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BRIEF

National Product Liability Association

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Contents

US Court Re-heats Fast Food Litigation Peter O'Donahoo, Partner, and Chris Peardon, Solicitor, Allens Arthur Robinson, Melbourne	1
Product Liability Reform: An Update The Product Liability Reform Table Allens Arthur Robinson	4
Health Claims for Food: Food Standards Review Update Melissa Daly, Senior Associate, Mallesons Stephen Jaques ¹	10
Unsafe Products? Million Dollar Fine! Ric Morgan, Lawyer, Allens Arthur Robinson	12
What's Happening with the Proposal to Introduce a 'General Safety Provision' for Consumer Products? Peter Holloway, Partner, and Eleanor Scacco, Special Counsel, Freehills	15

US COURT RE-HEATS FAST FOOD LITIGATION

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INTRODUCTION

In light of the spate of putative class actions commenced in the US in 2003, there has been conjecture that similar actions may be commenced in Australia. The US Court of Appeals for the Second Circuit decision¹ to allow an action against McDonald's for allegedly engaging in deceptive acts or practices in the conduct of its business to proceed to discovery provides a timely opportunity to consider whether there are any implications for Australia.

PELMAN V MCDONALD'S: INITIAL COMPLAINT

In August 2002, the plaintiffs filed a class action lawsuit against McDonald's in the Supreme Court of New York on behalf of all New York State children and their parents who had eaten at McDonald's restaurants and had developed 'obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or other detrimental and adverse health affects ...'. The complaint alleged that McDonald's was negligent and had acted in contravention of consumer protection legislation by failing to warn its customers that its products contain high levels of fat, sugar and cholesterol, which 'have been shown to cause' the adverse health affects outlined above and which are physically and psychologically addictive.

The US District Court granted McDonald's application that the case be struck out on the grounds that no jury would find in the plaintiffs' favour.² District Judge Sweet reasoned that it was not the place of the law to protect people who knew, or ought to have known, of the risks associated with eating copious amounts of fast food and who did so of their own volition. His

Honour observed that it would be difficult for an obesity suit to obtain class action status because of the myriad of factors that contribute to obesity. Nevertheless, his Honour gave the plaintiffs leave to re-plead their claims.

PELMAN V MCDONALD'S: AMENDED COMPLAINT

In February 2003, the plaintiffs filed an amended complaint. Counts one to three of the amended complaint concerned alleged violations of sections 349 and 350 of the New York General Business Law, commonly known as the New York Consumer Protection Act. Section 349 is similar to s52 of the *Trade Practices Act 1974* (Cth) and makes unlawful '[d]eceptive acts or practices in conduct of any business, trade or commerce...'. Section 350 prohibits false advertising. The plaintiffs alleged that:

- the combined effect of McDonald's various promotional representations during this period was to create the false impression that its food products were nutritionally beneficial and were part of a healthy lifestyle if consumed daily;
- McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented; and
- McDonald's deceptively represented that it would provide nutritional information to its New York consumers (citing an agreement between McDonald's and the New York State Attorney-General in 1987), when in reality such information was not readily available at a significant number of McDonald's outlets in New York visited by the plaintiffs and others.

The plaintiffs alleged that as a result of these deceptive practices, plaintiffs who ate at McDonald's three to five times a week throughout the years in question, were 'led to believe that

¹ *Pelman v McDonald's Corp.*, 396 F.3d 508, 2005 U.S. App. LEXIS 1229 (2d Cir. N.Y. 2005).

² *Pelman v McDonald's Corp.*, 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003).

[McDonald's] foods were healthy and wholesome, not as detrimental to their health as medical and scientific studies have shown, ... (and) of a beneficial nutritional value' and that they 'would not have purchased and/or consumed the defendant's aforementioned products in their entirety, or on such frequency but for the aforementioned alleged representations in campaigns.' Finally, the plaintiffs alleged that, as a result, the plaintiffs had developed obesity and other adverse health affects.

The US District Court dismissed the plaintiffs' amended complaint in September 2003 and denied the plaintiffs leave to re-plead.³ During the hearing of the application, the plaintiff's lawyer undertook not to pursue one of the more sensational claims in the Amended Complaint that McDonald's products have been processed to such an extent that they constitute a hidden health hazard of which consumers are not aware. The remaining claims were struck out by the Judge because the plaintiffs had failed to properly plead any deceptive acts of substance on the part of McDonald's let alone the causal link between their consumption of McDonald's food and their obesity. On this issue, Sweet DJ said:

Information about the frequency with which the plaintiffs ate at McDonald's is helpful, but only begins to address the issue of causation. Other pertinent, but unanswered questions include: What else did the plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are alleged to have been caused by McDonald's products? Without this additional information to determine if its foods are the cause of plaintiffs' obesity, or if instead McDonald's foods are only a contributing factor.

