



The quarterly publication of the
National Product Liability Association
First Quarter: 2006

BRIEF

National Product Liability Association

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

Contributions are welcome from all members. Please submit articles to:

Annette Hughes, C/- Allens Arthur Robinson, Melbourne
Belinda Thompson, C/- Allens Arthur Robinson, Melbourne

E-mail address: Annette Hughes
Annette.Hughes@aar.com.au

Belinda Thompson
Belinda.Thompson@aar.com.au

NPLA Executive 2005

President:

David Poulton
Minter Ellison

Vice President:

Peter Holloway
Freehills

Immediate Past President:

Andrew Morrison
Clayton Utz

Treasurer:

Melissa Daly
Mallesons Stephen Jaques

Secretary:

Derek Begg
Middletons

Committee Members:

Maryjane Crabtree
Allens Arthur Robinson
Annette Hughes (Editor, *Brief*)
Allens Arthur Robinson
George Karalis
ESSO Australia Resources Pty Ltd
Pam Madafiglio
Minter Ellison
Peter O'Donahoo
Allens Arthur Robinson
Belinda Thompson (Editor, *Brief*)
Allens Arthur Robinson
Jane Wilhelm
Minter Ellison

New South Wales Co-Ordinator

Pam Madafiglio
Minter Ellison

South Australian Co-Ordinator

John Langton
Bridgestone Australia

Western Australian Co-Ordinator

Gary Berson
Clayton Utz

Queensland Co-ordinator

Michael Klug
Clayton Utz

For any information concerning NPLA or its Executive, please log on to www.npla.com.au or contact the Executive Officer as follows:

Athena Tashevskia
Executive Officer — NPLA
PO Box 7622
Melbourne 8004
Tel: (03) 9867 0111
Fax: (03) 9867 0199
E-Mail: atashevskia@aigvic.aigroup.asn.au

Contents

UK DVT action skids off runway – airline liability explored in House of Lords' decision	1
Chris Peadar, Senior Associate, Allens Arthur Robinson	
The Productivity Commission concludes that Australia does not need a general safety provision	4
Peter Holloway, Partner, Freehills	
FSANZ seeks to strengthen and extend country of origin labelling requirements	7
Robert Kerr, Law Graduate, Michelle Bennett, Law Clerk and Peter O'Donahoo, Partner, Allens Arthur Robinson	
Dust diseases cases – South Australia	10
Susie Downie, Lawyer, Allens Arthur Robinson	
Amendments to the TPA to prevent claims for personal injury	11
Belinda Thompson, Partner and Alice Cope, Law Clerk, Allens Arthur Robinson	

UK DVT ACTION SKIDS OFF RUNWAY – AIRLINE LIABILITY EXPLORED IN HOUSE OF LORDS' DECISION

CHRIS PEADON, SENIOR ASSOCIATE, ALLENS ARTHUR ROBINSON

INTRODUCTION

In the past few years, there have been numerous actions against airlines in various jurisdictions by passengers who claim to have developed deep vein thrombosis (**DVT**) as a result of air travel. Liability of airlines for death or bodily injury to passengers in countries that are signatories to, and have incorporated the provisions of, the Warsaw Convention (the **Convention**) into their domestic law is limited under Article 17 of the Convention, which provides that:

*The carrier is liable for damage sustained in the event of the death or wounding of a passenger or other bodily injuries suffered by a passenger, if **the accident which caused the damage so sustained** took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [emphasis added]*

Courts in various signatory countries, including Australia and the UK, have endorsed the conclusion of Justice O'Connor of the US Supreme Court in *Air France v Saks*¹ that:

*... liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an **unexpected or unusual event or happening external to the passenger**. This definition should be flexibly applied after an assessment of all the circumstances surrounding a passenger's injuries. [emphasis added]*

Consistent with the approach taken by Australia's High Court, the UK House of Lords has recently rejected an appeal against the dismissal of an action under Article 17 of the Convention by airline passengers who developed DVT.

