

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TRADE PRACTICES AMENDMENT BILL (No. 2) 1991

EXPLANATORY MEMORANDUM

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



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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 proposed new Part VA inserted by this Bill is that a person who is injured, or whose personal 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 (No. 2) 1991*. 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 for the compensation of persons who suffer either personal injury or property damage caused by defective goods.

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 75AH 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. Section 75AD makes a manufacturer liable to compensate a person who suffers loss because of a defect in goods it supplied (see 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 contains the central definition for the purposes of Part VA. Subsection 75AC(1) provides that goods are defective if they do not provide the level of safety which the community 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 definition of 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.

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 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 claimant (see section 75AM 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 did meet community expectations at that time are not defective at a later time because the safety expectations of the community have increased. [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. 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.

25. 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) provides 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.

Section 75AD - Liability for defective goods

26. For constitutional reasons only manufacturers which are corporations are liable under this section. (Note the extended definition of manufacturer provided by sections 75AB above and 75AG 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.

27. Subsection 75AD(1) gives a person the right to compensation for loss suffered as a result of the death or injury of a person caused by defective goods. This

right to compensation will extend to all persons who suffer loss as a result of such injury or death, not just to the person so injured. Thus the dependants of a deceased person may suffer their own loss as a result of that person's death. Such dependants will have a right to take a separate action to recover such loss.

28. Subsection 75AD(2) provides a right to recover loss where defective goods cause damage to, or destruction of, a person's 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 is specifically excluded as this is covered by other remedies. In addition, subsection 75AD(2) 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.

29. 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 75AE - Death of individual results in loss by individual's estate.

30. This section deals with the situation where a person dies as a result of defect-related injuries. It provides that the person's personal representative (that is, the executor or administrator of his or her estate) is taken to suffer loss for the purposes of section 75AD.

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

31. This section provides that any part of the loss which could be recovered under either:

- . a State or Territory workers' compensation law; or
- . a law of a State, Territory or the Commonwealth giving effect to an international agreement;

cannot be recovered under the new Part VA.

32. It is only that part of the loss which could be recovered from either of the above sources which cannot be recovered. An injured person can still claim any other part of the loss under the new Part VA.

Section 75AG - Unidentified manufacturer

33. 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 75AG seeks to assist potential claimants who are in this position.

34. Subsection 75AG(1) permits a potential claimant to make a written request to any or all known suppliers of the good requesting them to provide the name of 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.

35. Where the potential claimant still cannot identify the manufacturer after a reasonable time, subsection 75AG(2) provides that each supplier which did not respond to such requests is deemed to have manufactured the goods.

36. In these circumstances, the claimant will be in a position to take action against the supplier 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 75AH - Defences

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

38. Paragraph 75AH(a) gives the manufacturer a defence if it can prove that the alleged defect did not exist at the time the product was first supplied by the manufacturer. The manufacturer is thus not liable for improper use either later on in the distribution chain or by the injured party or other users of the product.

39. 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.

40. Paragraph 75AH(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.

41. 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.

42. Paragraph 75AH(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.

43. 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.

44. 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.

45. The definition of 'goods' in section 4 of the TPA means that manufacturers of components which are incorporated in finished products will also be liable to compensate injured claimants if the component contributes to (or causes) 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.)

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

47. Paragraph 75AH(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.

Section 75AJ - Inferences from evidence

48. Section 75AD requires a claimant to prove that he or she suffered loss as a result of a defect in goods. It

is however, sometimes difficult for a claimant to gather direct evidence to prove the exact nature of the alleged defect or the precise causal connection between the defect and the loss or injury.

49. In order for a claim to go to trial, the claimant must establish a "prima facie" case. Australian courts have demonstrated a reluctance to find that a prima facie case exists where the claimant cannot provide any direct evidence (as opposed to circumstantial evidence) of defect or causation beyond the fact that the injury occurred.

50. In order to overcome this problem, courts in some countries have introduced special evidential and procedural rules to assist claimants who cannot provide direct technical evidence. In negligence actions in the UK, for example, claimants can take advantage of an evidentiary principle known as "res ipsa loquitur", which allows the Court to draw an inference of negligence from the mere happening of an event without the benefit of direct and detailed testimony about cause and responsibility. Its principal function is to prevent injustice in situations where the plaintiff is required to prove matters which are unknown to him or her but often within the knowledge of the defendant. Once the inference has been drawn, it is up to the manufacturer to rebut the "presumption" of negligence on the balance of probabilities.

51. With this in mind, section 75AJ provides that a Court must draw an inference that a defect in the goods caused the loss where it is reasonable in all the circumstances of the case to do so. This provision will ensure that consumers with "common sense" claims are not struck out on procedural or technical grounds, but will be allowed their day in court.

52. It will of course remain open to the manufacturer to attempt to refute this inference, either through cross examination of the claimant's witnesses or through presenting its own evidence. However, at the end of the day, the issue for the court will be: has the claimant shown, on the balance of probabilities, that a defect in the goods caused the injury or damage.

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

53. As noted above in relation to section 75AH, it is a defence for the manufacturer to show that the goods were defective only because of compliance with a mandatory standard. Section 75AK 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.

54. Subsection 75AK(1) requires a defendant who is seeking to rely on a Commonwealth mandatory standard as a defence to serve on the Commonwealth a copy of its defence and a prescribed notice.

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

56. Subsection 75AK(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 75AL - Liability joint and several

57. 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 75AG.

