there may be a role for Standards Australia to undertake in product safety research. However the research is to be undertaken, there will be issues of funding and resourcing.

Should the TPA make provision for an Australian government recall audit power?

Section 65F of the TPA currently empowers the Minister to issue compulsory product recall notices. However, these compulsory recall powers are rarely used. The vast majority of consumer product recalls are undertaken voluntarily.

In accordance with s 65R of the TPA, corporations are required to notify the Minister of a voluntary recall within 2 days of taking action to recall goods.

However, whilst requirements are prescribed under the TPA concerning the recall process, the TPA does not provide the government with formal

powers to audit the effectiveness of such recalls. It is suggested that government be given the power to audit and “assess” voluntary recalls.

It is suggested in the Discussion Paper that these obligations could be introduced independently or accompany the introduction of a GSP.

Further details are required to enable the option of a power to audit and assess recalls to be fully considered. In particular, the following issues should be addressed:

- Whilst the option of an audit power is referred to in the Discussion Paper, details supporting the need for this power have not been provided and there is no suggestion that the current system is deficient. Further details are required supporting the introduction of an audit power and public comment should then be sought as to whether the benefits of any such power outweigh the additional cost.
- Precisely what will be audited and assessed by the government? Presumably it will be the process adopted by a business to recall a specific product. Will standards be prescribed as to how a recall should be conducted or will general guidelines be used to provide flexibility due to the varying circumstances of each recall?
- In what circumstances will the power to audit and assess be exercised by the government? For example, will it be exercised:
 - for every recall;
 - on a random basis; or
 - in specific circumstances?
- At what point in time in the recall process will the power to audit and assess be exercised?
- What would the audit and assessment powers involve? Would the power be limited to gathering documentary evidence or would it extend to obtaining additional information and interviewing personnel within the relevant business?
- How will the information obtained from an audit be used? For example:
 - in relation to a voluntary recall, will the government be able to give directions as to the manner in which the supplier is to carry out the recall; and
 - will information obtained be used to further develop the product recall guidelines. If so, how will that information be gathered and published.

- Whilst a power to audit and assess both voluntary and compulsory recalls has the potential to enable the government to determine the effectiveness of a recall, it may also have an adverse impact on the recall process. Consideration should be given to issues such as the following:
 - whether the audit and assessment process may delay or interrupt the operation of a product recall, thus slowing down the removal of unsafe products from the market; and
 - whether the audit and assessment process may result in an increase cost to businesses. For example, businesses may incur additional legal and personnel costs as a result of the audit and assessment power. These additional costs may have the effect of deterring businesses from initiating a recall.
- What, if any, sanctions may be imposed during or following an audit?
- What additional costs would be incurred by the government in implementing the audit and assessment process and could those resources be better utilised?

However, the principal concern at this point in time is that, without firstly identifying specific defects in the current product recall process and providing details supporting the need for an audit and assessment power, the introduction of any such power may simply establish an additional layer of regulation where a need for such further regulation may not exist.

What difficulties are consumers experiencing in relation to obtaining redress for product safety problems?

The predominant issue is the cost and efficiency of the civil justice system. As indicated above, this is most likely beyond the reach of this review.

What is the best approach to achieving harmonisation of product safety legislation and enforcement?

Harmonisation and enforcement would greatly be enhanced by:

- One national body that looks at these issues.
- Only deviating from Australian standards consistently and where there is good reason to do so – in such circumstances it would seem better to amend the standard.
- Making more use of international standards and harmonising Australian legal position with those of other countries – this may mean that international standards need to raise to Australian standards in some circumstances. It is certainly not suggested that the level of safety required in Australia be dropped to those of lower levels which may exist in other countries.

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PROPORTIONATE LIABILITY REFORMS IN VICTORIA

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With the proclamation of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (**CLERP 9**) we have the final piece of the new regime of proportionate liability for certain causes of action in Victoria. Unfortunately, the pieces do not fit neatly together.

Notwithstanding the shortcomings of the regime, a working knowledge of what we have is a more than useful technical tool for any lawyer involved in dispute resolution in Victoria. This article focuses on the Victorian and Commonwealth reforms, as both will have an immediate impact on claims made in Victoria. A summary chart of these reforms follows.

THE LEGISLATION

For some years, those dealing in the construction area have worked with the concept of proportionate liability as legislated under the *Building Act 1993* (Vic) (**Building Act**). A more general application of the principle is introduced into the Victorian law by the insertion of Part IVAA into the *Wrongs Act 1958* (Vic) (**Wrongs Act**). The *Building Act* has consequently been repealed, so that cases previously captured by it will now fit into the new, broader regime.¹

CLERP 9 introduces similar proportionate liability amendments to three Commonwealth Acts which impose civil liability for misleading and deceptive conduct. They are the:

1. *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**): a new subdivision GA is inserted into Division 2 of Part 2;
2. *Corporations Act 2001* (Cth) (**Corporations Act**): a new Division 2A in Part 7.10; and
3. *Trade Practices Act 1974* (Cth) (**TPA**): a new Part VIA is inserted.

