Forum

Keynote address to the National Product Liability Association

The following is an edited speech by ACCC deputy chair Louise Sylvan, at the annual general meeting of the National Product Liability Association on 2 December 2003. The full speech, including overhead slides, is available on the ACCC website.

I have picked product safety and product liability as one of the first issues for me to speak on because I think it's such an important issue for consumers and also in part because it's rarely seen as the 'sexy' part of the ACCC's work. In fact product safety is as important, or possibly more crucial to consumers than, for example, stopping a merger or taking companies engaged in price fixing to the courts. Certainly it is a lot more 'individual' and that's especially the case in situations of personal injury. Which raises the closely related issue of product liability, of even more interest to you, and which I'll talk about as well, especially in view of some of the proposed changes to the Trade Practices Act.

ACCC role in product safety

Turning now to the ACCC's role in product safety and in product liability, from my perspective, the Act is an economic law, not simply on the Part IV side, but also on the consumer protection side. The consumer protection provisions in Part V, VA and VC impose requirements for fair trading and place responsibility and liability—for unsatisfactory products and for defective products—in a way that enhances economic efficiency. I'll come back to this point later.

On product safety specifically, the ACCC's role is to:

- maximise compliance with the product safety provisions in Part V, Division 1A of the Act, expressly for standards mandated and bans declared by the federal minister
- ensure unsafe goods subject to these provisions are removed from the marketplace and recalled when necessary
- promote consumer safety through awareness of the product liability provisions under Part VA, to:
  - provide redress for consumers and, perhaps more importantly
  - provide incentives for suppliers to make and sell safe goods.

The ACCC's philosophy, and I would hope that this is a philosophy that is mostly shared, is that consumer safety is best addressed by preventing unsafe goods from making it into the market.

'Prevention is better than cure' is a saying that is a bit hackneyed and overused these days, but when it comes to consumer safety, prevention of the problem has to be the key attitude of any responsible firm.

For the ACCC and for the people involved in this area of work, it's one of the driving philosophies.

Part V, Division 1A—standards and bans

In the spirit of first and foremost preventing loss or damage, the ACCC takes a proactive approach to achieving compliance with the provisions of Part V, Div 1A—standards and bans. For example, with more hazardous products when there is a higher risk of physical injury, more stringent action is required by regulators to protect consumers than waiting for a complaint or for harm to be brought to our attention.

A fair amount of market monitoring takes place, based on a risk-management program which involves all of the regional offices of the ACCC and often the Fair Trading Offices of the states and territories as well. These surveys of the market often result in discovering products that don't meet mandatory standards; and sometimes, they lead to

discovering products on the Australian market that are actually banned. More than half of the enforcement actions taken by the ACCC for product safety breaches have resulted from surveys.

While the focus of the surveys is on retail outlets, staff also target those up the supply chain, plus internet sales and direct marketing. The product safety provisions for standards and bans do not differentiate between levels in the supply chain. All suppliers from manufacturers to retailers must comply and the ACCC takes action across the board.

Section 85(4) provides a defence to a breach committed by the supplying of goods that do not comply with a consumer product safety standard. Suppliers may rely on the defence under s. 85(4) where they establish that the goods were acquired by them for the purposes of re-supply and that they did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with that standard. The defence will not, however, apply when the goods were acquired through an agent of an overseas entity, irrespective of whether the agent has a place of business in Australia, or when the goods were acquired from an entity located overseas without a place of business in Australia.

What might this mean in practical terms? Can a retailer rely on, say, verbal assurances from their supplier that they have done everything necessary to comply?

From the ACCC's perspective, the 'reasonableness' of a supplier's diligence would depend on factors including:

- the ability to assess compliance visually
- having written proof of compliance
- the nature of the supplier relationship, e.g. length of dealings and record of reliability.

With many standards requirements, for example labelling and dimensional specifications, simple visual inspection is enough to assess compliance. In these cases, we do not believe that traders down the supply chain should absolve themselves of their responsibility, nor that a court would allow a defence.