58. 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 75AL 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).

Section 75AM - Contributory acts or omissions to reduce compensation

59. Where the loss was caused by both a defect and an act or omission of either the claimant or a person for whom the claimant is responsible, the court will reduce the amount of compensation by an appropriate amount taking all the circumstances into account.

60. The amount of compensation is not to be reduced due to the act or omission of a third party. In such circumstances, the manufacturer remains wholly liable to the claimant and should seek to recover against that third party.

Section 75AN - Time for commencing actions

61. Subsection 75AN(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 both the loss caused by the defective good and the identity of the manufacturer.

62. Paragraph 75AN(2) creates what is known as a "repose period" for the purposes of Part VA. It provides that actions to recover damage to property must be commenced within 10 years of the supply of the product by the manufacturer and actions to recover loss caused by death or injury must be commenced within 20 years of such supply. A longer time period is allowed for personal injury to take into account injury which may be caused by diseases which develop slowly (such as cancer) and injuries which cause genetic problems.

63. 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

64. 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

65. 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

66. 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

67. 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

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

TPA Subsection 5(1)

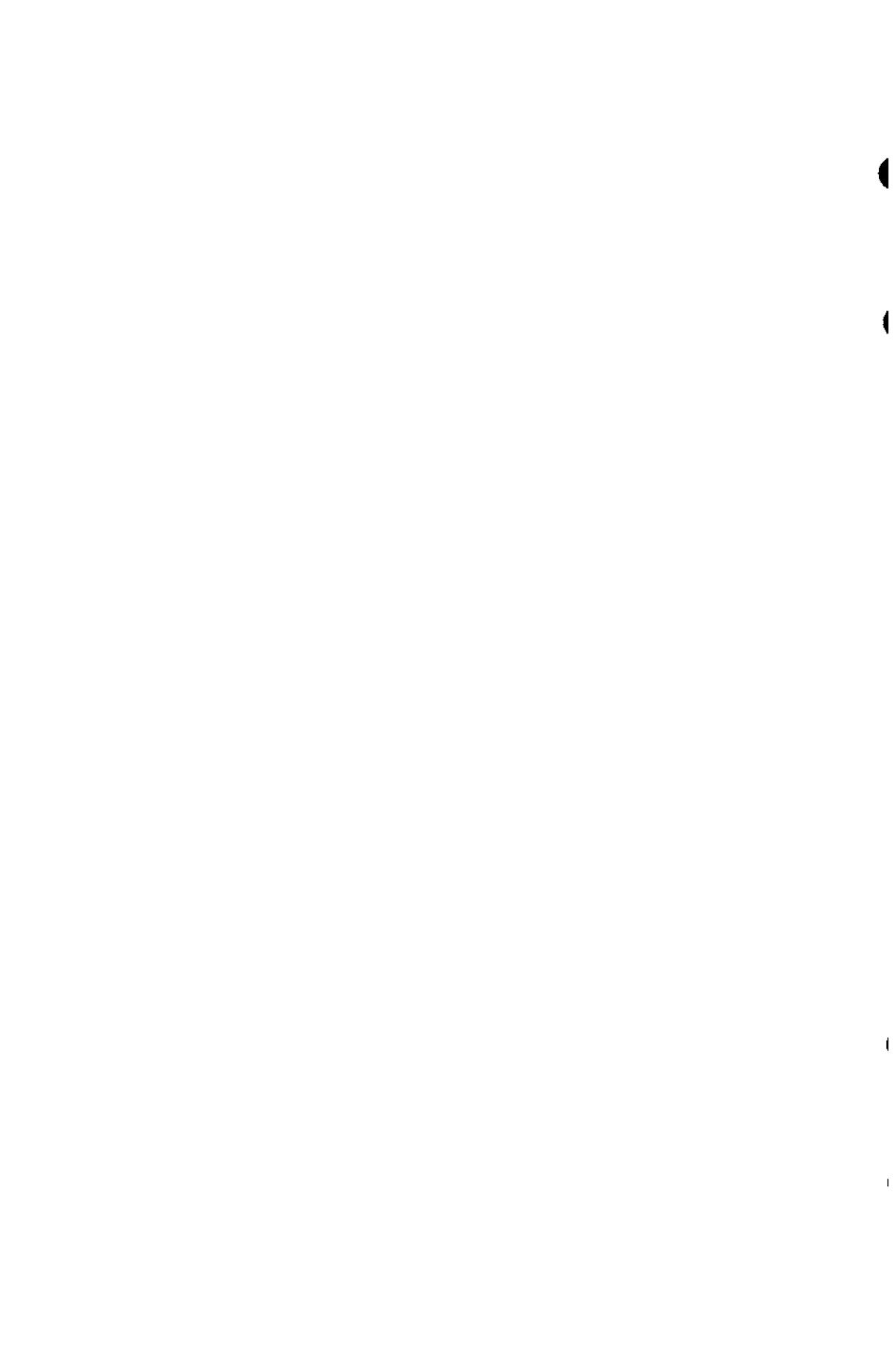
69. Section 5 of the TPA provides for the extraterritorial operation of the TPA where an Australian company engages in business outside Australia. The Schedule amends subsection 5(1) by inserting a reference to Part VA. This means that Australian manufacturers who "dump" defective goods in overseas countries can be held liable to compensate those who suffer loss as a result of the defective goods.

TPA paragraph 6(2)(c)

70. 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)

71. 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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