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BRIEF

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REVIEW OF THE AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM

PETER HOLLOWAY, PARTNER, FREEHILLS

Readers of *Brief* will be aware that in August 2004 the Ministerial Council on Consumer Affairs published a Discussion Paper concerning a review of the Australian consumer product safety system. Amongst other things, the Discussion Paper invited comment concerning the current product safety system and concerning a number of options for reform canvassed in the Paper. These options include the introduction of a "general safety provision" (**GSP**) which would impose a legal obligation on businesses to only allow "safe" consumer products to be released to market. A similar obligation has been introduced in a number of other jurisdictions including the United Kingdom. A provision of this nature is also proposed for Canada and New Zealand.

NPLA made a written submission to the Ministerial Council in November 2004. A copy of this submission was published in the last edition of *Brief*.

A number of other organisations provided written submissions to the Ministerial Council including the ACCC, the ACT Office of Fair Trading, the Australian Consumers' Association, the Australian Chamber of Commerce and Industry, the Commonwealth Consumer Affairs Advisory Council, the Insurance Council of Australia, the Small Business Development Corporation together with a number of other corporations and interested parties. In total, 31 submissions were received from a range of business, consumer and public sector organisations.

Following receipt of these submissions a consultation workshop was recently conducted at the Department of Treasury in Canberra. NPLA was represented at this workshop, which was presided over by a number of Treasury officials who have responsibility for collating information and data concerning the various proposals canvassed in the Discussion Paper.

Comment was made by the Treasury officials at the commencement of the workshop that the reasons why the product safety system is undergoing a review include repeated concerns having been expressed by businesses and consumer groups regarding the negative effects of inconsistency and duplication amongst State and Federal jurisdictions concerning product safety laws, which is said to impact negatively on the ability of business to address consumer safety issues.

A second reason given was concerns having been expressed by regulators and other interest groups that the current system is insufficiently proactive, meaning that unsafe products, once identified, are unable to be dealt with expeditiously.

Two particular issues were raised for discussion at the workshop:

- (a) harmonisation of product safety systems between the various jurisdictions that operate in Australia; and
- (b) the proposal to introduce a general safety provision.

There was widespread support expressed for the view that the existing system is inefficient and costly to business, and considered to be an impediment to consumer safety. There was strong support for the notion that the systems that exist in the various State and Federal jurisdictions should be harmonised to the maximum extent possible, whilst at the same time recognising the political difficulties that might be encountered in achieving this.

There was strong support for the notion that if a single national scheme could not be introduced, then at least there should be consistency and reciprocity amongst jurisdictions. There was much discussion about whether there should be a single body responsible for consumer safety, much along

the lines of the United States Consumer Product Safety Commission.

A divergence of views were expressed concerning the introduction of a general safety provision.

Many thought that the introduction of a GSP would be an over-reaction to a system which is basically sound and which experience demonstrates is effective in encouraging businesses to appropriately respond to product safety issues.

Opinions were expressed by a variety of organisations, including a number of industry associations, the ACCI and NPLA, to the effect that the existing system does not suffer from any fundamental or structural problem that would warrant the introduction of a GSP, which would carry with it obligations that were more than likely to increase "compliance" costs and divert resources away from the active pursuit of safety.

Contrary views were also firmly put, including to the effect that the current system should be reformed at least to the extent of enabling regulatory agencies to act even although a product may not have actually resulted in or caused injury to any person.

It was emphasised by Treasury at the completion of the workshop that the reform options canvassed in the Discussion Paper do not necessarily represent the views of any government or any government agency. It was stressed that whether or not this review will result in any changes to the existing systems is an open question.

WHERE TO FROM HERE?

It is intended that the Ministerial Council of Consumer Affairs (**MCCA**) will meet in April 2005 to consider the outcomes of the consultation workshop and the various submissions that have been made. The MCCA will then provide directions to Treasury officials for further analysis and collection of information. It is likely that further consultations will be undertaken as part of this exercise, ultimately proceeding towards the issue being further debated at the August 2005 MCCA meeting.

The Treasury is also in the process of organising a cost/benefit analysis of the reform options that have been considered.

Those readers who have not yet taken an interest in this issue are encouraged to obtain a copy of the discussion paper from the Ministerial Council of Consumer Affairs or to visit the treasury website at: http://www.consumer.gov.au/html/Consumer_Product_Safety_Review/discussion_paper.html.

NOW THERE ARE EVEN MORE REASONS TO TRADE FAIR

ELEANOR SCACCO, SPECIAL COUNSEL, AND VERITY SHEPHERDSON, SOLICITOR, FREEHILLS

Changes made to the Victorian *Fair Trading Act* and other consumer protection laws in late 2004 give traders further reason to ensure that they have effective and up-to-date legal compliance programs.

One of the effects of the amendments is that traders who breach the Victorian *Fair Trading Act 1999* (Vic) can now be ordered to publish corrective advertisements and advertisements that acknowledge breaches of the law, and to establish fair trading compliance training programs. These remedies mirror those which are also available under the *Trade Practices Act 1974* (Cth).

The amendments also confer new powers that could lead to Consumer Affairs Victoria obtaining remedies not currently available to the Australian Competition and Consumer Commission under Federal legislation. For example, those who breach the *Fair Trading Act* could now be ordered by a Court to honour promises made in the course of misleading or deceptive conduct or in false representations.

