

Australia

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Civil litigation system

1 The court system

What is the structure of the civil court system?

Australia has a federal court system and a hierarchy of courts in each of the States and Territories. The High Court of Australia (High Court) is empowered to determine constitutional disputes and is the ultimate court of appeal. Product liability litigation usually commences in the Federal Court of Australia (Federal Court) or the Supreme or County/District Courts of one of the states or territories.

The consideration of choice of law questions, the causes of action alleged and the quantum of damages sought will usually determine the forum for a product liability matter. In complex product liability matters this will often be the Federal Court.

2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

Product liability litigation may be brought in either the Federal Court of Australia or the State Supreme Courts. Such proceedings are generally heard by a judge sitting without a jury. However, there are provisions in the various court rules for some matters to be heard by a jury.

Civil litigation in Australia is conducted on an adversarial basis. The parties present their case to the court. The judge makes findings of fact and law after consideration of the evidence that has been presented, and submissions by the parties on the law.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Each court has procedural rules that set out the relevant steps involved. Those rules of procedure are not too disparate in the superior courts in Australia. The Federal Court operates a docket system. This means that upon commencement, proceedings are allocated to a specific judge who case manages the proceedings via a series of directions hearings and then becomes the trial judge.

Product liability actions in the Federal Court are commenced by an Application, accompanied by a Statement of Claim. The Application specifies the relief claimed by the applicant and the Statement of Claim contains a statement in summary form of the material facts on which the party relies. After service of the originating process, the respondent must either file an appearance or take some other step towards having service of the originating process set aside. In the Federal Court, the only time requirement is that a respondent must enter an appearance before the date appointed for a directions hearing and before filing any document. Thereafter, the key steps include the filing

of a defence and any reply as well as refinement of the matters in dispute, including requests for particulars, in some cases interrogatories, documentary discovery, subpoenas and the service of evidence.

In the Federal Court, orders for many of these key steps are usually made at a court appointed directions hearing held not long after service of the proceedings. The court has the power to give 'such directions with respect to the conduct of the proceeding as it thinks proper'. This discretionary power is exercised by the court on a case by case basis.

4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

Recently, there has been significant legislative activity in the area of 'pre-litigation protocols', which are mandatory steps a potential litigant must undertake before commencing civil proceedings. These protocols oblige litigants to pursue a range of alternative dispute resolution steps before commencing proceedings. Federal legislation obliges parties to take 'genuine steps' to resolve a dispute. State legislation adopts the concept of 'reasonable steps'. Under the Federal legislation, genuine steps include the requirement to file a statement specifying the steps that have been taken to resolve the issues in dispute, or the reasons why such steps were taken.

5 Summary dispositions

Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Interlocutory procedures exist for parties to move to strike out the whole or any part of a pleading (including causes of action, claims and defences), where the court determines that the pleading discloses no reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay, or is otherwise an abuse of court process.

6 Trials

What is the basic trial structure?

Australian courts proceed on an adversarial basis. Practice, procedure and rules of evidence are similar to those used in English courts.

A product liability action in Australia is usually heard by a court sitting in the capital city of the relevant state. In every case, the capital is both the political and commercial centre of the state.

Most of the trial and any subsequent appeal are conducted orally. There is no provision for depositions as they are understood in the US context. Where written statements or affidavits have been exchanged before the trial and a witness is called, their statement will be adopted and tendered in court as evidence in chief, with any minor additions or modifications addressed orally at the commencement of the witness' testimony. The witness is then cross-examined.

A witness may be cross-examined at large and often without restriction as to time subject always to the court's direction. This comparative freedom to cross-examine and the fact that trials are usually conducted by a judge sitting alone means cross-examination in product liability cases is often searching and extensive. Expert witnesses, particularly in matters involving complex issues of medicine or science, are generally subjected to detailed cross-examination relating to both their specific opinion evidence and the underlying science relating to those opinions.