In standards, the specifications of the standard require technical assessment of a product. Test reports from reliable, qualified test companies are necessary to establish compliance. Providing such proof can be made an element of a supply contract.

In these circumstances, all suppliers are responsible for compliance and should be held accountable. Including this level of the supply chain adds to a potential compliance 'ripple effect'. The ACCC guides to the standards are aimed at retailer level with this in mind.

It is not uncommon for complaints to come in from a company's competitors. While this might seem like a purely competitive matter, many suppliers who do the right thing and comply resent losing market share to competitors who can undercut them by selling non-compliant goods, often more cheaply.

Other avenues for becoming aware of breaches include consumer representative organisations. For example, the recent action we took against car manufacturers for non-compliant vehicle jacks was sparked by a consumer complaint submitted through the RACQ. The Australian Consumers' Association is another organisation that alerts us to product breaches through testing reported in *Choice* magazine and *Choice* online.

Products which are suspected of breaching the product safety provisions are investigated and the ACCC is very active in achieving enforcement outcomes and remedial action in the interests of consumers.

Some recent examples of enforcement action by the ACCC include:

- A s. 87B undertaking was accepted from Minmetals to stop supplying banned dart gun sets which were found in toy stores during a joint product safety survey by the ACCC and Vic CAV.
- The Federal Court, Melbourne, declared that BMW (Australia) Ltd had supplied vehicle jacks and owner manuals that failed to comply with the safety standards for vehicle jacks. An appeal hearing is listed.
- The ACCC obtained declarations and consent orders in the Federal Court, Perth, against Trans Oriental Import & Export Pty Ltd for supplying banned mini-cup jelly confectionaries containing the ingredient konjac, also known as glucomannan. These confectionaries can get stuck in the throat and have killed a few people overseas, mainly small children and elderly people.
- A s. 87B undertaking from Private Formula International Pty Ltd that it would re-label cosmetic products supplied without ingredient listings which are required under the mandatory cosmetics and toiletries information standard. Private Formula also published corrective advertising and implemented a trade practices compliance program. This enforcement resulted

from a consumer complaint—specifically an adverse reaction.

- Lane Wrigley gave a s. 87B undertaking to stop supply and recall non-complying baby cots, for which Australia has a mandatory safety standard. The company published recall notices and also established a trade practices compliance program.
- And lastly, Bikes Direct gave a s. 87B undertaking from, an internet trader, to recall and rectify defects and provide new instruction manuals to all past buyers, and to implement a trade practices compliance program.

Recalls can happen either voluntarily or compulsory. In the Lane Wrigley example the ACCC pointed out to the company the non-compliance with a mandatory standard and it immediately conducted a voluntary product recall, as did Bikes Direct.

Because internet customers cannot personally inspect goods, there is a greater obligation on internet traders to ensure that the information on their website is accurate. Bikes Direct has since had all of its bikes tested for compliance with the safety standard.

Not surprisingly, a fair few of the goods for which there is a mandatory standard in Australia, rather than a voluntary standard, have to do with children's products, since these consumers are in the least able position to protect themselves. But there are mandated standards for products as wide ranging and diverse as bean bags to tobacco to toys.

The ACCC is also active in the development and revision of standards as it is critical for effective enforcement and compliance that the standards remain current and meaningful to suppliers to ensure consumers are protected.

Working with others

It's important that I mention that the responsibility for product safety in Australia is not only the ACCC's. Policy responsibility rests with the Treasury, which also has responsibility for advising the minister. Due in part to the constitutional limitations of the Trade Practices Act (which limits its coverage mainly to incorporated businesses), each of the state and territory offices of consumer affairs or fair trading have responsibilities in product safety. All these agencies (plus New Zealand) are members of the Consumer Product Advisory Committee which advise senior officials and the Ministerial Council. And of course, the specific regulatory authorities for therapeutic goods, food, and so on, also have a major role.

