# product liability

> The buyer needs a hundred eyes, the seller not one.
>
> George Herbert, 1851

The ALRC proposed new laws to clarify and simplify the circumstances in which anyone injured by goods may claim compensation. The proposals are contained in Discussion Paper No 34, released at the end of August, which is available free of charge from the Commission.

The proposals are based on the policy that the costs resulting from unsafe goods should be reflected in their price and are also designed to make access to compensation easier and give manufacturers and importers an added incentive to produce safer goods. Under the proposed laws

- anyone who suffers loss or damage caused by goods which are not safe, or which are not of acceptable quality, will be able to claim compensation from the manufacturer or importer of those goods
- there will be no need for the person to prove that the manufacturer was negligent
- if the activities of some other person involved in the production process, for example, the designer or a manufacturer of a component part, made the goods unsafe or unacceptable, the manufacturer will be able to claim a contribution from that person
- if the injured person's own activities contributed to the loss or damage, the amount of compensation recoverable will be reduced.

The proposals are designed to stimulate public discussion and do not represent a final position. The ALRC will receive submissions until 1 December 1988. It will also hold public hearings in all capital cities during November. The details of the public hearings are on the back page of this issue of *Reform*. The Attorney-General has instructed the Commission to report by June 1989.

*policy objectives.* The ALRC adopted as its underlying policy objective the establishment of rules which will ensure that losses caused by goods should be reflected in the price of those goods to the extent that they are a consequence of the activity of some person involved in the enterprise of production. Another policy objective is to ensure maximum access to compensation at a minimum cost. The law should be as clear and simple as possible. The costs of recovering compensation, including the cost of the court system, should also be reduced as much as possible.

*the current law.* The Trade Practices Act 1974 (Cth) already imposes liability for unsafe or defective goods on manufacturers and importers of goods without proof of 'fault'. Those provisions cover owners or purchasers of goods, but give no rights to members of the households or guests of owners or purchasers, nor to bystanders. Such persons have had to rely on the law of torts. This has made it difficult, if not impossible, for them to recover compensation. They must first identify the proper defendant, then establish that that defendant was under a duty of care and that some act or omission by the defendant amounted to a breach of that duty (negligence).

For some time Australian courts and agencies like the National Consumer Affairs Advisory Council have been saying that the law on liability to pay compensation for loss or damage caused by goods is inadequate and unfair. Submissions to the ALRC support this view. The law does not conform to the policy that the price of goods should reflect all the costs associated with them because

- it provides different rights to persons suffering loss or damage from goods on the basis of the arbitrary and often fortuitous circumstance of the existence of a contract (or a chain of title to goods)

- it limits rights to 'consumers' and defines them in an arbitrary way
- the losses for which compensation may be claimed differ according to whether the person who has suffered loss or damage has an action in contract or in tort
- if compensation is found to be payable, there is no guarantee that it will be paid by the person whose activities were most responsible for the loss or damage.

The DP concluded that new statutory rules governing rights to compensation for loss and damage caused by goods should be enacted, similar to that introduced by the 1985 EEC Directive on Product Liability (see [1988] *Reform* 117.)

*goods.* The basis of liability would depend on a definition of 'goods', which refer to the complete product, and would include agricultural produce. Goods would include component parts of goods where those are acquired separately from the complete product. The DP recognises that some problems are presented by recent developments in biotechnology and information technology.

*basis of liability.* Liability would be imposed on the enterprise, that is, those engaged in the process of producing the goods and putting them into the market, where the plaintiff proves

- that there was loss or damage and
- that the goods have a characteristic which caused the damage, and which existed when the goods left the control of the enterprise.

The DP proposes two options as to the characteristic of the goods which would give rise to liability. Both options comprehend the notion of safety. The definition of safety would be based on community expectations. The first option is that liability would arise wherever the goods were 'unsafe'. The second, slightly wider, option is that liability would be imposed where goods were either 'unsafe' or 'unacceptable'. The wider option was formulated because the ALRC considers that the implied contractual term of merchantable quality is no longer satisfactory as a basis for liability in consumer transactions. The ALRC was influenced by the views of law reform agencies in the United Kingdom and New South Wales which have suggested that a broader definition, such as 'acceptable quality', should be used instead. The DP proposes that the definition of acceptable quality should be similar to that proposed by the Law Commission in England. This would comprehend factors such as durability, suitability for a range of purposes, and freedom from minor defects.

*onus of proof: presumptions.* Rebuttable presumptions would be available to assist the plaintiff in establishing that the the relevant characteristic which caused the loss or damage existed at the time the goods left the control of the enterprise, and that that characteristic made the goods unsafe or of unacceptable quality. The effect would be to place the burden of proof on the defendant, once the plaintiff established that the loss or damage was caused by an identified characteristic of the goods.

