International Product Liability Litigation: The Territorial Application of Part VA of the *Trade Practices Act* 1974 (Cth) and Part I of the *Consumer Protection Act* 1987 (UK)*

STUART DUTSON**

What follows in this article is a determination of whether the method of applying the rules of private international law can be applied to the *Consumer Protection Act* (the 'CPA') or the *Trade Practices Act* (the 'TPA'), and the application of the presumption against extraterritorial legislation and the purpose method to both the CPA and the TPA.

SHOULD THE RULES OF PRIVATE INTERNATIONAL LAW BE APPLIED TO THE CPA OR TPA?

CPA

Tebbens and other jurists have opined that a court must apply its jurisdiction's version of the legislation implementing the European Product Liability Directive[1] if that forum's choice of law rules rendered that law applicable.[2] Tebbens preferred this methodology over any application of the law on mandatory rules.[3]

* This article follows on immediately from my article: S Dutson, 'The Territorial Application of Statutes' (1996) 22(1) *Mon L R* 69. Hereafter 'CPA' and 'TPA' shall refer to Part I of the *Consumer Protection Act 1987* (UK) and Part VA of the *Trade Practices Act 1974* (Cth) respectively, unless the context requires otherwise.

** B Bus, LLB (Hons)(QUT), Ph D (Cantab), WM Tapp Scholar in Law, Fellow and Honorary Scholar of the Cambridge Commonwealth Trust and member of Herbert Smith Solicitors International Litigation and Arbitration Group, London. I am grateful to Mr Richard Fentiman of Queen's College, University of Cambridge; Professor WD Duncan of Queensland University of Technonogy; Professor PE Nygh of Bond University; Dr Lawrence Collins FBA of Herbert Smith Solicitors, London and Wolfson College, University of Cambridge; Dr David J Cooper of Bell Gully Weir Solicitors, Auckland; and Mr JG Collier of Trinity Hall, University of Cambridge, for their assistance in the preparation of the thesis upon which this article is, in part, based.

[1] The Council Directive relating to the Approximation of the Laws, Regulations and Administrative provisions of the member States concerning Liability for Defective Products of 25 July 1985 85/374/EEC, OJ No L 210, 7/8/85, 29. The CPA is the legislation implementing the Directive in the UK.

[2] H Duintjer Tebbens, *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability* (1980) 160–1, and JJ Fawcett, 'Products Liability In Private International Law: A European Perspective' (1993) *Recueil des Cours* 13, 196–7, 228.

[3] Tebbens, op cit (fn 2) 160–1.

It appears that the European Commission (the 'EC') may have intended that this be the case.[4]

One of the more obvious criticisms of the views of these jurists and the Commission would be that they are general views concerning the legal systems of all of the member states, a generalisation which is invalid when applied to England because, whilst the vast majority of the member states have a civil law system, England has a common law system in which statutory law and common law, whilst treated similarly for most purposes, are treated differently for some purposes. In the European civil law states all causes of action have their foundation in a provision of the state's civil code, and the relevant enactment of the EC Directive in those States is merely *lex specialis* of tortious or delictual liability as provided for in the relevant code.[5] However, common law jurists have also stated that choice of law rules should determine the application of the CPA itself.[6]

In November 1986 the Department of Trade and Industry prepared a document entitled 'Consumer Protection Bill: A Layman's Guide'. Paragraph 7 of that document stated that:

> Questions of **private international law** (concerning what cases courts have jurisdiction over and what law they apply) and the mode of implementation of the Directive in other Member States is . . . of considerable importance to UK producers, suppliers and consumers.

This is because

> importers means **importers into the Community** and not importers into the UK; thus if a radio is imported from Taiwan into Germany and subsequently sold in the UK, liability under the Directive falls on the German importer, not a subsequent importer into the UK.[7]

The 'Reference Sheet', prepared by the House of Commons Library Research Division[8] for the use of the members of the House of Commons after the *Consumer Protection Bill* 1987 had been passed by the House of Lords and before it had been considered by the House of Commons,[9] repeated in almost identical terms the material quoted above from paragraph 7 of the Department of Trade and Industry's November 1986 document.

[4] See the Commentary on Article 5 (now article 8(2) in the Directive) in the Amendment of the Proposal for a Council Directive relating to the Approximation of the Laws, Regulations and Administrative provisions of the member States concerning Liability for Defective Products (Presented by the Commission to the Council on 1 October 1979) [The Amendment of the Proposal from the Commission], COM (79)415 final [it was this version which the British Parliament had before it], OJ No C271, 26/10/1979, 3 [this version did not have an accompanying explanatory memorandum].

[5] See eg, a decision of the Athens Court of Appeal Judgment No 442 of 1993.

[6] R Merkin, *The Consumer Protection Act 1987* (1987) at 50–1, and Fawcett, op cit (fn 2) 196–7, 228.

[7] Emphasis in the original.

[8] Poole, *Parliamentary Advice* (1987) 10.

[9] 7 April 1987.

TPA

The Explanatory Memorandum to the *Trade Practices Amendment Act* 1992 provides that 'the purpose of this Bill is to introduce into Australia a strict product liability regime based on the 1985 European Community Directive'.[10] Subsequently, it provides that the CPA is the 'equivalent British legislation' and 'the Government intends that in applying this legislation the Australian courts will fully acquaint themselves with the emerging jurisprudence in Europe, especially on procedural and evidential matters.' Therefore, in accordance with s 15AB of the *Acts Interpretation Act* 1901 (Cth) the material above dealing with both the Directive and the CPA is germane to the same determination with respect to the TPA.

A great deal of material germane to the present issue was considered by the Senate Standing Committee on Legal and Constitutional Affairs in 1992. The 'exposure draft'[11] of the *Trade Practices Amendment Act* 1992, that is, the *Trade Practices Amendment Bill (No 2)* 1991 — a Bill introduced to facilitate and encourage debate, rather than as the final form of the Bill[12] — included a provision[13] which was described in its Explanatory Memorandum as designed to give overseas consumers the right to sue Australian manufacturers of defective products.[14] This provision was not included in the Bill as finally enacted and the government sent a reference to the Senate Standing Committee on Legal and Constitutional Affairs in these terms, inter alia, whether the *Trade Practices Act* 1974 should be amended to give Part VA of the Act the same extraterritorial application as is currently given to Parts IV and V.[15] This reference was made expressly for the Committee to consider whether a provision entitling overseas consumers to sue Australian manufacturers of defective products exported overseas should be included in the Act.[16] However the methods applied and evidence taken in the determination of the Committee's

[10] *Trade Practices Amendment Bill (No 2)* 1991 Explanatory Memorandum, paras 1 and 28.

[11] *Parliamentary Debates*, Senate (Cth), 19 December 1991, 5094 per Senator Tate on the occasion of the Second Reading Speech of the *Trade Practices Amendment Bill (No2)* 1991; and *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2661 per Senator Tate on the occasion of the Second Reading Speech of the *Trade Practices Amendment Bill* 1992.

[12] Ibid.

[13] See s 5 and the Schedule to the 1991 Bill.

[14] Explanatory Memorandum to the *Trade Practices Amendment Bill (No 2)* 1991 para 69 and see *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2663 per Senator Tate on the occasion of the Second Reading Speech of the *Trade Practices Amendment Bill* 1992. This provision was described as a provision providing for the extraterritorial operation of Part VA: *Parliamentary Debates*, Senate (Cth), 3 June 1992, 3374–5 per Senator Tate on the occasion of the Third Reading Speech of the *Trade Practices Amendment Bill* 1992.