APPEAL TO THE US COURT OF APPEALS FOR THE SECOND CIRCUIT

The plaintiffs appealed the decision to dismiss counts 1-3 to the Court of Appeals for the Second Circuit.

On 25 January 2005, the Court of Appeals found that the District Court erred in dismissing the claim under s349 of the New York Consumer Protection Act and ordered that this claim be remanded to that court for further proceedings.

³ *Pelman v McDonald's Corp.*, No. 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003).

The judgment of the Court of Appeals turns, in part, on the construction of s349 of the New York Consumer Protection Act and on the pleading requirements under the relevant court rules.

Briefly, the Court of Appeals agreed that the amended complaint did not contain any express allegation that any plaintiff specifically relied to their detriment on any particular representation made in any particular McDonald's advertisement or promotional material. The court observed that s349 of the New York Consumer Protection Act, which makes unlawful 'deceptive acts or practices in the conduct of any business, trade or commerce', does not require proof of actual reliance. The Court of Appeals noted that the District Court recognised that s349 does not require proof of reliance, but dismissed the claims under s349 because the plaintiffs had failed to draw an adequate causal connection between the consumption of McDonald's food and their alleged injuries. At first instance, District Judge Sweet had found it fatal that the complaint did not answer such questions as:

What else did the Plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are alleged to have been caused by McDonald's products?

His Honour then observed that:

Without this additional information, McDonald's does not have sufficient information to determine if its foods are the cause of the plaintiffs' obesity, or if instead McDonald's foods are only a contributing factor.

The Court of Appeals held that, under the court rules, the plaintiffs were not required to provide such detailed evidence in the pleadings and that this sort of information could appropriately be the subject of discovery. Accordingly, the Court of Appeals upheld the appeal of the plaintiffs in relation to the sole count concerning s349 and remanded the proceeding to the District Court where it could move on to discovery.

US LEGISLATIVE RESPONSE

On 2 February 2005, a Bill entitled the Personal Responsibility in Food Consumption Act was introduced into the US House of Representatives. The Bill proposes to limit the circumstances in which a person may bring a civil liability action

against a food manufacturer or seller arising out of a person's consumption of food resulting in obesity or other adverse health consequences unless:

- the manufacturer or seller knowingly or wilfully violated a statute related to the manufacture or sale of the food and the violation was a proximate cause of the person's obesity or other health condition; or
- the action concerned breach of an express contract or warranty in connection with the purchase of the food.

The Bill was co-sponsored by 52 members of the House of Representatives and was referred to the House Committee on the Judiciary on 2 February 2005 and to the Subcommittee on Commercial and Administrative Law on 3 February 2005. This level of support indicates that the Bill has better prospects of success than previous attempts to curb liability of food manufacturers and sellers.

IMPLICATIONS FOR AUSTRALIA

In an Australian context, the revival of this class action may be of some concern for food manufacturers. It appears that a litigation vehicle has been identified through which to explore potential remedies for alleged deceptive conduct that is asserted to be causally linked to the so-called injury of 'obesity'.

However, if and to the extent that claims of this type are pursued in Australia, there remain a number of hurdles that must be successfully overcome. For example, where compensatory relief is sought, a claimant will have to prove, on a balance of probabilities, that he or she relied upon the particular representation, resulting in the consumption of the particular food that in turn was 'the' cause or 'a' cause in their obesity.

Further, arguably, the prospects of success for similar actions in Australia are reduced by the recent emphasis by Australian courts on notions of free will, individual choice and responsibility as relevant to determining liability in negligence type claims,⁴ recent civil liability reforms in relation to 'obvious risks' and the application of the doctrine of voluntary assumption of risk.⁵

⁴ For example, see the High Court decision in *Cole v South Tweed Heads Rugby League Football Club* (2004) 207 ALR 52.

⁵ See the discussion in Bagaric, M and Erbacher, S, 'Fat and the law: Who should take the blame?' (2005) 12 *JLM* 323.

PRODUCT LIABILITY REFORM: AN UPDATE

THE PRODUCT LIABILITY REFORM TABLE

We have been tracking the progress of tort law reform in NSW, Victoria and Queensland against the Ipp recommendations since 2002 (see *Brief* December 2002 and September 2003). The current state of play is set out in the table below, prepared by Allens Arthur Robinson.

