2000

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CURRENT TRENDS AND FUTURE DIRECTIONS IN PRODUCT LIABILITY IN AUSTRALIA

Jocelyn Kellam†
Bettina Arste‡

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"Product liability" in Australia describes a type of claim, not a separate theory of liability. It refers to the law dealing with civil actions brought to obtain compensation for losses and injuries resulting from defective products. As in other parts of the common law world, product liability laws are "apparently disparate branches of legal theory...dealing with the same problem."1 "Defective" products are generally thought to be those of substandard quality, that is, they are either "shoddy" or dangerous or unsafe.

Prior to 1992, product liability claims brought in Australia were based in negligence2, under the implied warranty provisions

2. The Australian law of negligence is founded upon the 1932 House of Lords decision Donoghue v Stevenson [1932] AC 562.
of the *Sale of Goods* legislation and under the consumer protection

3. Sale of Goods Act, 1923, Section 19 (NSW), *Implied Condition as to Quality or Fitness*: (equivalent provisions at VICT. STAT. section 18; S. AUSTL. STAT. section 14; W. AUSTL. REPR. ACTS section 14; QUEENSL. PUB. ACTS section 17; TAS. STAT. section 19; AUSTL. CAP. TERR. LAWS section 19, N TERR. AUSTL. LAWS section 19):

"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose . . .

(2) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade."

Under the Sale of Goods Act, 1923, Section 19(2) (NSW), *Merchantable Quality*: (equivalent provisions at VICT. STAT. section 19(b); S. AUSTL. STAT. section 14(2); W. AUSTL. REPR. ACTS section 14(2); QUEENSL. PUB. ACTS section 17(2); TAS. STAT. section 19(2); AUSTL. CAP. TERR. LAWS section 19(4), N TERR. AUSTL. LAWS section 19(b)):

"Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. Provided that where the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed."

Also, in respect of consumer sales in NSW, see Sale of Goods Act, 1923, Section 64 (NSW):

"(5) Where, in any proceedings arising out of a contract for a consumer sale (not being a consumer sale of second-hand goods), it appears to the Court that the goods, at the time of their delivery to the buyer, were not by reason of any defect in them or for that and any other reason, of merchantable quality, the Court may add the manufacturer of the goods as a party to the proceedings and, if of the opinion that the defect should be remedied by the manufacturer, may make against him either:

(a) an order requiring the manufacturer to pay to the buyer an amount equal to the estimated cost of remedying the defect; or

(b) an order requiring the manufacturer to remedy, within such time as may be specified in the order, the defect and, in default of compliance with that order, require the manufacturer to pay to the buyer an amount equal to the estimated cost of remedying the defect, and may make such other ancillary orders against the manufacturer as to the Court seem proper.

(6) In subsection (5) "manufacturer", in relation to any goods the subject of proceedings referred to in that subsection, includes a person who resides or carries on business in the Commonwealth and who re-
warranty provisions of Part V of the Trade Practices Act 1974 (Cth). Since 1992 product liability litigation in Australia has changed. During that year two watershed legislative initiatives occurred: the introduction of provisions based on the 1985 EC Directive on Defective Products as Part VA of the Trade Practices Act 1974 and the introduction of a class action mechanism through the inclusion of Part IVA into the Federal Court of Australia Act 1976 (the "FCA Act"). The effect of these developments has increasingly been felt during the last two years, as the courts grapple with the meaning of the provision, changing the product liability litigation environment.

Parallel with these developments, liability is increasingly also being imposed by Australian courts for representations made in connection with products, specifically that a failure to warn can be misleading and deceptive. A representational basis of liability focuses on the expectations created in consumers by representations and the way a product is marketed and presented. It is submitted that in the future in Australia, liability for inadequate warnings and instructions for use, and misstatements concerning the safety of products, will become increasingly more important than the traditional basis of liability based upon the defective or substandard quality of products.

Both of the 1992 statutory reforms and the apparent readiness of the courts to impose liability for product representations and failure to warn are discussed below.

II. 1992 STATUTORY REFORMS: PART VA OF THE TRADE PRACTICES ACT 1974 (CTH)

Part VA, which deals specifically with the liability of manufacturers and importers of defective goods, is modelled on the European Community's Product Liability Directive 1985 (the "EC Direc-
It supplemented a regime of liability already in place, which included causes of action based on negligence, on the provisions of Part V Divisions 2 (Conditions and Warranties in Consumer Transactions)\(^7\) and 2A (Actions against Manufacturers and Importers of...\(^8\)).

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Whether the terms "product" and "goods" are equivalent is largely a question of semantics. In any event, the definitions contained in the EC Directive and Part VA Trade Practices Act 1974 (Cth) govern the application of the legislation. (See: U. DIEDERICHSEN, DIE HAFTUNG DES WARENHERSTELLERS 7 (Munich: C.H. Beck Verlag 1967) equating "Produkt" and "Ware" as being factually the same). The term "product" may be broader in meaning than goods, including, for example, intellectual products.

In relation to the three original options under the EC Directive, Part VA includes agricultural products as goods and a development risks defence. There is, however, no threshold or ceiling on liability for personal injury.

Part VA diverges in two significant respects from the EC Directive. First, under section 75AQ of the Trade Practices Act 1974 (Cth), the Australian Competition and Consumer Commission is allowed to take a representative action on behalf of named individuals who have suffered loss as a result of a defective good. Such a provision does not exist in the EC Directive. Second, under section 75AK of the Trade Practices Act 1974 (Cth), if a good is defective solely because of compliance with a mandatory Commonwealth standard, then the Commonwealth may be joined to the proceedings and may be held liable for the loss.

8. Trade Practices Act, 1974, Section 71 (Cth), Implied Undertakings as to Quality or Fitness:

"(2)Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the corporation or of that person.

(3)Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except where that corporation is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the
Goods) of the Trade Practices Act ("TPA"), and for breach of sec-

notice of the consumer before the contract is made."

Trade Practices Act, 1974, Section 66 (Cth), Interpretation:
"(2) Goods of any kind are of merchantable quality within the mean-
ing of this Division if they are as fit for the purpose or purposes for
which goods of that kind are commonly bought as it is reasonable to
expect having regard to any description applied to them, the price (if
relevant) and all the other relevant circumstances."

Trade Practices Act, 1974, Section 71 (Cth), Implied Undertakings as to Quality or Fit-

ness:
"(1) Where a corporation supplies (otherwise than by way of sale by
auction) goods to a consumer in the course of a business, there is an
implied condition that the goods supplied under the contract for the
supply of the goods are of merchantable quality except that there is
no such condition by virtue only of this Section:
(a) as regards defects specifically drawn to the consumer's attention
before the contract is made; or
(b) if the consumer examines the goods before the contract is made,
as regards defects which that examination ought to reveal."