[15] See Senate Standing Committee on Legal and Constitutional Affairs, *Product Liability — Where the loss should fall* (1992) ix; Australian Government, *Government Response* (1994) 1 (tabled in the Senate on 30 May 1994).

[16] See Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 27–8; *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2663 per Senator Tate on the occasion of the Second Reading Speech of the *Trade Practices Amendment Bill* 1992; and *Parliamentary Debates*, House of Representatives (Cth), 4 June 1992, 3668–9 per Ms McHugh on the occasion of the Second Reading Speech of the *Trade Practices Amendment Bill* 1992.

views on the reference were the same as those outlined in the previous article.[17]

The Committee's Report was published in December 1992 and tabled in the Senate on 4 May 1993. The Committee took oral evidence and written submissions on this issue from many sources including, inter alia, the Federal Bureau of Consumer Affairs, Professor Michael Pryles representing the Australian Product Liability Association Incorporated, Professor John Goldring (former Law Reform Commissioner in charge of the Australian Law Reform Commission's Product Liability Report[18]), Clayton Utz Solicitors, and numerous other practising and academic lawyers.

In answer to the rhetorical question: 'Would Part VA operate extra-territorially in the absence of an express provision [providing for its extra-territorial operation]?' The Committee stated that it was 'unable to reach a conclusion on the issue of whether Part VA would have extra-territorial effect ... because, as yet, there have been no reported cases on the Part.'[19] The Committee noted that[20] it

> was told both that the courts will apply the rules of private international law to give Part VA extra-territorial effect,[21] and that Part VA would not be given an extra-territorial effect because of the presumption that statutes do not operate extra-territorially.[22] It is also possible that the courts would treat the issue as a question of statutory interpretation without referring to the presumption that statutes do not have extra-territorial effect.[23]

However, in an appendix to its Report the Committee set out the competing arguments on this issue, as it saw them.[24]

The Committee noted that the application of the rules of private international law to the TPA had been advocated by Professor Pryles on behalf of the Australian Product Liability Association, and by other witnesses at its hearings.[25] Professor Pryles had also contended that for this purpose Part VA must be characterised as a tort.[26]

The Committee then noted the other two methods. In applying the purpose method to Part VA, the Committee noted that in the second reading speech for the *Trade Practices Amendment Act* 1992 the Minister stated:

> The provision giving overseas consumers the right to sue Australian manufacturers of defective products was removed from that Bill and that the issue of the extra-territorial operation of Part VA was referred to this Committee.[27] The clear intention of Parliament was that Part VA would not

[17] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15), 28 and 30.
[18] See infra.
[19] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 30.
[20] Ibid.
[21] Citing Evidence 250, 258 (Professor Pryles).
[22] Citing paras 5.17–5.29.
[23] Citing EI Sykes and M Pryles, *Australian Private International Law* (1991) 243–5.
[24] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 79–83.
[25] Id 30 n 2. Cf *Australian Commercial* v *ANZ Bank* [1989] 3 All ER 65, 72.
[26] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 30.
[27] *Parliamentary Debates*, Senate (Cth), 26 May 1992, appendix V, 5.

have extra-territorial effect and, in the absence of an express provision, the courts may give effect to this intention.[28]

The Committee did not attempt to apply the presumption against extraterritorial legislation to its problem. It did, however, note that whilst Professor Pearce described the application of the rules of private international law as a 'specific application of the [presumption]',[29] it was thought 'either [method] could be applied in every case where the extra-territorial operation of a statute is at issue without necessarily leading to the same result.'[30]

The Committee's final recommendation was that:

> Australia should adhere to the same position as adopted by the European Community. [The EC Directive] has no provision for extra-territorial liability.[31]

In its "Response"[32] to the Committee's Report the Australian Government noted that:

> Professor Pryles of the Australian Product Liability Association has expressed the view that the regime established by Part VA will be classified by the courts as a tort regime and the usual conflict of laws principles will apply when an overseas consumer seeks to bring an action against an Australian manufacturer in an Australian Court.[33]

In its conclusion the Government stated that:

> The Government accepts the advice of Mr Dennis Rose AM QC that the Act in its present form, that is without an amendment to section 5, does not give Part VA an extraterritorial operation. However, in the light of concerns expressed about possible detrimental effect on Australia's trade of an explicit extraterritorial application for Part VA, the Government accepts the Committee's recommendation that the question of whether an overseas consumer can bring an action in an Australian Court be left to conflict of law rules as applied by the courts.[34]

Therefore the Australian Government endorsed the characterisation of the TPA and the application thereto of the traditional private international law rules in the case of a foreign plaintiff attempting to sue an Australian defendant in the Australian courts. If this method is to be applied to the TPA to resolve the question of extraterritoriality in these cases then as a matter of principle it must be equally applicable to cases in which an Australian plaintiff is pursuing a foreign defendant unless, of course, the TPA provides otherwise.

However, the views of the Australian Government were expressed after the

[28] Senate Standing Committee on Legal and Constitutional Affairs (1992) at 82–3. Footnotes included as they appear in the original passage.
[29] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 99.
[30] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 83.
[31] See Senate Standing Committee on Legal and Constitutional Affairs (1992) xi and 46, Australian Government, op cit (fn 15) 1.
[32] Australia, op cit (fn 15).
[33] Id 2.
[34] Id 2–3.

Act was enacted[35] and the Senate Committee's Report was not published nor tabled until after that date. Therefore neither document can be utilised in the interpretation of the Act as enacted.[36]

Whilst the Australian Government's position is certainly of interest, albeit not determinative of the issue, it appears that the Committee's recommendation on the question of whether an overseas consumer can bring an action in an Australian court was not that it 'be left to conflict of law rules as applied by the courts' as the Government stated.[37] The Government's patent error on this point can perhaps be elucidated by reference to the Government's own view on the extraterritorial operation of Part VA: 'The Government's view has been that ... Australia ... has a moral obligation to ensure that overseas consumers, injured by Australian products, have the same rights to compensation as Australian consumers.'[38]

It appears that other Australian jurists hold the same views as Professor Pryles on the present issue, viz, the spatial application of Part VA should be determined by the application of the choice of law rule in tort.[39]

The context of these statements and materials, being the consideration of whether Part VA should be extended to allow foreign consumers to sue Australian manufacturers,[40] must be of some significance in considering them for present purposes. However, the methods applied and evidence taken in the determination of the Committee's views and the opinions of Ellicott and Rose, were the same as those relevant to the instant issue.[41]

The decision in *Francis Travel Marketing Pty Ltd* v *Virgin Atlantic Airways Ltd*[42] appears to lend support to the application of the rules of private international law to the TPA.[43] In that case the plaintiff and the defendant were parties to a general sales agency agreement. The defendant purported to terminate the agreement and the plaintiff then sought a declaration that the agreement had not been terminated and, pursuant to s 87 of the *Trade Practices Act* 1974, relief as a consequence of the defendant's alleged misleading and deceptive conduct contrary to ss 51A and 52 of the Act. The defendant sought a stay of the proceedings claiming that the proper law of the contract was that of England. Cole J of the New South Wales Supreme Court stated

[35] The TPA commenced operation on 9 July 1992: *Trade Practices Amendment Act* 1992, s 2.