Traders will need to be particularly mindful of this when using asterisks and disclaimers in advertising and promotional material. Broad marketing 'headlines' in advertisements are often tempered by small print conditions, such as conditions that a consumer must meet in order to be eligible for an attractive offer, or qualifications to and explanations about what the marketing line really means. One possible outcome that might eventuate if these small print conditions are not clearly disclosed and consumers are likely to be misled is that the trader could be ordered to meet the claims without being able to rely on the qualifications, exceptions or conditions.

The new provision should also be on the minds of traders making comparative claims. Is the product being advertised *really* 40% off regular price, and does the business *really* offer the lowest prices in

town? If not, the trader might be ordered to sell the product at 40% off whatever the real regular price is, and to genuinely offer lower prices than other stores in a particular area.

The bad publicity associated with remedies like corrective advertising could also be very costly and damaging to a trader's reputation. These new remedies are in addition to existing penalties and remedies, which include significant fines for some breaches, injunctions and orders to compensate those affected.

These recent developments are a timely reminder that compliance should be at the forefront of the minds of all traders and businesses, and should be well and truly built into day-to-day activities. The Victorian Government has emphasised this, stating that its objective is an enforcement strategy under which compliance with consumer protection laws is seen as a serious matter for all sectors of industry.

The Victorian Government has also indicated that the legislative amendments are part of a wider fair trading strategy which includes the 'Compliance and Enforcement Policy' published by Consumer Affairs Victoria in 2004. That policy states that Consumer Affairs Victoria's objectives when responding to breaches of consumer protection laws are to:

- stop the unlawful conduct
- provide compensation or other redress for those affected by the conduct
- ensure future compliance with the law
- raise awareness of legislative requirements through publication of enforcement outcomes and use of other compliance tools
- deter and punish wrongdoers.

Interestingly, the Director of Consumer Affairs Victoria has also been given additional powers by the recent legislative changes and now has the authority to obtain information from traders about

their compliance with consumer protection laws. In using this power, it appears that the Director does not need to hold a belief that a contravention of the *Fair Trading Act* has occurred. Instead, the Director can require the provision of information by a person who the Director 'believes is capable of providing information or documents that may assist the Director in monitoring compliance' with the *Fair Trading Act* and regulations. The information which is provided to the Director in accordance with a

notice under this new provision is not admissible in any proceedings except those for refusing to comply with a notice under the section.

These recent changes provide traders with an added incentive to review and update their compliance policies and procedures - and to ensure that they take compliance as seriously as the legislators and regulators.

HIGH COURT FINDS DISCLAIMER CLAUSE EFFECTIVE IN SECTION 52 *TRADE PRACTICES ACT* CASE

WEI-EE CHEAH, LAWYER, ALLENS ARTHUR ROBINSON

INTRODUCTION

In *Butcher v Lachlan Elder Realty Pty Limited* [2004] HCA 60, the High Court considered the relevance and effect of a disclaimer clause in the context of a claim for breach of section 52 of the *Trade Practices Act 1974* (Cth) (**TPA**). In this case, the disclaimer clause appeared on a brochure used by a real estate agency in the sale of a waterfront property in Sydney. By a three-two majority, the Court held that the disclaimer clause was effective and found that the real estate agency had not engaged in misleading and deceptive conduct under section 52 of the TPA.

FACTS

The decision was concerned with the circumstances surrounding the sale of a waterfront property in Sydney by real estate agents, Lachlan Elder Realty (the **agent**), to a Mr Butcher and Ms Radford (the **purchasers**).

The purchasers inspected the property with an employee of the agent and were provided with a glossy colour brochure about the property. The brochure consisted of a single sheet with colour photographs of the property on the front and information on the back. One of the photographs depicted a swimming pool, a fence and lawns

sloping to the water. The following disclaimer was printed at the bottom of the front side of the brochure:

Lachlan Elder Realty Pty Ltd ACN 002 332 247.
All information contained herein is gathered from sources we believe to be reliable.
However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries.

The back of the brochure contained certain information about the property and a reproduction of a survey diagram. The agent had obtained the diagram from the survey report annexed to the draft contract of sale, which was provided by the vendor. The survey diagram appeared to show a line representing the northern boundary of the property and a swimming pool wholly within this boundary.

The purchasers relied on the survey diagram to determine, with the assistance of professional advice, how they would redevelop the property, and on that basis, agreed to purchase the property. It was subsequently discovered that, in fact, the boundary of the property ran through the middle of the swimming pool such that the proposed redevelopment could not be carried out. The purchasers then commenced proceedings against the agent for misleading and deceptive conduct under section 52 of the TPA.

The purchasers claimed that by incorporating the survey diagram into its brochure, the agent had made a representation as to the accuracy of the diagram. Further, the purchasers claimed that the disclaimer on the brochure was ineffective as it was in such small print that they had not even noticed it.

The agent argued, in its defence, that based on the circumstances of the transaction and the disclaimer on the brochure, the reproduction of the survey diagram constituted a mere passing on of information, with no representation as to its accuracy.

The High Court agreed with the agent and, by a three-two majority, found that the agent had not engaged in misleading and deceptive conduct under section 52.