Trade Practices Act, 1974, Section 74B (Cth), Action in respect of Goods unfit
for Purpose.
"(1) Where:
(a) a corporation, in trade or commerce, supplies goods manufactured
by the corporation to another person who acquires the goods for re-
supply;
(b) a person (whether or not the person who acquired the goods from
the corporation) supplies the goods (otherwise than by way of sale by
auction) to a consumer;
(c) the goods are acquired by the consumer for a particular purpose
that was, expressly or by implication, made known to the corporation,
either directly, or through the person from whom the consumer ac-
quired the goods or a person by whom any antecedent negotiations in
connection with the acquisition of the goods were conducted;
(d) the goods are not reasonably fit for that purpose, whether or not
that is a purpose for which such goods are commonly supplied; and
(e) the consumer or a person who acquires the goods from, or derives
title to the goods through or under, the consumer suffers loss or dam-
age by reason that the goods are not reasonably fit for that purpose;
the corporation is liable to compensate the consumer or that other
person for the loss or damage and the consumer or that other person
may recover the amount of the compensation by action against the
corporation in a court of competent jurisdiction.
(2) Subsection (1) does not apply:
(a) if the goods are not reasonably fit for the purpose referred to in
that sub-section by reason of:
(i) an act or default of any person (not being the corporation or a ser-
vant or agent of the corporation); or
(ii) a cause independent of human control, occurring after the goods
have left the control of the corporation; or
(b) where the circumstances show that the consumer did not rely, or
that it was unreasonable for the consumer to rely, on the skill or
judgment of the corporation."
tions 52 and 53 of the TPA (which prohibit respectively misleading and deceptive conduct and false representations, for example, as to the characteristics or suitability for purpose of goods). At the time the reforms were introduced, fears were expressed that a flood of claims would result. In the context of claims by individual claimants, as opposed to class actions, this has not occurred.\(^\text{10}\)

A. Liability For Defective Goods

The operative sections of Part VA of the TPA are sections 75AD to 75AG. These sections permit a claim for compensation for loss caused by defective goods.

Section 75AD allows claims for personal injuries caused by defective products and provides:

"If:
(a) a corporation, in trade or commerce, supplies goods manufactured by it; and
(b) they have a defect; and
(c) because of the defect, an individual suffers injuries;\(^\text{11}\)
then:
(d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
(e) the individual may recover that amount by action


"(1) Where:
(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;
(c) the goods are not of merchantable quality; and
(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under the consumer suffers loss or damage by reason that the goods are not of merchantable quality, the corporation is liable to compensate the consumer that other person for the loss or damage and the consumer that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction."\(^\text{12}\)

10. *Infra*, Parts IV & V.
11. Workers compensation claims, however, are excluded. Trade Practices Act 1974 (Cth), section 75AI.
against the corporation; and

(f) if the individual dies because of injuries - a law of
a State or Territory about liability in respect of the death
of individuals applies as if:

(i) the action were an action under the law of the
State or Territory for damages in respect of the injuries;
and

(ii) the defect was the corporation's wrongful act, ne-
glect or default."

Section 75AE provides, in similar terms, for compensation to
be paid where loss is suffered by a person (other than the person
killed or injured) as a consequence of that other person's death or
injury. Compensation is, however, limited to circumstances where
the loss does not come about because of a business relationship.
Professional, employer/employee and similar relationships are de-

defined as business relationships.

Section 75AF provides for compensation in circumstances
where other goods (not being the defective product) are damaged
or destroyed.\textsuperscript{12} The section only allows claims in relation to dam-
age to goods "of a kind ordinarily acquired for personal, domestic
or household use" and then only if the person used or intended to
use the goods that suffered the damage in that way.

Finally, section 75AG provides for compensation for losses suf-
f ered as a result of destruction or damage to "land, buildings, or
fixtures, ordinarily acquired for private use." The phrase "private
use" is not defined. It is debatable whether it applies in the sense
of "private" as distinct from "public" use, or in the sense of "domes-
tic", as opposed to "business" use, or both.

B. What Are Defective Goods?

"Defect" is defined in section 75AC, which provides that:

"(1) For the purposes of this Part, goods have a de-
f ect if their safety is not such as persons generally are en-
titled to expect.

(2) In determining the extent of the safety of goods,
regard is to be given to all relevant circumstances includ-

\textsuperscript{12} Cf Council Directive, 85/374, art. 2, 1985 (L 210) 29 (appearing to allow
property damage claims caused by a defective component by defining a product to
include "all moveables... even though incorporated into another moveable or an
immovable...").
ing:

(a) the manner in which, and the purposes for which, they have been marketed; and
(b) their packaging; and
(c) the use of any mark in relation to them; and
(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
(e) what might reasonably be expected to be done with or in relation to them; and
(f) the time when they were supplied by their manufacturer.

(3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

(4) An inference that goods have a defect is not to be made only because:
(a) there was compliance with a Commonwealth mandatory standard for them; and
(b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer.

"Defect" is defined in similar terms to those that are used in the EC Directive. It is an objective test based on the community's knowledge and expectations rather than the subjective expectations of the injured party. It is not enough that the product does not function or is of sub-standard quality. It must also be unsafe.

Prima facie, the definition looks clear. However, its simplicity belies a number of difficulties. The section refers to the safety that persons are generally entitled to expect, but it is not made clear whether those expectations are to be defined by reference to the consumer, an expert or the manufacturer. If all are important, the section gives no indication of their relative importance.

Assuming the section incorporates a consumer reference test, there are a number of issues. If a danger is obvious, a consumer may logically have a correspondingly low expectation of safety. Consumers may lack the knowledge, expertise or information to
correctly assess risks, or may have no expectations of safety at all.\textsuperscript{13}

One issue of practical importance Australian courts have not yet had a chance to consider is that of what evidence of consumer expectations of safety will be admissible in determining whether a product was defective (whether in the form of either expert evidence or survey evidence) and what weight that evidence will be given.

The definition in section 75AC does not require goods to be absolutely risk-free. It does, however, encompass potential defects relating to the product's design, its form, structure or composition. It also encompasses defects that arise due to some manufacturing problem in the product's construction or assembly, and finally, defects relating to the product's presentation caused by inadequate warnings, instructions or directions.

The matters to be taken into account in determining whether a product is defective will, in some cases, be numerous and will allow for considerable argument by both plaintiffs and defendant manufacturers.

It is important to note that the matters specifically referred to in section 75AC(2) will have several implications. First, as is highlighted by the cases discussed later, the presentation of the goods, in the form of packaging, markings, instructions and warnings is very important in determining if the goods are safe. Notwithstanding that goods are potentially hazardous, sufficient care in their presentation may avoid a finding that the product is defective. Inadequate warnings alternatively attract liability.

Second, a product which is specifically targeted for use by professional or specialised personnel may not require the same degree of warnings or instructions as would be the case if it had been marketed to untrained consumers.

Finally, the use to which the product could reasonably be expected to be put is relevant. This means, in turn, that any misuse or abuse by a plaintiff is also relevant.

C. Who May Be Liable?

The provisions of the TPA apply to corporations. The provisions of the TPA do not, save in very limited circumstances, apply to natural persons or partnerships. This restriction is a consequence

\textsuperscript{13} J. KELLAM, A CONTRACT-TORT DICHOTOMY AND A THEORETICAL FRAMEWORK FOR PRODUCT LIABILITY LAW 229 (Nomos Verlag 2000).
of the limits imposed upon the Federal Parliament by the Australian Constitution. In practice, the fact that the TPA only governs the conduct of corporations has not proved to be significant. Most of the business activity in Australia involving the manufacture of goods is carried on by corporations.

Part VA adopts the extended definition of "manufacture" which is found in section 74A of the TPA. As a consequence, a corporation will be a "manufacturer of goods" for the purposes of sections 75AD to 75AG where:

1) the corporation manufactures the goods;
2) the corporation holds itself out to the public as a manufacturer;
3) the goods are "home brand", that is, manufactured under licence from the corporation;¹⁴
4) the corporation permits someone to promote the goods as those of the corporation; or
5) the corporation is the importer of the goods.

D. Unidentified Manufacturers

Section 75AJ provides a mechanism designed to assist a potential plaintiff who is experiencing difficulty in identifying the manufacturer of a defective product. The section provides that the potential plaintiff may request in writing, from any or all known suppliers of the goods which allegedly caused the loss, the name of the manufacturer or entity which supplied the goods to the person receiving the request.