[36] See ss 15AB(1) and (2)(b),(c) and (e) of the *Acts Interpretation Act* 1901 (Cth); and *Federal Commissioner of Taxation* v *Bill Wissler (Agencies) Pty Ltd* (1985) 16 ATR 952, 957.

[37] See *supra.*

[38] Australian Government,op cit (fn 15) 2.

[39] AI Tonking and LM Castle, *Australian Trade Practices Reporter* (1991) para 24–140; and semble SW Cavanagh and CS Phegan, *Product Liability in Australia* (1983) 234–5.

[40] Vis-à-vis whether Australian consumers can pursue foreign manufacturers under Part VA.

[41] Senate Standing Committee on Constitutional and Legal Affairs, op cit (fn 15), 28 and 32.

[42] (1994) ATPR ¶41–332.

[43] Compare *Astra AB* v *Delta West Pty Ltd* (unreported, Supreme Court of Victoria, 5/12/94), 22; and *Australian Commercial* v *ANZ Bank* [1989] 3 All ER 65, 72. Contrast *Green* v *Australian Industrial Investment Ltd* (1989) 25 FCR 532, 544.

that: 'Whether such *Trade Practices Act* claims may properly be brought depends upon the proper law of the contract. If the proper law of the contract is that of England, then no relief can be sought for breach of an Australian statute.'[44] Whilst Cole J did not characterise the statute's provisions themselves he did state that the provisions of the Act would not be applicable unless, applying the appropriate choice of law rule, viz, the rules in contract, the *lex causae* was the *lex fori*. In cases such as the vast majority of those which will be brought under Part VA of the TPA there will be no contract. If Cole J's application of the rules of private international law is to have any relevance in these cases then the provisions of the TPA itself must be characterised and their application determined in accordance with the appropriate choice of law rule. It therefore appears that Cole J's judgment in this case might be considered to lend some support to the application of the rules of private international law to Part VA.

It therefore appears that there is a preponderance of views that the rules of private international law are to be applied to the national legislation implementing the Directive, and more specifically, to the *Consumer Protection Act* 1987 (UK). In the case of the TPA, both Professor Pryles of the Australian Product Liability Association and the Australian Government advocate the application of the rules of private international law to it, and the decision in *Francis Travel Marketing Pty Ltd* v *Virgin Atlantic Airways Ltd*[45] goes some way towards advocating this approach.

The present author is of the opinion that the better view is that the territorial scope of the CPA will in time come to be universally determined by the application of the rules of private international law. The facilitation of the introduction of European legal concepts and practice, in private international law in particular, into the United Kingdom by British legislation such as the *Civil Jurisdiction and Judgments Act* 1982 and the *Contracts (Applicable Law) Act* 1990 will bring with it greater recognition of the European practice in the determination of the territorial scope of EC based laws. This practice will be very similar if not identical in all member states bar the UK, where the distinction between common law and statute law exists. The application of a different regime or practice to otherwise nearly identical law in the UK and on the continent will increasingly prove to be interpreted as a hindrance and anachronism by the legislature, the judiciary and practitioners. As international trade increases the juxtaposition of the two different methods will become more acute. An entirely predictable response to this situation which allows for the uniform treatment of EC based laws which is open to the courts according to reported decisions and the opinions of common law jurists alike, is to utilise choice of law rules. Choice of law rules which are, even at common law, increasingly beginning to resemble those which exist in the rest of Europe.[46] The treatment of the TPA will not be affected by similar consider-

[44] *Francis Travel Marketing Pty Ltd* v *Virgin Atlantic Airways Limited* ATPR ¶s41-332, 42 395.

[45] Ibid.

[46] See eg the position with respect to the choice of law in tort: *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC).

ations except in so far as they are imported into Australia by the judiciary or practitioners, and, in accordance with views of the present author expressed in the prior article, it appears to the present author that the methodology utilised in the TPA's application may be more an artefact of the parties' conduct of the issue before the courts than any reasoned jurisprudence. However, it may prove significant that the Explanatory Memorandum to the TPA requests the Australian courts, in applying the TPA, to 'fully acquaint themselves with the emerging jurisprudence in Europe [which deals with the EC Directive]'.[47] In the present author's view a single consistent approach to the territorial scope of the TPA may not yet emerge or come to be preferred.

CONSIDERATIONS OF POLICY AND THE PURPOSE OF THE ACTS: PREVENTING THE EVASION OF THE ACTS

Policy considerations have been taken account of by courts in the past in the determination of the territorial scope of a statute that suggest that both the CPA and the TPA must apply to foreign manufacturers. If they were not held to apply to foreign manufacturers then they could be too easily evaded and/or the purpose or object of the statute could be defeated, and in that event an injured consumer would in the vast majority of cases only be able to avail himself of the tort of negligence.[48]

To paraphrase Peter Gibson J in *In re Seagull Co Ltd*,[49] the patent intention behind the CPA and TPA was that those who place defective products on the market should be liable to compensate persons who are injured as a result of that conduct. Parliament could not have intended that a producer or own-

[47] *Trade Practices Amendment Act* 1992, Explanatory Memorandum, para 30.

[48] Compare FAR Bennion, *Statutory Interpretatation* (2nd ed, 1992) 270 and Part XXII 'Construction against Evasion' esp at 711–14; DS Kelly, *Localising Rules in the Conflict of Laws* (1974) 85; R Wright, 'Aspects Of The Extraterritorial Application Of Sections 50 And 50A Of The Trade Practices Act' (1992) *Australian Business Law Review* 152, 167–8; *The Electricity Trust of South Australia* v *Krone (Australia) Technique Pty Ltd* (unreported, Federal Court of Australia, von Doussa J, 18/7/94), 10; *Sussex Peerage Case* (1844) 11 Cl & Fin 85, 147 per Tindall CJ; 8 ER 1034, 1058 per Tindall CJ; *Magdalen College Case* (1615) 11 Co Rep 66b; 77 ER 1235; *Fox* v *Bishop of Chester* (1824) 2 B & C 635, 655 per Abbott CJ; 107 ER 520, 527 per Abbot CJ; *R* v *Russell (Earl)* [1901] AC 446; *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 427–8 per Kirby P (Clarke A-J A agreeing on this point); *Ahlstrom* v *Commission of the European Communities Joined Cases 89 to 129/85* (1988 — V) ECR 5193, 5243; *In re Paramount Airways Ltd* [1993] Ch 223, 236, 239 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); *In re Seagull Co Ltd* [1993] Ch 345, 344–55 per Peter Gibson J (Lloyd and Hirst LJJ agreeing), 360 per Hirst LJ (Lloyd LJ agreeing); *Heydon's case* (1584) 3 Co Rep 7a; 76 ER 637; *Pugh* v *Pugh* [1951] P 482, 492; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 38 per Menzies J in a dissenting judgment. Contrast *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 31 per Taylor J, 43 per Windeyer J, both of whom were in the majority; and *Arab Bank PLC* v *Mercantile Holdings Ltd* [1994] 2 WLR 307 at 313–14. The interpretation of a statute in a way which prevents the evasion of the Act and prevents the defeat of its object is a manifestation of the purposive approach discussed above: Kelly, op cit (fn 48), 85. It appears to the present author that the application of these considerations is not wholly dissimilar to the US effects doctrine: see the previous article and cf *Re Maxwell Communications Corporation Plc* [1995] ILPr 226, 243–4.

