1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TRADE PRACTICES AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Attorney-General, the Honourable
Michael Duffy MP)

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TRADE PRACTICES AMENDMENT BILL 1992

OUTLINE

The purpose of this Bill is to introduce into Australia a strict product liability regime based on the 1985 European Community Product Liability Directive by way of amendment of the *Trade Practices Act 1974*. It provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product has a right to compensation against the manufacturer without the need to prove negligence on the part of the manufacturer.

2. The key concept of the new Part VA inserted by this Bill is that a person who is injured, or whose property is damaged, by a defective product will have a right to compensation against the manufacturer of the product. Goods are 'defective' if they do not have the degree of safety which persons generally are entitled to expect in all the circumstances. 'Manufacturer' has the same extended definition as currently applies for the purposes of Division 2A of Part V of the Trade Practices Act.

3. The manufacturer can escape liability where it can prove one of a number of defences, the most significant being that the goods were not defective when supplied by the manufacturer or that the goods represented the "state of the art". The Bill also provides that, where goods contain a defect only because of compliance with a mandatory standard imposed by the Commonwealth, the Commonwealth and not the manufacturer should be liable to compensate the consumer. The amount of compensation payable is reduced by contributory acts by the injured party.

FINANCIAL IMPACT STATEMENT

4. It is not possible to make a precise costing of the impact the Bill will have on Government expenditure; however, the effect is not expected to be major. There is no plan at this stage to augment the staff or resources of any Commonwealth Department or Authority as a consequence of the introduction of the new regime. The Trade Practices Commission and courts, including the Federal Court, may however in the long run require increased funding as a result of their proposed additional roles if their product liability related workload is greater than anticipated.

5. Costs may also be incurred in consequence of Commonwealth liability for goods which are defective because of compliance with mandatory standards. Such costs will only arise where a Commonwealth mandatory standard requires a manufacturer to produce goods which are not as safe as the community is entitled to expect.

6. The Bill will ensure that the person responsible for putting defective goods into circulation is the party liable to compensate those who suffer loss because of the defect. This is of benefit to the whole community. While there will eventually be some increased cost to business as a result of the new law, European experience under a very similar regime has shown that this cost will be almost imperceptible in the initial years and very gradual after that.

ABBREVIATIONS

TPA: *Trade Practices Act 1974*
Commission: Trade Practices Commission

NOTES ON CLAUSES

Clause 1 - Short Title

1. This clause provides for the Act to be cited as the *Trade Practices Amendment Act 1992*. It also provides that the 'Principal Act' referred to in this Act is the TPA.

Clause 2 - Commencement

2. This clause provides for this Act to commence on the day it receives Royal Assent.

Clause 3 - Application

3. This clause provides that the new liability regime created by this Act will apply to goods supplied by their manufacturer after the commencement of this Act. The Act will not apply retrospectively to goods already put into circulation by manufacturers prior to commencement.

Clause 4 - Insertion of New Part

4. This clause inserts a new Part in the TPA - Part VA, which provides a new regime imposing liability on a manufacturer for damage caused by a defect in its product.

Section 75AA - Interpretation

5. All definitions in Part I of the TPA will apply to the new Part VA so far as they are relevant. Section 75AA, however, provides a number of additional definitions for the purposes of Part VA.

6. The most significant definition is that of a 'mandatory standard', because a manufacturer can escape liability if it can prove that the product was defective solely due to compliance with a mandatory standard (see section 75AK below). Section 75AA provides that a 'mandatory standard' is a standard for the goods or anything relating to them, which is imposed on the manufacturer by a State, Territory or Commonwealth law, and where some civil or criminal sanction is attached to a failure to comply. A mandatory standard could, for example, conceivably set requirements for such matters as the design, testing, manufacturing procedure, composition or performance of goods, or for instructions and warnings as to their use.

7. It is important to note the difference between simply "approving" a product for manufacture and sale and setting a standard in relation to the product. Merely "rubber stamping" a product for release does not constitute the imposition of a mandatory standard. However, if the approval process involves dictating absolute or non-discretionary performance criteria, manufacturing process or such matters, it is considered that these would involve the imposition of a mandatory standard.