The good news is that every recall, voluntary or mandated, that is done in Australia is collected into a single information website (the initiative of the Treasury) www.recalls.gov.au and it's one of the more used websites by consumers in Australia.

Furthermore the consumer protection agencies are emphasising uniformity of legislation to develop a national model and are coordinating on enforcement and operational issues (such as surveys, testing and investigations).

Tripartite approach

The underpinning philosophy in all the consumer protection agencies is that consumer safety involves a tripartite approach where government, suppliers and consumers all have a role to play. An example will serve to illustrate this. Bunk beds, which can be a fairly dangerous product, have a government-mandated standard for the critical parts related to safety; suppliers are expected without fail to meet that mandated standard, plus voluntarily to meet or exceed other parts of the standard; and consumers need to ensure safe use—for example, not allowing children to use bunks as a play-gym.

In the final analysis, however, it's the firms that produce the products where the primary responsibility for product safety rests. From my point of view providers in the market have both a moral responsibility in relation to product safety, as well as their legal responsibilities quite apart from sensible risk-aversion behaviour to protect the reputation capital of the firm. And as I've mentioned, the penalties are not insignificant if a prosecution results from an ACCC investigation.

It's quite clear that wilful non-compliance by business is not common in product safety breaches. Usually the problem is carelessness and poor attention to addressing the risks. However, sometimes it's necessary to take a supplier to court.

In another case, the ACCC, responding to a consumer complaint, found children's pedal bicycles which did not comply with the mandatory standard. The court fined the retailer, Dimmeys, $60 000 and required them to withdraw the bicycles from sale, publish recall notices for those already sold, and pay the legal expenses of the ACCC. The retailer had not previously stocked bicycles and the importer had not previously imported them, yet Justice Weinberg of the Federal Court declared that inexperience did not absolve either party from their obligations to ensure that products are safe. Both the importer and the retailer were aware of other

product safety standards applying to merchandise they handled, but failed to make appropriate inquiries.

The following year, in 2000, Dimmeys was found, during a regular retail store survey in Townsville, to be selling children's nightwear without the mandatory labelling regarding fire hazard. Dimmeys did a public recall but was later in the year found to be selling similar garments in Melbourne. The court fined Dimmeys $160 000 in March 2001. I guess there's a general question of whether those pecuniary penalties are sufficient to have the necessary effect. But certainly, there are good financial reasons to comply with the product safety standards if a firm has not been persuaded by other considerations.

Now, let me turn to a more contentious area, that of liability for defective goods.

Part VA—product liability

Part VA of the Act, which was inserted in 1992, provides for a private right of action. It imposes strict liability on manufacturers, deemed manufacturers and importers of products to compensate consumers who suffer loss as a result of defective goods. Goods are defective if their safety is not what people are entitled to expect in all the relevant circumstances. This part applies at the moment, in addition to any other cause of action that a plaintiff may have, such as negligence, breach of contract or breach of the statutory implied warranties. Under s. 75AQ, the ACCC can also take representative actions on behalf of those who have suffered loss, but it is the private sector which largely takes up this role.

Under Part VA, the test of whether goods are defective focuses on the reasonable expectations of the community—so it is an objective test for the court to decide, and the focus is not on what is appropriate in an individual circumstance.[1] Action under Part VA of the Act may be a way of prompting a whole industry response to ensure product compliance and safety.

It's important to note that Australia, unlike Europe and some other regions, does not have a 'general provision for safety'. There is no law prohibiting suppliers from knowingly selling unsafe goods. In the absence of such a provision, protection in consumer product safety is all the more reliant on the product liability scheme, in particular on the provisions of Part VA. Raising awareness of Part VA forms part of the ACCC's overall product safety education strategy.