[49] [1993] Ch 345, 354 , Lloyd and Hirst LJJ agreeing.

brander[50] could escape liability simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice. That seems to be a wholly improbable intention to attribute to Parliament.[51]

In *Goliath Portland Cement Co Ltd* v *Bengtell*,[52] in the context of a state's statute in a federal system, Kirby P stated that 'modern means of transport and other forms of communication make an excessively narrow approach to territorial connection inappropriate and likely to defeat the intended operation of at least some . . . statutes.'[53] It appears to the present author that this statement applies *a fortiori* to international trade,[54] and moreover both the CPA and TPA are statutes the operation of which could be defeated if an appropriate territorial connection is not ascribed to them. The successful completion of the Uruguay round of the General Agreement on Trade and Tariffs in December 1993 serves as a topical and powerful reminder of the dynamic internationalisation of trade and the lessening of barriers to international trade.[55] It is in this context that the following examples of methods of avoidance of the provisions of the CPA or TPA must be considered.[56]

A foreign manufacturer could export to a subsidiary importer with nominal capital and no assets. A domestic manufacturer might decide that it is to its commercial advantage to relocate its existing manufacturing operations offshore in order to avoid the Act whilst availing itself of a subsidiary importer with nominal capital and no assets in the knowledge that the Act does not extend in its operation to foreign manufacturers. If an English or Australian consumer intended to commence proceedings under the CPA or TPA respectively, and that Act did not extend in its operation to the foreign manufacturers, then the consumer would not be able to satisfy any judgment in their

[50] See s 2 of the CPA infra and ss 75AB and 74A(4) of the TPA infra.

[51] See fn 50 supra.

[52] (1994) 33 NSWLR 414, 428 (Cole A-JA agreeing on this point).

[53] Compare *Jensen* v *Tolofson* (1995) 120 DLR (4th) 289, 303 per La Forest J (the rest of the court concurred); *In re Seagull Co Ltd* [1993] Ch 345, 354–5 per Peter Gibson J (Lloyd and Hirst LJJ agreeing); *In re Paramount Airways Ltd* [1993] Ch 223, 239 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); GB Born and David Westin, *International Civil Litigation in United States Courts: Commentary and Materials* (1992); RC Reuland, '*Hartford Fire Insurance Co*, Comity, and the Extraterritorial Reach of United States Antitrust Laws' (1994) 29 *Texas International Law Journal* 159, 180.

[54] Compare *Jensen* v *Tolofson* (1995) 120 DLR (4th) 289, 303 per La Forest J (the rest of the court concurred); and *In re Seagull Co Ltd* [1993] Ch 345, 354–5 per Peter Gibson J (Lloyd and Hirst LJJ agreeing).

[55] See eg *The Independent Newspaper*, 26 August 1996, 10. Compare AI Tonking and LM Castle, op cit (fn 39) para 14–650; AD Neale and ML Stephens, *International Business and National Jurisidction* (1988) 4–6; DJ Harland, 'Products Liability And International Trade Law' (1977) 8 *Syd L R* 358, 359; and Born and Westin, op cit (fn 53) 1.

[56] See fn 56 supra; and cf *Jensen* v *Tolofson* (1995) 120 DLR (4th) 289, 303 per La Forest J (the rest of the court concurred): 'These are the realities that must be reflected and accomodated in private international law'.

favour and the Act would have been successfully evaded.[57] Pryles has stated that arranging corporate structure to defeat the enforcement of a product liability judgment by interposing a subsidiary between a manufacturer in one country and potential plaintiffs in another,

> has been found to be less expensive than the payment of one year's insurance premium. Further, and unlike insurance, the strategy is effective for many years . . . insurance coverage must be renewed each year.[58]

Concern has been expressed both in the British Parliament and by jurists as to a consumer's recourse under the legislation which implements the Directive in the member states when the goods were manufactured overseas. Importers may have only a small operation with little capital and in these circumstances a consumer will have no recourse unless, perhaps, the foreign manufacturer can be held liable under the legislation.[59]

The Australian Law Reform Commission expressed similar concern in *Product Liability, Report No 51*[60] which preceded the introduction of Part VA of the TPA. The Report provided, in the amendments to the TPA that the Report recommended, that if a judgment made against a corporation under the proposed Part VA remained unpaid for 60 days then the holding company of the corporation became jointly and severally liable to pay the unpaid amount.[61]

The entire House of Lords constituted the Committee during the

[57] Compare Neale and Stephens, op cit (fn 55) 130; FR Schoneveld, 'What All Exporters Should Know About Product Liability In The European Community' (1988) 4 *Australia and New Zealand Trade Practices Advertising and Marketing Law Bulletin* 69; McNeil in D Campbell (ed), *International Product Liability* (1993); MC Pryles, 'An Australian Counter to US Product Liability' (1991) *Product Liability International* 21. In *Amust Computer Corporation Pty Ltd* v *Australia Entre Business Centres Pty Ltd (No 2)* (1987) ATPR ¶40-829, a case in which the plaintiff sought to sue both a domestic subsidiary company and its foreign holding company under the TPA (not Part VA), Jenkinson J at 48 949 reiterated the trite Anglo-Australian position that the foreign holding company could not be treated as the party liable under the TPA merely because it was 'the creator and controller' of the domestic subsidiary. Contrast the European Court of Justice's position (*ICI* v *Commission* (1972) ECR 619, 662–3; and JP Griffin, 'The Power of Host Countries Over the Multinational: Lifting the Veil in the European Community and the United States' (1974) 6 Law & Policy in International Business 375); and the US position — it appears that US courts will be prepared to pierce the corporate veil in this type of case and make the parent company liable for its subsidiary's judgment debts: Born and Westin, op cit (fn 53) 136–44; and Neale and Stephens, op cit (fn 55) 129ff. However, enforcement of the US judgment against a foreign resident parent company may well prove to be a more problematic issue: *Adams* v *Cape Industries Plc* [1990] Ch 433 (CA).

[58] MC Pryles, 'An Australian Counter to US Product Liability' (1991) *Product Liability International* 21.

[59] *Official Report*, House of Commons (UK), 19 January 1987, col 820 per Mr Gerald Howarth; SP Gunz, *Product Liability- the implications of the EEC draft directives* (1980) 35; W Lorenz, 'Some Comparative Aspects of the European Unification of the Law of Products Liability' (1975), 1024; Thornton and Ellis in P Kelly and R Attree (eds), *European Product Liability* (1992) 469–71; Schoneveld, op cit (fn 57) 69; McNeil, op cit (fn 57) 219–20; JJ Fawcett, 'Products Liability In Private International Law: A European Perspective' (1993) I *Recueil des Cours* 13, 35, 47, 59.

[60] Australian Law Reform Commission, *Product Liability, Report No 51* (1989) 69.

[61] Id 171 (in the proposed s 75AL), 188; cf J Goldring and T Young, *Product Liability: Remedies and Enforcement, Research Paper No 5 Australian Law Reform Commission* (1989) 78–9.