APPLICATION

The Victorian and Commonwealth legislation diverge in their application. The Victorian reforms apply to relevant **proceedings** which are **commenced after 1 January 2004**. The Commonwealth legislation applies to **causes of action** which **arise on or after 26 July 2004**.

Given there is often debate as to when a cause of action has accrued, the Commonwealth solution carries with it a certain degree of ambiguity in this regard.

In both jurisdictions the proportionate liability regime does not apply to all proceedings or causes of action, but only to 'apportionable claims'. In Victoria², an apportionable claim is:

- (a) a claim for damages for economic loss or property damage arising from a failure to take reasonable care, whether that claim is brought in tort, contract, pursuant to statute or otherwise; or
- (b) a claim for damages for a contravention of s9 of the *Fair Trading Act 1999* (Vic).

Under the Commonwealth legislation an apportionable claim is a claim for damages brought under any of the relevant sections of each Act³ for economic loss or damage to property caused by conduct in contravention of the relevant consumer protection sections of those Acts.⁴

The Victorian provisions expressly do not apply to claims arising out of a personal or bodily injury including, inter alia, psychological injury or claim made pursuant to a number of statutes. Accordingly, there is a large amount of litigation which is not covered by the Victorian proportionate liability regime.

² Section 24AF(1) *Wrongs Act*.

³ Section 12GP *ASIC Act*, s1041L *Corporations Act*, s87CB *TPA*.

⁴ Section 12DA *ASIC Act*, s1041E *Corporations Act*, s52 *TPA*.

¹ *Wrongs and Limitation of Actions (Insurance Reform) Act 2003*

THE CORE REFORM

At first blush, it appears that the Victorian and Commonwealth legislatures at least managed to reach consensus on the fundamental reform. Even identical wording has been used - to a point:

'In any proceeding involving an apportionable claim [that is a claim to which the regime applies]...

- (a) the liability of a defendant who is a concurrent wrongdoer [ie a person who is one of two or more persons who caused independently or jointly with each other, the damage or loss that is the subject of the claim and whether or not one or all of them is insolvent, ceased to exist or has died] in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss and damage ...'⁵

The language of the legislation then varies between Victoria and the Commonwealth, but the sense is much the same in that:

- (a) the Victorian legislation provides:

'judgment must not be given against the defendant for more than that amount in relation to that claim.'

- (b) and the Commonwealth legislation provides:

'A court may give judgment against the defendant for not more than that amount.'

So the legislation speaks in terms of limiting a judgment to a 'proportion of the loss or damage' that is 'just having regard to the extent of the defendant's responsibility'. However, difficulty arises, since the regime only applies to some claims (as mentioned above) and it is a fact of litigation life that multiple and alternative claims are often brought which will not fit neatly into the categories targeted by the legislatures for reform. Accordingly, examination of the manner in which the legislature has dealt with circumstances of multiple claims is required.

The point has been made above that the reforms do not apply to personal injury claims at all and specifically certain specified claims. We should

also be aware that, in the mix of determining the proportion of the loss, there is the need to consider the proportion of responsibility which the plaintiff must carry for contributory negligence. Most importantly, an examination is required of the different methods of dealing with the circumstance of responsible parties who are not parties to the claim.

APPORTIONABLE AND NON APPORTIONABLE CLAIMS

In Victoria, the legislature has determined that if a proceeding involves both an apportionable claim and one which is not apportionable, such as a claim for economic loss and a claim arising from a personal injury (including for example, stress) then:

- (a) liability for the apportionable claim is to be determined in accordance with the new regime; and
(b) liability for the non-apportionable claim is to be determined in accordance with the ordinary legal principles⁶.

The Commonwealth solution is similar.⁷

CONTRIBUTORY NEGLIGENCE

In Victoria, the ordinary rules applicable to contributory negligence remain, being those in Part V of the *Wrongs Act*. By s26 of the *Wrongs Act*, the damages recoverable by a plaintiff are to be reduced 'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.

CLERP 9 has also introduced the concept of contributory negligence to the *ASIC Act*, *Corporations Act* and the TPA, and provides that in determining the proportions of responsibility a court must exclude the proportion of responsibility attributable to the plaintiff's contributory negligence.⁸

⁶ Section 24AI(2) *Wrongs Act*.

⁷ Section 87CD(2) TPA, s12GR(2) *ASIC Act*, s1041N(2) *Corporations Act*.

⁸ Section 87CD(3) TPA, s12GR(3) *ASIC Act*, s1041N(3) *Corporations Act*.