If, 30 days after such a request has been made, the person making the request still does not know who manufactured the goods, each supplier of the goods in question "who did not comply with the request" is deemed to be the manufacturer of the goods for the purposes of the claim. Thus, a company which does not respond to such a request within 30 days, or which does not provide particulars sufficient or accurate enough to identify the manufacturer, may find itself defending a claim in relation to goods which it did not actually manufacture.

¹⁴ Liability may also attach to both suppliers and manufacturers under Part V Division 2 and Division 2A of the Trade Practices Act. For an example of the operation of such provisions, see Aust Competition and Consumer Comm. v Glendale Chem. Prods. Pty Ltd.; Barnes v Glendale Chem. Prods. Pty Ltd. (1998) ATPR ¶41-632.
E. What Goods Are Covered?

Part VA does not include a definition of the term "goods." Accordingly, reference must be made to the general definition of "goods" in the TPA. Goods include gas and electricity and, in some instances, animals, fish, minerals, trees and crops, in addition to those products which are more normally considered to be "goods". There is no exclusion, therefore, for agricultural products. However, Part VA only applies to goods which are supplied by their manufacturer after 9 July 1992.

F. What Defences Are Available?

Specific defences are set out in section 75AK:
(a) the defect alleged did not exist when the goods were supplied by the manufacturer;
(b) the goods were defective only because there was compliance with a mandatory standard;
(c) the state of scientific or technical knowledge at the time when the goods were supplied was not such as to enable the defect to be discovered; or
(d) in the case of a manufacturer of a component used in the product, the defect is attributable to the design of the finished product or to any markings, instructions or warnings given by the manufacturer of the finished product rather than a defect in the component.

Subsection 75AC(4) provides that it shall not be inferred that goods are defective only because:
(a) the goods comply with a Commonwealth mandatory standard; and
(b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when the goods were supplied by the manufacturer.

It should be noted that "mandatory standard" is defined in section 75AA to mean a standard imposed by a law of the Commonwealth. Standards imposed under the laws of the states or territories are not within the scope of section 75AC, nor are the voluntary Australian Standards (AS) unless otherwise given the force of law.

15. The requirements of article 7(e) of the EC Directive, which refers to scientific and technical knowledge, are cumulative. The Australian defence, however, is expressed in the alternative.
The development risks defence, sometimes called the "state-of-the-art defence," was the subject of considerable controversy during the law reform process. Manufacturers argued strongly that they should not be held liable for defects which they could not discover because of limitations to scientific knowledge. As discussed below, the application of the defence was considered briefly in the Ryan class action,\(^{16}\) which is, to date, the first time that it has been effectively applied.\(^{17}\)

In any such litigation, one issue to be determined will be what was the relevant scientific or technical knowledge at a certain point in time. A second difficult issue will be determining the boundaries of what constitutes knowledge; that is, at what point does speculation, hypothesis or theory become knowledge.

G. Contributory Acts Or Omissions

Section 75AN ensures that a court assessing the level of compensation payable should take into account the extent to which the acts or omissions of the person who was injured or suffered the loss had in relation to the cause of that loss. At least in theory, the section acknowledges that, in some cases, the actions of the person injured, or who suffered the loss, may be of such significance that it is inappropriate to award any compensation notwithstanding the fact that the goods in question were, in some way, defective.


The year of 1992 saw not only the introduction of Part VA into the TPA, but also Part IVA into the FCA Act. Prior to the passage of Part IVA of the FCA Act in 1992, a formal class action mechanism was not included in Australian law. While the various rules of court had provided for more than one plaintiff to join an action against a defendant, procedural limitations had restricted the operation of those procedures to the most limited of circumstances.

A. Commencement Of Representative Proceedings

The FCA Act provides for the commencement of representative proceedings where (i) seven or more persons have claims

\(^{16}\) Ryan v Great Lakes Council (1999) ATPR (Digest) ¶46-191.

\(^{17}\) E. Olsson, Defective Goods, 7 TRADE PRACTICES L. J. 229 (1999).
against the same person; (ii) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and (iii) the claims of all those persons give rise to a substantial common issue of law or fact.18

Where these requirements are met, any one of those persons can commence a representative action, although such actions may only be commenced in the federal court.

One very important difference between class actions conducted in the U.S. pursuant to the provisions of the Federal Rules of Civil Procedure and those conducted under the FCA Act relates to the issue of certification. In the U.S. a class action must be certified by the court before it can proceed. In considering whether to certify an action the court will carefully consider the issues involved and determine whether the action satisfies the tests imposed by the rules.

No such requirement is imposed upon the Federal Court in Australia and thus, once commenced, a class action is likely to continue unless the respondent moves to terminate the action. In that case the onus will be on that party to satisfy the court that the action should be terminated.

B. The "Group"

Significantly, the FCA Act expressly provides that "the consent of a person to be a group member in a representative proceeding is not required"19 save in very limited circumstances. While the FCA Act provides that it is necessary to describe the group, it is not necessary to name or even specify the number of group members.

Once proceedings have been commenced, the Federal Court will fix a date by which a group member may "opt out" by giving

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18. A definitive statement of what satisfies the requirement of commonality is to be found in Wong & Ors v Silkfield (1998) 165 ALR 373. In that case, the High court held that the determination of whether the standing requirement under section 33C(1)(c) had been met was merely interlocutory. The court confirmed that "substantial" did not mean capable of having an effect on the resolution of claims, but meant "real or of significance". Wong (1998) 165 ALR at 373.

written notice to the federal court. The Federal Court will also give directions as to the manner in which group members are to be notified of the fact that the proceedings have been commenced and of the procedure which must be followed in the event that they wish to opt out of those proceedings. The FCA Act expressly contemplates that such notices may be given by way of advertisements published in newspapers, or broadcast by radio or television. Unless a person actually takes the step of opting out of the proceedings in writing, they will continue to be a part of the action and be bound by its outcome. Of course, there remains the possibility that a person who is deemed to be a group member by virtue of the manner in which the group has been described may never actually become aware of the fact that the proceedings have been commenced, and thus become bound by the result of those proceedings by default.  

20. Of particular interest is the recent case of Bright v Femcare Ltd & Anor (1999) ATPR ¶41-720 in which the constitutional validity of Part IVA of the FCA Act was challenged. The proceedings, commenced pursuant to section 33C of the FCA Act, concerned allegations that Femcare, the manufacturer of clips and applicators used in sterilisation procedures for women by occluding the fallopian tubes, had made representations that contravened section 52 of the TPA. Allegations of contraventions of sections 53 and 75AD were also made by the applicants. In response, Femcare argued that the enactment of Part IVA of the FCA Act went above and beyond the legislative competence of the Commonwealth Parliament. In the alternative, Femcare sought declarations that section 33J (opting-out) and section 33ZB (judgment binds all group members other than those who have opted out) were invalid. Broadly speaking, it was submitted that both sections deprived individual group members of their individual (substantive) rights. Particular facets of Part IVA of the FCA Act were cited in support of this premise, namely the ability to commence a representative proceeding without the awareness and approval of the other group members and the potential that not all group members would be conscious of the proceeding because of the nature of the notice requirements. In handing down his judgment on 6 October 1999, Lehane J rejected Femcare’s challenge to the constitutional validity of Part IVA of the FCA Act. On appeal from Lehane J’s judgment in Femcare Ltd v Bright (2000) FCA 512, the Full Federal Court rejected claims that Part IVA of the FCA Act, or alternatively, sections 33J and 33ZB of the FCA Act, were invalid.  