POSITION IN AUSTRALIA

The Australian High Court unanimously held in *Povey v Qantas*² that, in the absence of a practice or express obligation to warn passengers in respect of DVT at the time of the alleged incident, Mr Povey was not entitled to recover damages under Article 17 on the basis that the airline's failure to warn him was not an 'accident' (ie an unexpected or unusual event external to the passenger).³ Given that by Mr Povey's own admission nothing unusual or unexpected happened on board the aircraft or in the course of embarking or disembarking, the High Court held by the majority of 6-1 that no cause of action was established.⁴

DECISION OF THE HOUSE OF LORDS

In *Re Deep Vein Thrombosis and Air Travel Group Litigation*,⁵ the UK Court of Appeal ruled that a failure to warn passengers of the risk of developing DVT could not be an 'accident' and therefore passengers were not entitled to recover damages under Article 17. The airline subsequently funded an appeal by the passengers to the UK House of Lords (the court of last resort in the UK) in respect of this matter.

1. 470 US 392 (1985).

2. (2005) 216 ALR 427.

3. (2005) 216 ALR 427 at 437 per Chief Justice Gleeson and Justice Gummow, Hayne and Heydon; at 446 per Justice McHugh, at 472 per Justice Kirby; at 472-473 per Justice Callinan.

4. Chief Justice Gleeson and Justices Gummow, Hayne, Heydon, Kirby and Callinan; Justice McHugh dissenting.

5. [2003] 1 All ER 935.

The House of Lords was asked to consider:⁶

Whether the onset of [DVT] sustained during the course of, or arising out of, international carriage by air, whether as result of an act and/or omission of the carrier or otherwise, is capable, in principle, of being 'an accident' causing bodily injury within the meaning of article 17 of the Warsaw Convention.

This preliminary question was considered in the context of an assumed set of facts (some of which would be contested in any trial), including:

- the passenger cabin, seating space and type of seat were all in accordance with the airline's usual standards;
- the flight was operated in accordance with the airline's usual practices and procedures;
- nothing happened in the course of the flight that adversely affected the performance or flight characteristics of the aircraft;
- throughout the flight, the aircraft seating and systems affecting the passenger cabin environment were in their normal working order;
- the aircraft complied with, and the flight was carried out in accordance with, all applicable aviation regulations;
- the airline knew, or ought to have known prior to the flight, that passengers of aircraft are exposed to an increased risk of developing DVT;
- the airline did not warn the passengers of the risks of developing DVT or advise them how to minimise that risk any time prior to, or during, the flight; and
- the passengers developed DVT as a result of the flight.

The House of Lords recognised that claims under Article 17 based on a failure to warn passengers of DVT had been rejected in Australia, Canada, Germany and the United States, and acknowledged the importance of adopting an interpretation of the Convention that was consistent with the interpretation adopted by other signatory countries. In his leading judgment, Lord Scott of Foscotte (with whom the other members of the House of Lords agreed) observed that the most important decision was that of the Australian High Court in *Povey v Qantas*, in which the High Court had considered and rejected a similar claim in the context of similar assumed facts.⁷ Consistent with the reasoning in *Povey v Qantas*, the House of Lords held that the normal operation of the aircraft cannot constitute an 'accident' for the purposes of Article 17 and that the event or happening that caused the damage must be something external to the passenger. Lord Scott observed that:⁸

*These two requirements appear to me to rule out Article 17 recovery in DVT cases when no more can be said than that cramped seating arrangements in the aircraft were a causative link in the onset of the DVT. The failure by an airline to warn its passengers of the danger of DVT and the precautions that might be taken to guard against that danger does not, in my opinion, improve the case, **at least where there is no established practice of airlines generally or the defendant airline in particular to issue such warnings.** How the case would look if there were such an established practice and if by an oversight the usual warnings were not given does not arise for consideration in the present case. [emphasis added]*

6. *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72 at [10] per Lord Scott of Foscotte.

7. [2005] UKHL 72 at [20] per Lord Scott of Foscotte.

8. [2005] UKHL 72 at [24] per Lord Scott of Foscotte.

CONSISTENCY WITH POSITION IN THE US

The House of Lords also considered the decision in the context of the reasoning of the US Supreme Court in *Olympic Airways v Husain*.⁹ In that case, a passenger suffering from a congenital asthmatic condition died on board an aircraft. The passenger and his wife had asked to be moved away from the smoking section of the plane several times, but the flight attendant refused. The US Supreme Court held, by a majority of 6-2, that the flight attendant's conduct could constitute an 'accident' within the meaning of Article 17 and that the action should not be dismissed. The majority accepted the argument that the flight attendant's failure to move the passenger to an available seat further away from the smoking section was a cause of the damage external to the passenger and, since it was contrary to normal practice in the airline industry, was therefore neither expected nor usual. The majority rejected the argument that a failure to act could not constitute an 'event or happening' and, therefore, could not be an 'accident' for the purposes of Article 17 of the Convention.