At the conclusion of the evidence, the court hears closing arguments that address questions of both fact and law. In more complex matters heard by a judge alone, this oral argument will be supplemented by detailed written submissions. Where the matter is being heard by a judge and jury, the presiding judge addresses the jury at the conclusion of the parties' submissions. The judge will summarise the evidence and direct the jury as to the law. It is then for the jury to make findings of fact and, if necessary, assess the quantum of damages.

7 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

There is a detailed class action procedure in the Federal Court of Australia and the Supreme Court of Victoria, and more recently introduced in the Supreme Court of New South Wales. There are also representative action procedures in other state jurisdictions. An action can only be commenced in the Federal Court where it attracts federal jurisdiction, for example, if it involves a claim under federal legislation.

Class actions have involved products including weight loss drugs, heart pacemakers, aircraft fuel, gas, water, tobacco, pharmaceuticals, financial products and a variety of food stuffs.

The Federal and Victorian and New South Wales legislation provides for the commencement of a class action where seven or more persons have a claim against the same person and the claims are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial common issue of law or fact.

The Competition and Consumer Act 2010 (Cth) expressly provides for the institution of proceedings by the government regulator, the Australian Competition and Consumer Commission ('the ACCC') on behalf of those who have suffered or are likely to suffer loss as a result of contraventions of federal legislation.

8 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

Time to trial depends on the particular jurisdiction and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined.

Proceedings in the Federal Court are usually heard faster than those in the state and territory supreme courts, due in part to the Federal Court's case management system whereby each proceeding is allocated to a particular judge who manages the case and usually hears and determines it, and the supreme courts' heavier case load.

There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

Evidentiary issues and damages

9 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

One key aspect of pre-trial preparation involves gathering information and evidence in support of a claim and the defence. In Australia, there is currently no deposition process. Preliminary discovery is utilised by parties before commencement of proceedings, usually to identify prospective defendants, to determine whether or not they have a claim, or to gain information from third parties.

The key way parties obtain information and evidence is through the formal process of (documentary) discovery. This is used by parties to identify and make available for review all documents that are or have been in their possession, custody or power relating to any matter in question. It is an ongoing obligation to produce to other parties all documents relevant to facts in issue.

Discovery is available with the court's leave. Orders will only be made if the court is satisfied that the order is necessary at the time when it is made. In the Federal Court, discovery is typically restricted to categories of documents rather than general discovery, in an attempt to limit the burden imposed on parties.

Interrogatories are another way in which a party may seek the court's leave to require another party to answer specific questions, although these are less commonly used.

A further procedure for obtaining documents for the purposes of litigation is to ask the court to issue a subpoena. Subpoenas are usually issued to non-parties:

- to require a party to attend to give evidence (a 'subpoena to attend to give evidence'); or
- to produce documents to the court (a 'subpoena to produce').

10 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Product liability trials are typically conducted orally. Where written statements or affidavits have been exchanged before the trial and a witness is called, their statement will be adopted and tendered in court as evidence in chief, with any minor additions or modifications addressed orally at the commencement of the witness' testimony. The witness may be cross examined at large and often without restriction as to time, subject always to the court's discretion. This comparative freedom to cross examine means that cross examination in product liability cases is often searching and extensive. Expert witnesses, are required to prepare a written report outlining their opinion in advance of giving evidence. They are generally subjected to detailed cross examination on both their specific opinion evidence and the underlying science relating to those opinions.

11 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Courts in several Australian jurisdictions may appoint a 'court expert' to inquire into and report on a question of fact arising in a matter before the court, or an 'expert assistant' to assist the court on any issue of fact or opinion (other than an issue involving a question of law) identified by the court in the proceeding, should the need arise. In some jurisdictions, the court expert's report will only be binding on a party to the extent that that party agrees to be bound by it. In other jurisdictions, the report is deemed to have been admitted into evidence unless the court orders otherwise.