Litigation that arose as a consequence of an aviation fuel contamination last year, Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Limited (Attorney-General for the State of Victoria intervening) (2000) VSCA 103, shows that similar issues can arise in State Supreme Courts. Here, too, the respondents sought to challenge the class action by questioning the validity of the representative proceedings mechanism contained in the Victorian Supreme Court Rules, which allows parties with a common interest to aggregate and have the dispute resolved by a single action as opposed to separate actions. The majority ruling, handed down on 8 June 2000, rejected Mobil’s contention that the Supreme Court did not have the constitutional authority to entertain a class action.
The FCA Act expressly provides that the Federal Court may, at any stage in the proceedings, grant leave to amend the proceedings so as to alter the description of the group. Such an amendment may even extend to including additional group members who did not have a cause of action at the time the initial proceedings were commenced.

Representative actions can only be commenced in relation to proceedings where the Federal Court had jurisdiction prior to the enactment of certain cross-vesting legislation (essentially matters arising under federal legislation) and proceedings where the cause of action arose after 4 March 1992.

In practice, both these restrictions may be of limited effect. As is clear from the decisions below, section 52 of the TPA, which prohibits misleading and deceptive conduct by corporations, has potential application in many product liability claims and the cause of action can thus be used to attract federal jurisdiction. In any event, in the product liability context, the strict liability regime found in Part VA of the TPA is in a federal statute, and thus within the Federal Court's jurisdiction.

With respect to the requirement that the cause of action must accrue after 4 March 1992, it must be remembered that many product liability causes of action (for example, negligence or breach of Part VA) do not accrue until loss or damage has occurred. In the product liability context, a product may be supplied by a manufacturer but not fail, or otherwise injure the plaintiff, until well after the supply. Accordingly, in circumstances where damage is not suffered until some time after the other elements of the cause of action have arisen, the circumstances giving rise to the cause of action may well provide the basis of a representative action, even though the product was supplied prior to 4 March 1992.

C. Termination Of Proceedings By The Federal Court

Once representative proceedings have been commenced, the Federal Court has the power to order, in certain circumstances, the discontinuance of the proceedings. Such an order might be made where the costs of the proceedings, or the cost of distributing any sum that might be awarded as a consequence of the proceedings, would be excessive having regard to the amount each group member would receive. Similarly, the Federal Court has the power to order the discontinuance of the proceedings where the representative proceedings would not provide an efficient and effective means
of dealing with the claims of group members or it is otherwise inappropriate for the proceedings to continue. Additionally, it may also exercise its power to order the stay of proceedings where no reasonable cause of action is disclosed or where the proceedings are oppressive, frivolous or otherwise an abuse of process.

D. Management Of Proceedings

The FCA Act confers upon the Federal Court a variety of powers to manage the proceedings. Express provision is made for the determination of specific issues in the proceedings relating to subgroups or even individuals.21

Once representative proceedings have been commenced, the action may not be settled or discontinued without the approval of the Federal Court. Similarly, the person who actually commenced the representative action may only withdraw from the proceedings or settle his or her individual claim with the leave of the Federal Court.

E. Judgment And Costs

Where the Federal Court finds in favour of the plaintiffs, it may make an award of damages to group members, subgroup members or even individual members. According to the circumstances, the Federal Court may award damages consisting of:

1. specified amounts;
2. amounts calculated in a particular manner; or
3. an aggregate amount without specifying the amount to be awarded in respect of an individual group member.

Where the last option is adopted, a mechanism would then be set up to establish the share of the aggregate amount to which each member is entitled.

In Australia, the "costs" of legal proceedings, which include both a proportion of the lawyers' professional fees and any out-of-
pocket expenses, of the successful party, are usually paid by the unsuccessful party. However, in the case of a representative action brought under the provisions of the FCA Act, the legislation expressly provides that no order for costs may be made against group members other than those who actually commenced the proceedings. The FCA Act also provides for the making of a costs order in favour of individuals who commence representative proceedings where the action is successful or where the Federal Court otherwise thinks just.  

IV. RECENT LITIGATION: PARTS V AND VA OF THE TRADE PRACTICES ACT 1974 (CTH)  

Since the statutory reforms of 1992, there have been a number of landmark decisions which illustrate the operation of Parts V and VA of the TPA and highlight the willingness of the courts to recognise liability based upon representations and a failure to warn. Two decisions namely Australian Competition and Consumer Commission v  

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22. The making of an order for security for costs can pose a significant obstacle to claimants. Ryan v Great Lakes Council (1999) ATPR (Digest) ¶46-191. Although Lindgren J dismissed the appeal for security for costs in that case, he emphasised that his doing so was not to be taken as authority for the view that the representative of a group claim commenced according to Part IVA of the FCA Act could never be required to provide security for costs. Instead, he made the following remarks, which come close to articulating the test to be applied in determining whether such an order should be made:  

"It might, however, be found useful in some cases to inquire whether security would have been ordered if separate actions had been brought by the group members. If the group members or some of them were impecunious companies or persons ordinarily resident outside Australia and a "person of straw" had deliberately been chosen to be the representative party, it might be appropriate to order that the representative party provide security and that the proceeding be stayed until the security was provided."

Accordingly, a respondent, in seeking an order for security for costs against an applicant, might succeed in defeating a class action before it has even proceeded to trial. This is because an order for security for costs can only be awarded against the applicant and not against those he or she represents. Conversely, applicants are often chosen because they are without assets. However, the rules relating to security for costs do not allow orders to be made against merely impecunious plaintiffs unless they are a nominal plaintiff suing in the interests of others. The rationale behind this approach is that a multitude of individual actions would (contrary to one of the aims of Part VA of the TPA) decrease access to justice as those with small claims would not risk an adverse costs order. Further, the already congested Australian court system would become even more inefficient. In any event, an order for security for costs goes a long way to precluding frivolous and vexatious claims from proceeding to trial.
Glendale Chemical Products Pty Ltd.\textsuperscript{23} and Hampic Party Ltd. v. Adams\textsuperscript{24} are considered below. Notwithstanding these landmark decisions, the overall number of product liability judgments has, however, been limited.

A. Australian Competition And Consumer Commission v. Glendale Chemical Products Pty Ltd.

1. The Facts

The litigation arose in respect of loss and damage suffered by Mr Barnes as a result of the use of a product distributed by Glendale Chemical Products (Glendale) known as "Glendale Caustic Soda". Mr Barnes sustained injuries comprising burns to his face and eyes when a column of water rushed out of a pipe in his shower recess and struck him in the face after he used hot water with the chemical. The label affixed to the caustic soda advised the consumer to dissolve the product in cold water prior to pouring it down the drain, which Mr Barnes failed to do. It did not, however, warn against the use of the product in conjunction with hot water.

In May 1995, Mr Barnes purchased the caustic soda to dislodge debris caught in a drain in his shower recess. In evidence tendered during cross-examination, Mr Barnes stated that, in using the product, he had relied on information volunteered by a friend, Mr Phillips, and information contained on the labels of other products he had read in the store. He had chosen to ignore the instructions on the label affixed to the caustic soda, in spite of having read them twice and having understood them; he believed the method he adopted was suited to his purpose. Notably, Mr Barnes confirmed that even if the label had stated something to the effect of "use cold water" he would nevertheless have adopted the method suggested to him by his friend. Notwithstanding this, Mr Barnes testified that he would not have used hot water had the label stated something to the effect of "do not use hot water." However, he later qualified this by testifying that he would have asked Mr Phillips whether or not to heed a warning to the effect of "do not use hot water," and if Mr Phillips had dismissed the warning, Mr Barnes claimed that he "might possibly" still have followed his advice. Mr Barnes disagreed that it was "probable" that he would have relied


\textsuperscript{24} Hampic Pty Ltd v Adams (1999) NSWCA 455.
on Mr Phillip's advice.