Although several members of the House of Lords questioned the US Supreme Court's approach to interpreting the Convention (ie the US Court seemingly focused on the words of Justice O'Connor in *Air France v Saks* and not the terms of Article 17),¹⁰ they did not consider that the decision in *Olympic Airways v Husain* was inconsistent with the position in the UK.

ANALYSIS

In Australia and the UK the question of whether a passenger, who developed DVT in the course of a flight that took place prior to warnings about DVT becoming standard practice in the airline industry, and during which no unusual or unexpected event occurred, may recover damages under Article 17 has been resoundingly answered in the negative.

On a theoretical level, an airline that fails to comply with its own or industry procedures to warn passengers in respect of DVT could possibly be held liable under Article 17 on the basis that its omission to warn passengers was an 'accident'. However, the claimant is likely to face significant difficulty in proving the causative link between the failure to warn and the development of DVT.

It appears that the position in the US is consistent with that in Australia and the UK, notwithstanding the apparent criticism of the US Supreme Court's approach to the interpretation of the Convention.

These decisions provide some certainty to participants in the airline industry, and those assessing the risks of successful claims being made against airlines, in respect of DVT or other bodily injuries or deaths suffered during the course of a flight or while embarking or disembarking from an aircraft.

9. 540 US 644 (2004).

10. See [2005] UKHL 72 at [22] per Lord Scott of Foscotte (with whom the other members of the House of Lords agreed); at [49] per Baroness Hale of Richmond.

THE PRODUCTIVITY COMMISSION CONCLUDES THAT AUSTRALIA DOES NOT NEED A GENERAL SAFETY PROVISION

PETER HOLLOWAY, PARTNER, FREEHILLS

In previous issues of *Brief* we have commented upon the review of the Australian consumer product safety system being undertaken by the Productivity Commission – refer to the March, June and October 2005 editions of *Brief*.

The Productivity Commission had been asked by the Ministerial Council of Consumer Affairs (**MCCA**) to undertake a review of Australia's consumer product safety system and to consider a number of options for reform that had been set out in the terms of reference. This followed a discussion paper that was released by the MCCA, together with an options paper, in August 2004.

The Productivity Commission received more than 30 submissions in relation to the review, including a detailed submission by the NPLA. A copy of this submission was published in the December 2004 edition of *Brief*. In addition to written submissions, the Productivity Commission conducted meetings with a number of organisations, including NPLA, and convened a number of round-table discussions in Sydney, Canberra and Melbourne.

The review was focused upon the 'general' category of consumer products, being consumer products not otherwise regulated by specific legislation such as therapeutic goods, food, motor vehicles, electrical goods and veterinary and agricultural chemicals.

The Productivity Commission has now published its final report in relation to this review. A full copy of the report, which runs to more than 400 pages, can be obtained from Media & Publications, Productivity Commission, Locked Bag 2, Collins Street East, Melbourne 8003.¹

GENERAL SAFETY PROVISION

One of the more controversial options considered by the Productivity Commission concerned the introduction of a 'general safety provision' (**GSP**), which, if introduced, would create an explicit legal obligation on businesses to supply only 'safe' consumer products throughout Australia. Similar provisions to this have existed in the United Kingdom and Europe for some years and a similar concept is applied in a number of Australian product-specific regimes, including food and electrical goods.