Where the court has appointed an expert in relation to a question of fact that has arisen in the proceedings, the rules in each jurisdiction provide that the court may limit the number of other experts whose evidence may be adduced on that question, or that a party must obtain leave to adduce such evidence.

As a matter of practice, however, court experts are rarely appointed in product liability matters. As a matter of course, parties will retain their own experts and adduce evidence from them during the course of the proceedings.

12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

At common law, the type of compensatory damages available for claims alleging bodily injury include general damages for pain and suffering, loss of amenities and loss of expectation of life; and special damages, for loss of wages (both past and future), economic loss and medical treatment expenses and the like.

In 2002, reforms to the law of negligence (the ‘Tort Reform Process’) led to caps, thresholds and other limitations being placed on the amount of such damages that can be recovered for causes of action in negligence. Damages are also recoverable for mental damage provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for ‘pure economic loss’ but the nature and extent of such damages is extremely complex.

13 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Exemplary, punitive or aggravated damages can be awarded by the courts, although not in relation to claims brought under the federal legislation and, in some jurisdictions (as a result of the Tort Reform Process) not in negligence actions seeking damages for personal injury.

Litigation funding, fees and costs

14 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Yes, public funding is technically available but rarely so applied in product liability claims.

15 Third-party litigation funding

Is third-party litigation funding permissible?

Third party funding of claims is permitted in Australia. While lawyers are restrained from entering into contingency agreements, non-lawyers are not. Consequently, litigation funders have emerged to promote and fund class action litigation. The mechanism is relatively straightforward. A non-lawyer or corporation (the litigation funder), identifies a potential claim, contacts potential claimants and then enters into express contractual arrangements with potential claimants. These agreements provide for the litigation funder to receive an agreed percentage of any monies that come to the claimant by way of settlement or judgment. In addition, the claimants will often assign the benefit of any costs order they receive to the litigation funder who is, under the contractual arrangement, also given a broad discretion to conduct the litigation as they see fit. The litigation funder then retains a lawyer who agrees to conduct the litigation on behalf of

the litigation funder on the basis of the ‘normal’ rules governing the legal profession.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Rules prohibiting lawyers from entering into contingency fee arrangements have been relaxed and a variety of arrangements are now sanctioned. These new arrangements allow lawyers and clients to enter into an agreement that provides for the normal fee, or a fee calculated by reference to some pre-determined criteria such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an ‘uplift fee’ where an additional fee may be levied, calculable by reference to the initial fees. All jurisdictions continue to prohibit contingency fee arrangements where the lawyer’s fee is calculated by reference to a percentage of the client’s verdict.

17 ‘Loser pays’ rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

The unsuccessful party usually pays the costs of the successful party. These costs include not only court filing fees, copying charges and other out-of-pocket expenses, but also the lawyer’s professional fees. In this context, a reference to costs is not a reference to the total or actual costs incurred by the successful party. Recoverable costs are generally calculated by reference to a court scale, which invariably limits the amounts a successful party can claim for disbursements and services performed by their lawyers.

In some jurisdictions the Tort Reform Process has resulted in further limitations being imposed on the legal costs recoverable in small personal injury claims (although there are exceptions including where the lawyer and client have entered into a costs agreement that provides otherwise).

The common law rule has been significantly modified in the case of representative or class actions. Statutory provisions restrict a costs order being made against class members other than those who actually commenced the proceedings. Where the representative action is successful, a costs order may be made in favour of the class members who commenced the representative proceedings in an amount determined by the court.

Sources of law

18 Product liability statutes

Is there a statute that governs product liability litigation?

A plaintiff who claims to have been injured by a product or who has otherwise suffered loss or damage as a result of a defective product can bring an action for compensation on a number of grounds. The causes of action most commonly pleaded are the common law tort of negligence, a breach of a statutory duty or a breach of the Australian Consumer Law (ACL) (formerly the Trade Practices Act 1974 (Cth) (‘TPA’)). The liability of manufacturers for safety defects is now covered by part 3-5 of the ACL. It is a ‘no fault’ regime of strict liability. Specifically, goods are said to have a ‘safety defect’ if their safety is ‘not such as persons generally are entitled to expect’.