8. The definition of 'mandatory standard' in section 75AA specifically excludes a standard which can be complied with by meeting a higher standard. Standards which only prescribe minimum requirements do not fall within this definition. A standard which merely *permits* (as distinct from *requires*) a product to be tested, constituted, labelled, manufactured, etc in a certain way, is therefore not a 'mandatory standard'.

9. A 'Commonwealth mandatory standard' is defined as a mandatory standard imposed by Commonwealth law. Standards which are developed by a Commonwealth Authority but imposed under State or Territory laws (such as, for example, the food standards developed by the National Food Authority) are therefore not "Commonwealth mandatory standards".

Section 75AB - Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part.

10. Under this Part, a manufacturer is liable to compensate a person who suffers loss because of a defect in goods it supplied (see sections 75AD to 75AG below).

11. Division 2A of Part V of the TPA also provides a liability regime against manufacturers in certain circumstances. Subsections 74A(3) to (8) provide an extended definition of manufacturer for the purposes of Division 2A. A corporation will be held to be the manufacturer of goods:

- where the corporation manufactures the goods;
- where the corporation holds itself out to the public as the manufacturer;
- where the goods are "home brand" manufactured under licence for the corporation;
- where the corporation permits someone to promote the goods as those of the corporation; or
- where the corporation is the importer of the goods.

12. Section 75AB provides that this extended definition will apply for the purposes of the new Part VA. Thus all references to the corporation which manufactured the goods in Part VA include those deemed to be the manufacturer by virtue of this section.

Section 75AC - Meaning of Goods having defect

13. Section 75AC provides meaning for a term which is central to the purposes of Part VA. Subsection 75AC(1) provides that goods are defective if they do not provide the level of safety which persons generally are entitled to expect. This is an objective standard based upon what the public at large, rather than any particular individual, is entitled to expect.

14. Subsection 75AC(1) does not require goods to be absolutely free from risk. The level of safety required is that which the community is entitled to expect. It is thus the objective knowledge and expectations of the community which are to be assessed, not the subjective knowledge and expectations of the injured party. It should also be noted that in assessing "safety", the potential risk of damage to property is to be taken into account as well as the risk of personal injury or death.

15. It should be noted that there are a number of different types of potential defects. Design defects relate to matters such as the form, structure and composition of the goods. Manufacturing defects are those related to matters such as the process of construction and assembly. Instructional defects are those caused by incorrect or inadequate warnings and instructions. All these categories of "defect" fall within the meaning ascribed to defect in section 75AC.

16. Subsection 75AC(2) provides assistance in the application of the general principle set down in subsection 75AC(1). It provides that, in assessing safety, all the relevant circumstances are to be taken into account. The subsection also lists a number of specific factors which must be considered.

17. The first factor listed is the manner and purpose of the marketing of the goods [paragraph 75AC(2)(a)]. This factor may be relevant where the product is marketed for professional or trade use. The level of warnings and instructions required could be expected to be less for such products because the manufacturer can assume a certain amount of pre-existing knowledge on the part of the purchaser. (This is not to suggest that professional

products require no warnings or instructions, merely that the type and pitch of any instructions and warnings will necessarily be different.) An untrained consumer cannot expect to receive detailed instructions when purchasing a product only meant for use by trained persons. Similarly, consumers are entitled to expect a high degree of safety from goods which are marketed in a manner depicting simplicity and safety.

18. The second "group" of factors can be generally referred to as those relating to presentation. Paragraphs 75AC(2)(b) to (d) require factors such as the packaging, markings, instructions and warnings to be taken into account. In relation to goods which are known by the manufacturer to be potentially hazardous, instructions and warnings are particularly crucial, as it is through these sources that the manufacturer can detail the nature and extent of the potential hazard and provide adequate instructions to assist consumers in avoiding that hazard. Similarly, the general presentation of the product can influence consumer expectations by exaggerating safety aspects or minimising reference to possible risks.