⁵ Section 24AI *Wrongs Act*, s12GR(1) *ASIC Act*, s1041N(1) *Corporations Act*, s87CD TPA.

CONTRACTUAL INDEMNITIES UNDER THE NEW REGIME

Though the proportionate liability reforms are intended to benefit defendants, by limiting liability to the extent of each defendant's personal responsibility for losses suffered by a plaintiff, they may also carry negative consequences for concurrent wrongdoers in certain situations. In particular, concurrent wrongdoers who have attempted to apportion liability between themselves on agreed contractual terms may be frustrated by the operation of s24AJ of the *Wrongs Act*, and similar provisions in the Commonwealth reforms⁹.

Under the old joint and several liability regime, a defendant in a proceeding was able to join concurrent wrongdoers to the proceeding and seek contribution or indemnity from those concurrent wrongdoers (in contract or at common law) by way of cross-claim. Thus, while a plaintiff was able to recover the whole of their loss from a single defendant, that defendant could still enforce a pre-existing contractual risk allocation vis-à-vis any concurrent wrongdoers.

Section 24AJ of the *Wrongs Act* states that:

'a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim -

- (a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and
- (b) cannot be required to indemnify any such wrongdoer.

The combined effect of ss 24AI (quoted earlier) and 24AJ is to limit the liability of any concurrent wrongdoer, joined as a defendant in proceedings for an apportionable claim, to the extent of that wrongdoer's personal responsibility for the loss or damage suffered by the plaintiff (s24AI), and then to grant such a wrongdoer immunity from any cross-action for indemnity or contribution that may be brought by another concurrent wrongdoer. This may prevent the enforcement of contractual risk allocations between co-defendants.

If it does, it is questionable whether such an arrangement actually serves the interests of

concurrent wrongdoers, as the reforms purport to do. For example, while product manufacturers and suppliers might be safe in the knowledge that their liability in defective product claims is able to be capped by reference to the extent of their responsibility for losses suffered, surely they should still be free to apportion liability between themselves, in proportions which may differ from those imposed under the proportionate liability provisions. If a manufacturer contractually assumes greater liability than would ordinarily be attributed to them under the law, then so long as the plaintiff is fully compensated in one way or another, why should the Courts interfere with that contract?

It is unclear whether the apparent effect of s24AJ, and the equivalent Commonwealth provisions, was intended by the Victorian and Commonwealth Legislatures. If it was not, then further legislative amendment will be necessary to rectify the problem.

AN ABSENT RESPONSIBLE PARTY

The key difference between the Victorian and Commonwealth reforms is the application of the reforms when not all parties responsible for the loss or damage are parties to the litigation.

In Victoria, consistent with the manner in which of the *Building Act* had previously proceeded, unless a party is a defendant no part of the loss can be apportioned to it unless that person:

- (a) is dead; or
- (b) in the case of a company, has been wound up;¹⁰

and the Court may give leave for concurrent wrongdoers to be joined as defendants in a proceeding in relation to an apportionable claim.¹¹

The court clearly has a discretion under rule 9.06(b)(ii) of the Rules of the Supreme Court whether or not to allow joinder of multiple defendants. In exercising the discretion given to the court, for which the criteria includes that it is 'just and convenient' for questions to be determined in one proceeding, Gillard J in *Robak Engineering and Construction Pty Ltd v Boral Resources (Vic) Pty Ltd & Anor*¹² in the context of a proceeding to which the Building Act applied,

¹⁰ Section 24AI(3) *Wrongs Act*.

¹¹ Section 24AL *Wrongs Act*.

¹² (unreported 30 April 1998 C9801757).

⁹ Section 87CF *TPA*, s12GT *ASIC Act*, s1041P *Corporations Act*.

found that it was not 'just and convenient' to require the plaintiff to sue a party it did not wish to sue and refused a defendant's application that another be joined as a defendant. His Honour's decision was no doubt influenced by the fact that the defendant was able to join the further alleged wrongdoer as a third party, although this limited the defendant's protection to a contribution from a perhaps impecunious third party rather than an appropriate proportion of the plaintiff's damage as between two defendants.

The problem of that decision is sought to be overcome in the Victorian legislation by the extension of the definition of 'defendant' to include:

'Any person joined as a defendant or other party in the proceeding (except as a plaintiff) ...'¹³

with the effect that defendants and third and subsequent parties all participate in the exercise of apportioning responsibility for apportionable claims - but not absent wrongdoers.

The Commonwealth approach to dealing with absent wrongdoers is entirely different. The court is empowered, but not obliged, in apportioning responsibility between defendants, to have regard to the comparative responsibility 'of any concurrent wrongdoer who is not a party to the proceedings'.¹⁴ In a similar vein to the Victorian scheme, the Commonwealth extends the definition of a defendant to include a defendant or other party to the proceedings, except the plaintiff, and so captures the position of third and subsequent parties.

