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PRODUCT LIABILITY CLAIMS under the *Trade Practices Act 1974*

By Michael Mills, Jason Betts and Amanda Liu

Consumers and regulators are increasingly vigilant in relation to product safety issues and their rights and remedies. According to the Australian government's Product Recalls Australia database, there were 757 voluntary or compulsory product recalls in the 2007/08 financial year.[1]

The heightened scrutiny placed by the Australian public on product safety issues underscores the importance of the role of the *Trade Practices Act 1974* (TPA) in providing remedies for those who suffer loss or damage as a result of defective products.

Product liability law in Australia is a labyrinthine arrangement of common law principles and statutory liability provisions drawn from a range of jurisdictions, contained within various state and territory legislation. The TPA arguably offers the most comprehensive range of remedies to those injured by defective products.

Product liability claims under the TPA generally fall under the following categories:

- actions regarding unfair practices in respect of products, in particular misleading or deceptive conduct under Part V Division 1;
- actions for breach of conditions and warranties implied into contracts with consumers under Part V Division 2;
- actions against manufacturers and deemed manufacturers in respect of unsuitable or unmerchantable goods under Part V Division 2A; and
- actions against manufacturers and deemed manufacturers in respect of defective goods under Part VA.

Case law in relation to the product liability provisions of the TPA has developed slowly and incrementally. In recent years, this development has been dampened by various civil liability reforms that have significantly limited the damages recoverable for personal injury claims, including in the product liability context. This does not mean that the product liability provisions of the TPA are ineffective or lack importance. The TPA regime has clearly contributed to a greater level of compliance by manufacturers with the safety procedures and governance protocols necessary to avoid the production of unsafe or defective products. Further, the availability of causes of action under the TPA has no doubt resulted in many product liability claims settling prior to the commencement of formal litigation.[2]

This article summarises the key features of the TPA product liability regime.

UNFAIR PRACTICES – PART V DIVISION 1

Part V Division 1 of the TPA contains:

- a general prohibition against misleading and deceptive conduct by a corporation in trade or commerce (s52); and
- a range of prohibitions in relation to more specific unfair practices including false representation as to quality or standard of goods (s53), and conduct liable to mislead the public as to the nature or characteristics of any goods (s55).

A number of the specifically prohibited practices (but not breaches of s52) are prescribed offences under Part VC of the TPA and can result in criminal prosecutions and fines, in most cases up to a maximum of $1,100,000.[3]

More generally, breaches of the provisions of Division 1 (and other divisions of Part V) can result in the Australian Consumer and Competition Commission (ACCC) or any person with requisite standing seeking an injunction to restrain the breach (s80(1)), orders for corrective advertisements (s86C), adverse publicity orders (s86D), or an award of damages other than as a result of death or personal injury (s82).[4] A range of other remedial orders in response to breaches of Division 1 are available under s87.

Section 52

Section 52 is frequently raised in circumstances where a consumer has suffered loss as a result of a misrepresentation (which may include an omission) as to the performance or quality of a product. It has particular application in the context of cases based on a failure to warn of significant risks associated with the use of a product, or where incorrect statements are made about a product in promotional material.

These kind of cases are numerous. In *ACCC v Cadbury Schweppes Pty Ltd*,[5] the respondent's labelling of cordial depicting fruit, where there was no fruit extract in the cordial, was found to be misleading. In *Bristol-Myers Squibb Australia Pty Ltd v Astra Pharmaceuticals Pty Ltd*,[6] the court granted an interlocutory injunction restraining a pharmaceutical company from making certain misleading claims about a new drug to reduce blood pressure. In *AFCO v Tobacco Institute of Australia Ltd*,[7] a cigarette advertisement that claimed, among other things, that there was no scientific proof that cigarette smoke caused disease in non-smokers, was held to be misleading.

Nothing in s52 confines its operation to conduct that amounts to a failure to take reasonable care. Accordingly, a corporation that has acted honestly and reasonably may nevertheless be liable for a breach if it has, in fact, misled or deceived others or has engaged in conduct that is likely to do so.[8] This element of strict liability provides advantages to applicants bringing a product liability claim for breach of s52 because, unlike a common law negligence claim, the applicant is not required to establish any subjective fault, recklessness or intentional misconduct on the part of the corporation in order to succeed.