Of all the reform options that were considered by the Commission, this was the one that attracted perhaps the most interest and keen debate. In the end, the Commission concluded that:

On balance, (we have) not been convinced that a GSP, as proposed in the options paper, would generate net benefits over and above those currently achieved. The case for a GSP may be stronger in the context of examining the overall consumer protection regulatory framework rather than the more limited area under reference.²

This was despite the Commission having identified potential benefits that a GSP might achieve, including:

- making clear the objective of supplying only safe products;
- applying notions of consistency with other product regimes in which a similar concept already exists;
- promoting 'cultural change' by creating stronger incentives for businesses to consider safety;

1. It is also available at: <http://www.pc.gov.au/study/productsafety/finalreport/productsafety.pdf>.

2. Productivity Commission, Final Report at p XXVIII.

- making it easier for regulatory authorities to take pre-emptive action before a product causes injury;
- conferring greater flexibility on businesses in meeting safety obligations and reducing the need for mandatory standards; and
- forestalling the creation of more product specific regulatory regimes, such as for toys or nursery furniture.³

The Commission however recognised that the implementation of a GSP would result in additional costs to business and would also be affected by matters such as:

- uncertainty about how to define and measure the benchmark level of safety required to demonstrate compliance with the GSP;
- considerable increases in voluntary standards; and
- the fact that any costs of compliance would most likely be passed on to consumers and result in higher prices and even the withdrawal of some products from the market.

The Commission also took into account that the current system seems to be generating reasonable safety outcomes and it is not clear that a major shift in 'culture' is required. Consideration was also taken of the fact that action can already be taken to recall or ban unsafe products, irrespective of whether an injury has occurred and, based on the experience in other sectors and countries, most if not all of the existing regulatory framework would remain.

FORESEEABLE USE OR MISUSE

Another topic that was keenly debated was the extent to which a product might be unsafe as a result of 'reasonably foreseeable misuse'. That is, products can potentially cause harm because of the way in which they are used, even when this usage is not intended by the manufacturer or supplier.

In relation to this, the Commission noted:

The notion of reasonably foreseeable conduct is already embedded in the common law tort of negligence and in strict product liability laws. In designing a product, producers should take into account how it is likely to be used, including reasonably predictable misuse, especially where a pattern of use is recurring of which the producer is or should be reasonably aware.⁴

The Commission observed that there are various interpretations across different jurisdictions within Australia as to whether foreseeable use can be taken into account. A recommendation has been made that this be clarified and that reasonably foreseeable use should be explicitly covered in any definition of 'unsafe' products.

HARMONISATION

It became apparent from the work undertaken by the Commission, particularly the round-table conferences, that there is a great deal of concern at the lack of consistency and duplication across different jurisdictions concerning product safety. The Commission received comments from businesses and other participants in industry to the effect that this alone is a cause of significant compliance costs to business. Examples were given of approaches that are acceptable in one jurisdiction not being acceptable in another, and the resultant confusion and duplication of effort.

The Commission has concluded that greater harmonisation of product safety regulation is desirable:

... due to the costs that inconsistencies impose on businesses, governments and consumers. Such inconsistencies make it difficult or more expensive for businesses to supply goods across state and territory borders. Further, it reduces competition and opportunities to exploit economies of scale to some extent.⁵

3. Ibid at p XXVII.

4. Ibid at p XXXIII.

5. Ibid at p XXIX.

The Commission concluded that there is little justification for separate regulation of product safety, given that for the most part there is a national market for products, the risks and hazards are generally the same across the country and public resources are scarce. The Commission also noted that the growth in e-commerce will continue to erode the capacity of jurisdictions to enforce differences in regulatory responses, such as through different standards and bans.

The Commission canvassed two models for achieving greater national consistency:

- a 'one-law, one-regulator' model, which would see the States refer powers to the Australian Government; or
- legislative uniformity via adopting template legislation or, at a minimum, by adopting the same core legislative provisions and improved enforcement approaches.

Ultimately, the Commission expressed the view that the most appropriate way to achieve uniformity is to centralise decision making with one regulator administering a single law and that this body should be the ACCC. The Commission conceded however that the local jurisdictions will wish to be able to act quickly and locally to deal with unsafe product issues. It therefore suggested that a modified alternative may be for the States and Territories to retain the ability to temporarily ban a suspected unsafe product while referring the powers to determine whether a national permanent ban or standard should be implemented to the Australian Government, with enforcement through the ACCC.

SELF REPORTING

The Discussion Paper issued by the MCCA in 2004 suggested that businesses should monitor the safety of their products and report any products that are under investigation by the business for possible safety risks, have been associated with serious injury or death or have been the subject of a successful product liability claim.

The Commission recognised that difficulties might be encountered in enforcing a requirement to report goods that are 'under investigation'. It conceded that this might discourage businesses from investigating potentially dangerous products because of the consequences that might follow.