The Commonwealth has put the onus on the existing defendant to an apportionable claim to notify the plaintiff of any information as to the identity of another wrongdoer and the circumstances which give rise to the notion that that person is another wrongdoer. A failure to do so, by reason of which the plaintiff unnecessarily incurs costs through ignorance of the concurrent wrongdoer, may result in costs being awarded on an indemnity basis or otherwise against the defendant who failed to give notice.¹⁵ In addition,

the legislation provides for the Court to give leave to join more persons as defendants.¹⁶

The Commonwealth legislation makes it clear that a plaintiff is able to bring a second proceeding in respect of the same loss to recover any proportion of loss not recovered from the first proceeding by reason of the non-joinder as a party of a concurrent wrongdoer, provided of course that the sum of the amounts recovered from the wrongdoers does not exceed the total of the loss and damage suffered.¹⁷

However, this method of recovery would require a second proceeding and therefore the costs and delay which that implies. Perhaps more importantly, it leaves open the possibility of a finding of fact as to an absent wrongdoer's proportion of responsibility being binding as to a maximum on the plaintiff but not binding on that wrongdoer since he was not a party to the first proceeding. For example, if an absent wrongdoer was found to have 20% responsibility and the plaintiff therefore recovered 80% from wrongdoers who were parties to the proceeding, the plaintiff could not recover more than 20% from the absent wrongdoer in a subsequent proceeding as they would be bound by the earlier decision. On the other hand, the absent wrongdoer could presumably argue for a contribution of less than 20%.

Comparing the Commonwealth and Victorian positions, it is difficult to see the rationale for the provision in the Victorian *Wrongs Act* where the court has no regard to absent concurrent wrongdoers and determines liability entirely amongst those before it. Perhaps the intention is that a plaintiff who has 'recovered judgment' of a proportion of damages from a defendant but has not been able to execute the judgment may pursue a party absent from the first trial in a subsequent proceeding to recover that proportion. A tortured interpretation of the provision can result in that conclusion although it is difficult to believe those circumstances would ever arise. And if they did, what is to become of the unexecuted judgment against the defendant? The legislation makes no provision for the circumstances.

¹³ Section 24AE *Wrongs Act*.

¹⁴ Section 87CD(3)(b) *TPA*, s12GR(3)(b) *ASIC Act*, s1041N(3)(b) *Corporations Act*.

¹⁵ Section 87CE *TPA*, s12GS *ASIC Act*, s1041O *Corporations Act*.

¹⁶ Section 87CH *TPA*, sGV *ASIC Act*, s1041R *Corporations Act*.

¹⁷ Section 87CG *TPA*, s12GU *ASIC Act*, s1041Q *Corporations Act*.

¹⁸ Section 12GF(1B)(c) *ASIC Act*, s1041I(B)(c) *Corporations Act*, s82(1B)(c) *TPA*.

¹⁹ Section 12GQ *ASIC Act*, s1041M *Corporations Act*, s87CC *TPA*.

FRAUD

There is a significant difference also between the manner in which the Commonwealth and Victorian legislatures have dealt with the issue of a fraudulent defendant.

The Commonwealth approach is to exclude operation of the contributory negligence¹⁸ and proportionate liability¹⁹ rules in cases where a wrongdoer has fraudulently, or with intention, caused the loss or damage complained of in an apportionable claim, such that in those circumstances liability, so far as it applies to that person, is to be determined in accordance with the usual legal rules of joint and several liability.

In Victoria, however, the approach is worded far more vaguely, and may be construed as applying a severe penalty on fraudulent defendants. The Victorian legislation provides:

'... a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding.'²⁰

On this wording, there appears to be no requirement that a finding of fraud has to be related to the apportionable claim itself. The required connection is merely that the person against whom a finding of fraud is made is a defendant to a proceeding in relation to an apportionable claim. If the finding of fraud relates to a separate claim such as one which is not apportionable, then presumably nevertheless, to the extent that there is a claim that is apportionable, the defendant does not get the benefit of the regime.

More telling, in the event that there is a finding of fraud, there is no requirement of causation between that finding and the damages which are awarded to the plaintiff. If there is a finding of fraud at all in the proceeding, then the fraudulent defendant will apparently be jointly and severally liable for any damages which are awarded against any other defendant in the proceeding, whether or not the fraud gave rise to those damages. It appears to be some consolation to conclude that at least the joint and several liability with other

defendants is limited to the apportionable claims although, realistically, if a non apportionable claim, joint and several liability is likely to apply with the result that the defendant subject to a finding of fraud will be jointly and severally liable to pay damages with all other defendants in respect of any cause of action whether or not there is any causative connection between the fraud and the damage.