19. A further factor which must be taken into account is the use to which the product could reasonably be expected to be put [paragraph 75AC(2)(e)]. This "use" includes all reasonably expected secondary uses and likely potential misuse. Thus in some cases a manufacturer will be under an obligation to warn consumers of the potential consequences of misuse which could be anticipated by the manufacturer. This may in certain circumstances go beyond merely stating that a certain course of action should not be adopted and require the manufacturer to detail the specific consequences of such misuse (ie, to detail the type of injury or damage which may be suffered). If the loss does result partially from misuse, the manufacturer will be able to reduce the amount of compensation payable to reflect that part of the damage caused by contributory acts by the injured person (see section 75AN below), but this does not relieve the manufacturer of the obligation to warn.

20. The final specified factor is the time at which the goods were supplied [paragraph 75AC(2)(f)]. The critical time is when the alleged defective good which caused the loss was put into circulation by its manufacturer. Goods which met community expectations at that time are not defective at a later time because the safety expectations of the community have increased. Goods which are older and have been subject to more use similarly cannot be expected to be as safe as brand new ones. [See also subsection 75AC(3)

below.]

21. As noted above, in addition to the factors specified in subsection 75AC(2), the court must take all relevant circumstances into account in determining the safety of goods. Safety expectations may also depend on matters such as the nature of the product and community knowledge of that product. For example, there are a number of known negative side effects associated with certain pharmaceuticals and vaccines. It is also generally accepted and known that these side effects cannot be avoided. Such products are known to confer substantial benefits which flow to the wider community at large. The small statistical chance of injury associated with them does not of itself mean that they are "defective".

22. Similarly, there is a class of goods which can be conveniently referred to as "inherently dangerous products". Products in this class include tobacco, guns and knives. Because such products are, by definition, inherently dangerous and known to be such, community expectations in relation to these products must include an understanding of the degree of risk involved with their use. In the case of products for which the nature of the danger is well known to the general community, the community expects (and must accept) a degree of risk. Other products, however, where the risk is less generally known may require appropriate warnings.

23. The price of the goods may also be relevant. The purchaser of a cheaper product should not expect that product to contain any additional special safety features which may be associated with a more expensive version. A consumer is, however, entitled to expect that the product is not dangerous simply because it is cheaper.

24. The role which intermediaries may play in the supply of goods may also need to be taken into account. For example, prescription pharmaceuticals are supplied to the consumer by a qualified pharmacist and only on the prescription of a qualified medical practitioner. Due to the complex nature and effects of these products, complete instructions and warnings may not be provided to the consumer by the manufacturer. However, detailed product information is provided to doctors and pharmacists by the manufacturer so these learned intermediaries are sufficiently informed to be able to decide whether or not it is appropriate to dispense pharmaceuticals to particular consumers. This factor will be relevant in determining whether a pharmaceutical is defective, particularly

where a claim of a defect in information provided is made. [See also the defence in paragraph 75AK(1)(a) below.]

25. Subsection 75AC(3) makes it clear that a product is not defective solely because a safer product is subsequently put on the market. This should not be seen as preventing this factor from being taken into account by a court, but merely providing that this is not to be seen as the sole reason for goods being considered defective. This subsection should ensure that product development and innovation are not jeopardised by the introduction of a strict liability regime.

26. In relation to standards, there must also be some recognition that there is a time lag between scientific and technological advances and the development of new standards. This is probably most pressing in the case of therapeutic goods, where there can be a long period between the development of a drug and its release onto the market. Subsection 75AC(4) seeks to ensure that no liability should attach to the Commonwealth solely because its standard does not represent the very latest technical or scientific knowledge. Once again, this is not to say that this cannot be a factor in assessing safety, only that it should not be the sole factor.

Sections 75AD to 75AG - Liability Provisions

27. Sections 75AD to 75AG set out the types of compensation which a person can claim from the manufacturer under Part VA for loss caused by defective goods. For constitutional reasons only manufacturers which are corporations are liable under this Part. (Note the extended definition of manufacturer provided by sections 75AB above and 75AJ below.) Amendments to section 6 of the TPA contained in this Bill will provide an extension to non-incorporated manufacturers in certain situations - see below. The application of Part VA is also restricted to supply "in trade or commerce". Non-commercial supply is therefore excluded.

28. As has already been noted, this new strict product liability regime is based on the 1985 European Community Directive on Product Liability. The Government's intention in introducing this regime is that Australian consumers who are injured by defective goods should be placed in a position which is no less advantageous than that enjoyed generally by their European counterparts in the same situation. In this context it should be noted that while the EC Directive clearly requires that a plaintiff bear the burden of

proving his/her case, the Directive was prepared on the understanding that Member States would continue to utilise their existing rules of evidence and procedure in dealing with cases brought under the Directive.