The ACL now provides a single, unified statute that applies to each State and Territory. Part 3 of the ACL provides a range of specific protections aimed at regulating unfair practices, consumer transactions, safety of consumer goods and product-related services, information standards and, (as noted above) the liability of manufacturers for goods with safety defects. The liability of manufacturers for safety defects is now covered by part 3-5 of the ACL.

It is a 'no fault' regime of strict liability. Specifically, goods are said to have a 'safety defect' if their safety is 'not such as persons generally are entitled to expect'.

Sections 18 and 29 of the ACL relate to misleading or deceptive conduct and false or misleading representations respectively, and part 3-2 Division 1 of the ACL sets down the 'consumer guarantees' (which equate to the former actions for fitness for purpose and merchantable quality (now 'acceptable quality')). A person who has suffered loss or damage by reason of conduct contravening chapter 2 or 3 of the ACL may make a claim for damages. Some restrictions apply to claims for personal injury.

In addition, part 5-4 of the ACL provides a range of remedies against suppliers and manufacturers of goods in relation to the consumer guarantees. If an action is brought against a manufacturer, a consumer's remedy is limited to damages. For actions against suppliers, an affected person may seek a broader range of remedies, including rejecting goods or terminating contracts. The nature of the breach will also affect the remedy available. A failure to comply with a guarantee is considered to be a 'major failure' if:

- the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the goods depart in one or more significant respects from any description, sample or demonstration model;
- the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot (easily and within a reasonable time) be remedied to make them fit for such a purpose;
- the goods are unfit for a disclosed purpose made known to the supplier of goods or a person involved in negotiations or arrangements about the acquisition of goods, and they cannot (easily and within a reasonable time) be remedied to make them fit for such a purpose; or
- the goods are not of acceptable quality because they are unsafe.

Part 3-5 of the ACL provides specific actions against manufacturers for goods with safety defects. An individual may recover, by action against a manufacturer, the amount of the loss or damage (which includes injury) suffered by the individual. If the individual dies because of the injuries, a law of a state or territory about liability in respect of the death of individuals applies as if the action were an action under the law of the state or territory for damages in respect of the injuries, and the safety defect were the manufacturer's wrongful act, neglect or default. Liability for loss or damage may also extend to a person other than the injured individual.

19 Traditional theories of liability

What other theories of liability are available to product liability claimants?

In Australia, theories of liability are a mixture of the common law and statute. A person who claims to have been injured or who has otherwise suffered loss or damage, may commence an action for compensation on the following bases:

- The common law tort of negligence, which is tort-based;
- Contract; and
- Breaches of the various statutory provisions.

20 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The Competition and Consumer Act 2010 (Cth) (CCA) establishes a single, national regime that applies to each state and territory by incorporating the Australian Consumer Law (ACL) into schedule 2

of the CCA. Like the TPA, the ACL is a federal statute that will be relied upon in product liability claims as it contains consumer protection, product safety and quality provisions.

See answer to question 18 above.

21 Criminal law

Can criminal sanctions be imposed for the sale or distribution of defective products?

Yes. Certain conduct by corporations and their officers may be subject to criminal sanctions under federal or state legislation.

22 Novel theories

Are any novel theories available or emerging for product liability claimants?

The ACL has introduced a significant change by introducing a new legal standard of 'acceptable quality'. Where a person supplies goods to a consumer, there is a guarantee that the goods are of acceptable quality. Goods will be considered to be of acceptable quality if they are:

- fit for all purposes for which goods of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe;
- durable; and
- as a reasonable consumer fully acquainted with the state and condition of the goods (including any 'hidden defects' of the goods), would regard as acceptable having regard to the nature of the goods, the price of the goods, any statements made on any packaging or label, any representation made by the supplier or manufacturer or any other relevant circumstance relating to supply.