	Ipp Recommendations	NSW	Victoria	Queensland
Professional Negligence	Bolam principle should be reinstated, with the proviso that the court consider the opinion was rational.	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice. <i>Civil Liability Amendment (Personal Responsibility) Act 2002 (Personal Responsibility Act)</i>	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice, unless the court determines that the opinion was unreasonable. <i>Wrongs and Other Acts (Law of Negligence) Act 2003 (Law of Negligence)</i>	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice. <i>Civil Liability Act 2003</i> Professional liability for negligence not causing death or personal injury may be limited through a scheme established by a professional association. <i>Professional Standards Act 2004 (Professional Standards)</i>
Non Profit Organisations (NPO's)/ Volunteers/ Recreational Activities	NPO's should not be liable for personal injury or death of a voluntary participant in recreational activity as a result of an obvious risk.	Volunteers will not be liable for their good faith acts. <i>Personal Responsibility Act</i> A person who donates food in good faith for a charitable purpose with the intention that the consumer not have to pay for it will not incur civil liability if it is safe to consume when it leaves the donor's possession and the donor gives all necessary handling instructions, including the time limit for eating, to the donee. <i>Civil Liability Amendment (Food Donations) Act 2005¹</i>	Volunteers not liable for good faith actions for community organisations, unless acting outside scope or contrary to instructions. A person who donates food in good faith for a charitable purpose with the intention that the consumer not have to pay for it will not incur civil liability if it is safe to consume when it leaves the donor's possession and the donor gives all necessary handling instructions, including the time limit for eating, to the donee.	Volunteers not liable for good faith actions for community organisations, unless acting outside scope or contrary to instructions. Excludes volunteer's criminal conduct and liabilities that are required by law to be insured against. No liability for personal injury suffered from obvious risk of dangerous recreational activity. <i>Civil Liability Act 2003</i>

¹ Assented to 18 May 2005. Commencement yet to be proclaimed

		No duty owed to participants in recreational activities if warned, nor in respect of obvious risks. Warning can be general. Participants can waive rights. <i>Personal Responsibility Act</i>	Excludes volunteer's criminal conduct or conscious/flagrant indifference to the rights or safety of the plaintiff. Liability transferred to community organisation. Sellers of recreational services may limit the liability for personal injury or death claims, using prescribed form. Participants can waive rights. <i>Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Public Liability Act)</i>	
Limitation of Actions	Jurisdictional uniformity. 3 years, with 12 year long stop (with discretion, and minors). From 'Date of Discoverability' When plaintiff knew/ ought to have known injury had occurred and attributable to defendant and significant enough to warrant proceedings.	Not addressed.	3 years for adults to make personal injury claims (from the date on which the damage is discoverable), with 12 year long stop (with discretion, and minors). <i>(Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Insurance Reform Act))</i>	Not addressed.
Foreseeability/ standard of care/ remoteness of damage	<i>Wyong SC v Shirt</i> gives too much emphasis to 'Far fetched and fanciful' as the test for existence of duty – should be whether a reasonable person would take precautions. Should limit liability where risk of harm is 'not insignificant'. Consider: • Probability of harm. • Severity of harm • Burden of preventing harm.	A possibility does not have to be far fetched or fanciful before it is not reasonably foreseeable. No civil liability to take reasonable care, or warn, of an inherent or obvious risk (a matter of common knowledge). <i>Personal Responsibility Act</i>	No liability unless risk was foreseeable, not insignificant, and, in the circumstances, a reasonable person would have taken precautions. In assessing reasonableness, consider: • Probability of harm • Likely seriousness of harm • Burden of taking precautions • Social utility of activity	No civil liability to take reasonable care, or warn, of an obvious risk (a matter of common knowledge), or take reasonable care of an inherent risk (which can not be avoided by reasonable care and skill.) <i>Civil Liability Act 2003</i>

	<ul style="list-style-type: none"> Social utility of activity. Replace 'But For' test with 'material contribution to harm/ risk of harm'.		Insignificant risks include but are not limited to risks that are 'far-fetched or fanciful'. Duty to warn of a risk discharged if reasonable care is taken in warning. Test for factual causation: was the negligence a necessary condition of the harm? <i>Law of Negligence</i>	
Contributory negligence and Voluntary Assumption of Risk	Contributory negligence on same principles as defendant's negligence. Contributory negligence available in death claims. Plaintiff should be presumed to be aware of obvious risk. Not necessarily the actual risk.	Contributory negligence extended to Compensation to Relatives Claims. <i>Civil Liability Act 2002</i>	Contributory negligence on same principles as defendant's negligence. Contributory negligence can defeat a claim for damages. Plaintiff presumed to be aware of obvious risk unless proven not to have been aware. <i>Law of Negligence</i> Provides for self-assumption of risk by participants in inherently risky activities. <i>Insurance Reform Act</i>	Contributory negligence on same principles as defendant's negligence. <i>Civil Liability Act 2003</i>
Mental Harm Claims	An expert panel for assessing mental harm claims. Limit to where defendant should foresee mental harm, and limit the circumstances.	Nervous shock recovery limited to victims, those present or a family member who has a demonstrable psychological injury beyond grief. <i>Personal Responsibility Act</i>	Recovery limited unless the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychological illness if reasonable care were not taken, or the defendant knew or ought to have known that the person was of less than normal fortitude.	Not addressed.