29. In practice this means that, in many EC countries (including the United Kingdom, Ireland, Germany, France and Italy), claimants have the advantage of certain procedural and evidentiary devices which, in varying degrees, may assist plaintiffs to make out their cases.

30. The Bill conforms with the EC Directive by leaving the onus of proof on the balance of probabilities on the issues going to liability (sections 75AD to 75AG) firmly with the plaintiff. In contrast to the Directive itself, in the Australian legal context there is no need to specifically provide that this is the case because Australian courts will presume this to be so in the absence of express words to the contrary. This is likewise the case under the equivalent British legislation, the Consumer Protection Act 1987. The Government intends that in applying this legislation the Australian courts will fully acquaint themselves with the emerging jurisprudence in Europe, especially on procedural and evidential matters.

Section 75AD - Liability for defective goods causing injuries - loss by injured individual

31. Section 75AD gives an individual the right to be compensated by the manufacturer for loss suffered by the individual as a result of injury caused by defective goods.

32. Where an individual dies because of a "wrongful act", State and Territory laws based on Lord Campbell's Act provide that certain dependants of the deceased may claim for specified classes of damages through the administrator or executor of the estate. Paragraph 75AD(f) provides that, where an individual dies as a result of injuries caused by defective goods, these State and Territory laws will apply to an action taken under this Part. This provision operates in conjunction with section 75AH [see below].

Section 75AE - Liability for defective goods causing injuries - loss by person other than the injured individual

33. The dependants of a person who is injured or dies because of defective goods may also suffer their own loss as a result of that person's injuries or death. Section 75AE provides such persons with a right to take a separate

action to recover such loss, as "Lord Campbell" type actions compensate only in limited circumstances.

34. Loss which is caused by a business relationship between the injured person and the potential claimant is specifically excluded by paragraph 75AE(1)(e), as the legislation is not intended to create rights of a commercial nature. Losses caused, for example, by the injury of a business partner or injury of a director of a company are therefore excluded. Subsection 75AE(2) makes it clear that, for the purposes of this regime, a profession is a business. It also provides that an employer/employee relationship (or one of a similar nature) is a business relationship.

Section 75AF - Liability for defective goods - loss relating to other goods

35. Section 75AF provides a right to recover loss where defective goods cause damage to, or destruction of, personal property. Only loss occasioned through the damage or destruction of goods of a kind ordinarily acquired for personal, domestic or household use or consumption can be recovered. Damage to, or destruction of, the defective goods themselves is specifically excluded as this is covered by other remedies. In addition, paragraph 75AF(d) provides that the damaged goods must not only be of a "consumer" type, they must have been used or intended for use by the claimant mainly for that purpose.

36. Damage to commercial property is specifically excluded from the scope of the regime, as it is considered that commercial users are usually in a better position to protect themselves from such risk through their commercial arrangements.

Section 75AG - Liability for defective goods - loss relating to buildings, etc

37. Defective goods may also damage or destroy real property, such as land, buildings and fixtures (for example stoves, fixed bookshelves and light fittings). Section 75AG gives a person the right to recover loss suffered as a result of damage to or destruction of real property caused by defective goods. As is the case with personal property, damage to commercial property is excluded and only loss occasioned through damage to property of a kind ordinarily acquired for private use is recoverable. Similarly paragraph 75AG(d) provides that the damaged goods must not only be of a "consumer" type, they must have been used or intended for use by the claimant mainly for that purpose.

Section 75AH - Survival of liability actions

38. This section provides for the application of State and Territory laws about the survival of causes of action vested in persons who die to cases brought under Part VA. These Acts provide that all causes of action vested in a person at the time of his or her death survive for the benefit of the estate. They will apply to cases brought under Part VA whether or not the death was actually the result of the injuries caused by the defect. However, the types of damages recoverable will differ depending on whether the death was caused by the relevant injuries.