Committee stage of the *Consumer Protection Bill* 1987 (UK). Lord Williams of Elvel expressed concern that parent companies may sacrifice their subsidiaries in order to avoid liability under the CPA. His Lordship stated that a company could vest its entire manufacturing process in one of its subsidiaries that has nominal capital and no assets, or a foreign company could use a subsidiary with nominal capital and no assets to act as an importer into the EU.[62] Then Parliamentary Under-Secretary of the Department of Trade and Industry, Lord Lucas of Chilworth, in answer to Lord Williams' question, conceded that in these circumstances the subsidiary company could be 'bankrupted' with no prospect of the judgment being met and the parent company would not be liable for its debts. Lord Williams suggested that 'if companies can isolate themselves by this financial mechanism [then it] . . . render[s] the whole of Part I [of the CPA] . . . relatively nugatory'.[63] Lord Lucas undertook to take advice on the matters raised by Lord Williams and communicate with him as to the results of his enquiries.[64] The following exchange then took place.

Per Lord Lucas of Chilworth:

> Perhaps the liability that we foresee . . . would be only very occasionally large enough to justify, certainly in commercial terms, the sacrifice of a subsidiary. Even then, I suggest, the question would arise only if the liability . . . has not been adequately insured. If a group of companies is large enough to be able to sacrifice a subsidiary, surely it is much more likely that it would be able to either bear the financial loss or to have secured adequate insurance in the first place. I do not think that it would sacrifice a subsidiary . . . with the consequences for the whole group. We should also remember that there are other statutes which would inhibit it so doing . . . the provisions of the Insolvency Act, which impose duties on the directors. They are not ones that they can easily walk away from purely by taking the course of action that the noble Lord poses that they might take.

Per Lord Williams of Elvel:

> What we are now down to is whether a parent company considers its reputation sufficiently important to it not to abandon its subsidiary, or whether the directors of that subsidiary happen to be people who are covered under the Insolvency Act. I can invent all sorts of scenarios for the noble Lord, and I am sure any noble Lord can do so. We can put in a trust company; we can vest it in a trust company in Gibraltar, or in the Cayman Islands; we can do all sorts of things, and people do this.

[62] *Official Report*, House of Lords (UK), 19 January 1987, col 751–6. In a statement to the Commons Standing Committee D when it was considering the *Consumer Protection Bill* 1987, Mr Richard Page made a point similar to that made by Lord Williams, however it was not referred to again: 'Some of our far eastern competitors would be able to attack our markets, using carefully constructed import companies of no substance to bring goods into our market . . . Then, when and if something went wrong, our consumer would have no come-back against those companies': *Parliamentary Debates*, Commons Standing Committee D Official Report Session 1986–87 vol II col 35. Compare McNeil, op cit (fn 57) 219–20.

[63] *Official Report*, House of Lords (UK), 19 January 1987, col 754.

[64] *Official Report*, House of Lords (UK), 19 January 1987, col 754–5.

Per Lord Lucas of Chilworth:

> I find it very difficult to believe — perhaps because I am a naive man — that companies will engage in a number of those practices . . . I dare say that a number of noble Lords could paint a variety of scenarios, all to the detriment of some producer who wants to escape his moral as well as his legal responsibilities. I do not believe that business is conducted in that way. I believe that the provisions of the Bill are sufficient to persuade him to a proper course of action.

Per Earl De La Warr:

> I think the noble Lord [Lord Williams] has put it succinctly and he is also very practical. We know that much of this Bill is to catch the rascals there are. To say that one can rely on the conscience of a company is no answer, certainly no answer in law. It is not a legalistic question because when the chips are down it is and will be very practical.

Per Lord Lucas of Chilworth:

> [Earl De La Warr] knows, because he has been in business a long time, that in practice the reputable industrial, commercial, and manufacturing companies do not seek to avoid their risks.[65]

Lord Denning responded to this exchange by saying that these were matters which were not only concerned with product liability, but all the liabilities of companies throughout the tort law. Accordingly, he stated that 'it involves general company law and so many things outside the Bill. I believe it is better not to pursue it at this stage.'[66]

Subsequently, Lord Lucas of Chilworth did not act upon his undertaking to Lord Williams of Elvel. In a letter dated 3 March 1987, he indicated that he felt that their exchange, along with the point made by Lord Denning, adequately covered the points that Lord Williams had made. The issues raised by Lord Williams were not discussed again in the debates on the Bill.

Despite Lord Lucas' protestations it appears that English importers may already have adopted a variation of this practice in order to avoid liability under the CPA.[67] There already exists much anecdotal evidence of these practices.[68] Whilst it is presently unknown to what extent similar schemes operate in Australia in respect of the TPA, it was stated in one of the Australian Law Reform Commission's research papers for *Product Liability, Report No 51* that 'considering the extent of income tax avoidance through use of the corporate form, there is good cause to be concerned also as regards avoidance of civil liability.'[69] More recently Goldring has advocated the enactment of a statutory provision providing for the liability of corporators (including directors, managers, officers and shareholders), where a corporation is liable to pay compensation under a statute and 'it appears that one of the reasons for

[65] *Official Report*, House of Lords (UK), 19 January 1987, col 754–6.
[66] *Official Report*, House of Lords (UK), 19 January 1987, col 756.
[67] Compare Goldring and Young, op cit (fn 60) 78.
[68] Ibid but cf Pryles, op cit (fn 57) 21.
[69] Goldring and Young, op cit (fn 60) 79.

forming, or acquiring the assets of or shares in the corporation may have been to ensure that its assets will be insufficient to meet the liability in the contingency of liability under the statute'.[70] He stated that Part VA 'is one area where it would be appropriate to apply such a provision'.[71] Whilst he is unable to calculate or estimate the extent to which schemes which would activate his proposed provision operate in Australia he stated that the 'problem is real. Its extent cannot be discovered, as those who use the corporate form as a device to avoid corporate civil liability are unlikely to parade their motives in public'.[72]

The same arguments would hold true for another arrangement which has been noted and which could result in an injured party having no recourse against an importer notwithstanding that the product was imported from outside the EU or Australia. If a product is directly imported by a business to be used in its own enterprise then the only claim which a person injured or suffering damage due to a defective product can make under the relevant legislation will be against the foreign manufacturer.[73]

There may well be cases in which a judgment against a foreign manufacturer is of some value to a consumer and is worth obtaining and enforcing. Therefore, in line with authorities cited above, a factor in favour of interpreting both the CPA and TPA to apply to foreign manufacturers is that this must be done to uphold the policy of interpreting an Act so as to prevent its evasion and to prevent its purpose being defeated.[74]

CPA

The Territorial Scope/Extraterritorial Operation of the Council Directive

Article 3(2) of the Directive provides:

> *Without prejudice to the liability of the producer*, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this directive and shall be responsible as a producer (emphasis added).

In November 1985 the Department of Trade and Industry prepared a document entitled *Implementation of EC Directive on Products Liability — An explanatory and consultative note*. Paragraph 45 of that document, which discusses Article 3 of the Directive, stated that:

> Those liable include the manufacturer of a finished product or component; the producer of raw material; or a person who holds himself out to be a

[70] J Goldring, 'Making Corporate Officials Personally Liable For Statutory Torts' (1994) 4 *Australian Journal of Corporate Law* 376, 377.
[71] Id 377, 379, 380.
[72] Id 381.
[73] See R Merkin, *A Guide To The Consumer Protection Act 1987* (1987) 15.
[74] Compare *Ahlstrom* v *Commission of the European Communities* (Joined Cases 89 to 129/85) (1988 — V) ECR 5193, 5243; Ontario Law Reform Commission, *Product Liability* (1979) 121.