			Nervous shock recovery limited to victims, those present, or those in a close relationship with the victim. No award of damages for economic loss for mental harm unless the harm is a recognised psychiatric illness. <i>Law of Negligence</i>	
Proportionate Liability	No change.	For economic loss claims, or property damage in non personal injury claims – person only liable to the extent of their proportionate responsibility, unless the person intended to or fraudulently caused the harm or loss. <i>Personal Responsibility Act; Civil Liability Amendment Act 2003</i>	For economic loss claims, or property damage in non personal injury claims – person only liable to the extent of their proportionate responsibility. <i>Insurance Reform Act</i>	For economic loss claims, or property damage in non personal injury claims (not less than \$500,000) – person only liable to the extent of their proportionate responsibility, unless they are fraudulent or intended to cause the harm or loss, in which case the person is severally liable for all damages. <i>Professional Standards</i>
Intoxication, Good Samaritans, Self defence and other limitations on liability.	Not addressed.	Ability to recover damages limited where: <ul style="list-style-type: none"> Plaintiff intoxicated. Plaintiff committing criminal offence Defendant acting in self defence. Defendant acting in good faith as a Good Samaritan, if exercising reasonable care. <i>Personal Responsibility Act</i>	Must consider plaintiff's intoxication or illegal activity when evaluating existence and breach of duty. Good Samaritans not liable for good faith acts. <i>Insurance Reform Act</i>	Good Samaritans not liable for good faith acts. Ability to recover damages limited where: <ul style="list-style-type: none"> Plaintiff intoxicated Plaintiff committing criminal offence. <i>Personal Injuries Proceedings Act 2002 (PIP Act)</i>
Apologies/Waiver of Fees	Not addressed.	Apologies do not constitute admissions. <i>Personal Responsibility Act</i>	Apologies and waiver of fees do not (of themselves) constitute admissions. <i>Insurance Reform Act</i>	Apologies/ expressions of regret do not constitute admissions. <i>PIP Act</i>

Damages	Overcome the <i>Planet Fisheries</i> case, ie courts may refer to other cases. Threshold for general damages – 15% of a most extreme case Cap general damages at \$250,000. Cap loss of earnings at calculations based on twice the average full time adult ordinary time earnings (FTOTE). Discount rate of 3% on future loss.	In determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts. <i>Personal Responsibility Act</i> Threshold for general damages – 15% of a most extreme case. <i>Civil Liability Act 2002</i> Cap general damages at \$350,000 (for most extreme case). Table of specified damages. <i>Civil Liability Act 2002</i> Cap economic loss at calculation based on 3 times average weekly earnings: Court must state assumptions on which calculation is founded. <i>Civil Liability Act 2002</i> Discount rate to be prescribed. <i>Civil Liability Act 2002</i>	Not addressed. Threshold for the recovery of damages for non-economic loss: more than 5% for non-psychiatric injury and more than 10% for psychiatric injury. <i>Insurance Reform Act</i> Cap general damages at \$371,380 indexed. <i>Public Liability Act</i> Cap economic loss at calculation based on 3 times average weekly earnings. <i>Public Liability Act</i> Discount rate 5% (or varied by regulation). <i>Public Liability Act</i> No discount of damages on account of remarriage or re-partnering, or prospect of remarriage or re-partnering, of dependants of a deceased person. <i>Wrongs (Remarriage Discount) Act 2004</i>	Not addressed. Not addressed. Considering caps and thresholds on general damages as part of a later set of reforms. Cap economic loss at calculation based on 3 times average weekly earnings. <i>Civil Liability Act 2003</i> Discount rate 5%. <i>Civil Liability Act 2003</i>
Exemplary/Punitive/Aggravated Damages	Abolish for negligence claims.	Abolished for negligence claims. <i>Civil Liability Act 2002</i>	Not addressed.	Abolished for negligence claims. <i>Civil Liability Act 2003</i>