MAJORITY JUDGMENT

The majority of the High Court (comprised of Gleeson CJ, Hayne and Heydon JJ) found that the real estate agent did not engage in misleading conduct as it did no more than communicate the vendor's representations, without adopting or endorsing them. In reaching this conclusion, the majority had regard to the nature of the parties, the character of the transaction contemplated and the contents of the brochure.

The majority considered the factual circumstances of the case in detail and in so doing, found that the personal characteristics of the purchaser and agent were relevant to the question of misleading conduct. In particular, it was noted that the purchasers were intelligent, shrewd and self-reliant and would have appeared that way to the agent. On the other hand, it was found that the agent was merely a suburban real estate agent.

The majority considered that it was a matter of common experience that the skill of suburban real estate agents was limited to tasks such as making contracts on behalf of sellers with buyers and locating potential sellers and purchasers of property. Real estate agents do not hold themselves out as possessing research skills or means of independently verifying title details about the properties they sell.

In its decision, the majority also gave weight to the fact that the transaction involved the purchase of a very expensive property (the agreed purchase price being \$1.36m) and that the purchasers had engaged appropriate professional advisers to assist them – an accountant, an architectural designer and

building consultant and a licensed builder, along with solicitors, to assist with the process of making and completing the contract.

In relation to the brochure itself, it was found that potential purchasers would be likely to assume that the survey diagram had been taken from a survey report. The Court held that not only was it plain that the diagram had not been made by the agent, the circumstances also negated any suggestion that the agent had adopted the surveyor's diagram as its own, or that it had verified its accuracy.

Significantly, the majority of the Court found that the disclaimer on the brochure was effective to communicate that the agent not making any representations about the accuracy of the information conveyed save that it believed the sources of the information to be reliable.

Although the disclaimers were in small type, the majority considered that the brochure was a short document with little writing on it, and the disclaimers were clearly legible. The majority held that, in this case, the relevant test of the agent's conduct was what a reasonable person in the position of the purchasers, taking into account what they knew, would make of the agent's behaviour. The majority then went on to find that reasonable purchasers would have read the whole document, given its importance, its brevity and their use of it as a source of instructions to professional advisers.

Therefore, the majority of the Court found that, taken together, the circumstances in this case were such that it would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading, namely the survey diagram. The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information and did no more than state a belief in the reliability of the sources. In the circumstances, the majority held that the agent had not engaged in misleading and deceptive conduct under section 52 of the TPA.

DISSENTING JUDGMENTS

Justices McHugh and Kirby delivered strong separate dissenting judgments, placing great emphasis on the consumer protection objectives of section 52 of the TPA and the need to avoid

an overly technical approach to the provision's operation.

Although it was acknowledged that, in certain circumstances, incorrect information may be passed on without any contravention of section 52, both dissenting judges found that by incorporating the survey diagram into its brochure, the agent had assumed responsibility for the diagram and made a representation as to its accuracy.

Further, McHugh and Kirby JJ found that the disclaimer, in stating a belief in the reliability of the sources of information, amounted to a representation as to the truthfulness of the contents of the brochure. It was also emphasised separately that the failure of the agent to repeat orally the disclaimer during the course of the property inspection was significant in the finding of misleading conduct.

Justice Kirby went on to state that for a disclaimer to be effective, it must be clear, detailed and prominent. He also disagreed with the majority's view that the personal characteristics of the consumer were relevant to a claim under section 52 of the TPA.

CONCLUSION

The decision of the High Court in *Butcher v Lachlan Elder Realty Pty Limited* does not rewrite the law on disclaimer clauses and the operation of section 52 of the TPA. Although the case was decided by a three-two majority, there was no disagreement between the judges as to the underlying principles governing the operation section 52. It is clear that section 52 deals with 'conduct' which is not limited merely to representations, express or implied, and the question whether conduct is misleading or deceptive is to be determined objectively by the court, taking into account all relevant facts and circumstances.

Nevertheless, this case is significant in that it suggests that disclaimer clauses may be accorded greater significance where the relevant class of consumer is sophisticated and where the circumstances are such that that it is appropriate to conduct a more detailed examination of the document. However, it must be noted that the Court clearly stated that a more impressionistic analysis may be sounder where a consumer only briefly considers a document.

US CLASS ACTION FAIRNESS ACT

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THE NEW ACT

The Class Action Fairness Act (the **CAFA**) was signed into law by President Bush on 18 February 2005. The originating Bill passed easily through the Senate and the House of Representatives by a vote of 72-26 and 279-149 respectively. US business and industry groups have welcomed the CAFA as enabling greater access to the US federal court system for class action suits and its supervision of class settlements that result in significant fees being paid to lawyers acting for the class.

This reform of the class-action regime is a significant victory for the Bush Administration, which has been pushing for a general overhaul of the US civil justice system. Other key elements of the proposed reform package include the Personal Responsibility in Food Consumption Act and the Bankruptcy Abuse Prevention and Consumer Prevention Act. Predictably, the CAFA has been the subject of much debate and controversy in the US. The Bush Administration hopes that the CAFA 'will help protect people who are wrongfully harmed while reducing the frivolous lawsuits that clog courts, hurt the economy, cost jobs and burden American businesses'¹. The CAFA does not apply to cases that are currently pending, but applies to all suits filed after 18 February 2005, the date of the CAFA's enactment. The key provisions of the CAFA are summarised below.