The Commission suggested however that a requirement for suppliers to report products associated with 'serious' injury and death may be more likely to provide net benefits to the community, including providing more timely information to regulators and allowing the pooling of information to enable regulators to make better judgments about serious product-related injuries.

RECALLS OF UNSAFE PRODUCTS

One of the options identified by the MCCA Discussion Paper was that businesses be required to recall products that are found to be 'unsafe'.

The Commission noted that there are about 160 voluntary recalls of general consumer products each year, although the success rate of recalls was found to be variable at best, with only a relatively small proportion of the total number of products sold being retrieved or returned.

The Commission concluded in this respect that:

Given that any formal requirement that businesses recall unsafe products would be unlikely to significantly change the behaviour of either responsive or non-responsive suppliers, and that recalls have a mixed success rate, the Commission does not believe that such a proposal would yield a net benefit.⁶

The Commission did however find that the current recall guidelines could be improved and that the MCCA should initiate a review of current recall guidelines with a view to improving the effectiveness of recalls.

The Commission did not support the notion that regulators should be given specific powers to audit voluntary recalls.

WHERE TO FROM HERE?

A meeting of the MCCA is to take place in April 2006. This meeting will receive the report of the Productivity Commission in relation to its review of the Australian consumer product safety system and decisions will then be made by the Council in terms of the various recommendations and findings of the Commission.

Brief will report upon further developments as they occur.

6. Ibid at p XXXVIII.

FSANZ SEEKS TO STRENGTHEN AND EXTEND COUNTRY OF ORIGIN LABELLING REQUIREMENTS

ROBERT KERR, LAW GRADUATE, MICHELLE BENNETT, LAW CLERK AND PETER O'DONAHOO, PARTNER, ALLENS ARTHUR ROBINSON

INTRODUCTION

Food labelling falls under the jurisdiction of Food Standards Australia New Zealand (**FSANZ**). FSANZ is a bi-national independent statutory authority under the *Australian Food Standards Australia New Zealand Act 1991* (Cth) and it is subject to policy guidelines set by the Australia and New Zealand Food Regulation Ministerial Council (**Ministerial Council**).

FSANZ is responsible for the Australia New Zealand Food Standards Code (the **Code**), which regulates food labelling in Australia and New Zealand. When approved by the FSANZ Board and subject to a review by the Ministerial Council, standards become law in Australia by being adopted by reference under the food laws of the states and territories. In New Zealand, the Minister of Health must gazette the food standard under the *Food Act 1981* (NZ). However, to date, New Zealand has preferred a voluntary approach to country-of-origin labelling and has never legislated to make it mandatory (except for wine products).

FSANZ has recently reviewed the standards in the Code concerning country-of-origin labelling. The principal objective of the review was to ensure that adequate information is provided about the origin of food products to enable consumers to make informed choices. There was also an acknowledgement that the benefit to consumers must be balanced with the cost to industry.

The new country-of-origins Standard 1.2.11 was gazetted on 8 December 2005. This Standard will completely replace the transitional country-of-origin Standard 1.1A.3 by 8 December 2007, however the provisions relating to unpackaged fruit, vegetables, nuts and seafood will be effective from 8 June 2006. New Zealand has decided not to introduce a mandatory country-of-origin labelling regime at this time.

WHAT IS THE CURRENT LAW?

In Australia, the current standard in the Code requires labels to be attached and to contain a statement that identifies the country or countries where the food was produced. This can often be satisfied by identifying the country where the food was packed for retail sale. Also, if any of the goods do not originate in the country, it is often acceptable to give a statement saying that the food is made from ingredients that are imported.

This applies to all packaged food. It also applies to the following unpackaged foods that do not originate in Australia or New Zealand:

- fish;
- fresh vegetables;
- nuts; and
- fruit.

Fruit juice that contains one or more imported fruit ingredients must also comply, and there are specific requirements for spirits that are produced in countries other than Australia.

However, the Code is not the only source of law on country-of-origin labelling. In Australia, the *Trade Practices Act 1974* (Cth) (the **TPA**) prohibits conduct that is misleading or deceptive, and prohibits the making of false or misleading representations about the origin of goods. Division 1AA of Part V of the TPA, which contains ss 65AB and 65AC, explains how to make country-of-origin representations that do not contravene the prohibitions on engaging in misleading or deceptive conduct (s52), falsely representing that the goods have had a particular history (s53(a) and s75AZC(1)(a)), and making false or misleading representations concerning the place of origin of the goods (s53(eb)).