Gratuitous Services Damages	Gratuitous Services Damages should only be allowed when provided for more than 6 hours per week for more than 6 months – at an hourly rate linked to FTOTE.	Limited to where there is a reasonable need and services would not otherwise be provided. No allowance if less than 6 hours a week for less than 6 months. <i>Personal Responsibility Act</i>	Gratuitous Services Damages should only be allowed when provided for more than 6 hours per week for more than 6 months, at an hourly rate linked to FTOTE. <i>Insurance Reform Act; Law of Negligence</i>	Limited to where the services are necessary and arise solely from the injury and the incident in question. No allowance if less than 6 hours per week and for less than 6 months. <i>PIP Act</i>
Legal costs	Legal costs should be limited – no costs on claims of less than \$30,000, limited to \$2,500 on claims between \$30,000 and \$50,000.	Legal costs capped on claims under \$100,000 to whatever is the greater of \$10,000 or 20% of the amount recovered (plaintiffs and defendants, barristers, and solicitors' fees) unless a costs agreement in place. Potential to limit unnecessary costs and unmeritorious claims. Solicitors must hold a reasonable belief in the reasonable prospects of success of the claim or defence. <i>Legal Profession Act 1987</i> ²	Reforms to costs were proposed in the <i>Personal Injuries Procedures Bill</i> , which lapsed in November 2002.	Legal costs capped for small claims (under \$50 000). <i>PIP Act</i>

² The *Legal Profession Act 1987* is to be repealed on the commencement of the *Legal Profession Act 2004* (see Schedule 1). Commencement of the latter is yet to be proclaimed.

HEALTH CLAIMS FOR FOOD: FOOD STANDARDS REVIEW UPDATE

MELISSA DALY, SENIOR ASSOCIATE, MALLESONS STEPHEN JAQUES¹

In the December 2004 edition of *Brief* it was reported that Food Standards Australia and New Zealand (**FSANZ**) had released an Initial Assessment Report (**IAR**) foreshadowing major changes to the regulation of food labelling and advertising in Australia and New Zealand². In particular, the IAR contemplates removing the blanket prohibition on the making of health claims for foods³.

The new regime is promoted by FSANZ as a 'significant and positive change for industry, with a wide range of claims permitted', which 'will enable further innovation in the food industry'. Meanwhile, consumer protection mechanisms will include:

- the need for health claims to meet substantiation criteria which prescribes the evidence required for a proposed claim;
- the need for foods allowed to carry claims to be defined;
- the requirements that claims will have to be made in the context of a healthy balanced diet; and
- the appointment of a 'watchdog' under the auspices of the Australia and New Zealand Food Regulation Ministerial Council to monitor compliance with the new regime.

The IAR foreshadowed the introduction of two allowable classes of health claims:

- high level claims, which are claims which refer to a biomarker or a serious disease (for example, a claim that consumption of a certain food may reduce the risk of heart disease); and
- general claims, such as claims relating to the biological role of food in the growth, development and maintenance of particular bodily functions.

The Report also proposed three options for future regulation of health claims.

Option 1: Retention of the status quo, with its prohibition on health claims, and the regulations of nutrient claims in Standard 1.2.8 and the Code of Practice on Nutrient Claims in Food Labels and Advertisement.

Option 2: Development of a new Standard and guideline(s) for Nutrition, Health and Related Claims, with criteria and conditions for general level claims in a guideline, and high level claims in a Standard.

This option would allow food manufacturers to make nutrition and health claims on food products provided they meet certain conditions and are fully substantiated.

Option 3: As for Option 2, but with the criteria and conditions for general level claims included in the formal Standard⁴ rather than non-legally binding Guidelines.

The IAR also canvassed other issues associated with the development and implementation of the new regime, such as the guidelines and framework for substantiation of health claims, the mechanisms by which approval of health claims can be provided by FSANZ, and an examination of the potential impact of health claims on consumer information, understanding, and purchasing patterns.

Following publication of the IAR, FSANZ conducted a series of consultative meetings with stakeholders, and invited written submissions from interested parties and the public. 146 written submissions were received from industry bodies, individual food producers, consumer groups, health authorities and regulatory bodies.

Submissions from industry overwhelmingly supported a change in the current regulatory regime to allow the making of health claims for food products. Most industry respondents welcomed the foreshadowed removal of the prohibition on making health claims for food products, and supported the use of non-binding guidelines for general claims to promote innovation and flexibility. Specific issues raised by industry respondents regarding the proposed new regime include:

- The proposed definition of 'serious disease'⁵ is considered to be too broad to allow for a workable distinction between high level claims and general claims. Respondents have suggested that the definition be limited to situations of significant risk, and that FSANZ should specify what diseases and disorders should be considered 'serious'.
- Concerns about the substantiation process: in particular the cost, time and potentially cumbersome nature of the proposed claims assessment process, and the lack of protection of intellectual property in the claims assessment process.
- The desirability of allowing health claims which have been approved by regulatory authorities in other jurisdictions to be automatically included in the Standard.
- One respondent suggested that claims which are made in a non-retail context, such as presentations to health professionals, should be excluded from the framework.