JURISDICTION OF FEDERAL COURTS

Diversity jurisdiction

The CAFA expands the diversity jurisdiction of federal courts over interstate class actions in an effort to prevent state-based forum shopping. Previously, the jurisdiction of the US federal court was not invoked unless diversity of citizenship existed between every representative plaintiff and every defendant and plaintiff had an individual claim for damages of \$75,000 or more. (Diversity

of citizenship exists where any plaintiff is a citizen of a state that is different from any defendant or where the action is between a citizen of a state and a foreign state or foreign citizen.) Now federal district courts have original jurisdiction over any civil class action in which there are at least 100 class members, diversity of citizenship exists between any one member of the plaintiff class and any defendant and the claim for damages exceeds US\$5 million in aggregate.

The federal court jurisdiction is also governed by what have been coined the 'home state' and 'local controversy' exceptions. Class action cases must also be automatically directed to the jurisdiction of the federal court if one-third or less of the class members share the same home state as the primary defendant. If two thirds or more of the class members are from the same state as the primary defendant, a federal court must decline to hear the class action case in question. However, for cases in which between one-third and two-thirds of the class members reside in the same state as the primary defendant, the federal court has the discretion to decide whether 'in the interests of justice' the case should be heard locally or in the federal jurisdiction. The citizenship of class members is determined as at the date of filing of the complaint or amended complaint.

Jurisdiction over mass actions

The jurisdiction of the US federal court over mass actions has also been expanded by the CAFA. For jurisdictional purposes, any civil action in which 100 or more named parties together bring a claim for monetary relief will be treated as a class action provided that their claims meet the individual 'amount-in-controversy' threshold (currently US\$75,000). Claims that fall below this threshold will be remanded to state courts.

Certain mass actions are not eligible for removal to the federal jurisdiction. This includes those actions where:

¹ President Bush quoted in *The Washington Times*, 18 February 2005.

- all the claims arise out of an event in the state where the suit is filed and the injuries were incurred in that state and adjacent states;
- the defendant, rather than the plaintiff, seeks to join the claim;
- the claim has been brought on behalf of the general public, not individuals or a purported class; or
- the claims have been consolidated for pre-trial purposes only.

Removal

The CAFA provides for the transfer of interstate class actions to the federal district court in accordance with existing procedure, with a couple of exceptions. The one-year limit after filing on the removal of diversity cases does not apply to class actions. Also, defendants may remove cases to the federal court without having to take into account the citizenship of any other defendant, and without the consent of all defendants.

The CAFA further authorises discretionary appellate review of district court orders granting or denying a motion to remand and provides for expedited rulings on these appeals. Parties must file an application for review with seven days and the court must make its final decision within 60 days.

Coupon settlements

The CAFA imposes conditions on 'coupon' settlements in an attempt to regulate class counsel fees so that they correlate with either the value of the settlement actually received by class members, or their actual time spent working on the case. Accordingly, before approving a coupon settlement the court must hold a hearing and make a written finding that the settlement is fair, reasonable and adequate for class members. Where a lawyer has a contingency fee arrangement with plaintiffs and those fees are based on the value of the coupons awarded to class members, they must be based on the value of coupons actually redeemed. In relation to all other coupon settlements, lawyers' fees must be based on reasonable time spent working on the case.

Finally, the court can also require that the settlement provide for the distribution of a portion of the value of any unclaimed coupons to charitable or governmental organisations.

The CAFA does not provide any guidance on lawyers' fees in non-coupon settlements.

PROTECTION OF CLASS MEMBERS

Protection against loss

In response to a series of recent cases in which lawyers for the class have received substantial fees, even though class members themselves suffered financial loss as a result of the settlement, the CAFA has moved to protect such class members. Any settlement where a class member must pay a sum to his or her lawyer that would result in a net loss to the class member must only be approved by the court if it can be shown that the non-monetary benefits to the class member substantially outweigh the monetary loss.

Protection against geographic discrimination

Furthermore, federal courts are prohibited from approving a settlement that grants greater sums to certain class members as a result of their proximity to the court in which the case has been heard.

Notice to state and federal officials

The CAFA also contains a notification provision that is intended to ensure that relevant state and federal officials who might have an interest in the settlement of a class action have sufficient information and time to intervene where they consider that settlement to be unfair or irregular.

Within 10 days of a class action settlement being proposed, each defendant that is participating in the proposed settlement must notify the relevant responsible state and federal officials. Notification of state officials is required only in those jurisdictions in which class members reside. Class members can refuse to comply with, or be bound by, a settlement agreement or consent decree if they can show that appropriate notice was not provided to the relevant officials.

Reporting requirements

Finally, the CAFA provides that the Judicial Conference of the United States must prepare and submit a report to the Committees on the Judiciary of the Senate and House of Representatives within one year of its enactment. The report must detail further ways in which to ensure that proposed class

action settlements are fair to class members and to ensure that the fees and expenses awarded to counsel in connection with class action settlements are also fair and reasonable.

CONCLUSION

The CAFA represents a significant step towards cleaning up the US class-action procedure. In particular, it seeks to reduce forum shopping by funnelling class-action suits with plaintiffs in different states out of state courts and into the federal court system, in addition to protecting plaintiffs from unfair class settlements. It remains to be seen whether the Australian class-action regime, which in large part mirrors that of the US, would adopt and benefit from similar procedural reforms.