Section 75AI - Section 75AD not to apply where workers' compensation or law giving effect to an international agreement applies

39. This section provides that loss which could be recovered under a law of a State, Territory or the Commonwealth which either:

- relates to workers' compensation; or
- gives effect to an international agreement;

cannot be recovered under the new Part VA.

40. The new Part VA is being introduced as a consumer protection measure. Loss caused by work-related injuries has therefore been excluded, as it is considered that this field is comprehensively regulated under existing workers' compensation regimes. Similarly, loss which is regulated by way of international agreement has also been excluded.

Section 75AJ - Unidentified manufacturer

41. Because the right to compensation created by the new Part VA applies not only to owners, but to innocent bystanders who are injured by defective goods, it may not always be possible for a potential claimant to identify the manufacturer of the defective goods. The new section 75AJ seeks to assist potential claimants who are in this position.

42. Subsection 75AJ(1) permits a potential claimant to serve a written request to any or all known suppliers of the action goods requesting them to identify the manufacturer of the goods, or (if the supplier does not know the name of the manufacturer) the name of the party which supplied it with the goods. It should be noted that it is the manufacturer for the purposes of section 75AB which is referred to in this context, as it would be of little assistance to a consumer if a foreign manufacturer was identified rather than the Australian importer.

43. The "service" of the request should be conducted in accordance with section 28A of the Commonwealth *Acts Interpretation Act 1901*. Under that provision, service of a document on a corporation can be effected by either sending the document by pre-paid post to, or leaving it at, the head office, a registered office or a principal office of the corporation.

44. Where the potential claimant still cannot identify the manufacturer after 30 days, subsection 75AJ(2) provides that each supplier which did not respond to such requests is deemed to have manufactured the goods.

45. In these circumstances, the claimant will be in a position to take action against the supplier of the action goods which is best placed to meet the claim. This is not considered unduly harsh, as a supplier can easily avoid being made liable by virtue of this section by simply providing the claimant with the name of its supplier or of the manufacturer.

Section 75AK - Defences

46. Section 75AK provides that the manufacturer will not be liable to compensate the claimant if it can prove one of a number of defences.

47. Paragraph 75AK(1)(a) gives the manufacturer a defence if it can prove that the alleged defect did not exist at the time the product left the control of the manufacturer ("the supply time"). The manufacturer is thus not liable for matters beyond its control occurring either later on in the distribution chain or caused by the injured party or other users of the product.

48. Subsection 75AK(2) provides a definition of "supply time". In the case of goods other than electricity, the subsection provides that the supply time is the time at which they were supplied by their manufacturer. In the case of electricity, the "supply time" is defined as the time at which it was generated.

49. To succeed in this defence, the manufacturer must show, on the balance of probabilities, that the (admittedly) defective goods were defect free when they left the manufacturer's control. Factors such as the nature of the goods, the level of use of the goods, and the length of time between the goods leaving the control of the manufacturer and the damage will be important. Depending on the nature of the defect, the manufacturer may also need to provide detailed evidence on the manufacturing process and quality control to which the alleged defective good (not just goods of that type generally) was subjected, in order to show that this particular good was not defective

when it left the manufacturer's control.

50. The role of intermediaries may be relevant in relation to this defence. As noted above in relation to matters relevant to determining whether goods are defective, due to the complex nature of pharmaceuticals, detailed product information is provided to the qualified intermediaries rather than directly to the consumer. The information is provided with the expectation that it will be used to properly inform the consumer about the product as the doctor or pharmacist sees fit. A product cannot be considered to be defective if it acts in an injurious or damaging manner due to the failure of the intermediary to properly inform the consumer, provided that the proper information is provided by the manufacturer to the intermediary.

51. This defence will also be particularly relevant for component manufacturers. In many cases, a component may be incorrectly installed into a finished product and subsequently act in a "defective" manner. In these circumstances, the component manufacturer can use this defence and prove that its product was free of defects at the time it was supplied. (See also the specific defence for component manufacturers contained in paragraph 75AK(1)(d) below.)

52. Paragraph 75AK(1)(b) provides a defence where the manufacturer can prove that the only reason the product was defective was because it complied with a mandatory standard. Note that compliance with the standard must have been the *sole cause* of the defect; the manufacturer is not freed from liability where compliance is merely a partial cause of the relevant defect.