Proportionate liability

Proportionate liability provisions apply in relation to s52 claims. Part VIA of the TPA provides for the apportionment of damages for an 'apportionable claim', being a claim for economic loss or property damage arising from a breach of s52 where there is more than one 'concurrent wrongdoer'. A concurrent wrongdoer is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim (s87CB). In any proceeding involving an apportionable claim, the liability of the respondent who is a concurrent wrongdoer is limited to the proportion of the damage or loss >>

that the court considers just, having regard to the extent of the respondent's responsibility.

It is as yet unclear whether the proportionate liability provisions will have significant application in the product liability context. Part VIA does not apply to claims in contravention of the specific prohibitions in Part V Division 1, including s53 (false or misleading representations in relation to goods); nor does it apply to claims in respect of products that are unmerchantable or unfit for an intended purpose under Part V Division 2A, or claims in respect of defective goods under Part VA.

Limitation period

Section 82(2) provides that an action to recover loss or damage by conduct in breach of a provision of Part V must be commenced within six years from the day on which the relevant cause of action accrued. A cause of action based on a breach of s52 (and the other specific prohibitions in Division 1) accrues when the loss or damage is suffered.[9]

PRODUCT SAFETY AND PRODUCT INFORMATION – PART V DIVISION 1A

Part V Division 1A contains various provisions that regulate the standard of safety expected of Australian products.

Two central provisions of Division 1A are ss65C and 65D, which prohibit the supply of goods that do not comply with a prescribed consumer product safety or information standard. A number of safety and information standards have been prescribed for the purposes of the TPA, covering a range of products including bunk beds, bicycles and sunglasses.

Supply of non-compliant goods by a corporation is a prescribed offence punishable by a fine not exceeding $1,100,000 (s75AZS).

Whether or not goods comply with a product or information safety standard is a matter to be determined on the circumstances of the particular case. In *ACCC v MHG Plastic Industries Pty Ltd,*[10] the court held that certain motorcycle helmets manufactured by the respondent did not comply with a prescribed consumer product safety standard for that type of product. The ACCC obtained consequential declarations and an injunction preventing further supply of the helmets. However, on appeal, these orders were set aside on the basis that the testing authority had deviated from the test specifications prescribed by the relevant standards.[11]

Division 1A also imposes requirements for the conduct of voluntary and compulsory product recalls. Section 65R provides that, where a corporation voluntarily takes action to recall goods because the goods 'may or will cause personal injury to any person', the corporation must notify the minister within two days of taking the action, stating that the goods are subject to a recall and detailing the nature of the defect. The minister has broad powers under s65F to order a corporation to undertake a compulsory product recall (together with a range of alternative remedial steps) where s/he is of the opinion that the supplier has not taken satisfactory action to minimise the risk of injury being caused by a defect or dangerous characteristic in a product.

Damages

A person who suffers loss as a result of non-compliance with the provisions of Division 1A may recover damages under s82.[12] To date, however, limited actions have been successfully advanced in respect of breaches of Division 1A, possibly because of the range of alternative bases of recovery under the TPA that do not require the consumer to, for example, establish as a foundation for the claim some level of non-compliance with a prescribed product safety or information standard.

CONDITIONS AND WARRANTIES IMPLIED INTO CONTRACTS – PART V DIVISION 2

Part V Division 2 contains provisions that imply conditions and warranties into contracts for the supply of goods and services. Importantly, Division 2 applies only to contracts with a 'consumer', as defined by s4B of the TPA (that is, a person who acquires goods with a price that does not exceed $40,000 or, where the price exceeds that amount, the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption).

The conditions implied by Division 2 include:

- where goods are supplied by description, an implied condition that the goods will correspond with the description (s70);
- an implied condition that the goods are of merchantable quality (s71(1));
- where the consumer makes known to the supplier a particular purpose for which the goods are being acquired, an implied condition that the goods are reasonably fit for that purpose (s71(2)); and
- where goods are supplied by reference to a sample, an implied condition that the bulk will correspond with the sample (s72).