FLY THE FLAG – BUT NOT NEAR A SANDBAR: *SWAIN V WAVERLEY MUNICIPAL COUNCIL* (2005) HCA 4 (9 FEBRUARY 2005)

LEON SHER, LAW CLERK, ALLENS ARTHUR ROBINSON

INTRODUCTION

The appellant, Guy Swain, suffered spinal injuries whilst entering the surf at Bondi Beach in 1997 when he dived through a wave and struck a sandbar. Swain alleged that the incident occurred within the area outlined by the safety flags and he sued the manager of the beach, the Waverley Municipal Council (**Council**). Swain alleged that the Council was negligent in failing to take reasonable care in positioning the flags and in failing to warn swimmers of the sandbar through the use of warning signs. At first instance, a jury found the Council liable and Swain partly liable for contributory negligence. The Council appealed and the Court of Appeal set aside the verdict on the basis that there was no evidence capable of sustaining the jury's findings. Swain then appealed to the High Court in relation to the alleged negligent placement of the flags.

ISSUE

The issue for the High Court was purely a question of law, that is whether there was evidence on which a jury *could* be satisfied that the defendant had been negligent. Justice Gummow described the issue as follows:

Did the majority in the Court of Appeal err when it concluded that there was no evidence upon which a reasonably jury could have found that the Council was in breach of its duty in the placement of the flags?¹

Chief Justice Gleeson, Gummow and Kirby JJ found in the affirmative, with McHugh and Heydon JJ dissenting.

¹ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [123].

MAJORITY JUDGMENTS

The majority held that there was evidence before the jury to support the appellant's claim of negligence and the appeal was upheld.

Gummow J

Justice Gummow explained that the Court of Appeal could only set aside the jury's verdict if the Council was entitled to a verdict 'as a matter of law'. In order to assess whether the Council was entitled to a verdict 'as a matter of law', Gummow J used the following formulation adopted by Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*:²

[I]f the stage is reached that a prima facie case has been made out [by the plaintiff], the question whether the jury should accept that case, or should accept rebutting evidence called for the defendant, is one for them, no matter how overwhelming the rebutting evidence may be.³

The Court of Appeal set aside the jury's verdict on the grounds that there was no evidence upon which the jury could conclude:

- 1) that the flags conveyed that it was safe to dive;
- 2) that the Council had breached its duty of care because the dangers of diving were obvious; and
- 3) that the Council could have taken any alternative action.

On an analysis of the evidence Gummow J held that it was open to the jury to conclude that the flags conveyed that it was safe to bathe and more importantly, that the Council failed in exercising reasonable care in positioning the flags in front of a sandbar. Evidence was provided that sandbars could be hazardous, that the Council was in a position to identify such hazards and that a response to such a hazard would be to reposition the flags. In relation to obviousness, Gummow J described this as being part of the standard of care, a question of fact to be decided by the jury, and it was open for them to infer that the dangers were not obvious.

Kirby J

Justice Kirby formulated the issue before the court as a question of law as to whether there was evidence 'that ought reasonably satisfy the jury that the fact sought to be proved is established'. The issue is not what findings the judge would make, but whether accepting the evidence most favourable to the party concerned, as a matter of law the jury might reasonably return a verdict in favour of the plaintiff.

Justice Kirby held that it was open to the jury on the evidence that the flags indicated to persons that it was safe to swim. It was also open to the jury to conclude that this encompassed a number of activities and that the flags signified the assessment of the lifeguards on duty. He held that the Court of Appeal conducted their own evaluation of the facts rather than a consideration of the appellant's case at its highest. Justice Kirby also made particular note of the fact that the Council focused their evidence on the issue of whether the appellant was outside the flags when the incident occurred. In so doing, they failed to adduce evidence about what its officers did or considered with respect to the placement of the flags on that day, or why the flags weren't shifted. He suggested that the jury might have drawn adverse inferences from this omission.

Gleeson CJ

Chief Justice Gleeson held that it was 'clearly open to the jury to accept the appellant's version of how he came to suffer his injury'.⁴

Chief Justice Gleeson also mentioned the Council's lack of evidence with regard to the placement of the flags and its focus on the location of the appellant's injury:

Faced with a quadriplegic plaintiff, and a jury, that was a strong line to take in the absence of any evidence to show that moving the flags would not have made a material difference, or improved overall safety.⁵

² (1941) 42 SR 1.

³ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [130].

⁴ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [14].

⁵ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [18].

DISSENTING JUDGMENTS

Justice McHugh (in dissent) held that there was no evidence upon which the jury could find the Council negligent. This was because assuming there was a reasonably foreseeable risk of injury to the appellant when he dived at the beach, he tendered no evidence that would have entitled the jury to find that there existed a reasonably practicable means of avoiding that risk. The appellant did not provide evidence that areas outside the flags were safer, and nor was there any evidence presented that a portion of the flagged area did not have as high a risk of injury from the sandbank. Justice McHugh stated that evidence was required to show that the risk of injury was lower in these areas, and without that, there was no evidence upon which a jury could reasonably find the Council guilty of negligence.

Justice Heydon agreed with McHugh J however he went further in stating that it was not reasonably foreseeable that there was a risk of injury to the plaintiff of the kind suffered in the circumstances.