The Australian Competition and Consumer Commission (ACCC) sought the following orders: first, that the defendant be restrained from acting in contravention of sections 52 and 53(c) of the TPA with regard to the representations concerning the product; second, that Glendale be compelled to undertake corrective advertising and relabelling in relation to the product; and third, that Glendale compensate Mr Barnes because of a defect in the product, bringing it within the scope of section 75AC of the TPA.

Mr Barnes also brought proceedings against Glendale. Both proceedings were heard coterminously.

2. ACCC's Claim Based On Sections 52 and 53 Trade Practices Act 1974 (CTH)

The Commission alleged that the labelling of the product was misleading and deceptive and that there had been a contravention of section 52 of the TPA by virtue of the fact that:

"(1) [t]he label failed to state that the use of hot or boiling water with the Product in a confined space such as a drain would rapidly increase the temperature of the water and the water pressure within the drain, to the extent that a stream of the mixture of the Product with water at a high temperature may erupt from the confined space;" and

(2) [t]he said label failed to state that there was any danger attaching to the use of the Product when it was combined with water other than cold water."

The Commission also alleged that Glendale had contravened section 53(c) of the TPA by indicating that the caustic soda possessed performance characteristics, uses and/or benefits which it, in fact, did not possess unless used in conjunction with cold water. It was contended that a product's safety constituted a performance characteristic.

3. Judgment

In delivering his decision on 27 February 1998, Emmett J held that the product was defective under Part VA of the TPA, as the label affixed to the product failed to warn against the use of caustic

26. Id.
soda with hot water, especially in a restricted area such as a drainpipe. His Honour based his finding on the following considerations:

"(a) [I]t was generally well known, or at least ought to have been well known, to a supplier of caustic soda that mixing of caustic soda with water produces heat and splashing and that such reactions would be exaggerated by an increase in the temperature of water;" 27

"(b) Section 75AC(2) makes it clear that the section applies even if there is no inherent defect in the goods in question. Thus, it is clear that a substance which is, for example, marketed as being suitable for a particular purpose without warnings as to the particular way in which that purpose should be achieved may have a defect because use in some ways would not be safe;" 28

"(c) Glendale was marketing the Product for the purpose for which it was in fact used by Mr Barnes...I consider that the possibility of reaction with hot water was one which was sufficiently well known for a conclusion to be drawn that it was not safe for caustic soda to be marketed in a package for the purposes of use such as that described without a warning against using it in hot water in a confined space," 29 and

"(d) Further, it is not unreasonable to expect that a householder could pour very hot, even boiling water down a drain in order to dislodge a blockage" 30.

His Honour noted that the claim was not founded on representations, but omissions. His Honour noted, however, that "it may be possible to find an implied representation by a supplier of a dangerous substance that the supplier is unaware of any danger which is not disclosed on the label." 31 Nevertheless, Emmett J was not convinced that there had been a breach of section 52. Nor was he persuaded that, even if conduct constituting a contravention of section 52 had been established, Mr Barnes had suffered loss or damage as a consequence thereof. There was no suggestion that Mr Barnes had understood the label as constituting a representa-

27. Id. at 40,971.
28. Id.
29. Id. at 40,971-40,972.
30. Id. at 40,972.
31. Id.
tion such as those contended, nor was there any evidence that Mr Barnes had relied upon such a representation that the product was safe in acting as he did.

Further, Emmett J did not consider that a representation that a product was safe to use could be classified as a performance characteristic under section 53(c) TPA. He also held that the label affixed to the caustic soda could not be seen to constitute a representation with respect to the performance of the substance in the relevant sense.

4. The Appeal

On appeal, the Full Federal Court upheld the trial judge's finding that the product was defective because of its labelling and in breach of Part VA of the TPA. As part of the appeal, the ACCC also sought to challenge Emmett J's finding that Glendale's conduct had enlivened neither section 52 nor section 53 of the TPA.

In this respect, the Full Federal Court held that in light of the resolutions arrived at regarding other aspects of the case, it was unnecessary to decide conclusively the issue of the application of sections 52 and 53(c). Nevertheless, the court felt compelled to express its misgivings about Emmett J's determination that a representation as to the safety of goods was not a representation that "goods... have performance characteristics" within section 53(c) of the TPA. The Court stated:

"One definition of "performance" in the Macquarie Dictionary is "the way in which something reacts under certain conditions or fulfills the purpose for which it was intended." It is not a misuse of language to say that an express or an implied representation that an article is safe to use in particular circumstances is a representation relating to that article's performance characteristics. Moreover, in our view, there is no textual or policy reason to give a narrow construction to the expression "performance characteristics" in s 53(c)."

B. Hampic Pty Ltd. v. Adams

1. The Facts

33. Id. at 57,536.
This case concerned an appeal by a manufacturer of cleaning products against the finding of liability for injury occasioned by the inappropriate use of a cleaning liquid caused by an inadequate warning which was, however, not available to, or read by, the user.

The respondent, Adams, a cleaner with the Newcastle City Council, was instructed by her supervisor, Mr Ling, to use a cleaning product called 'Power Kleen' to remove boot polish from the surface of a changing table. Adams wore vinyl gloves supplied by her employer with cotton gloves underneath. The Court found that prior to putting them on, Adams ensured that there were no holes in the vinyl gloves. It was only after completion of the ten minute task, which involved dipping a cleaning pad into the liquid and then rubbing the surface of the table, that Adams detected a hole in her gloves. Subsequently it was ascertained that she had contracted dermatitis, as a consequence of which she was forced to cease employment.

The liquid was distributed by the manufacturer in twenty-five litre drums. The label affixed to the drums contained the following instructions for use:

"Recommended average strength one part Power Kleen with 15 parts water.
May be used stronger or weaker as required. Mop, spray, brush or wipe the surface to be cleaned.
Allow a couple of minutes penetration then rinse with water."

The label also warned users that "rubber gloves should be worn with prolonged use".

Adams' supervisor had read the label on the drums and then decanted the undiluted liquid into smaller containers, one of which was used by Adams. No label was affixed to the smaller container and accordingly Adams had not read the warning.

2. Section 52 Trade Practices Act 1974 (CTH) And Glendale

At first instance, the case concerned a claim of misleading or inadequate safety labelling of the product under section 52 TPA. The claim could not be brought under Part VA which is not applicable to workers compensation claims. The trial judge had found that the conduct of the manufacturer was misleading within the

34. *Infra* note 12.
meaning of section 52 of the TPA notwithstanding the fact that Adams had used the liquid in its undiluted form and had used a rubbing motion to apply the product to the surface of the changing table rather than by means of mopping, sponging, brushing, wiping or rinsing.

In the present case, the Court of Appeal looked to Glendale for guidance on how the inadequate labelling of a product can result in a contravention of section 52.