A number of conditions are also implied in relation to the provision of services to a consumer. Notably, s74(1) implies a warranty that services will be rendered with due care and skill.

A breach of any of the conditions implied by Division 2 gives rise to an action for damages by the consumer for a breach of contract, as opposed to a breach of the TPA.[13]

Section 68 renders void any term of a contract that purports to exclude, restrict or modify the conditions implied by Division 2.

Merchantable quality – s71(1)

Section 71(1) implies into contracts for the sale of goods to a consumer a warranty that the goods are of merchantable quality. Section 66(2) provides that goods are of merchantable quality if they are 'fit for the purpose or purposes for which goods of that kind are commonly bought, as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances'.

The condition as to merchantable quality does not arise in relation to defects specifically drawn to the consumer's attention before the contract is made (s71(1)(a)) or, where the consumer examines the goods before the contract is

made, in relation to defects which that examination ought to reveal (s71(1)(b)).

What an examination 'ought to reveal' is a question of fact. In *WM Johnson Pty Ltd v Maxwelton (Oaklands) Pty Ltd*,[14] the respondent was injured by a defective 'knotting system' in a machine purchased from the applicant. The evidence showed that the respondent spent about three minutes inspecting the knotting system on the machine prior to purchase. The court held that there was no evidence that the inspection should have revealed the defect, and that the condition of merchantability had been breached. In *Bethune v Qconn Pty Ltd*,[15] the applicant was injured when he tried to remove a tree branch protruding into the cabin of an earth-mover vehicle that should have had a protective mesh wiring, but did not. The applicant failed in a claim based on s71 because, as a result of an inspection prior to purchase, he knew the cabin did not have protective meshing when he bought the machine.

As these cases demonstrate, an unusual feature of the application of s71 is that a consumer who does not bother to examine goods prior to purchase may ultimately be in a better legal position than one who does, given that the absence of an inspection will ordinarily preclude a finding that a defect was revealed to the consumer prior to purchase in a way that disentitles reliance on the section.

Fitness for purpose – s71(2)

Section 71(2) implies into a contract for the sale of goods to a consumer a warranty that the goods are reasonably fit for an intended purpose made known (expressly or by implication) to the supplying corporation.

Whether an intended purpose was made known in a particular case is a question of fact and, as an evidentiary matter, can be difficult for a consumer to establish. In *Carpet Call Pty Ltd v Chan*,[16] the owners of premises that had been converted into a nightclub purchased carpeting. They stated to the supplier that they wanted a good-quality carpet, capable of withstanding the heavy human traffic expected in a nightclub. The carpet supplied was not suitable and quickly wore and stained. The court rejected the nightclub owners' claim under s71(2) on the basis that the owner had not made known to the supplier the particular purpose for which the goods were being acquired. The court determined that the level of discussion between the parties had been superficial and that any meaningful discussion would have included more detailed factors.

Privity of contract

One significant limitation of the conditions under Division 2 is that they arise only in circumstances where there is a contract between a consumer and a corporation. Accordingly, Division 2 will in many instances not provide a consumer with a remedy against the actual manufacturer of goods that are unmerchantable or unfit for an intended purpose, because a consumer will rarely have a direct contractual relationship with the manufacturer. In such circumstances, consumers are often left to pursue claims in negligence or under Part V Division 2A or Part VA.

ACTIONS AGAINST MANUFACTURERS FOR UNSUITABLE AND UNMERCHANTABLE GOODS – PART V DIVISION 2A

Part V Division 2A creates statutory causes of action that consumers may enforce directly against manufacturers. In contrast to Division 2, Division 2A does not apply where the consumer has a contract with the manufacturer.[17]

Division 2A creates a claim the substance of which is similar to the contractual terms implied under Division 2, but without the requirement of contractual privity. The liability imposed by Division 2A does not require the consumer to show that the manufacturer acted unreasonably or recklessly. As the cause of action created by Division 2A is directly against the manufacturer, it overcomes difficulties that can arise when the supplier or retailer of goods is either unknown to the consumer, or is not otherwise a viable defendant due to, for example, bankruptcy. Sections 74B-74G of Division 2A provide for self-contained remedies for persons who suffer loss or damage as a result of non-compliance with the division.