Is this an error of drafting or is it the introduction by stealth of a further basis of punitive damages to add to exemplary and aggravated damages? Whatever the case, those responsible for drafting professional indemnity insurance policies will need to review their work to ensure exclusion from indemnity of damages awarded by reason of the operation of this legislation beyond the outcome which would have occurred absent fraud.

UNAFFECTED RELATIONSHIPS

The discussion above has centred principally upon the relationship between the parties to the proceeding and, in the case of the Commonwealth legislation, extending to absent wrongdoers. There are other relationships which have been considered in drafting the legislation if only to make clear that those relationships are unaffected. They are the relationships which give rise to a liability in a non-party simply by reason of liability being imposed upon a defendant.

For example, the Victorian legislature has made it clear that the new proportionate liability provisions do not impact upon the law in respect of vicarious liability, principal and agent, and of partners' joint and several liability.²¹ The Commonwealth has made the same points.²²

However, the Victorian provision goes further and expressly does not affect the power of a court to award exemplary or punitive damages (and as can be seen from the discussion above, it perhaps in a de facto way extends that power), nor to affect the operation of any Act which might impose several liability.

CONCLUSION

The stated purpose of the Act is to sheet home responsibility for loss and damage to those responsible for it rather than those who can afford to pay it. As lawyers, we must be in a

²⁰ Section 24AM *Wrongs Act*.

²¹ Section 24AD *Wrongs Act*.

²² Section 87CI *TPA*, s12GW *ASIC Act*, s1041S *Corporations Act*.

position to advise our clients as to how best to take advantage of the legislation with all of its inconsistencies, all of its difficulties and all of its benefits. In particular, lawyers in Victoria must be aware that, in cases where proportionate liability may apply, the defendant bears the onus of joining other concurrent wrongdoers to the proceedings. Since the courts, under the Victorian reforms, are unable to have reference to concurrent wrongdoers who are not parties to the present proceedings, joinder is essential in order to gain the benefits of proportionate liability.

Equally important is the conundrum presented by s24AJ, which would appear to prevent a concurrent wrongdoer from being forced to pay for any amount in excess of their personal responsibility, even where that wrongdoer has contractually assumed greater liability. This position is a significant departure from the scheme that previously existed under the Victorian *Building Act*, and Victorian lawyers must be quick to adapt to new legal problems which may arise under it.

PROPORTIONATE LIABILITY SUMMARY TABLE

State	Relevant Statutes/Bills	Proportionate Liability Provisions	Miscellaneous Rules
Vic	<p>The relevant law is contained in the <i>Wrongs Act 1958</i> (Vic), as amended by:</p> <ul style="list-style-type: none"> • <i>Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003</i> (Vic) • <i>Wrongs and Other Acts (Law of Negligence) Act 2003</i> (Vic) 	<p><i>Wrongs Act 1958</i> (Vic), Part IVA</p> <p>s.24AF - An apportionable claim is:</p> <p>a) a claim for economic loss or damage to property in an action for damages (whether under tort, contract, statute or otherwise) arising from a failure to take reasonable care; and</p> <p>b) a claim for damages for a contravention of section 9 of the <i>Fair Trading Act 1999</i>.</p> <p>s.24AI(1) - In any proceeding involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and</p> <p>(b) judgment must not be given against the defendant for more than the amount in relation to that claim.</p> <p>s.24AJ - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p>	<p>The provisions apply to <i>proceedings</i> commenced after 1 January 2004, regardless of when the cause of action accrued.</p> <p>In apportioning liability, the court <i>must not</i> have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p> <p>'Damages' is defined as 'any form of monetary compensation'.</p>
NSW	<p>The relevant law is proposed to be inserted into the <i>Civil Liability Act 2002</i> (NSW), via amendments contained in:</p> <ul style="list-style-type: none"> • <i>Civil Liability Amendment Act 2003</i> (NSW); and • <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i> (NSW). <p>The proportionate liability provisions in the amending acts have been enacted, and commence on 1 December 2004 and apply to proceedings commenced on or after that date.</p>	<p><i>Civil Liability Act 2002</i> (NSW), Part 4</p> <p>s.34 - An apportionable claim is:</p> <p>a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care; or</p> <p>b) a claim for economic loss or damage to property in an action for damages for a contravention of s. 42 of the <i>Fair Trading Act 1987</i>.</p> <p>s.35(1) - In any proceeding involving an apportionable claim:</p> <p>a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>s.36 - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p>	<p>In apportioning liability, the court <i>may</i> have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>