The ACCC and other agencies also use Part VA to help negotiate for the removal of unsafe goods in the marketplace; reluctant suppliers can be reminded of the liability risk they are taking. There seems to have been an effect in this regard: over the past 10 years recalls conducted on general consumer goods have increased more than 300 per cent, so some incentive seems to be at work. While agencies have the option of seeking an order to recall by the minister or the courts, this has rarely been needed. The recalls notified under s. 65R of the Act and placed on the recalls website are generally either done voluntarily by suppliers or on negotiation with regulatory agencies. Either way, product liability appears to be providing an incentive to suppliers to ensure that any potentially unsafe goods are removed, and that's good.

So, I would argue that Part VA is really as much about prevention of injury as it is about consumer redress. If so, then those advising supplier companies on how to minimise liability have a key role to play in promoting a corporate culture of compliance and safety and in actively feeding back to a client, and to the broader business community, the value of proactive approaches to sourcing reliable raw materials, design, complaint handling, recalls and so on.

Possible amendments to Part V, Divisions 1 and 1A, and Part VA

Let me now move on to tort reform on which there has been rather a lot of attention recently. I'm sure I don't need to talk too much to most of you about the origins and outcomes of the Review of the Law of Negligence, or Ipp review—I note that your association made a submission.

Among other aspects which it addressed, the review panel considered what steps should be taken to ensure that actions under the Act were not more attractive or available than actions under the general law of negligence as proposed to be amended.

In relation to the Act, the review panel recommended that individuals should be prevented from bringing actions for damages, and the ACCC from bringing representative actions for damages, for personal injury or death arising from a contravention of the provisions in Part V, Division 1. A Bill to that effect was introduced in March 2003.

In October an opposition amendment to the Bill was moved to allow for claims to be made for loss or damage but to ensure that the amount of damages

[1] *ACCC v Glendale Chemical Products.*

recoverable must not exceed the amount of damages recoverable under the civil liability law of the state or territory which had the closest connection to the event giving rise to the loss or damage or where the person sustained the loss or damage. The amendment also proposed to ensure that a person may not recover the amount of the loss or damage to the extent to which the death or personal injury is attributable to any act or omission of the person who suffered the loss or damage. I'm advised that these amendments passed through the Senate last night.

In the ACCC's second submission to the Ipp review, it stated that it considered that serious harm would flow from any proposal that narrowed the scope of the provisions prohibiting misleading and deceptive conduct. The ACCC then commented that one of the least harmful options would be to minimise the 'incentives' which might otherwise exist to bring personal injury based claim for damage caused by contravention of provisions of Part IVA and V by:

- restricting (for example, using thresholds and caps) the damages recoverable for personal injuries in a manner which is broadly consistent with restrictions under state and territory personal injury law regimes
- requiring 'contributory' conduct, especially on the part of an applicant, to be factored in to awards of damages awarded under the Act.

Basically, the proposed amendment implements this option.

The Ipp review also recommended that the Act be amended so that the rules relating to limitations of actions, quantum of damages and other limitations on liability recommended in the report apply to any claim for negligently caused personal injury or death that is brought under Part V, Div 1A (product safety and product information), Part V, Div 2A (manufacturer liability for unsuitable goods), Part VA and Part IVA (unconscionable conduct). No amendments have been introduced into parliament at this point in relation to these recommendations.

I would note that, also in the ACCC's second submission, it strongly opposed changes which would reform Part VA of the Act, especially since there was considerable debate at the time of its introduction and this part was introduced to overcome deficiencies in the protections afforded consumers by the common law.

I want to illustrate a couple of examples of the effects of the Ipp review recommendations. Just to clearly point out possible scenarios when such changes to the law would matter. I'm using a risky activity as an example, because the Trade Practices Act 1974 (Liability for Recreational Services) Bill has been passed.

Consumers now take on much more risk in relation to such activities. Assuming the proposed amendment in relation to Part V, Div 1 is passed as proposed (and not amended), a consumer—although basing their decision and their choice to assume to participate in a risky activity on false and misleading representations—still would have no right to sue for damages under Part V, Div 1. I would have thought for most people this rather raises very substantial issues about fairness in the marketplace.