CONCLUSION

It must be emphasised, as the majority judgments did, that this is not a case concerned with the extent of the duty of care owed by local governments to beach-goers and nor does it determine in general terms the standard of care required. Instead it highlights the different considerations involved in the review of a jury decision. Justice Kirby in particular emphasised the respect accorded by the law to jury verdicts 'and the severe difficulty presented to those who receive them and then seek to overturn them'.⁶ Such cases often rely on a particular reading and interpretation of the evidence. The essential issue before the High Court was whether the Court of Appeal correctly set aside the jury's verdict. As Gummow J explained:

In its essence, the reasoning of the majority in the Court of Appeal leads to no more than the conclusion that a verdict for the Council was the preferable outcome on the evidence before the jury. That is an insufficient basis for holding that the Council was entitled to a verdict 'as a matter of law'...⁷

⁶ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [160].

⁷ *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005) at [156].

LIFE SINCE *FAIRCHILD V GLENHAVEN FUNERAL SERVICES*: BRIDGING EVIDENTIARY GAPS IN THE OLD DART AND THE ANTIPODES

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INTRODUCTION

For those engaged in the active defence of tort and trade practices claims in relation to products, the 2002 decision of the House of Lords in *Fairchild v Glenhaven Funeral Services*¹ (***Fairchild***) is recognised as a landmark decision concerning the judicial approach to causation in the common law world. It has certainly been the subject of much impressive scholarly analysis².

The ramifications have been felt outside England with analogous judicial recognition, if not unqualified acceptance, here in Australia. Perhaps most potently this culminated in the recent enactment of a *Fairchild* provision in the codification of negligence by the States as a part of the recent wave(s) of tort law reform³.

However, such a powerful judicial tool, namely, a preparedness to bridge evidentiary gaps on causation, is by no means either uniformly understood or commonly invoked in this country. Under the recent statutory reforms it is also only to be used in exceptional cases - whatever that may come to mean.

This short note offers a concise summary of *Fairchild* and records both recent expansion in England and skirmishes in Australia in the period since the speeches in that case were made. The authors readily acknowledge that the case law focuses most closely on tortfeasor liability in asbestos litigation. However, they wish to highlight the way in which the principle might be used rather

than the adjectival subject matter in the noted cases.

In the field of product liability this promises to be a significant future issue as products become more sophisticated and, by extension, questions of causation become more complex.

THE COMMON LAW POSITION ON CAUSATION – ONE SHOE CAN'T FIT ALL

In tort law, the causal link between the breach of duty and the damage which has been suffered is an essential element. However, it can be a particularly complex issue to resolve, especially in products related cases. As the High Court in *March v Stramare*⁴ were at pains to make clear, a “but for” test of factual causation has limitations. There the Court expressed the opinion that it was plainly inadequate for dealing with cases where there is more than one possible cause of the damage in issue. However, common sense only gets you so far.

This limitation is brought into sharp relief in the so-called ‘evidentiary gap’ cases where none of several possible causes of the relevant damage can be proved to have more probably than not caused the damage. In this setting the decision in *Fairchild* wrought a significant change.

FAIRCHILD V GLENHAVEN FUNERAL SERVICES - A POLICY LEAP

Fairchild was a consolidated appeal of three single instance decisions in relation to English dust diseases claims. The Claimants had contracted mesothelioma and all three matters concerned an appeal on the issue of causation.

¹ [2003] 1 AC 32.

² For example, the close analytical work of Professor Jane Stapleton (ANU, Texas and Oxford) - “Lords a’leaping evidentiary gaps” (2002) 10 TLJ 276 and “Cause-in-Fact and the Scope of Liability for Consequences” (2003) 119 LQR 388.

³ For example, s. 5D(2) of the *Civil Liability Act* 2002 (NSW) or s. 51 of the *Wrongs Act* 1958 (Vic).

⁴ (1991) 171 CLR 506.

The Claimants had each been employed by several employers during their working lives. These periods of employment ranged from years to weeks. The employers admitted exposing the Plaintiffs to asbestos dust. Breach was not in issue. However, medical science was unable to determine at which place of employment the claimants had actually inhaled the fibre which, after many decades, resulted in the terminal condition. Hence, which of the negligent employers had caused or materially contributed to the injury was in issue. A 'but for' analysis was ineffectual.

The answer proffered by the Law Lords was to 'leap' the evidentiary gap thereby relieving the Claimants of the burden of proving 'on the balance of probabilities that the Defendant's tortious conduct caused or materially contributed to the Claimant's injury'.⁵ Instead they entitled the Claimants to reach the required standard for causation by proving on the balance of probabilities that the Defendant materially contributed to the relevant 'risk of the injury'. According to Lord Hutton, in these circumstances, once the claimant has discharged this standard of proof, the onus shifts to the defendant, holding that:

Where the Claimant proves that the breach of duty materially increased the risk of the onset of the disease from which he suffers, it will open to the defendant to adduce evidence to argue that even though the breach of duty materially increases the risk, nevertheless the evidence adduced on its behalf displaces the inference of causation.⁶

Under this analysis, each of the employers was individually liable for the full loss of their former employee, despite the inability of medical evidence to attribute the occurrence of the illness either to a particular period or to a cumulative exposure. This approach was said to be available in cases of this type on the proviso that the exposure for which the employer was responsible was not of an 'insignificant' nature.⁷

Lord Bingham of Cornhill described the conclusion drawn in the case as being consistent with principle and properly understood authority, with the decision being both just and in accordance with

common sense.⁸ It was not an approach limited to the confines of asbestos litigation which, on any view in Australia, has developed a range of unique procedural characteristics which are generally adverse to defendants.