While Division 2A requires supply to a 'consumer' (as defined by s4B), a narrower definition of 'goods' applies to Division 2. Division 2A applies to goods that are 'ordinarily acquired for personal, domestic or household use or consumption' (s74A(2)). The basis for this difference between Division 2 and 2A is not clear, although the Division 2A definition is to be construed broadly so as to >>

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give the widest relief that a fair interpretation will allow wherever it appears in the TPA.

Section 74K(1) operates to preclude parties from contracting out of the liability provisions created by Division 2A.

Bases for the cause of action

Division 2A sets out a range of circumstances in which a consumer may make a claim, including:

- where the consumer acquired the goods for a particular purpose (expressed or implied), and the goods were not reasonably fit for that purpose (s74B);
- where the goods were supplied to the consumer by description, and the goods did not correspond with that description (s74C);
- where the goods were not of merchantable quality (s74D);
- where the goods were supplied to the consumer by reference to a sample, and the bulk of the goods did not correspond to the sample (s74E); and
- where the corporation failed to comply with an express warranty given or made by the corporation in relation to the goods (s74G).

The term 'merchantable quality' is defined by s74D(3). Goods will not be of merchantable quality unless they are as fit for the purposes for which they are commonly bought as it is objectively reasonable to expect. This is a factually specific enquiry. In *Thomas v Foreshore Marine Exhaust Systems Pty Ltd,*[18] a manufacturer of a defective marine engine water-lift muffler was held liable under s74D for providing a muffler that was not of merchantable quality on the basis that the muffler was constructed with an inadequate polymer bond which caused a malfunction and, ultimately, the sinking of a vessel.

Deemed manufacturers

Under s74A, the circumstances in which a corporation will be deemed to be the manufacturer of goods for the purpose of Division 2A include where it:

- holds itself out to the public as the manufacturer of the goods or causes or permits its name, brand or mark to be applied to the goods;
- causes or permits another person to hold the corporation out to the public as the manufacturer of the goods; or
- although not the actual manufacturer, imports the goods into Australia where the actual manufacturer does not have a 'place of business' in Australia.

An interesting application of the deeming provisions arose in *ACCC v Glendale Chemical Products Pty Ltd (Glendale),*[19] where a corporation that applied its label to the product was held to be a deemed manufacturer even though the label expressly stated that the corporation was not the manufacturer. *Glendale* demonstrates the strict nature of the deeming provisions in s74A, the purpose of which is to ease the forensic difficulties that a consumer might otherwise experience in identifying the actual manufacturer.

Which end-users may claim?

Claims under Division 2A are not limited to the first retail purchaser of goods. Division 2A extends the cause of action to a consumer or any person who 'acquires the goods from, or derives title to the goods through or under, the consumer'. However, people who do not have title to the goods (for example, someone who borrowed the goods or bystanders who happen to be injured by the goods), are not entitled to recover under Division 2A. This is partly redressed by Part VA.

Defences

Within each of its operative liability provisions, Division 2A contains a number of statutory defences available to manufacturers. For example, it is a defence to a claim against a manufacturer that goods were not of merchantable quality if the manufacturer can show that the condition of the goods occurred by reason of a cause independent of human control, or by reason of the act or default of a person unrelated to the manufacturer (s74D(2)). The manufacturer bears the onus of proof to establish the statutory defences and the evidentiary threshold can be high. In *Effem Foods Ltd v Nicholls,*[20] a manufacturer was unable to avail itself of the defence that goods were not merchantable by reason of an act of another person (s74D(2)(a)(i)), even though it was able to lead evidence that the possibility of the defect arising during manufacture was remote.