In the result, the Court confirmed that the trial judge had not erred in finding that the label affixed to Power Kleen was misleading or deceptive or was likely to mislead or deceive. In fact, "[t]o anyone who read it, it had the capacity to lull into a false sense of security." Indeed, the warnings contained on the label disadvantaged the manufacturer, as the NSW Court of Appeal found that they had been qualified by other statements. The warning to wear rubber gloves was noted to be qualified by the statement 'with prolonged use', whilst the direction to dilute 'one part Power Kleen with fifteen parts water' was in itself held to be undermined by a further statement that the liquid could be used 'stronger or weaker as required'. Further, the NSW Court of Appeal concurred with the finding of the trial judge that the lack of first aid directions contributed to the representation that the product was not as potentially harmful as it turned out to be.

3. Causation, Reliance And Section 82 Trade Practices Act 1974 (CTH)

Although they are similar in some respects, Hampic and Glendale differ in one major respect. In this appeal the injured party never saw the label on the product. Nevertheless, the NSW Court of Appeal allowed the claim for damages based on section 82.

Section 82 of the TPA allows an injured party a cause of action where the party has suffered loss or damage as a result of the conduct of another person done in contravention of section 52. Moreover, following the decision in Janssen-Cilag Pty Ltd v Pfizer Ltd36, the Court held that "there is no requirement that the damages can be recovered only where the injured party relies directly upon the conduct of the party constituting contravention of the relevant provision". The Court of Appeal concluded that despite

35. Federal Court of Australia Act, 1976, Part IVA, Section 34 (Cth).
the fact that Adams' supervisor had himself read the label on the product, decanted the liquid into a smaller container without adding any warnings of his own, and then provided gloves, "but for a warning that did not contravene section 52, it is probable that Mr Ling would have acted differently, and so would the respondent". 37

The Court established a causal link by applying reasoning from the case of Anderson v City of Enfield. 38 By parity of reasoning, the Court of Appeal concluded that "so long as the label can be shown to have been misleading in the section 52 sense, then the reasoning in Anderson is applicable". 39 In Anderson, the negligent act held to have caused the plaintiff's injuries comprised leaving an open container of the liquid for employees' use without warning against the possible dermatological risks associated therewith. The negligent act was found to have been caused by a 'lack of realisation' of the possible risks on the part of the employee who mixed the solution, whose ignorance was, in turn, held to have flowed from the manufacturer's failure to sufficiently label the liquid. Applying this reasoning to the present case, the Court of Appeal found that although Adams' supervisor had acted negligently in providing the liquid to Adams in an undiluted form and in not adding any warnings of his own, the misleading labelling of the liquid had contributed to his negligence, which had subsequently contributed to Adams' injury. Indeed, "[i]n view of the obvious purpose of a warning in relation to a substance capable of causing injury, the court can readily and properly infer the necessary causal link". 40

V. CLASS ACTIONS

Since 1992, multi-party litigation in Australia has been going through a period of intense development. After a slow start, over

38. Anderson v City of Enfield (1983) 34 SASR 472. The case concerned the manufacturer of a cleaning product who had distributed a cleaning liquid that contained a substance which could precipitate dermatitis if improperly used. The label affixed to the product failed to suggest the seriousness of the potential risks attendant upon the use of the product. Consequently, the plaintiff suffered injury. Despite the fact that the plaintiff had used the product for a use other than that for which it was intended (the plaintiff having mistakenly used it as an ordinary detergent) it was held that it ought to have been in the contemplation of the manufacturer to warn of danger to the skin and so alert a user to the hazards inherent in using the product as an ordinary detergent.
the past two years in particular there has been an unprecedented increase in the level of class action litigation. Indeed, Australia has now gained the unenviable reputation of being the most likely place, outside the United States, for such a suit to be brought.

Certain celebrated controversies—for example, in relation to financial services, toxic torts and product liability claims—have highlighted the potential for such proceedings to be brought in instances of "mass wrongs". It is also perhaps no coincidence that the rising sophistication of such litigation has paralleled improvements in technology, in particular, computer litigation support.41

The Australian legal system has traditionally recognised the notion of multi-party or grouped proceedings. Historically, however, Australian courts have appeared reluctant to encourage such litigation. Until the decision of the High Court of Australia in Carne v Esanda Finance Corporation Ltd.42 in 1995, it was difficult for plaintiffs to maintain such an action since the traditional "common interest" requirements in the Rules of the State Supreme Courts and the Federal Court of Australia were interpreted narrowly. Further, the traditional mechanisms for bringing multi-party or group proceedings suffer from the disadvantage that the judgments are only binding upon the individual litigants named in the proceedings rather than determining the rights of a class.

Recent years, however, have seen dramatic changes to this area of the law for a number of reasons. First, there has been a liberalisation of judicial attitudes in Australia towards procedural matters generally.43

Second, there have been statutory reforms expanding the scope for multi-party actions to be brought in Australia. Most importantly, the enactment of Part IVA of the FCA Act in 1992 gave plaintiffs access to an effective class action mechanism.

Illustrative decisions concerning product liability class actions which also highlight the potential for liability to attach because of a failure to warn and misleading representations, namely McMullin v.

43. A feature of the administration of justice in Australia in recent times has been a general disfavour towards procedural rigidities and a preference for a more flexible approach to statutory preconditions where these are of a procedural character. Emanuele v Australian Securities Commission (1997) 188 CLR 114, 146-147) (Kirby, J.).
ICI Australia Operations Pty Ltd. & Ors\textsuperscript{44} and Ryan & Ors v. Great Lakes Council & Ors\textsuperscript{45}, are discussed below.

A. McMullin v. ICI Australia Operations Pty Ltd. & Ors

1. The Facts

The litigation arose as a consequence of the loss and damage occasioned by the marketing and sale of an insecticide, "Helix", which was intended to be used on cotton crops during the last stage of their life cycle, up to 21 days before harvest. Helix, which had been actively marketed as "environmentally soft", contained CFZ, a chemical with a tendency to bio-accumulate and persist in the environment as well as in animal tissues.

Prolonged periods without rain resulted in graziers using the processed remains of cotton plants - "cotton trash" - as cattle fodder, some of which had been contaminated with CFZ. Consequently, those cattle that had eaten the contaminated cotton trash also became infected, leading the Government to place bans on the sale of cattle and meat. Direct losses followed as a result of the dramatic decline in sales of cattle and meat products. Delays, testing and holding costs, coupled with the decline in prices exacerbated the overall economic losses incurred. Financial reverberations of the crisis were also felt by others in the cattle and meat industries.

A class action was mounted on behalf of approximately 470 individuals claiming to have suffered loss and damage as a consequence of the marketing and sale of Helix. Parties to the action included cattle graziers who claimed loss of value of stock, costs incurred as a result of testing and holding stock, and loss of profits. Also included in the group were businesses operators, such as abattoirs, meat processors and exporters, who purchased contaminated cattle and as a result thereof sustained economic loss.\textsuperscript{46}

\textsuperscript{44} McMullin v. ICI Australia Operations Pty. Ltd. (1997) 72 FCR 1.

\textsuperscript{45} Ryan & Ors v. Great Lakes Council & Ors (1999) ATPR (Digest) ¶46-191.

\textsuperscript{46} Prior to reaching a determination, Wilcox J considered it necessary to divide the applicants and group members into distinct groups. His Honour divided the appellants into the following seven groups:

(i) claimants (mainly graziers) whose cattle become contaminated by CFZ during their period of ownership;

(ii) claimants (graziers and others such as abattoir operators) who unwittingly purchased already-contaminated cattle;

(iii) claimants, such as meat processors and exporters, who owned meat
2. Applicants' Argument

The applicants argued that Helix should never have been placed on the market. They reasoned that ICI owed them a duty of care and that their losses occasioned by the use of Helix were a direct consequence of ICI's failure to exercise due care, for all were reasonable foreseeable and sufficiently proximate. With regard to the latter point, it was submitted that despite the fact that the requisite physical proximity between ICI and the various claimants was absent, it should have been within ICI's contemplation that the claimants would have been directly impacted upon by any carelessness in the production and marketing of Helix. Moreover, it was argued that ICI failed to discharge its duty of care and was negligent, as little research had been undertaken into the properties of CFZ, the use of Helix had not been properly tested, no appropriate holding period had been established for Helix, and no steps had been taken to regulate the use of Helix after it had been released for sale onto the market.