However, the decision in *Fairchild* expressly left open a number of questions in relation to cases of this kind. One such question - should the liability be imposed in strict proportion to the period that the Claimant had worked for each employer? This would of course have a significant ramification in situations where an employee who has contracted mesothelioma worked for several employers for periods ranging from months to years and is only able to sue one of the employers due to the other employers having "disappeared" years before.

BAKER V SAINT GOBAIN PIPELINES – THE NEXT STEP

In England this question was answered and the *Fairchild* principle extended in the decision of *Baker v Saint Gobain Pipelines*⁹.

The facts of this case are that Mr Baker had been exposed to asbestos three times in his working life. Due to his exposure to asbestos he had contracted mesothelioma and died. The action was brought by his widow, Mrs Baker.

In the case, it was admitted by the employer (*Saint Gobain*) that it had breached the duty of care it owed Mr Baker by exposing him to asbestos dust and fibres during the course of his employment. Mr Baker had worked for the Defendant for a period of around 8 years.

However, Mr Baker had been a self employed plasterer for over 20 years. During this period he had also been exposed to asbestos. A third period of exposure occurred whilst employed by another company not sued in the action.

Saint Gobin argued that, unlike the claimants in *Fairchild*, Mr Baker was not an 'innocent victim'. It argued that in order to invoke the *Fairchild* principle, the Applicant's condition had to be caused by one of the negligent acts of the Defendant or the other employer. As Mr Baker had been self-employed for a substantial period of his exposure to asbestos he was not necessarily the victim of a breach of duty by another party.

⁵ J Stapleton, "Lords a'leaping evidentiary gaps", *ibid*

⁶ [2002] 3 All E.R. 305, [111].

⁷ S Green, "Winner takes all", *Law Quarterly Review* 2004, 120 (Oct), 566-571, 566.

⁸ [2003] 3 ALL ER 305, [34].

⁹ [2004] EWCA Civ 545.

The Court recognised that in cases of this type, if the applicant was entitled to recover then there was a risk that an innocent party would have to compensate for the actions of other negligent parties or even the Applicant's own negligence. However, the Court reached the conclusion that, by applying an objective assessment, the **greater** injustice would happen if they did not allow the Applicant to recover.

The Court expressed the view that there was the potential for injustice if they did not allow apportionment of damages between the Applicant, the sued Defendant and the other employer who was not present. However they again concluded that there was the potential for **greater** injustice if they did. The Court readily acknowledged situations where the insolvency of former employers left the Applicant unable to recover damages.

The Court held that the contribution to the damage made by the Applicant could and should be dealt with through contributory negligence. In this particular case, the damages received by Mrs Baker were reduced by 20%.

Fairchild has not gone without controversy in England. In the recent decision of *Chester v Afshar*¹⁰ two members of the House of Lords who had made majority speeches in *Fairchild* voiced a dissent intended to prevent the unchecked extension of the relevant principles. The authors will provide a short update on this case in the next edition of Brief.

THE AUSTRALIAN SITUATION, WAS FAIRCHILD ALREADY HERE?

As we can see the *Fairchild* principle has been expanded in England, but what of its judicial treatment in Australia? This article does not attempt to canvas all possible direct or indirect references. Instead a brief reflection on differences in approach serves to make the point.

In *Bendix Mintex Pty Ltd v Barnes*¹¹ Mason P held that the 'common law is not unsympathetic to the plight of plaintiffs who are faced with multiple defendants yet uncertain as to which of them was legally responsible, where it appears not all of them were.'¹² His Honour opined that Australian

law needs and is encouraged to take a 'robust and pragmatic' approach to proof of causation.¹³

Yet, in *Orica Ltd v CGU Insurance Ltd Santow JA* (a member of the same Court) held that in Australia the Fairchild 'elision' of establishing causation by merely causing a material increase in the risk of injury 'is not permitted under Australian authority',¹⁴ although this was not a case that had to be decided on similar facts to *Fairchild*.

However, in a recent West Australian case, Barker J expressed the opinion that, in circumstances such as those found in *Fairchild*, the defendants, by increasing the risk of injury and by them not presenting accepted evidence that refuted the application of that risk and that risk then eventuating, had materially contributed to the injury itself and thus satisfied the requirements of causation in Australia.

In *Misiani (as Executor of the Will of Misiani (deceased) v Welshpool Engineering Pty Ltd (in liquidation))*¹⁵, Mr Misiani worked for both Welshpool Engineering Pty Ltd (the first defendant) (Welshpool) and James Hardie Coy Ptd Ltd (the second defendant) (**James Hardie**). Whilst working for both, he was exposed to asbestos dust and fibres which caused his mesothelioma and subsequent death.

One of the issues in the case was the same as that in *Fairchild*, in that it could not be scientifically proved which defendant caused the death of Mr Misiani.