> producer (eg by putting an own-brand label on the article). Where an article is manufactured outside the EC, the importer will *also* be liable (emphasis added).[75]

Many jurists have stated that Article 3(2), by deeming the importer a producer, does not relieve the actual foreign producer from liability. The injured consumer may sue the producer as well as the importer under the Directive if they wish.[76]

The last sentence in Article 3(3) appears to also confirm that an injured consumer may sue the producer as well as the importer. It provides that the mechanisms provided for identifying a producer 'apply in the case of an imported product even if the name of the producer is indicated.'[77] In the circumstances contemplated in this provision the producer must be resident outside the EC by virtue of the definition of importer.[78] Article 3(3) therefore treats the non-resident producer as having the concomitant liability of a producer under the Directive.

Lasok and Stone state that the Directive does not 'evince any interest in the conflict-of-law issues relating to its operation.'[79] They ask rhetorically:

> Does the Directive apply at all to products manufactured within the Community but exported outside it, causing injury beyond its borders? On the other hand, does it apply to the liability of a manufacturer resident outside the Community whose goods are brought within it by a parallel importer, perhaps without the manufacturer's knowledge or consent?[80]

They conclude that:

> The silence of the Directive makes it impossible to suggest answers to such questions with any great confidence. But, with diffidence, it is suggested that it will be reasonable to confine the operation of the Directive to products which were delivered to the ultimate purchaser within the territory of the Community, and to apply, on points which the Directive remits to national law, the law of the Member State in which delivery took place. On the other hand, the Directive should not be available against a manufacturer resident outside the Community who did not intend his goods to enter the Community; it is enough to impose liability on the importer in such cases.[81]

Whilst these answers may appear logical and workable, Lasok and Stone do not purport to base them on any analysis of EC law or the law of the member states.

Articles 3(1) and 3(2) clearly provide that the liability as prescribed by the Directive of the importer into the EC or the own-brander will be in addition to, not in substitution for, liability on the part of the actual producer.[82] In

[75] Compare Nelson-Jones, *Product Liability: the new law under the Consumer Protection Act 1987* (1988) at 41–2.
[76] Id 42; Fawcett, op cit (fn 2) 35, 47, 59–60; Tebbens, op cit (fn 2) 157.
[77] Article 3(3).
[78] See Article 3(2) *supra.*
[79] D Lasok and P Stone, *Conflict of Laws in the European Communities* (1987) 124.
[80] Ibid.
[81] Id 124–5.
[82] Compare Tebbens, op cit (fn 2) 157.

these cases the actual producer will necessarily reside outside the EC. Articles 3(1) and 3(2) do not expressly limit the 'producer' to producers resident or carrying on business within the EC.

The better view is that the Directive was intended to have application to producers both within and without the EC.

Indications of Parliament's Intention in the Parliamentary Debates

In July 1985, before the Council Directive was passed the House of Commons considered the Amended version of the Proposal from the Commission.[83] The then Parliamentary Under-Secretary of State for the Department of Trade and Industry[84] stated that:

> All products supplied in the EC will be covered by the directive. So British companies will not be placed at any competitive disadvantage ... it will *also* apply to all importers, regardless of where the products originate.[85]

During the debates on the CPA express consideration was given to the territorial scope of Part II of the CPA. The fact that the general safety requirement did not apply to exported goods in favour of foreign consumers was debated.[86] No such consideration was given to Part I. What was said in Parliament with respect to the insertion of s 6(7) dealt only with 'procedural jurisdiction' within the EC not 'substantive jurisdiction', ie whether a consumer who suffers damage in Britain can bring proceedings in a British court against a producer or importer resident elsewhere within the EC.[87]

The Provisions of the CPA

Section 2 of the CPA provides, so far as is relevant:

> (1) ...where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.
> (2) This subsection applies to-
> (a) the producer of the product;
> (b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;

[83] Recall the Amendment of the Proposal for a Council Directive relating to the Approximation of the Laws, Regulations and Administrative provisions of the member States concerning Liability for Defective Products (Presented by the Commission to the Council on 1 October 1979) [The Amendment of the Proposal from the Commission], COM (79)415 final [it was this version which the British Parliament had before it], OJ No C271, 26/10/1979, 3 [this version did not have an accompanying explanatory memorandum].

[84] Mr Alex Fletcher.

[85] *Official Report*, House of Commons (UK), 8 July 1985, col 812 (emphasis added).

[86] *Official Report*, House of Lords (UK), 8 December 1986, col 1027, 1050, and 1053; and *Official Report*, House of Lords (UK), 20 January 1987, col 899–904.

[87] *Official Report*, House of Lords (UK), 8 December 1986, col 1043; and *Official Report*, House of Lords (UK), 19 January 1987, col 787.

(c) any person who has imported the product into a member State[88] from a place outside the member States in order, in the course of any business of his, to supply it to another.

....

(5) Where two or more persons are liable by virtue of this Part for the same damage, their liability shall be joint and several.

The Law Commission in its Report on Liability for Defective Products[89] recommended that the strict liability action in tort or delict which it had earlier recommended be created should be imposed on the importer of goods into the jurisdiction *in addition to* the producer of the defective goods.[90]

The Royal Commission made an almost identical recommendation.[91]

Morse,[92] whilst principally addressing the application of the CPA within the EC,[93] stated, by way of a footnote, that:

> It is by no means clear that the 1987 Act applies to cases containing no relevant EEC element: see Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp 124–125. In principle, however, there is no particular objection to applying it to a producer from outside the EEC, providing that the producer is subject to the jurisdiction of the English court, and the producer's activities effect [sic] the EEC market.[94]

Many jurists have stated that s 2(2), by deeming the importer a producer, does not relieve the actual foreign producer from liability. The injured con-

[88] That is, states which are members of the European Communities: see the *European Communities Act* 1972 (UK), s 1(2), Sch 1 Pt II, as applied by the *Interpretation Act* 1978 (UK) s 5, Sch 1.

[89] (1977) No 82.

[90] Id paras 97–8, 102–3. The justification for this was the possible difficulty in obtaining jurisdiction against, and the inconvenience and expense in suing, a foreign producer, and because it was thought that 'the outcome of the litigation depends to a large extent on the law of that [foreign] country': para 102. Compare the Law Commission's Working Paper No 64 (1975), para 62(c) which preceded the Report, the Commission stated: It would be contrary to the "channelling" principle [the 'channelling' principle was described as one of the main considerations of policy in the Law Commission's Report (1977) Cmnd 6831: para 23(h)] to impose strict liability on the first distributor of a defective product where the injured person could without great difficulty obtain redress from the foreign producer. For example, a judgment obtained against a foreign producer may be enforced against assets which the producer has within the jurisdiction of the court of judgment. If therefore an American producer, with assets in London, were to export a defective product from America to England where it caused an accident, the injured person would be able to sue the American producer in England and obtain satisfaction of his judgment in England. Furthermore, arrangements for the reciprocal enforcement of judgments outside the EEC have been made by treaty and statute.[See Orders in Council made under the *Administration of Justice Act* 1920, ss 13–14, such as Hong Kong, SR & O 1922 No 353, and the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.]

[91] United Kingdom, *Royal Commission on Compensation for Personal Injury Report* (1978) Cmnd 7054 para 1250.

[92] CGJ Morse, 'Product Liability in the Conflict of Laws' (1989) *42 Current Legal Problems* 167, 181–184.