53. As noted above, section 75AA provides that a standard which sets only minimum performance requirements is not a 'mandatory standard' for the purposes of Part VA. Where a manufacturer is free to exceed the minimum requirements of the standard without sanction, then it cannot be said that the standard is the sole cause of the defect. Similarly, where the manufacturer is free to choose how to achieve the performance level required by the standard, and chooses a "defective" method, this defence will not be available.

54. Paragraph 75AK(1)(c) provides the manufacturer with a defence if it can show that the defect could not have been discovered in the light of the state of scientific and technical knowledge at the time the goods were

supplied. This is sometimes referred to as the "development risks" or "state of the art" defence.

55. It is the objective state of scientific and technical knowledge, not the subjective knowledge of the individual manufacturer, which is to be taken into account. It is only if the defect could not have been discovered by anybody that the manufacturer will be able to succeed. A manufacturer must expect that there may be further scientific or technical advances during the period of testing and production. The manufacturer should therefore satisfy itself that there have been no further technical advances which affect the safety of the goods before putting them into circulation.

56. Similarly, a manufacturer must keep up to date with advances in knowledge after it first puts a product into circulation to ensure that new information is taken into account in the manufacture of subsequent goods, as new information may expose defects in goods. The crucial time is therefore when the alleged defective good which caused the injury was supplied by the manufacturer, not the time at which the manufacturer first supplied goods of that type.

57. The wide meaning given to 'goods' in section 4 of the TPA will include component parts which are later integrated into finished goods. Manufacturers of components which are incorporated into finished products will therefore also be liable to compensate injured claimants if the component goods contribute to (or cause) a defect in the finished goods. (In this context, note that if a defective component is incorporated in the finished goods, those goods will also be defective and that both the component manufacturer and the manufacturer of the finished goods will be liable to compensate the claimant.)

58. However, the manufacturer of components should not be liable if the finished product is defective solely due to an act or omission of the manufacturer of the finished product. Paragraph 75AK(1)(d) therefore provides a component manufacturer with a defence if it can prove that the defect is attributable only to the design of the finished goods, or to any markings, instructions or warnings given by the manufacturer of the finished goods.

59. Paragraph 75AK(1)(d) makes it clear that a defect in a component cannot be attributed to the component manufacturer if the defect is due to an

activity of the ultimate manufacturer, such as careless assembly, using an unsuitable component or incorrect or inadequate instructions. As noted above, the defence in paragraph 75AK(1)(a) may also be relevant to component manufacturers in these circumstances.

Section 75AL - Commonwealth liability for goods that are defective only because of compliance with Commonwealth mandatory standard

60. As noted above in relation to section 75AK, it is a defence for the manufacturer to show that the goods were defective only because of compliance with a mandatory standard. Section 75AL provides that where that defence is successfully argued in relation to a Commonwealth mandatory standard, then the Commonwealth should be liable to compensate the claimant instead of the manufacturer.

61. Subsection 75AL(1) requires a defendant who is seeking to rely on a Commonwealth mandatory standard as a defence to serve a copy of its defence and a prescribed notice on the Commonwealth as soon as practicable after raising the defence.

62. Subsection 75AL(2) automatically makes the Commonwealth a defendant to the action once the notice has been served.

63. Subsection 75AL(3) makes the Commonwealth liable in the place of the defendant if the defendant would have been liable but for a 'mandatory standards' defence in relation to a Commonwealth mandatory standard. It further provides that judgement will be entered against the Commonwealth for the amount of the loss, and permits the Court to make such costs orders as it sees fit in the interests of justice.

Section 75AM - Liability joint and several

64. Under the new scheme, it is possible that more than one party will be liable to compensate the claimant for the loss. For example, where loss is caused by a defect in a component, both the component manufacturer and the manufacturer of the finished product could be liable. Similarly, a number of suppliers could be simultaneously liable pursuant to section 75AJ.

65. Where several persons are liable to the same claimant for the same damage, the adequate protection of the claimant requires that he or she be able to claim the full amount against any one of those who are liable. Section 75AM therefore makes all those responsible liable "jointly and severally" (ie, individually and collectively). This gives the claimant the

opportunity to institute proceedings against the party which will be best able to pay compensation. The claimant is also relieved of the necessity to take a separate action against each party who is liable to compensate him or her in order to obtain each person's "portion" of the loss (that is, that part of the loss for which the person is responsible).