There is no breach of this guarantee when:

- the reason why the goods are not of acceptable quality is specifically drawn to the consumers attention before supply in writing and in a manner that is 'transparent';
- the consumer to whom they are supplied causes them to become of unacceptable quality or fails to take reasonable steps to prevent them from becoming of unacceptable quality and they are damaged by abnormal use; or
- the consumer examines the goods before acquisition and that examination ought reasonably to have revealed that the goods were not of acceptable quality.

The TPA equivalent of this provision required goods to be of 'merchantable quality'. While the extrinsic material surrounding introduction of the new term suggests there should not be any substantive change to the interpretation of this term, this remains to be seen in practice.

23 Product defect

What breaches of duties or other theories can be used to establish product defect?

Under the ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if their safety is not such as persons generally are entitled to expect. The definition of 'manufacturer' under the ACL is extremely broad and potentially includes anyone in the supply chain. Alleged deficiencies in product-related design, testing, manufacturing, warnings and directions for use may all form the basis for a claim of a defective product.

24 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

In negligence, contract and under some of the provisions of the ACL, the claimant has the burden of proving that the product was defective.

The statutory warranty/guarantee and the defective/unsafe product causes of action under the ACL are often referred to as 'strict liability' provisions. In the former, a claimant need not prove fault but nonetheless must establish, on balance that the subject goods are not fit for purpose or are not merchantable (or 'acceptable') in the circumstances. In the latter, a claimant needs to prove that the subject goods are not as safe as persons are generally entitled to expect.

At common law, in contract and in other actions based on the provisions of the ACL, the claimant must establish:

- that loss or damage has been suffered;
- that the relevant conduct is either in breach of a common law duty, in breach of the contract or contravenes one of the provisions of the ACL; and
- that the loss or damage was caused by the defendant's conduct.

25 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

Under the ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if their safety is not such as persons generally are entitled to expect.

The definition of 'manufacturer' under these provisions of the ACL is extremely broad and potentially includes anyone in the supply chain.

26 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

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- that loss or damage has been suffered;
- that the relevant conduct is either in breach of a common law duty, in breach of the contract or contravenes one of the provisions of the ACL; and
- that the loss or damage was caused by the defendant's conduct.

27 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Under the common law, manufacturers and suppliers of products owe a continuing duty to purchasers and foreseeable users to take reasonable care to prevent a product from causing harm, including after the product is sold. Failure to recall a product that may cause harm may amount to negligence and give rise to the obligation to

pay compensation to persons suffering injury, loss and damage as a result.

The issues that will be considered in deciding whether recall action is necessary include the:

- magnitude of the potential harm involved;
- probability of such harm occurring;
- availability and effectiveness of alternative remedial action; and
- degree of knowledge in potential users of the potential harm.

In addition, the product safety provisions of part 3-3 of the ACL contain a stringent regime for the compulsory recall of goods that:

- do not comply with a prescribed safety standard;
- have been declared to be unsafe goods or permanently banned; or
- will or may cause injury to any person.

Limitations and defences

28 Limitation periods

What are the applicable limitation periods?

Contract and tort

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, resulting from a profusion of specialist legislation and court decisions, although the Tort Reform Process has resulted in more uniformity in relation to the limitation period applicable to personal injury actions.

In general terms, limitation periods are routinely defined by reference to the nature of the cause of action, including whether the claimant alleges fault-based or strict liability. In most jurisdictions the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff ('the date of discoverability') or 12 years from the date of the alleged act or omission ('the long-stop period'); or
- three years from the date the cause of action accrued.

Limitation periods including those applicable to personal injury claims are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability that impedes them from properly managing their affairs.