Qld	<p>The relevant law is contained in the <i>Civil Liability Act 2003</i> (Qld), as amended by the <i>Professional Standards Act 2004</i> (Qld).</p> <p>The proportionate liability provisions are due to commence on 10 April 2005.</p>	<p><i>Civil Liability Act 2003 (Qld), Part 2</i></p> <p>s.28 - Proportionate liability provisions apply to all claims, except those for breach of duty resulting in:</p> <p>a) personal injuries; or</p> <p>b) damages of an amount less than \$500,000.</p> <p>s.30(1) - If there is more than one defendant in a proceeding, each defendant is liable only for the amount of damages decided by the court.</p> <p>s.30(2) - The liability of each defendant is the amount decided by the court to be just and equitable having regard to the extent of the defendant's responsibility for the harm.</p> <p>Under section 7(3) parties may contract out of the proportionate liability regime.</p>	<p>The proportionate liability provisions will only apply to <i>breaches of duty</i> that occur after the commencement of the provisions.</p> <p>In apportioning liability between the defendants, the court <i>must not</i> have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>
WA	<p>The relevant law is proposed to be inserted into the <i>Civil Liability Act 2002</i> (WA), via amendments contained in:</p> <ul style="list-style-type: none"> • <i>Civil Liability Amendment Act 2003</i> (WA); and • <i>Civil Liability Amendment Bill 2004</i> (WA). <p>The proportionate liability provisions in the <i>Civil Liability Amendment Act</i> are yet to be proclaimed. The proportionate liability provisions in the <i>Civil Liability Amendment Bill</i> are still before parliament. Therefore, none of the provisions are in force yet.</p>	<p><i>Civil Liability Act 2002</i> (WA), Part 1F</p> <p>s.5AI(1) - An apportionable claim is:-</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure to exercise reasonable care; or</p> <p>(b) a claim for economic loss or damage in an action for damages for contravention of section 10 of the <i>Fair Trading Act 1987</i>.</p> <p>s.5AK(1) - In any proceeding involving an apportionable claim:</p> <p>a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>Under section 4A, parties may contract out of the proportionate liability regime.</p>	<p>In apportioning liability between the defendants, the court must have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>
SA	<p>The SA Govt has expressed support for the adoption of proportionate liability in relation to economic loss and property damage claims, but no legislation has yet been proposed.</p>		

Tas	<p>The relevant law is proposed to be inserted into the <i>Civil Liability Act 2002</i> (Tas), via amendments contained in the Civil Liability Amendment Bill 2004 (Tas).</p> <p>The Civil Liability Amendment Bill is still before parliament and, thus, the proportionate liability provisions are not yet in force.</p>	<p><i>Civil Liability Act 2002</i> (Tas), Part 9A</p> <p>s.43A(1) - An apportionable claim is:-</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure to exercise reasonable care; or</p> <p>(b) a claim for economic loss or damage in an action for damages for contravention of section 14 of the <i>Fair Trading Act 1990</i>.</p> <p>s.43B(1) - In any proceeding involving an apportionable claim:</p> <p>a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>s.43C - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer. However, where a concurrent wrongdoer has contracted to contribute/ indemnify, then the contract will stand.</p>	<p>In apportioning liability between the defendants, the court must have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>
NT	<p>No legislation has been proposed.</p>		
ACT	<p>The relevant law is proposed to be inserted into the <i>Civil Law (Wrongs) Act 2002</i> (ACT), via amendments contained in the <i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004</i> (ACT).</p> <p>The proportionate liability provisions in the amending act have been enacted, but are yet to be proclaimed, and therefore, are not yet in force. However, they are due to come into forced effect on 8 March 2005.</p>	<p><i>Civil Law (Wrongs) Act 2002</i> (ACT), Chapter 7A</p> <p>s.107B(2) - An apportionable claim is:-</p> <p>(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure to exercise reasonable care; or</p> <p>(b) a claim for economic loss or damage in an action for damages for contravention of Part 2 of the <i>Fair Trading Act 1992</i>.</p> <p>s.107F(1) - In any proceeding involving an apportionable claim:</p> <p>a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and</p> <p>(b) the court may give judgment against the defendant for not more than that amount.</p> <p>s.107H - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p>	<p>In apportioning liability between the defendants, the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>