*a two-stage procedure: the primary stage.* The DP proposed that a provision which identifies a single member of the enterprise of production as the defendant assists persons claiming compensation, but that on its own it does not meet the policy objectives that the ALRC identified. It has therefore proposed a 'two-stage' procedure. The plaintiff would bring a claim against a 'primary defendant', normally the manufacturer. 'Manufacturer' would include importers and persons who represent that they are the producer of the goods. Where the only remedy sought is the repair or replacement of the goods or a refund of the price, the retail supplier of the goods should also be a primary defendant. Where the manufacturer cannot readily be identified or has ceased to exist, another supplier of the goods should become the surrogate of the manufacturer and would remain liable unless and until it provided informa-

tion enabling the manufacturer to be identified.

*the second stage.* In the second stage of liability, which is necessary to impose liability on the person responsible for the characteristic of the goods that caused the loss or damage, the primary defendant would have statutory rights of contribution and indemnity if the other person who was responsible for the condition of the goods was a member of the enterprise of production. Otherwise, the primary defendant would be limited to rights arising under the law of tort or contract.

*exclusion or limitation of liability.* The DP suggests that under the new laws, as under the Trade Practices Act, it should not be possible to limit or exclude the liability of the primary defendant by any contractual provision. Comments are sought on whether the same considerations apply between members of the production enterprise (for example, the producers of components and the final assembler of the goods).

*defences: 'development risks'.* The DP suggests that there should not be a 'state of the art' or 'development risks' defence. No such defence is available in actions for breach of contract or statutory actions under the Trade Practices Act 1974 (Cth) which impose liability on manufacturers. This does not appear to have restricted innovation or adversely affected industry in Australia. The state of scientific or technical knowledge and any warnings would be relevant in determining whether or not the goods were safe.

*defences: compliance with statutory standards.* The DP proposes that there should be no specific defence that the goods complied with a statutory standard. Where compliance with a relevant statutory standard or specification caused the condition of the goods which led to the loss or damage, the primary defendant should be able to recover contribution or indemnity from the person who established the standard or specification.

*defences: activities of a third party.* The DP proposes that it should not be a defence that the condition of the goods was caused by the activity of a person who was not a member of the enterprise, unless such activities took place after the goods left the control of the enterprise of production.

*compensation.* Compensation would include economic and non-economic loss arising from personal injury and property damage and 'pure economic loss' suffered by the owner of the goods. Pure economic loss suffered by a third party should not be compensable. There should be a new statutory measure of damages because the measure of damages available both under the rules relating to torts and to contracts is not adequate. Exemplary or punitive damages should not be available. There should be no limit on the amount of damages to be awarded.

*limitation period.* The DP suggests a limitation period of three years, beginning on the date when an injured person became or ought reasonably to have become aware of the loss or damage; the characteristic of the goods; *and* the identity of the primary defendant. The court would have a discretion to extend the period where it would be just to do so.

*a national law.* The DP proposes that the new statutory regime should be enacted by a Commonwealth law with the widest possible scope. Rights under existing laws, if consistent with the proposed law, would be preserved.

*criticism of proposals.* The ALRC's provisional proposals have already attracted some criticism. Mr David Edwards, Deputy Executive Director of the Victorian Employers' Federation, in a letter to the *Financial Review* on 16 September, commented that the Commission's proposals 'would result in Australia adopting a similar system to that which exists in the United States'. He noted that the Commission 'favours a system of system of strict product liability where it would not be necessary to show a manufacturer had been negligent'. However, Mr Edwards has

apparently overlooked the fact that, as was pointed out in the Discussion Paper, the Trade Practices Act 1974 (Cth) PtV, Div2A does not presently require a showing of negligence by a manufacturer. These provisions have been in operation for 10 years. He also expressed the concern of the VEF 'at the commission's faith in the American system which has been roundly criticised for encouraging the idea that individuals should take no responsibility for their own conduct'. Far from having 'faith in the American system', the ALRC's has *not* proposed

- contingency fees for lawyers
- that each party to legal proceedings should bear its own costs, regardless of the outcome
- punitive damages
- that the amount of damages payable should be assessed by juries
- that the laws of each of the States should continue to operate, a matter which is one the prime concerns in the United States.

Mr Edwards also said that the VEF was critical of the ALRC because it had not identified a need for new laws on product liability, nor had it conducted a cost-benefit analysis of the proposals. The DP, however, did contain an analysis of the existing law which pointed out, amongst other things, that the present requirement for proof of negligence by persons who are neither buyers nor owners of goods severely limits their opportunities to obtain compensation, and also was costly and time-consuming, when compared to the situation of the buyers of goods. In all situations, the DP proposed, liability should be based on the condition of the goods, not on the conduct of a person involved in the production or distribution of the goods. The ALRC has also engaged an economic consultant to conduct a study of the cost implications of its proposals, a matter which it is required to investigate by its terms of reference.