Taking a less straightforward example than that of a granny buying a baby cot based on the sales representative's claims that 'this is the safest cot you can buy in the marketplace'. In reality, the cot actually fails to meed mandatory standards for head entrapment. If the baby is injured, there is no right to damages for breach of Part V, Div. 1. This again illustrates why it seems unusual that one would want to create a situation in the market where misleading conduct could not be adequately addressed by a consumer. Whether the consumer would have decided to pursue an action under Part V, Div 1 is, of course, up to them. This example is a bit unusual as it is rare for consumer to go to the courts at all for this type of thing; but it is rather odd, it seems to me, that any arrangements in our law would allow misleading and deceptive conduct to appear not so much as 'more permissible' (note that the ACCC can still take action) or at least less punishable by the consumer.

A better example might be a small business man buying an expensive welding machine. Let's say the seller, who has a few of these and knows that he has imported a poor product, conspires with his salesman to demonstrate a replica model which performs excellently. The small businessman who owns a welding shop buys the machine for $10 000 which subsequently malfunctions and injures him. Why shouldn't this small businessman have a right of action under Part V, Div 1, especially in a case of such egregious behaviours as what appears to be a conspiracy to deceive?

Which brings me full circle to my initial point, that the Act—even on its consumer protection side—is a law designed to enhance economic efficiency.

Part VA was drafted on the premise that in relation to most consumer goods it is the manufacturer, and

not the consumer, who can most easily avoid losses because the manufacturer has control of the process of manufacture and also has far better information than the consumer about the risks associated with using a product. To the extent that producers can more cheaply assess information about the risks of their products, economic efficiency suggests they should bear the costs for losses caused by the characteristics of the goods. Of course, that doesn't mean that consumers do not need to exercise care, and s. 75AN makes it quite clear that if the loss was caused by both an act or omission of the consumer and a defect, the assessment of the loss can be reduced as the court thinks fit.

So, it's important in relation to the laws to give the right signals to manufacturers and consumers about products and product safety. What are we as regulators to tell consumers about a marketplace where deceptive conduct is less punishable? At the moment, consumers have great confidence in the Australian market generally and they have become used to having clear rights as well; in general, consumers believe that they can have confidence in the claims that are made by suppliers and they know, largely because of the high public profile of the ACCC, that deceptive and misleading claims are not permissible.

It is widely recognised in economics that when misleading or deceptive claims are permitted in commerce, the consequence is to increase the long-run cost of supply as consumers seek to protect themselves from transactions that, given correct information, they would not have entered into. To these direct costs must be added the costs that come from the fact that in any environment where poorly based claims can be made, the competitive mechanism cannot work as effectively as it otherwise would to ensure that less efficient suppliers are displaced by more efficient suppliers. Basically, these types of proposals undermine, in my view, the central objects of the Act which are to promote competition, fair trading and consumer protection.

It isn't just economic theory that says these aspects of markets are important, it's also the empirical evidence produced by, among others, the world's foremost economic guru, Michael Porter from Harvard.

A great part of the framework for product safety rests on standards, both for products and in terms of behaviour in the market. Here is Michael Porter on standards generally—I've deliberately chosen one of the earlier Porter works, because I think he articulated the concepts particularly well in *The competitive advantage of nations* (1990).

> It might seem that regulation of standards would be an intrusion of government into competition that undermines competitive advantage. Instead the reverse can be true. Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage.

Here's a further quote, which reframes the issue much more broadly and in terms of the competitive nation.

> Firms, like governments, are often prone to see the short-term cost of dealing with tough standards and not their longer-term benefits ... Such thinking is based on an incomplete view of how competitive advantage is created and sustained. Selling poorly performing, unsafe, or environmentally damaging products is not a route to real competitive advantage ... especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations.

So, the 'message' from the laws of the land in terms of what standards exist and who bears the loss if such standards aren't met, are not an important question just for individual suppliers and consumers, they are also important in terms of the attitude (of firms and competitors generally) which prevails in an economy.