Section 65AB provides that where country-of-origin representations are made (such as where a label states that a product is 'made in' a particular country), a corporation does not contravene the prohibitions if:

- the goods have been substantially transformed in that country;
- 50 per cent or more of the cost of producing or manufacturing the goods (as the case may be) is attributable to production or manufacturing processes that occurred in that country; and
- the representation is not a 'product of' or 'produce of' representation (to which s65AC applies), or a prescribed logo representation (to which s65AD applies).

Section 65AC provides that a corporation does not contravene the prohibitions if it makes a representation that goods are the produce of a particular country (whether the representation uses the words 'produce of', 'product of', or any other grammatical version of the word 'produce') if:

- the country was the country of origin of each significant ingredient or significant component of the goods; and
- all, or virtually all, processes involved in the production or manufacture happened in that country.

The TPA is administered by the Australian Competition and Consumer Commission (the **ACCC**). On 30 June 2005, the ACCC published a guide for businesses about country-of-origin labelling: *Food and Beverage Industry: Country of Origin Guidelines to the Trade Practices Act*.¹

In New Zealand, there are no mandatory country-of-origin labelling requirements (except for wine products). However, where the country of origin is voluntarily indicated, the *Fair Trading Act 1987* (NZ) prevents businesses from misleading consumers about the origin of goods. The Act is administered by the Commerce Commission, which has published a guide for businesses: *The Fair Trading Act – A General Guide*.²

WHAT ARE THE CHANGES?

The revised standards have not led to any radical changes – the goal is more to extend and strengthen the current regime through the following changes:

- For whole foods, the actual country where the food was produced, made, manufactured or packaged must be identified on the label. It will no longer be adequate to note that ingredients are 'imported'.
- For mixed foods, however, the standard does not go as far as requiring information about the country of origin of each ingredient. For such foods, it is adequate to indicate where the food was made, manufactured or packaged for retail sale and that the food is constituted from ingredients imported into that country or from local or imported ingredients.
- The requirements for unpackaged food are extended to a wider range of foods, including semi-processed fish, fresh and preserved pork, and whole or cut fruit and vegetables that have been preserved, pickled, cooked, frozen or dehydrated.
- The new requirements clarify the legibility requirements, set out in Standard 1.2.9, for labelling and display signs to make sure that the statement of country-of-origin is clear and unambiguous.
- The characterisation of certain products are modified. For example the specific requirements relating to fruit juices are removed because they are treated under the general banner of packaged food.
- In Australia, the terms 'made in' and 'product of' must continue to comply with trade practices legislation, as discussed above.

The Ministerial Council met in October 2005 and decided that FSANZ should explore one more issue: where one or two whole pieces of fruit and/or vegetables are packaged together (even if there are other incidental ingredients), it was proposed that the label should identify the actual country of origin of each of the two pieces of fruit or vegetable. FSANZ considered the labelling of

1. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/306388>.

2. Available at: <http://www.comcom.govt.nz/FairTrading/FairTradingPublications/GeneralFairTradingPublications/PublicationList.aspx>.

whole, shelled, diced, peeled, chopped or diced fruit and vegetables. It also included, at the request of ministers, juices and soy milks with two or less fruit and/or vegetable ingredients. The final report was recently prepared (but has not yet been publicly released) for the Ministerial Council, who will make a decision about whether this is developed further into a food standard.

STATED BENEFITS OF THE NEW REQUIREMENTS

The purported benefits of the recent changes are:

- that consumers will be provided with clear and unambiguous information on the source of a food product, both packaged and unpackaged;
- unpackaged foods will be treated in a like manner – whether locally produced or imported, which would address a present inconsistency;
- unpackaged foods will be brought into line with general labelling provisions in the Code;
- the Code will become consistent with trade practices legislation; and
- consumers will be able to identify locally produced fresh and semi-processed unpackaged foods, which research suggests are preferred by consumers.

TRANSITIONAL ISSUES

There is a phase-in period with different time periods specified for different products. For example, unpackaged fruit, vegetables, nuts and seafood must be labelled according to the new standard by 8 June 2006. Most packaged food will have until 8 December 2007 to comply with the new labelling standard. This period reflects the normal commercial labelling cycle and an additional grace period of one year has also been provided for packaged stock to avoid stockpiles of obsolete labels.