In the same paper on 20 September, PP McGuinness also criticised the ALRC's proposals. Amongst his criticisms he comments that the proposals 'would effectively remove any liability on a claimant for damages to prove negligence on the part of the supplier'. This is quite true, but it is nothing new. For many centuries, buyers of goods have not had to prove that their supplier has been negligent in order to obtain compensation, only that the goods are not in the condition required by the contract or under terms implied in the contract by the law. All that the proposals would do is translate these implied terms into statutory standards and enable all people, not merely buyers, to rely upon them as a basis for claiming compensation. Mr McGuinness was also sceptical of the consideration that will be given by the ALRC to the economic study. However, he appeared to equate the economic study to a cost-benefit analysis, and then criticised the ALRC for its views as to the usefulness of a cost-benefit analysis. Mr McGuinness finds 'objectionable' the ALRC's consideration of safety matters.

> Let us take the obvious example, that of tobacco. The first question which has to be asked is, is it true that tobacco is harmful to health? Most people would agree that it is, and much work is being done by medical researchers to establish the causal connections. But in the meantime, the commission is prepared to accept 'a probable causal connection'.

Mr McGuinness failed to quote the remainder of the sentence in which the cited words appear which, in discussing the concept of causation, stated that it is enough to show 'facts from which it can be rationally inferred that the goods, or a characteristic of the goods, caused the loss or damage'. More importantly, Mr McGuinness represents that this is an ALRC invention. A reading of the previous sentence would have indicated that this is the present law. Mr McGuinness also raises, in the context of tobacco products, the question of warnings, and suggests that, in the face of such warnings, users should take some responsibility for their use of cigarettes. The DP expressly address this situation, re-

quiring that warnings given on products be considered when assessing the safety of goods and that user conduct should be a ground for reducing compensation when that conduct has contributed to injury, or for denying compensation altogether when the conduct has effectively been the sole cause of injury.

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## 13th australasian law reform agencies conference

> Clapping with the right hand only
> will not produce a noise.
>
> Malay proverb

The 13th Australasian law reform agencies conference was held in Canberra on 3 September1988. It was hosted by the Australian Law Reform Commission.

Delegates attended from the Administrative Review Council; Research School of Social Sciences, Australian National University; New Zealand Law Commission; Northern Territory Law Review Committee and the Law Reform Commissions of Queensland, Papua New Guinea, New South Wales, Victoria, Western Australia and the Australian Law Reform Commission. The newly appointed Tasmanian Law Reform Commissioner, Mr Justice Cosgrove and his assistant, Terese Henning, also attended.

*ministerial address.* Senator MC Tate, the federal Minister for Justice, gave an address entitled 'The Process of Effective Criminal Law Reform: Some Considerations'. Senator Tate drew attention to the consolidation and revision of criminal laws in the Commonwealth and to the diversity of approaches in respect of offences and penalties. He argued that LRCs might be most effective in their operations if they were more closely linked to the parliamentary process. He reviewed the powers contained in the National Crime Authority Act, and commented on recent New South Wales anti-corruption legislation and the possible prejudice that could arise from pre-trial publicity and self-incrimination as a result of public hearings. Senator Tate also commented on sentencing, proceeds of crime legislation, and mutual assistance to international law enforcement agencies and courts.

Means by which representatives could meet with parliamentary committees when their reports were tabled were discussed.

*the role of the attorney-general's department in law reform.* The Secretary of the Commonwealth Attorney-General's Department, Mr Pat Brazil, had prepared a paper on the role of the Commonwealth Attorney-General's Department in the law reform process. The paper focused on the interface between his Department and the process of implementing law reform in Australia.

*departmental initiatives in law reform.* The paper outlined some of the major law reform initiatives currently being undertaken within the Attorney-General's Department. They include the Gibbs review of Commonwealth Criminal Law; the reform of statutory interpretation; the Australian Securities Commission proposals with respect to the Co-operative Companies and Securities scheme; and a departmental submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs in relation to its inquiry into mergers, takeovers and monopolies.

*implementation of ALRC reports.* In his paper, Mr Brazil pointed out that there are currently five ALRC reports currently being considered by the Attorney-General's Department. They are *Sentencing; Service and Execution of Process*; *Evidence*; *Contempt*; and *Matrimonial Property.* Recommendations with respect to the last mentioned report are with the Attorney-General.

In his paper Mr Brazil used the example of the Evidence report to show how the Department goes about its consideration of a report once it has been tabled.