One thing appears to be quite clear, low standards—or poor laws that do not direct the liability appropriately so that standards are not taken sufficiently seriously—don't just affect individual firms or people in an economy. Ultimately, it's these types of factors that contribute to how competitive a nation will be globally.

Finally, a few quick words on the ACCC's priorities. The ACCC has three main priorities.

- To pursue and achieve appropriate remedies for serious cartel behaviour such as price fixing or market sharing. Such conduct can have significant economic detriment and the ACCC takes action to ensure unlawful conduct ceases and that the community is aware of the results of its compliance activities.
- To achieve greater certainty in interpretation of the law on unconscionable conduct and current misuse of market power matters. Businesses and individuals as well as governments can act more confidently from knowing the court's interpretation of existing laws.
- To pursue and achieve appropriate remedies for false, deceptive and unconscionable conduct. This priority particularly benefits small business as well as consumers. Through strategies

including court action, education and consultation, the ACCC helps individuals and businesses comply with the law.

With these priorities in mind and specifically in terms of consumer protection priorities, on 2 June this year [2003] the ACCC and its consumer consultative committee (CCC) launched a campaign that focuses on commercial and business practices that target or seek to exploit disadvantaged or vulnerable consumers. Characteristics that may, for example, suggest disadvantage include: low income, disability (whether intellectual, psychiatric, physical or sensory), illiteracy, indigenousness, homelessness, remoteness or chronic ill-health for example.

The ACCC regards the campaign as an important part of our consumer protection work. While not all disadvantaged or vulnerable consumers will be at risk in all market situations, it is fact that:

- the information asymmetry that is present between almost all consumers and traders is often greater between disadvantaged consumers and traders
- disadvantaged and vulnerable consumers have fewer tools with which to address the problems they may experience in the marketplace—whether through lack of mobility, lack of education, a language barrier or other reason
- unlawful conduct can have a disproportionate impact on this group of consumers. For example, a financial loss that may be relatively small for a consumer on an average income may be very significant for a consumer on a low or fixed income.

As we focus on this, it is the case that some unscrupulous players in the marketplace specifically set out to exploit the disadvantage or vulnerability of others. Some examples are unconscionable selling tactics directed at intellectually disabled, impaired or infirm consumers, 'miracle' cures marketed to people with serious or terminal illness, 'wonder, no exercise involved' weight loss solutions and metropolitan car dealers going into indigenous communities and offering unroadworthy vehicles for sale at inflated prices.

This campaign is an important initiative for the ACCC and we are actively investigating several cases at the moment.

So in summing up, I have spent a bit of time on compliance with the Act, and the whys and wherefore of our product safety work and the Act's priorities more generally.

I hope you will also take the long-term view on these issues so that we have a better compliance culture and better society as a result.

Intellectual property rights and competition law—making them co-exist

The following is an edited speech by ACCC commisioner John Martin at the 2003 Taipei international conference on competition policies/laws (The future development of competition framework) in Taipei, Taiwan on 28 October 2003.

Introduction

I would like to address the interaction of intellectual property rights with competition policy. The ACCC, particularly our former chairman Professor Allan Fels, has been influential in the debate and implementation of policy changes in this area. Underpinning my comments is an appreciation that the issues about the appropriate interface between intellectual property and competition laws are complex, and that a fine balance needs to be struck between important and sometimes competing principles.

I frame my discussion in the following way.

- Canvassing some of the conceptual thinking that underpins the notion of intellectual property rights and competition law.
- Discussing the ongoing policy debate in Australia about this complex topic.
- Outlining Australia's competition law, the *Trade Practices Act 1974*, and the role of the ACCC and identifying when the exploitation of intellectual property rights might conflict with Australian competition law.
- Reporting on a recent review of the competition aspects of Australia's intellectual property legislation and the government's response to that review. In particular I will canvass aspects of the government's decision that affect exemptions from the Trade Practices Act, s. 51(3)) and the operation of copyright collecting societies.