The applicants also claimed that ICI's conduct in relation to the production and marketing of Helix contravened section 52 of the TPA. In their Fourth Further Amended Statement of Claim, the applicants articulated the alleged misleading conduct by claiming that ICI should have:

(i) provided a warning that CFZ had a tendency to build up residues in tissues of cattle if they consumed the "feed and water" i.e. cotton trash and by-products, stubble, pasture and water from waterways; and

that was found to be contaminated and was, therefore, condemned;
(iv) claimants, such as feed lot operators, who found that cattle in their possession (but not ownership) were contaminated and thereafter incurred expense in holding them in detention;
(v) claimants whose cattle were not in fact contaminated by CFZ, but were placed in detention or on a targeted tail-tag list, because of a belief that they were or may be affected;
(vi) claimants, such as gin trash transporters and trash pellet suppliers, who lost business (or their whole enterprise) because of the discovery of CFZ contamination and the resultant advice given to graziers against feeding cotton gin trash to cattle; and
(vii) claimants, such as abattoir operators, feed lot operators, stock agents, cattle transporters, meat processors and exporters and the like, who lost business, or suffered reduced profit margins, because of the effect of the controls introduced by the NSW Department of Agriculture or the Queensland Department of Primary Industries or the attitude of foreign governments to CFZ contamination.
(ii) notified a withholding period which corresponded with the persistence of CFZ in crops, stubble, trash and by-products.47

3.  ICI's Argument

Counsel for ICI contended that none of the losses were recoverable. Seven propositions were advanced in support of this contention:

"First, all the claimed losses were characterised as pure economic losses and it was argued that none of the claimants had such a special relationship with ICI as to give rise to a duty of care to avoid economic losses. Second, and alternatively, all losses sustained by people other than those of the first in the seven categories48 listed above were characterised as pure economic loss. Third, the graziers who suffered loss consequentially on feeding cotton gin trash were not sufficiently proximate to ICI to be owed a duty of care. Fourth, and alternatively, the type of harm suffered by these people was not reasonably foreseeable; so no duty of care arose. Fifth, the losses related to cattle intended for the domestic market and having CFZ residues of less than 1mg/kg was purely economic and/or unforeseeable losses. Sixth, any losses caused by an inability to export meat having a detectable level of CFZ contamination of less than 1mg/kg arose from the state of the international trade system and were not recoverable from ICI. Seventh, the effect of allowing recovery of the cotton trash feeding claims would be to circumvent limitations of liability in the chain of contractual relationships."49

Further, counsel for ICI argued that the section 52 claim could not succeed for three reasons. First, in so far as neither the applicants nor Mr Blomfield, the Queensland sub-group representative party, had ever used Helix or read or placed any reliance upon the withholding period, and in so far as there was no indication that their losses arose from anyone else doing so, the claim regarding the withholding period must fail. Accordingly, it was argued that the applicants "never had a sufficient interest in a section 52 claim to commence or maintain the proceeding."50 Second, any neglect

47.  *McMullin*, (1997) 72 FCR 1, at 89 FCR.
49.  *McMullin*, (1997) 72 FCR 1, at 70 FCR.
50.  *Id.* at 89 FCR.
to inform consumers of an appropriate holding period did not, in and of itself, constitute misleading or deceptive conduct or conduct that is likely to mislead or deceive. Further, the 21-day withholding period was determined according to the anticipated use pattern of the insecticide and was not intended to be understood as a representation as to the period of time it would take the CFZ to biodegrade. Third, regarding the appellants' first particularised item of alleged misleading conduct, ICI did not issue a positive statement concerning bio-accumulation.

4. **Judgment**

Wilcox J rejected the seven propositions put forward on behalf of ICI, holding that the product should not have been placed on the market and finding ICI guilty of negligence. However, Wilcox J only found in favour of the first four claimant groups\(^1\), holding the cattle, whether dead or alive, to furnish the "connecting link" upon which proximity hinges.

Wilcox J thought it unnecessary to determine the section 52 claim in that present context. Indeed, for persons falling within ICI's duty of care, he considered that it was immaterial whether or not they had suffered loss as a result of conduct contravening section 52, as, at common law, they were entitled to recover whatever losses they had sustained as a result of ICI's negligence. The section 52 claim would only be of relevance to those unable to bring themselves within the scope of the duty of care.

Although Wilcox J considered the section 52 claim a matter to be addressed at some later point in time, he nevertheless elected to briefly respond to the propositions on which ICI had based its defence. Regarding the first proposition, Wilcox J held that both "the applicants, and Mr Blomfield, have standing to assert all claims, of any group members, associated with the section 52 claim in relation to which ICI acknowledges their standing to sue".\(^2\)

Regarding the second proposition, His Honour accepted that the withholding period was unconnected with the persistence of the chemical, however, he did acknowledge that it gave rise to a "surprising, even bizarre"\(^3\) result in that "a person might easily be mislead by the notified withholding period into believing that, if it

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51. See note 47 infra for a description of the claimant groups.
52. *Id.* at 90 FCR.
53. *Id.* at 90 FCR.
was observed, there would be no persistence problem".\textsuperscript{54} Again, as it could not be inferred that anybody had placed any reliance upon the withholding period or incurred loss as a consequence thereof, Wilcox J held that the issue was to be determined at some later point in time, albeit expressing the view that he thought it unlikely that more removed plaintiffs, for example, cattle owners whose stock had not been damaged, abattoir operators or gin trash transporters, would be able to make out a case in respect of that issue.

Regarding the third proposition, His Honour noted that the applicants were not asserting that ICI had made a positive statement, but that its silence on the issue of bio-accumulation was constitutive of misleading conduct. Wilcox J interpreted this to mean that "ICI's failure to mention bio-accumulation in the Helix brochures and labels misled purchasers, and their advisers, in relation to its characteristics, and this caused damage to some or all the claimants."\textsuperscript{55} Given that evidence tendered during trial had established neither of the two contentions, Wilcox J reserved the issue for future determination.

\textbf{B. Ryan \& Ors v. Great Lakes Council \& Ors}

1. \textit{The Facts}

At the beginning of 1997 there was a Hepatitis A outbreak. The source of the widespread viral infection was ultimately identified as the oysters grown in Wallis Lake on the north coast of NSW. In response, Mr Grant Ryan commenced a class action on 13 March 1997. After the resolution of a number of preliminary issues, Wilcox J eventually heard the common issues of liability arising from Mr Ryan's personal claim and his representative claims against Great Lakes Council, the State of NSW and the Barclay companies (oyster growers and distributors) towards the end of September 1998.

2. \textit{Sections 75AD And 52 Trade Practices Act 1974 (CTH)}

Of the six alleged breaches of the TPA, two, alleging contravention of section 75AD (liability for defective goods causing injury) and section 52 (misleading and deceptive conduct) against the Barclay companies, are of importance for the discussion here.

\textsuperscript{54} \textit{Id.} at 90 FCR.