Australian Consumer Law

A person has three years in which to commence a defective goods action including actions against manufacturers for goods with safety defects. Time commences to run when a claimant becomes aware or has reasonably become aware of each of the following three elements:

- the alleged loss or damage;
- the safety defect of the goods; and
- the identity of the person who manufactured the goods.

A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

A person who suffers loss or damage because of the conduct of another person, in contravention of a provision of chapter 2 or 3 of the ACL may commence an action for damages at any time within six years after the day on which the cause of action that relates to the conduct accrued. In addition, an affected person may commence an action for damages against manufacturers of goods for a breach of certain consumer guarantees within three years after the day on which the affected person first became aware, or ought reasonably to become aware, that the guarantee to which the action relates has not been complied with.

Part VIB of the CCA applies to proceedings taken under the ACL that relate to parts 2-2, 3-3, 3-4 or 3-5 or Division 2 of part 5-4 of the ACL, and in which the plaintiff is seeking an award of personal injury damages, which are not in respect of death or personal injury resulting from smoking or other use of tobacco products. Where a claim is brought for personal injury damages in a proceeding to which part VIB applies (which includes actions for liability in respect of the consumer guarantees or for safety defects) the applicable limitation period is the later of three years after the 'date of discoverability' and the 'long-stop period' for that death or injury.

The 'date of discoverability' is the first date that the plaintiff in the proceedings knows or ought to know:

- that the death or personal injury has occurred;
- that the death or personal injury was attributable to a contravention of the CCA; and
- that, in the case of a personal injury, the injury was significant enough to justify bringing an action.

The 'long-stop period' for the death or personal injury is a period of twelve years following the act or omission alleged to have caused the death or injury, as may be extended by the court. The court is not permitted to extend the long-stop period by more than three years beyond the date of discoverability for the death or injury

29 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

If a product is found to be defective or unsafe under the federal legislation, the manufacturer or supplier can argue what is commonly referred to as the 'state of the art defence' or 'development risk defence'. The manufacturer or supplier must establish that the state of scientific or technical knowledge at the time when the product was supplied by its actual manufacturer was not such as to enable the defect to be discovered.

Under the statutory warranty/guarantee provisions of the federal legislation, the issue would be whether the product was fit for the purpose for which it was intended, giving consideration to any description applied to the goods by the corporation, the price received by the corporation for the goods, and all the other circumstances.

In negligence, the claimant must establish that the manufacturer failed to exercise reasonable care. The state of scientific and technical knowledge is often pertinent to this issue and forms the basis of the manufacturer's defence.

30 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Under the defective/unsafe cause of action provisions of the federal legislation, it is a defence that the goods had the defect only because there was compliance with a mandatory standard. A mandatory standard is a standard for the goods or anything relating to the goods which, under law, must be complied with when goods are supplied, and which carries a penalty for non-compliance. A standard that simply requires a minimum standard to be achieved is not a mandatory standard.

In an action for negligence and under the statutory warranty/guarantee provisions of the federal legislation, compliance with regulations or standards is a relevant factor in determining whether goods are as fit for the purpose(s) that goods of that kind are commonly expected to be when bought.

Update and trends

Australian appellate courts appear to have been taking a more rigorous approach to proof of causation in personal injury claims, particularly in circumstances where there are potential cumulative or competing causes. 'Possibilities' do not equate to 'probabilities', which is the standard of proof required under Australian law. This is so in the context of actions arising out of both alleged negligence or breach of statute ('by reason that' goods were not fit or merchantable). The High Court of Australia has made it clear that just because something can cause injury does not mean that it necessarily did in a particular case.

In addition, recent decisions have made it clear that an increased risk of harm is alone insufficient to establish causation by material contribution to the harm or for a conclusion of responsibility in law for that harm. A claimant must demonstrate that it is more probable than not that:

- a tortious act is capable of causing the harm; and
- the tortious act did in fact cause or materially contribute to the harm in the plaintiff's circumstances, in the sense of being a necessary condition for the harm.