Limitation period for claims

An action under Division 2A must be commenced within three years of the day on which the cause of action accrues (s74J(1)). In most cases, the cause of action will accrue on the day on which the consumer became aware, or ought reasonably to have become aware, of the contravention of the provision under which the claim is made (for example, the date on which the consumer ought to have been aware the goods were not of merchantable quality, see s74J(2)(a)(iii)). In addition, an action must be commenced within ten years from the time of the first supply of the goods to a consumer (s74J(3)).[21]

ACTIONS AGAINST MANUFACTURERS FOR DEFECTIVE PRODUCTS – PART VA

Part VA provides consumers with a cause of action against manufacturers in respect of dangerous or unsafe goods that cause loss consequent on physical injury or property damage. Sections 75AD-75AG impose upon manufacturers a strict liability to compensate those who die or suffer injury >>

or property damage as a result of 'defective' goods. The liability provisions of Part VA are generally thought to closely resemble those contained within the European Community Product Liability Directive (85/374/EEC), which operates as a form of statutory tort.

The test of when goods are defective under Part VA is different to the tests that arise under Part V Divisions 2 and 2A. 'Defective' goods are defined in Part VA as goods that do not provide the degree of safety that persons are generally entitled to expect (s75AC(1)). In determining the extent of the safety of goods, regard is had to a range of circumstances that include the purpose for which they have been marketed and any accompanying instructions (see s75AC(2)).

Importantly, a product can be defective even when it performs exactly as intended. For example, in *Glendale*, a corporation that packed and sold caustic soda through supermarkets was found to have supplied defective goods when a consumer purchased the product and used it in an unsafe manner. The court found that the label did not contain a sufficient warning against unsafe methods of use. This rendered the product defective even though, when used safely, the caustic soda performed exactly as intended.

Like the provisions of Part V Division 2A, the liability imposed by Part VA is strict, and there is no requirement to prove negligence on the part of the manufacturer. For that reason, like the provisions of Part V Division 2A, the cause of action covered by Part VA has some advantages over actions in negligence.

Section 75AP provides that the provisions of Part VA cannot be excluded by agreement between the parties.

Cases brought under Part VA have traditionally involved a wide variety of factual situations relating to products such as oysters contaminated with hepatitis A,[22] injuries arising from the unsafe use of caustic soda[23] and, more recently, inadequate installation instructions for garage roller doors.[24]

What 'goods' are caught?

The definition of 'goods' under Part VA is not limited to goods acquired for a consumer purpose, in contrast to, for example, Part V Division 2A, the application of which is limited to goods that are of a kind ordinarily acquired for personal, domestic or household use or consumption (s74A(2)(a)). The more expansive definition of 'goods' in s4 is therefore applicable to Part VA.[25]

Who is a 'manufacturer'?

The provisions in Part V Division 2A that determine the circumstances in which a corporation can be deemed to be a manufacturer of goods also apply to actions against manufacturers under Part VA (s75AB).

Section 75AJ provides a further mechanism by which a supplier can be deemed to be the manufacturer. Where the identity of the manufacturer is not known to the person wishing to institute an action, s/he may serve a notice on each known supplier of the goods seeking the identity of the manufacturer or another supplier in the supply chain. A supplier that fails to provide a response within 30 days of receipt of the notice is deemed to be the manufacturer of the goods for the purpose of Part VA.

The definition of manufacturer for the purpose of Part VA is therefore extremely broad, and potentially includes any corporation in the supply chain.

Damages

Under Part VA, damages are recoverable by an individual who is injured or dies as a result of a defective product (s75AD). A person other than the injured individual may also claim compensation where s/he has suffered loss because of the injury or death of the individual, provided such loss does not arise due to a business relationship between the person and the injured individual (s75AE). In this way, Part VA effectively creates a regime of strict liability for the benefit of individuals who have claims for loss of dependency through the death or injury of another person.

Claims for losses arising in relation to damage to personal, domestic or household products, as well as losses relating to private land, buildings and fixtures due to the product defect, can also be made (ss75AF and 75AG).

Defences

Although Part VA imposes a strict liability regime in respect of defective products, limited statutory defences are available: where a defect arises after the product has left the manufacturer's control, or because of compliance with a mandatory standard (which was the sole cause of the defect); where the state of scientific or technical knowledge did not enable the defect to be discovered at the time of supply; and where the manufacturer produces a component of another product and the defect was due to the overall design of the product or some other component (s75AK(1)).