Consumer groups generally opposed any change to the status quo, submitting that there is little evidence to suggest that introducing health claims improves public health, and that public health and consumer interests should take priority over the interests of the food industry. However, if health claims are to be permitted, groups such as the Australian Consumers Association prefer the more prescriptive model offered by Option 3. Indeed, this model was supported by a substantial minority of industry respondents, on the grounds of providing greater certainty and consumer confidence than the self-regulatory model in Option 2.

Health authorities and nutritional experts expressed caution regarding the potential benefit to consumers from allowing food producers to make health claims. In particular, concern was expressed that allowing health claims could encourage greater consumption of processed food at the expense of fresh food, and that the cost of the substantiation regime could divert resources from other public health campaigns. Health authorities consistently supported Option 3 over Option 2, and were also concerned to ensure that health claims are promoted in the context of a healthy balanced diet, and that health claims should not be allowed to be made for foods of no nutritional value.

FSANZ is currently analysing the submissions and outcomes of its consultative process, and conducting further work in relation to streamlining the process for pre-market assessment of health claims and verification of biomarker maintenance claims. Upon completion of these projects FSANZ will develop the draft standard for Nutrition, Health and Related Claims, which is due for publication in October or November 2005. A further round of consultation will then be conducted, with stakeholders invited to make further submissions prior to the publication of a final report sometime in 2006. It is likely that a transitional period of at least 2 years will apply to any new regime.

For more details, and other FSANZ publications relating to the Food Standards review, go to <http://www.foodstandards.gov.au/whatsinfood/healthnutritionandrelatedclaims>.

¹ The author gratefully acknowledges the assistance of Bridget Collier and Peter Selway of Mallesons Stephen Jaques in preparing this article.

² Proposal P293 - Nutrition, Health and Related Claims. This report can be accessed electronically at www.foodstandards.gov.au.

³ With the exception of the role of folate in preventing neural tube defects in newborns if consumed by expecting mothers.

⁴ The various state and territory Food Acts give legal effect to the Food Standards published by FSANZ by providing penalties for breaches of Food Standards.

⁵ 'Serious disease' is defined as a disorder, condition or defect generally accepted as not being appropriate to be diagnosed or treated without consulting a suitably qualified health care professional, or one that is beyond the ability of the average person to evaluate accurately, or treat safely, without regular supervision by a suitably qualified health care professional.

UNSAFE PRODUCTS? MILLION DOLLAR FINE!

RIC MORGAN, LAWYER, ALLENS ARTHUR ROBINSON

INTRODUCTION

The new Victorian *Occupational Health and Safety Act 2004* (Vic) changes the liability of providers of goods and services to workplaces in Victoria. The Act imposes new duties on these upstream providers. A breach of these duties can result in fines of up to \$1 million for corporate entities and \$200,000 for individuals.

As foreshadowed in the report by Chris Maxwell QC¹ and discussed in my earlier article in *Brief*², liabilities under the new Act are different from traditional product liability. First a breach of the duty imposed is a criminal offence. Secondly, liability arises from a failure to carry out the duty and does not require any injury or damage to be caused. In line with the criminal nature of the breach, individuals can be imprisoned for up to five years where they are reckless in their failure to meet the duty.³

The new Act also provides more clearly defined duties.

THE NEW DUTIES

Designers of plant

The Act imposes duties on the designers of plant where the designer knows or ought reasonably to know that the plant will be used in a workplace.⁴ The designer must ensure that the plant is designed to be safe and without risk to health when used for the purpose for which it was designed. The designer must also undertake testing and examination of the plant to evaluate whether the plant they have designed will in fact be safe and without risks to health. Finally, the designer must provide information to those who are given the design. This information must cover:

- the purposes for which the plant was designed;
- the results of any testing or examination the designer has undertaken; and
- any conditions necessary to ensure that the plant is safe when used for the purpose for which it was designed.

A designer must provide the information to any person who uses the plant whenever they are requested to do so.

Designers of buildings or structures

Designers of buildings or structures have, for the first time, a duty under the new Act.⁵ Designers who know, or should know, that the building or structure will be used as a workplace must ensure that it is designed to be safe and without risks to the health of the people who use it. Unlike designers of plant, the designers of a building or a structure are not required to undertake any testing or provide any information in relation to the design.