Cth	<p>The relevant law is contained in the:</p> <ul style="list-style-type: none"> • <i>Australian Securities and Investments Commission Act 2001</i> (Cth) • <i>Corporations Act 2001</i> (Cth) • <i>Trade Practices Act 1974</i> (Cth) <p>all as amended by CLERP 9.</p>	<p><i>Australian Securities and Investments Commission Act 2001</i> (Cth), Subdivision GA</p> <p>s.12GP - An apportionable claim is a claim for damages for:</p> <p>a) economic loss; or</p> <p>b) damage to property;</p> <p>caused by conduct in contravention of section 12DA. (misleading/deceptive conduct)</p> <p>s.12GR - In any proceeding involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and</p> <p>(b) judgment must not be given against the defendant for more than the amount in relation to that claim.</p> <p>s.12GT - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p> <p><i>Corporations Act 2001</i> (Cth), <i>Division 2A</i></p> <p>s.1041L - An apportionable claim is a claim for damages for:</p> <p>a) economic loss; or</p> <p>b) damage to property;</p> <p>caused by conduct in contravention of section 1041H. (misleading/deceptive conduct)</p> <p>s.1041N - In any proceeding involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and</p> <p>(b) judgment must not be given against the defendant for more than the amount in relation to that claim.</p> <p>s.1041P - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p> <p><i>Trade Practices Act 1974</i> (Cth), <i>Part VIA</i></p> <p>s.87CB - An apportionable claim is a claim for damages for:</p> <p>a) economic loss; or</p> <p>b) damage to property;</p>	<p>The new provisions in each of the three Acts apply to <i>causes of action</i> arising on or after 26 July 2004.</p> <p>In apportioning liability under any of the three Acts, the court <i>may</i> have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.</p>
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		<p>caused by conduct in contravention of section 52. (misleading/deceptive conduct)</p> <p>s.87CD - In any proceeding involving an apportionable claim:</p> <p>(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and</p> <p>(b) judgment must not be given against the defendant for more than the amount in relation to that claim.</p> <p>s.87CF - A concurrent wrongdoer cannot be required to contribute to damages recoverable from another concurrent wrongdoer, and cannot be required to indemnify another concurrent wrongdoer.</p>	
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A SNICKERS BAR THAT DID NOT SATISFY....

BELINDA THOMPSON, PARTNER, AND CAROLYN MORLEY, LAWYER,
ALLENS ARTHUR ROBINSON

The recent NSW Court of Appeal case of *Effem Foods Ltd v Nicholls*¹ provides an opportunity to consider the defences available to manufacturers under the *Trade Practices Act 1974* (Cth) (the **Act**) who face a claim for breach of the obligations imposed by ss74D and 75AD of the Act to supply goods which are of merchantable quality and free from defects.

FACTS

Ms Nicholls' purchased a Snickers bar from her local newsagency, took it home and put it in her cupboard. She told the Court that on the day of the injury she ripped the packaging of the bar open, pushed the bar partially out of its packaging and took a bite. As she began to chew the bar she felt a hard object at the back of her tongue which caused her to spit out her mouthful.

Ms Nicholls discovered that there was a safety pin in the Snickers bar. The safety pin caused a cut on her tongue, which required her to have a tetanus injection and produced an allergic reaction.

Ms Nicholls also underwent tests for HIV and Hepatitis B and C viruses, and she developed an obsessive condition which gave her a poor appetite and disturbed sleep.

Ms Nicholls sued Effem Foods Ltd (**Effem**) as the manufacturer of the Snickers bar, for breaching ss74D and 75AD of Part V Division 2A and Part VA of the Act respectively.

THE TRADE PRACTICES ACT 1974 (CTH)

The following sections of the Act were considered by the court:

Section 74D states that:

- (1) Where
 - (a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
 - (b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods ...to a consumer;
 - (c) the goods are not of merchantable quality; and
 - (d) the consumer or a person who acquires the goods...suffers loss or damage by reason that the goods are not of merchantable quality;the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer...may recover the amount of the compensation by action against the corporation in a court...
- (2) Subsection (1) does not apply:
 - (a) if the goods are not of merchantable quality by reason of:
 - (i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or
 - (ii) a cause independent of human control;occurring after the goods have left the control of the corporation....

Section 75AD states that:

If

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
 - (b) they have a defect; and
 - (c) because of the defect, an individual suffers injuries;
- then
- (d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
 - (e) the individual may recover that amount by action against the corporation...

¹ [2004] NSWCA 332, Judgment delivered 17 September 2004

Section 75AK states that:

- (1) In a liability action, it is a defence if it is established that:
- (a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time...

The relevant defences to a claim in respect of an alleged breach of ss74D and 75AD of the Act are contained in:

- (a) s74D(2)(a)(i) of the Act, which required Effem to prove to the civil onus that the safety pin was present in the Snickers bar by 'reason of an act or default' of a stranger 'occurring after the goods had left the control of the corporation'; and
- (b) s74AK(1)(a) of the Act, which required Effem to establish on the balance of probabilities that the defect did not exist at the time when Effem delivered the goods into the supply chain.

PROCEEDINGS AT FIRST INSTANCE

At first instance, the trial judge held that Ms Nicholls had proved a prima facie breach of s74D(1), because the bar was not of merchantable quality, and a prima facie breach of s75AD because the defendant, in trade and commerce, had supplied defective goods manufactured by it which had injured the plaintiff.