\textsuperscript{55} \textit{Id.} at 91 FCR.
(save that it should also be noted that the oysters were found to be in breach of warranty and the oyster grower liable to compensate injured claimants).

In respect of section 75AD, Wilcox J found that the Barclay companies were liable for supplying defective oysters causing Mr Ryan's injuries, but that they could rely on the defence in section 75AK(1)(c) (the state of the art defence), as "the only test that would reveal the defect [flesh testing] would destroy the goods."\(^{56}\)

Pursuant to section 75AK(1)(c) of the TPA, a manufacturer has a defence if it can show that the defect causing injury was undiscoverable at the time of supply given the state of scientific and technical knowledge at the time.

Wilcox J held that the defence applied in this case:

"The term manufactured is defined in s 75AA, for the purposes of s 75AD, in the same terms as in s 74A. Section 75AC(1) explains that "goods have a defect if their safety is not such as persons generally are entitled to expect". Consistently with what I have already said, it seems to me the elements stipulated by s 75AD are satisfied in this case. However, s 75AK(1)(c) provides a defence to an action under s 75AD (amongst other sections) "if it is established that...the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable the defect to be discovered". The paragraph obviously intends the defence to be unavailable if the goods were supplied notwithstanding the discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, discovery and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods. Accordingly, it seems to me the defence applies and the s 75AD claim fails."\(^{57}\)

With respect, it is submitted that this finding may be wrong. It appears to ignore the fact that random flesh-testing would have revealed the presence of the defect without destroying all of the goods. From the judgment, it appears that the contamination could have been discovered had this approach been adopted.

Further, in applying the state of the art defence His Honour

\(^{56}\) Ryan & Ors, (1999) APTR (Digest) ¶ 46,191, at 52,339.

\(^{57}\) Id. at 52,339 (emphasis added).
failed to differentiate between design defects and manufacturing defects, a distinction which has emerged in EC case law. $58$ This distinction, however, is not self-evident from the wording of section 75AK(1)(c) of the Explanatory Memorandum to Part VA and it may well be that the defence does apply in Australia to manufacturing defects which cannot be discovered at the time of supply.

In respect of section 52, the applicant argued that the sale of oysters without any warning that they may be contaminated was misleading and deceptive, as it was said to amount to an implied representation that they were uncontaminated. However, Wilcox J, following *Rhone-Poulenc Agrochimie SA v. UIM Chemical Services Pty Ltd* $59$ declined to impose liability on this basis and held that:

"silence will generally constitute misleading conduct only where something has occurred between the parties rendering it necessary for one party to supply further information to the other if the latter is not to be misled; for example, it is necessary to qualify an otherwise absolute statement or update earlier information." $60$

VI. CRITICAL OBSERVATIONS AND FUTURE DIRECTIONS

A. Part VA Trade Practices Act 1974 (Cth)

Individual plaintiff litigation under Part VA has been sparse. $61$ Indeed, Part VA has not been relied upon to the degree anticipated by those who feared and contested its inception. The first reported interlocutory decision was reported in 1996, just over four years after the provision came into force. $62$ *Glendale*, the first final decision of a superior court dealing with a claim under Part VA, was decided only in 1998. The main effect of the provision has only been felt in the context of class actions such as *Ryan*.

$58$. Indeed, a number of German decisions have made this distinction on the basis of extrinsic materials relating to the passage of the EC Directive and commentaries on it, primarily by German authors. The German courts have held that §1(2)(5) ProdHaftG, the equivalent of the state of the art defence in section 75AK(1)(c) of the TPA, only applies to design defects and not defects arising in the manufacturing process.


A possible explanation for this lack of litigation by individual plaintiffs under Part VA is to be found in the function of product liability legislation itself. Whilst the primary endeavour of product liability legislation is to provide equitable compensation to persons suffering loss and damage as a result of defective products, a subsidiary function of such legislation is to deter manufacturers and suppliers from placing defective products onto the market. The dearth of cases brought under Part VA should therefore not be seen as reason enough to dismiss, as some commentators have, the legislative amendment as incapable of protecting consumers' interests. Rather, its value may lie in encouraging preventative measures being instituted by manufacturers.

It is submitted that it is questionable whether there will be a significant (or any) increase in claims brought by individual claimants under Part VA in the future for two reasons. First, a change in the law does not cause a change in the number of accidents. Second, it seems likely that, in the future, such claims are more likely to be settled before they proceed to trial. *Glendale* prefigures this approach in so far as it is authority for interpreting the provision in its strictest sense. The decision handed down by Emmett J and subsequently upheld on appeal by the Full Federal Court is regarded by some manufacturers as unfair in light of Mr Barnes' blatant disregard of the instructions contained on the product label. Notwithstanding the fact that Mr Barnes failed to observe the instructions for use, he was found not to have materially contributed to the injuries he sustained.

### B. Class Actions

The number of class actions has been slowly growing since the insertion of Part IVA into the FCA Act in 1992, and is now beginning to accelerate. There are a number of possible reasons as to the rate of growth.

First, it is not unusual for a period of time to elapse before lawyers and counsel familiarise themselves with changes to law and procedure, and before judicial pronouncements have clarified the manner in which the legislation is to be interpreted and applied. It is submitted that Australia is in this interim period.

It is anticipated that the increasing familiarity and conversancy

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of solicitors with the class actions mechanism contained in Part IVA of the FCA Act will usher in a corresponding rise in class actions in the future, including ones based on Part V and VA and in the area of toxic torts such as McMullin and Ryan.

Second, in spite of the benefits they confer upon applicants, class actions also engender procedural complications and disadvantages. A considerable problem posed by class actions is that, in the absence of any cost-sharing agreement between the parties, the representative applicant must bear the costs if the litigation is unsuccessful. Closely allied to this issue is the making of an order for security for costs, and the possible obstacle such an order poses (as discussed above). Lawyers acting for a class also need to take care to discharge their professional duty to not only the class overall, but also to the individual claimants.

Third, in so far as the class action mechanism does not operate retrospectively, there will inevitably be a delay between the enactment of the legislation and the identification of the damage which could be the subject of the litigation.

Fourth, the increase in applicants' bargaining power flowing from the legislative scheme has seen a number of claims being settled before proceeding to trial. Such settlements were negotiated in the Sydney Water Business Interruption class action and the Kraft Peanut Butter salmonella poisoning case.64

In the aggregate, the class actions mechanism brings with it substantial advantages for the plaintiffs, as it enables them to bring an action where legal expenses would otherwise act as a disincentive to the institution and execution of legal proceedings, particularly in situations where the individual loss suffered is minimal in relation to the overall cost of the litigation. Accordingly, it is submitted that the product liability litigation landscape of the future in Australia will, to a large part, be dominated by class action proceedings.

C. Representational Liability

Consumer expectations of a product's quality, purpose and safety are powerfully and primarily influenced by marketing, and especially by advertising. Indeed, it is marketing that induces con-

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consumers to purchase a product. At point of sale, consumers presume sales personnel to have expert knowledge of the design, performance and suitability of a product for particular applications. Packaging, instructions for use and warnings on a product also contribute to create in consumers' conceptions as to what a product can deliver. Recognising this, a representational theory of product liability makes manufacturers, suppliers and retailers answerable for the information they expressly or impliedly make available to consumers, and the adequacy of that information in the course of marketing and selling their products.

The full implications of a representational theory of product liability are yet to be appreciated in Australia. The decisions discussed above, however, illustrate the willingness of Australian courts to impose liability on this basis. We submit that liability based on a representational theory, whether under sections 52 and 53 or Part VA of the TPA, will become increasingly prevalent in the future.