This duty does not come into effect until 1 July 2006. The maximum penalties for a breach of this duty are significantly less than those imposed for the other upstream providers. The maximum penalties are \$250,000 for a corporation and \$50,000 for an individual.

Manufacturers of plant or substances

Manufacturers of plant or substances that are to be used in a workplace are required to ensure that the plant or substance they manufacture is safe and without risks to health.⁶ This duty is framed in a very similar manner to the duty imposed on designers of plant.

Consequently, manufacturers of plant or substance need to ensure that testing and examination of the plant or substance is undertaken to determine the risks to health and safety associated with the plant or substance.

Manufacturers are also required to provide information as outlined for designers of plant. This duty to provide information is a continuing one with manufacturers of products required to provide the information whenever requested.

Suppliers of plant or substances

Suppliers of plant or substances owe the same duty as manufacturers of plant or substances.⁷

While this duty is separated from that owed by manufacturers, it is likely to be sufficient that one of the two duty holders undertake the required testing and examination. It would be appropriate for suppliers to ensure that their contractual arrangements with manufacturers set out responsibilities for the testing and examination of plant or substances. Both manufacturer and supplier will be required to provide information to users of the plant or substance whenever requested. Consequently, both manufacturer and supplier need access to the results of any testing and examination conducted.

Installing and commissioning plant

Those involved in the installation, erection, or commissioning of plant owe a duty to ensure that nothing about the way in which they carry out these activities makes the use of the plant unsafe or a risk to health.⁸ Those installing plant are not required to ensure that the plant itself is safe and without risks to health, only that the actions that they are in control of do not make the plant unsafe.

CORPORATE RESPONSIBILITY AND PERSONAL LIABILITY

The new Act also makes changes to both corporate responsibility for the actions of employees, agents and officers of a corporation and to the liability of those individuals in relation to corporate conduct.

A corporate entity is deemed to be responsible for all actions of its employees, officers and agents that appear to others to be authorised by the corporation.⁹ It is not possible to come to agreement with an individual to limit the responsibility of the corporation for the actions of that individual.

The new Act also makes it possible for an individual to be held responsible for the actions of a corporation.¹⁰ This can occur where there has been a breach by a corporation that can be attributed to the individual failing to take reasonable care. In making this assessment, courts are required to consider what the individual knew, the individual's ability to control or influence the behaviour of the corporation and the responsibility of any other person. An individual can be prosecuted and convicted regardless of any action taken against the corporation.

PRACTICAL ACTIONS TO MEET THE DUTY

While these new duties are onerous, it is possible to implement practical strategies to assist a duty holder to meet their duty. To understand the limits on what is required, it is important to understand how the duty is limited. First, a duty holder is only required to do what is reasonably practicable. The Act makes clear that in determining what is reasonably practicable. The following factors need to be considered:¹¹

- the likelihood of the hazard or risk to health and safety occurring;
- the severity of the harm that will occur should the risk eventuate;
- the availability and suitability of any risk control measures;
- the costs of eliminating or reducing the hazard or risk; and
- what is known about the risks to health and safety and the ways of eliminating or reducing that risk or hazard. In assessing what was known it is important to note that it is not just the knowledge of the duty holder that is important, rather it is what is known generally by people in similar circumstances to the duty holder.

Also relevant is the recognition in the Act that it is not always reasonably practicable to eliminate a risk. Where this is the case, a duty holder can satisfy their duty by reducing the risk as far as is reasonably practicable.¹²

¹ Maxwell, C, *Occupational Health and Safety Act Review*, March 2004.

² Morgan, R, *New statutory crimes proposed in Victoria for suppliers, designers and manufacturers*, *Brief*, June 2004, page 14.

³ *Occupational Health and Safety Act 2004* (Vic), s 32.

⁴ *Occupational Health and Safety Act 2004* (Vic), s 27.

⁵ *Occupational Health and Safety Act 2004* (Vic), s 28.

⁶ *Occupational Health and Safety Act 2004* (Vic), s 29.

⁷ *Occupational Health and Safety Act 2004* (Vic), s 30.

⁸ *Occupational Health and Safety Act 2004* (Vic), s 31.

⁹ *Occupational Health and Safety Act 2004* (Vic), s 143.

¹⁰ *Occupational Health and Safety Act 2004* (Vic), s 144.

¹¹ *Occupational Health and Safety Act 2004* (Vic), s 20(2).

¹² *Occupational Health and Safety Act 2004* (Vic), s 20(1).

The Act appears to allow a duty holder to meet their duty, in part, by providing information about the conditions necessary to ensure that the product is safe and without risks to health. However, the provision of information will only be a satisfactory way for a duty holder to meet the requirements of the *OHS Act* where they have done what is reasonably practicable to eliminate or reduce the risk by designing out or providing appropriate guarding or control systems for the use of a particular product.