[93] Id 184.

[94] Id 194, fn 2.

sumer may sue the producer as well as the importer under the CPA if they wish.[95]

Section 2(2) clearly provides that the liability under the CPA of the importer into the EC or the own-brander will be in addition to, not in substitution for, liability on the part of the actual producer. In these cases the actual producer will necessarily reside outside the EC. Section 2(2) does not expressly limit the 'producer' to producers resident or carrying on business within the EC.

It appears that the CPA must apply extraterritorially in the limited sense of applying to producers and importers domiciled outside the UK but within the member states.[96] Section 2(2)(c) only applies to an importer who imports into a member state, therefore if a product is produced within a member state but not within the UK no importer can be liable under the CPA.[97] However, an importer domiciled within a member state but not within the UK can be liable under s 2(2)(c).[98] It follows *ipso facto* that Parliament intended that s 2(2)(c) of the CPA apply to an importer domiciled within Europe whether or not they have any presence within the UK.[99] It follows logically on from this that Parliament intended that the CPA apply also to a producer and production anywhere within the member states, whether or not the producer is present within the UK or whether production occurred within the UK.[100]

Moreover, a submission that the inclusion of an additional defendant in the CPA in cases in which the product was produced outside the EC restricts the possible defendants, appears to run counter to the very intention of the legislature in providing for the additional defendant — an additional person who may be able to compensate the injured party — in the first place.

A point which may prove to be significant in a particular case is this: if a plaintiff cannot pursue a foreign manufacturer in the plaintiff's own court then this may disbar him totally from pursuing the foreign manufacturer. This is because the manufacturer's own court may not allow the foreign consumer to pursue the domestic manufacturer there on the basis that it has no procedural or substantive jurisdiction or upon the invocation of a principle similar to *forum non conveniens*. However, it appears that with respect to the *forum non conveniens* point this line of reasoning results in a circular argument. This is because the doctrine of *forum non conveniens* presupposes the

[95] Fawcett, op cit (fn 2) 35, 47, 59–60; and Nelson-Jones, op cit (fn 75) 42. Compare *The Electricity Trust of South Australia* v *Krone (Australia) Technique Pty Ltd* (unreported, Federal Court of Australia, von Doussa J, 18/7/94) 4–13 discussed in detail infra. Nelson-Jones, after noting the provisions of Article 3(2) of the Directive and the Department of Trade and Industry's explanatory note of November 1985, stated that Part I applies to 'a Japanese or Canadian producer as well as to a French or English importer'.

[96] Compare *Official Report*, House of Lords (UK), 19 January 1987, col 787 per Lord Morton of Shuna; and Tebbens, op cit (fn 2) 296–7.

[97] Subject to the possibility of a producer domiciled within a member state exporting a product to a country which is outside the member states which product is later imported back into the member states: Merkin, op cit (fn 7) 15; and A Clark, *Product Liability* (1989) at 56–7.

[98] Ibid; and Nelson-Jones, op cit (fn 75), 41.

[99] Ibid.

[100] Compare Fawcett, op cit (fn 2) 46–7, Morse, op cit (fn 92) 194 fn 92, and see supra.

existence of an alternative forum.[101] Therefore, a court will not refuse to exercise jurisdiction regularly obtained if the defendant could not be pursued in England/Australia. In so far as this argument is based upon a lack of procedural or substantive jurisdiction in the manufacturer's forum jurisdiction, it has some merit. If, as is the case in Australia under the TPA, a foreign consumer cannot pursue a domestic manufacturer in the manufacturer's own courts for injuries or damage sustained outside the jurisdiction caused by goods manufactured within the jurisdiction, then an English or Australian consumer[102] would be left without a remedy if his own courts refuse to entertain the suit.[103] In Australia the courts lack the substantive jurisdiction to entertain such a suit because the TPA does not extend in its operation to foreign consumers injured overseas. However, the argument is valid also for cases in which the foreign manufacturer's forum's procedural rules do not allow for jurisdiction over the manufacturer in such a case.

Another possible argument in favour of interpreting both the CPA and the TPA so as to apply to foreign manufacturers, is that both Acts are remedial in nature and should therefore receive a liberal construction giving 'the most complete remedy which the phraseology will permit'.[104]

Section 2(3) allows a potential plaintiff to issue written requests to suppliers of the product requesting them to identify 'one or more of' the producer, any own-brander, any importer, or be liable for the damage in lieu thereof. Section 2(3) therefore clearly contemplates the identification of a foreign manufacturer either in addition to the importer or to the exclusion of the importer. If the liability provisions of the CPA do not similarly contemplate a foreign manufacturer then a person who has suffered damage may issue a request which will be duly complied with by the identification of a person to whom the CPA does not apply, therefore rendering s 2(3) futile in the identification of potential defendants. This was surely a wholly improbable intention to attribute to Parliament.[105] Accordingly, the terms of s 2(3) in conjunction with s 2(1) support the conclusion that the CPA applies to foreign producers.

In *Holmes* v *Bangladesh Biman Corporation*[106] Lord Jauncey of Tullichettle (Lords Griffith, Ackner and Lowry agreeing) relied upon, inter alia, the

[101] *Schertenleib* v *Traum* 589 F 2d 1156 (1978); *Gulf Oil Corporation* v *Gilbert* 330 US 501, 67 SCt 839, 91 L Ed 1055 (1947); *Brewers* v *American Home Products Corporation* 459 NYS 2d 666, 670 (1982).

[102] These nationalities are merely taken as examples of the cases which the topic of this thesis concerns itself with, they are not exhaustive of the topic.

[103] Compare *Brewers* v *American Home Products Corporation* 459 NYS 2d 666, 670–1 (1982)

[104] *Holmes* v *Permanent Trustee Co of NSW Ltd* (1932) 47 CLR 113, 119 per Rich J. See eg Gifford, *Statutory Interpretation* (1990) at 164 and the cases there cited; E Wilberforce, *Statute Law: The Principles Which Govern The Construction And Operation Of Statutes* (1881) 230–42 and the cases there cited; *Waugh* v *Kippen* (1986) 160 CLR 156, 164–5; *Patton* v *Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14, 17; and *Trade Practices Commission* v *Gillette Company and Others (No 2)* (1993) 118 ALR 280, 291–2.

[105] Compare *Air-India* v *Wiggins* [1980] 1 All ER 192, 197 per Lord Widgery CJ (Eveleigh and Kilner Brown LJJ agreeing)(CA); and *Thwaites* v *O'Sullivan* [1965] SASR 34, 37.

[106] [1989] 1 AC 1112.

answer to the rhetorical question 'what interest [does] Parliament [have] in legislating for [the extraterritorial person or matter to which one party wishes to apply a statute]'[107] in deciding whether an English statute had extraterritorial effect. The interest which both the English and Australian[108] Parliaments have in legislating for the liability of foreign manufacturers of defective products is that these persons be able to be made to compensate English or Australian plaintiffs injured because of the defect.[109] A simple riposte to this analysis would appear to be that Parliament has realised this interest by providing for the liability of the importer into the EC or Australia respectively. However, as has already been stated, there will be situations in which a plaintiff's only feasible course under the CPA or TPA will be to pursue the foreign manufacturer and if the statutes do not provide for liability on the part of a foreign manufacturer then this allows for evasion of the Acts.