Provision for reducing the loss claimed is also made in cases of contributory negligence on the part of the person who suffers loss (s75AN).

Limitation period for claims

Actions under Part VA must be commenced within three years from the day on which the person became aware, or ought reasonably to have become aware, of the alleged loss or defect and the identity of the manufacturer (s75AO). In addition, the action must be commenced within ten years of the supply by the manufacturer of the subject goods.[26]

PART VIB

In 2004, the TPA was amended to include Part VIB, which effectively brings the TPA into line with, among other things, civil liability and other tort reforms introduced in the states and territories in 2002.[27] Significant features of Part VIB include shorter, stricter time limits for filing TPA claims regarding personal injury or death under Divisions 1A and 2A of Part V and Part VA, as well as constraints on damages for non-economic loss and loss of earning capacity that may be recovered.

CONCLUSION

The TPA provides for a wide range of remedies where individuals have been injured or suffered other loss as a

result of unmerchantable, unsuitable or defective products. The operative provisions of the TPA are in some cases complex, and variations in how the product liability provisions apply can give rise to confusion. In particular, differences arise in the damages available and limitation periods applicable to the causes of action in the product liability context. Further judicial consideration of the remedies outlined above will no doubt assist in clarifying the operation of the TPA product liability regime. Calls for an overhaul and simplification of Australian product liability law, including the provisions of the TPA, may find legislative favour in the interim. ■

Notes: **1** Commonwealth of Australia, *Product Recalls Australia*, www.recalls.gov.au at 11 November 2008. These recalls related to products as diverse as agricultural and veterinary chemicals, consumer products, food, motor vehicles and therapeutic goods. **2** J Kellam and L Nottage, 'Happy 15th Birthday, Part VA TPA; Australia's Product Liability Morass' (2007), 15 *CCLJ* 26, at 29 (at footnote 12). **3** For example, s75AZC creates an offence in relation to conduct that mirrors the subject matter of s53. **4** Section 82 was amended in 2006 to remove the right to bring most actions for personal injury or death based upon a contravention of Part V Division 1, see s82 (1AAA). **5** [2004] FCA 516. **6** [1999] FCA 256. **7** (1991) 27 FCR 149. **8** *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191. **9** *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. **10** [1999] FCA 788. **11** *MHG Plastic Industries Pty Ltd v ACCC* [2000] FCA 1069. **12** A six-year limitation period applies, see s82(1); however, in relation to claims for death and personal injury, Part VIB prescribes more specific limitation periods (see below). **13** *E v Australian Red Cross Society* (1991) 99 ALR 601; *Arturi v Zupps Motors Pty Ltd* (1980) 33 ALR 243. The contractual limitation period (six years in NSW; see s14 of the *Limitation Act 1969* (NSW)) applies. **14** [2000] NSWCA 286. **15** [2002] FCA 1485. **16** (1987) ASC 55-553 **17** *Zaravinos v Dairy Farmers Co-operative Ltd* (1985) 7 FCR 195. **18** [2005] NSWCA 451. **19** (1998) 40 IPR 619. **20** [2004] NSWCA 332. **21** In the case of claims for damages as a result of death or personal injury, Part VIB prescribes more specific limitation periods, including an overall limit of 12 years from the date on which the act or omission alleged to have caused death or injury occurred (s87H). Part VIB also contains limitations on certain types of damages awards. **22** *Graham Barclay Oysters Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 102 FCR 307; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540. **23** *ACCC v Glendale Chemical Products Pty Ltd* (1998) 40 IPR 619; *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1999) ATPR 41-672. **24** *Skerbic v McCormack* [2007] ACTSC 93. **25** Section 4 defines 'goods' as follows: 'goods includes (a) ships, aircraft and other vehicles; (b) animals, including fish; (c) minerals, trees and crops, whether on, under or attached to land or not; and (d) gas and electricity'. **26** Part VIB restricts awards of compensation for death or injury claims and sets other time limits for such claims. **27** For example, *Civil Liability Act 2002* (NSW) and the *Trade Practices Amendment (Personal Injuries and Death) Act 2004* (Cth).

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