In order to ensure that a risk to health or safety is designed out of a product it will be important for designers, manufacturers, and where relevant, suppliers, to evaluate the risks to health and safety in a consultation with those who will use the product. This will be important because, without understanding how a particular product will be used, it will be difficult to evaluate whether the product is safe and without risks to health.

Here again, the Act provides some assistance by limiting the duty to the use for a purpose for which it was designed. This enables the upstream provider to limit the responsibility to ensure that the plant or substance is safe for particular uses.

WHAT'S HAPPENING WITH THE PROPOSAL TO INTRODUCE A 'GENERAL SAFETY PROVISION' FOR CONSUMER PRODUCTS?

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INTRODUCTION

With the announcement that the Productivity Commission is to conduct research into Australia's consumer product safety system, it is timely to provide an update on the proposal to introduce a 'general safety provision'.

In previous editions of *Brief*, we have provided an overview of the review of the Australian Consumer Product Safety System being conducted by the Ministerial Council on Consumer Affairs (**MCCA**).

The MCCA is considering a uniform approach to achieving appropriate levels of safety for consumer products in Australia and New Zealand, including the potential introduction of uniform national legislation. The review is also examining ways of dealing with potential safety hazards more swiftly – the emphasis being on the prevention of injury, rather than reacting once harm has been suffered.

Thirty submissions were made to the Ministerial Council concerning the product safety review. These included submissions from industry bodies such as the Australian Chamber of Commerce and Industry and the Australian Retailers Association, regulators including the Australian Competition and Consumer Commission, consumer groups such as the Australian Consumers' Association, and other interested bodies including Standards Australia. NPLA also made a submission.

Following receipt of those submissions, a consultative workshop was conducted in Canberra by Treasury. This workshop focussed on two aspects of the review – the potential impact of a general safety provision, and the desirability of achieving harmonisation across different

jurisdictions in Australia concerning the regulation of consumer products. The workshop was attended by regulators, industry groups and other interested groups. The feedback obtained from the workshop, generally, was that there is universal support for harmonisation, but divergent views concerning the utility of a general safety provision.

The MCCA met again in April 2005 and reaffirmed its commitment to improve the product safety system. MCCA has now:

- asked the Standing Committee of Officials of Consumer Affairs (**SCOCA**) (which consists of all chief executive officers of consumer protection agencies) to develop more detailed options for reform, and
- requested the Productivity Commission to undertake a research study concerning the potential for gains to be derived from the various reform options.

WHAT ISSUES HAS SCOCA BEEN ASKED TO CONSIDER?

SCOCA has specifically been asked to develop more detailed options for reform of the consumer product safety system in the areas of:

- harmonisation of regulation and enforcement;
- establishing a more proactive system-enabling the consumer product safety system to better detect and assess safety hazards faced by consumers prior to those hazards resulting in harm to consumers; and
- improving product and safety research and information.

WHAT IS THE PRODUCTIVITY COMMISSION'S BRIEF?

The Productivity Commission has also been requested to examine the financial and other impacts of the various reform options. The proposed options for reform are those outlined in the MCCA discussion paper, namely:

- a general legal obligation for businesses to only market safe consumer products;
- a revised definition of 'unsafe' goods;
- revisions to the regulatory coverage of services and second hand goods;
- the provision of improved product safety information to businesses and consumers;
- new requirements for businesses to monitor and report on the safety of their products;
- the establishment of product hazard early warning information systems;
- the linking of product information systems;
- increase government and industry funding of industry product safety research;
- a requirement for business to recall unsafe products;
- a government power to order product recalls;
- measures to harmonise safety legislation, administration and enforcement; and
- measures to enhance the making of product safety regulation decisions by Australian Government.

The Productivity Commission is currently considering submissions on these issues and other matters that are relevant to consumer product safety provisions. The deadline for submissions to the Productivity Commission was 20 May 2005.

A draft Productivity Commission report is due in July 2005, with round table discussions on the draft report to be conducted in September 2005. The final report is scheduled to be submitted in January 2006.

WHAT HAPPENS AFTER THAT?

In the meantime, further discussions will be held by MCCA at their meeting in August 2005 when they consider updates from SCOCA and the Productivity Commission.

SCOCA is due to finalise its recommendations for reform and to submit them to MCCA by March 2006, with decisions concerning reforms to be made in April 2006.

HOW CAN I GET A COPY OF THE REPORT?

If you are interested in receiving a copy of the draft report from the Productivity Commission, please contact the Productivity Commission at productsafety@pc.gov.au.

BRIEF

National Product Liability Association