James Hardie contended that the Plaintiff:

has merely established that the conduct of the second defendant merely increased the risk of contracting mesothelioma as opposed to materially contributing to the injury and that it is not sufficient, for the plaintiff to have judgment against the second defendant, for the plaintiff merely to show that it was possible that the injury was caused by the second defendants default. The second defendant's submission also implied that the plaintiff could only prove on the balance of probabilities that the second defendant had 'materially contributed to the risk' of contracting mesothelioma, a test for

¹⁰ [2004] UKHL 41.

¹¹ (1997) 42 NSWLR 307, 317.

¹² Ibid, 317.

¹³ Ibid.

¹⁴ [2003] NSWCA 331, 90.

¹⁵ [2003] WASC 263.

causation accepted by the English House of Lords in *Fairchild v Glenhaven Funeral Services Limited* [2002] 3 WLR 898, but not a test that applies in Australia.¹⁶

Barker J decided not to deal directly with the assertion that *Fairchild* does not apply in Australia, but allowed the 'leap' by referring to what he held to be the present situation for the proof of causation in negligence actions in Australia.

Barker J concluded that the issue of causation had been dealt with by the High Court of Australia in a number of decisions culminating in *Naxakis v Western General Hospital*,¹⁷ where Gaudron J held that the difficulties associated in proving causation were often exaggerated. Justice Gaudron further stated:

if a wrongful act or omission results in an increased risk of injury to the plaintiff, and the risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. And in that situation, the trier of fact ... is entitled to conclude that the act or omission caused the injury in question unless the defendant establishes that the conduct had no effect at all or that the risk would have eventuated and resulted in the damage in question in any event.¹⁸

After deliberating on the case law about causation within Australia and beyond, Barker J came to the conclusion that where, in a case such as the present, the wrongful acts of the defendants increased the risk of injury to a plaintiff, and then that risk eventuates 'the Defendant's conduct has materially contributed to the injury that the Plaintiff suffers'.¹⁹

The question that Barker J decided needed to be answered was:

not whether the first defendant or the second defendant simply "materially contributed to the risk" of the deceased contracting an asbestos related disease in its workplace, but whether, having regard to the medical expert evidence and other

evidence concerning the nature of the exposure of this deceased to asbestos and each period of exposure, it may be said, having regard to the fact that there was an increase risk of such injury as a result of such exposure and that risk in fact eventuated, on all the evidence that the conduct of each Defendant had 'no effect at all' or 'that the risk would have eventuated and resulted in the damage in question in any event'.²⁰

His Honour found that in the present matter, the Defendants' conduct in exposing Mr Misiani to asbestos dust and fibre had increased the risk of an asbestos related disease and subsequently Mr Misiani had contracted mesothelioma. Thus, Barker J held that the Defendants' conduct had materially contributed to Mr Misiani's injury. His Honour stated that 'the Court is entitled to conclude that the act or omission caused the injury 'unless the Defendant establishes that the conduct had no effect at all or that the risk would have eventuated and resulted in the damage in question in any event'.²¹

In conclusion His Honour stated that in considering all of the factual issues of the deceased exposure, both Defendants had exposed the deceased to significant risks of contracting an asbestos related disease. This risk had eventuated in the form of Mr Misiani mesothelioma. Neither defendant had proved that their conduct had not had any effect or the Mr Misiani would have contracted the disease regardless. As such His Honour was satisfied 'the plaintiff has established that in each case the defendant's wrongful conduct was a cause or materially contributed to the mesothelioma contracted by the deceased'.²²

Although a decision at first instance, it is useful as the circumstances are similar to *Fairchild* and the evidentiary gap was cleared by analogy to the common law in Australia.

CONCLUSION - NO SURPRISES AND NOW STATUTORY TREATMENT

The issues faced in *Fairchild and Saint Gobain Pipelines* were repeated in *Misiani*, that of a claimant who could not prove causation against defendants who had admitted or were found to

¹⁶ [2003] WASC 263, [158].

¹⁷ (1999) 197 CLR 269.

¹⁸ *Ibid*, 278-279.

¹⁹ [2003] WASC 263, [173].

²⁰ [2003] WASC 263, [174].

²¹ *Ibid*, [173].

²² *Ibid*, [188].

have been in negligent breach of duty. It is clear that in such cases the Courts will not lightly let such Plaintiffs go without compensation.

The judgment of Hale LJ in *Saint Gobain* sums up a prevailing judicial sentiment in such cases, '[o]nce the degree of exposure, the breaches of duty and the medical causation had been established, it would be an unjust legal system which did not hold the employer responsible for what had happened.'²³

It is therefore not surprising that the expansion of *Fairchild* to include cases where the plaintiff also contributed to the risk has been dealt with by making a deduction for contributory negligence while still allowing the plaintiff to recover for his injurious exposure.

In the area of products law the policy position of manufacturers is not dissimilar to that of the past employer in asbestos cases. With the passage of tort law reform in the States, what has, to date, been an arm's length dance with the principles in *Fairchild* now has a statutory foundation. The provision to enable bridging of evidentiary gaps is expressed as applicable in exceptional cases to be determined by the Courts. It remains to be seen how and to what extent Australian courts will conclude that the circumstances of a particular case warrants proper (exceptional) invocation of such a bridging doctrine.

²³ *Transco v Griggs* [2003] EWCA Civ 564, 35, an English case dealing with causation and injury to workers.

BRIEF

National Product Liability Association