The strict liability provisions of 'fitness for purpose' and 'merchantable quality' under the former TPA are not met by reference to mathematical comparisons of relative risk alone. Rather, all relevant circumstances must be considered in making an assessment of liability. The similarity between the wording of the former TPA and the ACL suggests the courts will apply the law in a similar manner for future claims.

31 Other defences

What other defences may be available to a product liability defendant?

Defendants are permitted to rely on a statutory right to contribution from other concurrent tortfeasors (whether joint or several). Alternatively defendants may seek to rely on a contractual right of indemnity. These remedies may be pursued either in the same or subsequent proceedings. If subsequent proceedings are required, time limits do apply. These differ between jurisdictions and depend on the cause of action.

Following the Tort Reform Process, all Australian state and territory jurisdictions enacted a statutory regime of proportionate liability for non-personal injury claims for damages. The liability of a defendant who is a concurrent wrongdoer is now limited to an amount reflecting the proportion of the damage the court considers just having regard to the extent of that defendant's responsibility.

Certain state jurisdictions allow parties to expressly contract out of the proportionate liability scheme.

32 Appeals

What appeals are available to the unsuccessful party in the trial court?

In virtually all jurisdictions there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal.

A party dissatisfied with the decision of a state or territory Court of Appeal or the Full Federal Court may seek leave to appeal to the High Court of Australia, the country's ultimate appellate court. Appeals to the High Court are essentially restricted to questions of law. The High Court will only grant leave to appeal if it is convinced that there is a significant question to be determined.

Jurisdiction analysis**33 Status of product liability law and development**

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Prior to 2011, Australia had a relatively well settled product liability regime. From 1 January 2011, the new ACL introduced significant changes. The ACL was designed to establish a single, national, law concerning consumer protection and fair trading and by streamlining pre-existing State and Federal legislative regimes, the ACL introduces obvious benefits. However, the ACL also significantly amends previous Federal legislation and introduces important changes to the law. It will take some time to assess the effect of the ACL in a litigation environment, which is already heavily influenced by litigation funding and class actions.

34 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

The effects of new ACL are now beginning to be felt. Manufacturers and suppliers are coming to terms with the following changes:

- the introduction of mandatory reporting where suppliers must report to the appropriate regulator products, which have been associated with serious injury or death. This is potentially the most significant change for suppliers, including manufacturers, in terms of post market surveillance requirements and product reporting;
- a broader test for bans and recalls. Previously, the Minister could ban or recall goods that were unsafe because of a defect in the product itself, but it was unclear whether he or she can do so if the threat to consumer safety arises only as a result of consumer misuse. Under the ACL, the threshold test for bans and recalls

would cover all goods of a kind that, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person. In a country where self-regulation through reportable voluntary recalls has been the norm, this change will force manufacturers and suppliers to give careful consideration to both anticipated consumer use and misuse, including 'off-label' use (namely, use other than for indicated or approved purposes); and

- the practical impact of provisions relating to so-called 'major failures' on suppliers, particularly in relation to a claim that goods would not have been acquired by a consumer had the consumer been 'fully acquainted with the nature and extent of the failure'.

35 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

Australia has a long history of product liability litigation. More than 70 years ago, Australia's highest appellate court considered the application of sale of goods implied warranties to the consumer model. More recently, product liability litigation has been influenced by a focus on consumer protection and product safety. In the 1990's, Australia introduced its version of the EC product liability directive and a class action procedure. Both had been significant forces in shaping product liability litigation and consumer activism. Indeed, much of Australia's product liability litigation in the two decades commencing 1990 mirrored the mass tort cases that were being conducted in the United States. While the recent introduction of the ACL was primarily designed to establish uniform laws concerning consumer protection and fair trading, by providing the federal regulator with new powers, it demonstrates the importance politically of consumerism and consumer protection.

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