66. Any defendant who believes that liability should be shared is of course at liberty to join other parties to the action by way of third party proceedings in the normal manner.

Section 75AN - Contributory acts or omissions to reduce compensation

67. Where the loss was caused by both a defect and an act or omission of the person who suffered loss because of the defective goods, the court will reduce the amount of compensation by an appropriate amount taking all the circumstances into account. In appropriate circumstances, the reduction can amount to a complete disallowance of the claim.

68. It is expected that in deciding whether there should be any reduction, a court will take into account the nature of the act or omission which contributed to the loss. For example, where the act is one which would be associated with normal use of the product (such as turning on an appliance) a reduction in damages would not be anticipated. It is therefore expected that reductions will occur to take into account only the *culpable* acts or omissions of the injured person.

69. Subsection 75AN(3) provides that the acts or omission of an individual include the acts or omission of another person for whom the individual is responsible. A reduction (or disallowance) of damages can therefore also be made where the loss is partially caused by a person for whom the individual who suffered the loss is responsible.

70. Damages are only to be reduced in the circumstances outlined in this section. The amount of compensation is therefore not to be reduced due to the act or omission of other parties, such as transporters or wholesalers of the goods or other bystanders. In such circumstances, the manufacturer remains wholly liable to the claimant and should seek to recover (either in whole or in part) against that party.

Section 75AO - Time for commencing actions

71. Subsection 75AO(1) provides that a potential claimant must commence an action within three years of the time at which he or she became aware (or ought to have become aware) of the loss, the existence of a defect in the goods and the identity of the manufacturer of the goods.

72. Paragraph 75AO(2) creates what is known as a "repose period" for the purposes of Part VA. It provides that actions to recover damage must be commenced within 10 years of the supply of the product by the manufacturer. The time at which the repose period begins to run is the time at which the alleged defective good which caused the loss (not merely a good of that type) was first supplied by its manufacturer. (Note that, in the case of importers, the relevant time is that when it was first supplied by that importer.)

Section 75AP - Application of provisions not to be excluded or modified

73. Section 75AP is based on section 68 of the TPA, and provides that the application of Part VA cannot be restricted, excluded or modified by contract. Any term of a contract which purports to do so is void.

Section 75AQ - Representative actions by the Trade Practices Commission

74. This provision empowers the Commission to take actions under the new Part VA on behalf of persons who have suffered loss. Subsection 75AQ(1) provides that the Commission may file a claim on behalf of claimants identified in an application. Subsection 75AQ(2) provides that the Commission must obtain the written consent of each person it wishes to represent. The Commission may already bring representative actions in relation to alleged contraventions of Part V of the TPA.

Section 75AR - Savings of other laws and remedies

75. It is intended that the rights contained in the new Part VA should be in addition to a claimant's pre-existing rights, whether they be by way of contract, tort or a statutory right under a Commonwealth, State or Territory law. Section 75AR therefore provides that Part VA does not in any way exclude, limit or otherwise affect such rights.

Section 75AS - Jurisdiction of courts

76. This section confers power on the Federal Court and State and Territory courts of competent jurisdiction to hear matters arising under the new Part VA. It also empowers the Federal Court to transfer matters to either the Family Court or a State or Territory court in certain

circumstances. This is in line with other provisions of the TPA.

Clause 5 - Other amendments

77. This clause provides that the TPA is also amended as set out in the Schedule. The following amendments are contained in the Schedule.

TPA paragraph 6(2)(c)

78. Section 6 of the TPA gives the Act additional application in certain circumstances. In particular, paragraph 6(2)(c) provides that the TPA applies to non-corporations engaged in interstate or overseas trade or commerce, or trade or commerce involving a Territory. The Schedule amends this paragraph to provide that this extended operation also applies to matters under Part VA.

TPA paragraphs 170(1)(a) & (c)

79. Under section 170 of the TPA, the Attorney-General may grant legal aid to a person who has instituted (or proposes to institute) an action under the TPA in certain circumstances. The Schedule amends section 170 to allow legal aid to be granted to persons taking action under Part VA.

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