At trial, Effem provided detailed evidence of its internal procedures, including the use of metal detectors. Effem argued that it was very unlikely that the safety pin entered the bar at the time of manufacture as the chances of the bar surviving the metal detector are very remote, although it could not be said that such an outcome was impossible. Effem led evidence suggesting ways in which the bar could have been tampered with after it had left its factory.

After hearing all of the evidence, the trial judge held that Ms Nicholls had proved her case. Section 74D(1) had been breached because the bar was not of merchantable quality. Section 75AD was breached because Effem, in trade and commerce, had supplied defective goods manufactured by it which had injured Ms Nicholls. The judge commented that Effem's evidence had not shown that the wrapper or the chocolate coating of the Snickers bar had been disturbed. The evidence only went so far as to show that the wrapping could

be opened and the bar removed, so that a safety pin may be inserted without 'evident damage' to the wrapping but the chocolate coating would be disturbed.

DECISION OF NSW COURT OF APPEAL

On appeal, Effem argued that the defence provided by 74D(2)(a)(i) of the Act (that the safety pin was inserted into the bar by someone else after it left its factory) only required it to show that the system of manufacture was such that the possibility of the pin getting through the metal detector undetected was extremely remote, and there was evidence that the Snickers bar could subsequently have been interfered with. Effem argued that it was not restricted to proof of actual interference; a circumstantial case could be sufficient.

Effem argued that proof of those matters would also establish the other defence to the claim under s75AD, provided by s74AK(1)(a) of the Act (that the defect did not exist at the time when the manufacturer delivered the goods into the supply chain)

The NSW Court of Appeal dismissed Effem's appeal.

The Court held that there was no practical difference in the scope of the two defences – the first requires proof that the defect occurred after supply, the second proof that the defect did not exist at the time of supply. The Court concluded that the defences are simply two sides of the same coin.

Ms Nicholls' Snickers bar was the only one contaminated in the entire batch. It was delivered to the supplier in a sealed box, and any tampering en route to the supplier would have been apparent by normal inspection of the goods. On the evidence, the Court had a choice between two factual scenarios:

- an isolated event in the factory due to the inadvertence or negligence of an employee; and
- a deliberate but isolated act of sabotage by an employee in the retailer's shop.

However, the Court considered that there was also a third option, a decision that Effem had not discharged its onus of proof.

In its evaluation of the competing hypotheses, the Court applied the ordinary presumption against criminality in civil cases. An employee of the retailer who deliberately sabotaged this Snickers bar by inserting a safety pin would be guilty of an offence under s 41 of the *Crimes Act 1900* (NSW) of causing to be administered to any person a destructive or noxious thing with intent to injure that person.

On the evidence, the sabotage of the Snickers bar on the premises of the retailer was no more than a bare possibility and in the Court's view proof of this possibility and nothing more was not sufficient to discharge Effem's onus of proof, bearing in mind the weight to be given to the presumption of innocence in respect of the retailer's employee.

IMPLICATIONS

This decision is of guidance to manufacturers of food and other goods facing similar claims under the Act. It establishes that:

- whilst a manufacturer's liability is strict it is not absolute;
- defences are available where there is evidence of direct tampering;
- the manufacturer has to establish the defences on the balance of probabilities; and
- speculation and proof of mere possibilities are not sufficient to successfully discharge the defences under the Act.

WOMEN IN LAW – A GLOBAL PERSPECTIVE. OBSERVATIONS FROM THE US AND AUSTRALIA

NPLA was proud to be one of the sponsors of the highly successful "Women in Law" dinner held at Melbourne Park on 10 November 2004.

The attendees at the dinner had the benefit of presentations by The Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, and Sheryl Willert, Partner (and former Managing Director) of US firm Williams, Kostner & Gibbs PLLC (Seattle), and immediate past President of the Defence Research Institute.

Chief Justice Warren, having prepared a speech on "Women Litigants and Advocates in Insurance Law", instead provided a candid insight into Her Honour's experience in her first year in the role of Chief Justice. Her Honour discussed the role of women in the law generally and her own experience, particularly in her first year as Chief Justice.

Sheryl Willert discussed the importance of mentoring for the advancement of women in the law.

The "Women in Law" dinner was also sponsored by women@aar.com.au, AILA, Australian Women Lawyers, Victorian Women Lawyers and Women In Insurance.



Chief Justice Warren (left), Maryjane Crabtree, Partner of Allens Arthur Robinson (centre) and Sheryl Willert, Partner of US firm Williams, Kostner & Gibbs PLLC (Seattle) (right).

NPLA WISHES ALL OF IT'S MEMBERS
BEST WISHES FOR THE FESTIVE
SEASON AND A HAPPY NEW YEAR.

BRIEF

National Product Liability Association