COMPLIANCE AND COSTS OF IMPLEMENTATION

The costs to producers, processors and distributors are likely to be:

- the one-off cost of changing the label design. This will primarily affect packaged food suppliers; and
- the recurring cost of re-labelling products to comply with the Code. This will affect importers and some retailers who need to re-label packaged food that they import.

WHERE WILL THE CHANGES MAINLY BE FELT?

FSANZ estimates the changes to cost a one-off \$60 million. The principal costs will be borne in relation to packaged goods. For fresh and unpackaged foods, the major impact will be on the retail sector, which will be required to provide more specific information than is currently the case. The main change will be the need to provide display materials indicating country of origin adjacent to food on display.

FURTHER INFORMATION

Standard 1.2.11 provides detailed information about the changes,³ which are summarised in general terms in this article. FSANZ has also created a comprehensive guide for interpreting and implementing the new standard.⁴

3. Available at: http://www.foodstandards.gov.au/_srcfiles/FSC_1_2_11_Country_of_origin_v85.doc.

4. Available at: http://www.foodstandards.gov.au/_srcfiles/CoOL_1st%20Edn-PRINT_with_cover.pdf.

DUST DISEASES CASES – SOUTH AUSTRALIA

SUSIE DOWNIE, LAWYER, ALLENS ARTHUR ROBINSON

The December 2005 issue of *Brief* contained a discussion of the *Dust Diseases Bill 2005 (SA)* (the **Bill**). That Bill, which was introduced by the Hon Nick Xenophon, was amended extensively as it passed through Parliament. Ultimately, the South Australian Parliament passed legislation in the form of the *Dust Diseases Act 2006 (SA)* (the **Act**). The most important of the amendments are summarised below.

- There will be no separate Tribunal in South Australia. The Act gives the District Court the power to ensure that dust disease actions have priority over less urgent cases and are dealt with expeditiously, and grants the Court special powers when dealing with such actions.
- The Act does not provide that no temporal limitations will apply to dust disease actions. However, it amends the *Limitation of Actions Act 1936 (SA)* to provide that 'in the case of a personal injury that remains latent for some time after its cause, the period of 3 years mentioned in subsection (1) [the limitation period for personal injury claims] begins to run when the injury first comes to the person's knowledge'.
- The Act does not contain a definition of 'dust', and the definition of 'dust disease' no longer includes a disease or pathological condition that is declared by the regulations to be within the ambit of that definition.
- Under the Act, as was proposed in the Bill discussed in the December 2005 *Brief*, special rules of evidence and procedure apply to dust disease actions brought in the District Court.
- The Court may admit evidence admitted in an earlier dust disease action against the same defendant (including in a dust disease action brought in another Australian jurisdiction). This procedure is, however, narrower than originally proposed under the Bill in its original form.
- The Court may dispense with proof of any matter that appears to be not seriously in dispute.
- The Court may invite a party to admit facts of a formal nature, or facts that are peripheral to the major issues in dispute, and may award the costs of proving those facts against the party if the party declines to do so.
- If a finding of fact has been made in a dust disease action by a court in any Australian jurisdiction and that finding is relevant to a dust disease action before the District Court, the finding may be admitted into evidence and the Court may indicate that it proposes to make a corresponding finding unless a party who would be adversely affected satisfies the Court that such a finding is inappropriate. The Bill originally provided that the Tribunal should not allow issues of a general nature to be re-litigated, where those issues have been established by a court of coordinate jurisdiction, unless convinced it is in the interests of justice to do so.
- The provisions dealing with multiple defendants and/or insurers are much more straightforward under the Act than under the Bill. The Act states simply that the Court will determine questions of liability and quantum of liability to the plaintiff before dealing with questions of contribution between defendants or insurers, unless any delay resulting from dealing with the questions together is inconsequential in the circumstances. The Act does not provide for the appointment of a representative defendant.

In short, the Act is considerably less radical than the Bill in its original form. Nonetheless, it constitutes a significant departure from the traditional rules of evidence and procedure, and it is likely that a large number of plaintiffs will seek to have their claims fast-tracked through the South Australian District Court under the provisions of the Act.

AMENDMENTS TO THE TPA TO PREVENT CLAIMS FOR PERSONAL INJURY

BELINDA THOMPSON, PARTNER AND ALICE COPE, LAW CLERK,
ALLENS ARTHUR ROBINSON

In response to the rising cost of public liability insurance, the *Trade Practices Act 1974* (Cth) (**TPA**) has been amended to prevent individuals from recovering compensation for personal injuries and death in reliance on the provisions of the TPA that prohibit unfair practices in trade or commerce, including misleading and deceptive conduct.

BACKGROUND

In 2002, the Federal Government announced a review of the law of negligence to be chaired by Justice David Ipp (the **Ipp Review**), with the aim of identifying possible reforms to address the cost and availability of public liability insurance. The Ipp Review's terms of reference included a review of the interaction between the TPA and the law of negligence.

As a result of its inquiry, the Ipp Review made a number of recommendations, including that the TPA be amended to prevent individuals from bringing actions for damages for personal injury and death based on contraventions of Division 1 of Part V of the TPA (the **Unfair Practices, Consumer Protection provisions**).

The Federal Government initially responded to the Ipp Review by introducing the Trade Practices Amendment (Personal Injuries and Death) Bill 2003 (Cth) (the **2003 Bill**). The 2003 Bill was not passed by the Senate, which amended the Bill such that claims for damages for personal injury or death could still be made, but the quantum of damages available was limited.

However, in 2004 the Federal Government reintroduced the previously rejected amendments to parliament, with the *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth) (the **2006 Act**) being enacted earlier this year. The amendments contained in the 2006 Act will commence on 20 April 2006.

OBJECTIVES

The Ipp Review's recommendations were aimed at limiting public liability claims costs, in order to address the rising cost and availability of public liability insurance. The amendments contained in the 2006 Act aim to achieve this goal through preventing claims for personal injury or death resulting from contraventions of provisions contained in Division 1 of Part V of the TPA, which prohibit unfair practices in trade or commerce, including misleading and deceptive conduct.

The Ipp Review stated that section 52 of the TPA 'has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault'.¹ On this basis, the amendments to the TPA aim to remove what is potentially otherwise an extremely broad basis for claiming damages for personal injury or death. The amendments will also prevent plaintiffs from taking certain actions for personal injury or death under the TPA which may otherwise undermine state and territory laws, in particular those laws that set caps on recoverable damages in such claims.

1. *Final Report of the Review of the Law of Negligence* (2002), 5.24. The report is available at: <http://revofneg.treasury.gov.au/content/review2.asp>.

THE AMENDMENTS

The 2006 Act makes the following amendments to the TPA:

- A person, and the ACCC in a representative capacity, is not permitted to recover damages for personal injury or death to the extent that such an action is based on a contravention of the Unfair Practices, Consumer Protection provisions of the TPA, contained in Division 1 of Part V.
- Similarly, a person, and the ACCC in a representative capacity, is not permitted to seek other orders from a court (including orders to pay damages) to compensate for loss or damage resulting from personal injury or death where the order would be based on a contravention of the Unfair Practices, Consumer Protection provisions of the TPA, contained in Division 1 of Part V.
- However, claims for loss or damage asserted to have been caused by smoking or the use of tobacco products based on an alleged contravention of the Unfair Practices, Consumer Protection provisions of the TPA, contained in Division 1 of Part V, may be pursued. Such claims will be subject to a limitation period of 3 years after the 'date of discoverability' of the personal injury or death.

IMPLICATIONS

For contraventions of Division 1 of Part V of the TPA occurring after 20 April 2006 that result in personal injury or death, a plaintiff will not have a cause of action under the TPA, and will instead need to rely on another cause of action such as negligence at common law.² However, contraventions that have occurred (or occur prior to 20 April 2006) will continue to be actionable until the end of the relevant limitation period under the TPA, which is generally 3 years after the 'date of discoverability' for the personal injury or death, or 12 years after the conduct that caused the injury or death.

While the amendments do remove a potentially broad cause of action available to plaintiffs, it remains to be seen whether the ultimate aim of addressing the rising cost and availability of public liability insurance will be achieved.

2. 2006 Act, Schedule 1, Item 8.

BRIEF

National Product Liability Association