It therefore appears, on an examination of the provisions of the CPA, that the better view is that the CPA applies to importers domiciled within the member states whether or not they have a presence within the UK, and to producers domiciled or resident anywhere in the world, whether or not they have a presence within the UK, and wherever production took place.

The question arises whether this conclusion accords with the determination that would be reached under any of the three specific methods discussed above, and whether a precise territorial scope of operation can be ascribed to the CPA.

In the case of an action in the English courts against a defendant domiciled within the member States the court must obtain jurisdiction[110] pursuant to the Brussels or Lugano Conventions,[111] and the issue of whether the CPA would then be applicable to the producer or importer would be determined in accordance with the application of the methods for the determination of the territorial scope of a statute discussed earlier.[112] In the civil law systems of the member states apart from the UK, the territorial scope of the legislation implementing the Directive would be determined by the application of the relevant choice of law rule in the absence of a specific choice of law rule provided for by the relevant code or other legislation.[113] However, in the UK

[107] Id 1151–4.

[108] This reasoning applies equally to the TPA.

[109] Compare *Official Report*, House of Lords (UK), 8 December 1986, col 1003–4 per The Lord Advocate (then Lord Cameron of Lochbroom); P Lane, *The Trade Practices Act — Its Constitutional Operation* (1966) 92–3; the Explanatory Memorandum to the *Trade Practices Amendment Bill* 1992 (Cth) paras 1, 2 and 28; and (generally on the TPA) *Hughes Motor Service Pty Ltd* v *Wang Computer Pty Ltd* (1987) 35 FLR 346 (Fed Ct).

[110] That is, procedural jurisdiction.

[111] See s 6(7) of the CPA which provides that the tort special jurisdiction provisions of the Conventions will be applicable. The Conventions were enacted in the UK by the *Civil Jurisdiction and Judgments Act* 1982 (UK) (as amended by the *Civil Jurisdiction and Judgments Act* 1991 (UK)), and are herein described collectively as 'the Conventions'.

[112] That is, substantive jurisdiction.

[113] Probably the tort/delict choice of law rule. See eg Tebbens, op cit (fn 2) 117, 171 esp n 4, and 237. Note that the Directive itself contains no provisions detailing its territorial scope.

and Australia the issue of 'substantive jurisdiction' when dealing with a statute is more contentious.[114] It was stated above that the better view is that the CPA applies to importers domiciled within the member states whether or not they have a presence within the UK, and to producers domiciled or resident anywhere in the world whether or not they have a presence within the UK and wherever production took place. If the presumption against extraterritorial legislation were to be preferred then it could be easily rebutted because Parliament appears to have manifested a clear intention to apply the CPA to both producers and importers within the member states.[115]

The purposive approach would similarly bring about the application of the CPA to producers and importers within the member states.[116] Of the application of the rules of private international law to the CPA to determine its application,[117] the apparent manifestation of Parliament's intention that the CPA apply to producers and importers within the member states would appear to override the application of, or utility in applying, any choice of law rule in the determination of whether the CPA applies to importers domiciled within the member states or to producers or production anywhere in the world.

However, what of the other elements of the cause of action under the CPA? What if the injury or damage was not suffered within the UK? The provisions of the CPA do not appear to provide any indication of the scope of the Act outside its application to importers, producers and production.[118] Whilst the Directive's purpose was to provide a cause of action for all persons injured within the EC due to defective products,[119] the CPA need not have such a broad compass. In European law the Conventions provide that only in a limited class of cases can persons establish procedural jurisdiction in a UK court, they do not require that the CPA apply to all injuries or damage that occur throughout the EU.[120] By articles 2 and 5(3) a plaintiff may commence proceedings in an action related to tort or delict against an EU domiciled defendant in the jurisdiction where the defendant is domiciled, the damage occurred, or the event giving rise to the damage took place.

In the case of a non-UK but EU domiciled producer who has produced a defective product within the EU but outside the UK, it appears that it will only be when the plaintiff suffers direct injury or damage that occurs within the UK that the plaintiff will be able to commence proceedings against him in a UK court at all. As the CPA applies to non-EU domiciled producers it must similarly only allow for a person to bring an action in the UK courts when the injury or damage occurs within the UK, otherwise the Act would inexplicably

[114] See supra.
[115] See supra.
[116] See supra.
[117] As Merkin, op cit (fn 7) 50–1; and Fawcett, op cit (fn 2) 196–7, 228 would counsel us to do.
[118] See supra.
[119] This appears to have been the presumption throughout all of the EC material dealing with the Directive. Compare semble *Official Report*, House of Lords (UK), 8 December 1986, col 1004, 8 per the Lord Advocate (then Lord Cameron of Lochbroom) in the Second Reading Speech for the CPA.
[120] A matter of substantive jurisdiction.

allow for a greater scope of operation in cases in which the defendant has a non-EU domicile. A territorial scope for the CPA which provides that the CPA extends to claims in which the damage or injury occurs within the UK would also comply with the presumption against extraterritorial operation. It appears that there is no reason, upon reading the CPA or the Directive, or upon a consideration of the policy of the Act or the Directive, why the CPA should extend to injuries or damage that occur other than within the UK.[121] The CPA was passed to comply with an EC Directive the purpose of which was to provide a cause of action for all persons injured within the EC due to defective products. In accordance with this purpose it might be argued that the UK legislation implementing the Directive should apply in favour of *all* persons who sustain personal injury or suffer property damage anywhere within the EU due to defective products and commence an action in the UK courts.

However, a person injured within the EU but not within the UK would have a choice of not merely three potential jurisdictions in which to commence their proceedings,[122] but also more than one version of the legislation implementing the Directive may be applicable as the choice of law rule in tort in the majority of the member states of the EU is a *lex loci delicti* rule.[123] This situation would be a forum shopper's Harrods, and it would not further the purpose of the Directive because another member state's legislation implementing the Directive would be applicable to the same facts thereby ensuring that the injured party has a cause of action based upon the Directive, albeit not the CPA, and the enforcement of the judgment within Europe can be accomplished under the Conventions.[124] In light of this determination it would appear that the rules of private international law become inapplicable. Alternatively, the relevant choice of law rule would be applied to the statute to determine its scope of application. It has previously been concluded that the cause of action created by the CPA should be characterised as a tort for private international law purposes. In pre-*Private International Law (Miscellaneous Provisions) Act* 1995 (UK) cases, if the cause of action can be described as a foreign tort,[125] the CPA will be applicable in the case of a foreign producer or importer[126] if the production of a defective product or the importation of a defective product from outside the member States, would be actionable both in England and in the foreign country[127] where it was done, unless another

[121] Compare *Official Report*, House of Lords (UK), 19 January 1987, col 787 per Lord Morton of Shuna.

[122] Viz the producer's domicile, the place of production, and the place where the injury or damage occurred.

[123] Compare *Dicey and Morris on the Conflict of Laws* (L Collins, ed, 12th ed, 1993) 1480.

[124] Compare Morse, op cit (fn 92) 182.

[125] That is, cases of manufacturing or design defects. If the cause of action is a domestic tort (ie cases of instructional defects) then the CPA and English common law of tort must *ipso facto* apply: *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 446 (CA) (overruled in *Lonrho plc* v *Fayed* [1992] 1 AC 448 but not on this point), and Dicey and Morris, op cit (fn 123) at 1534–5.

[126] That is, a producer or importer domiciled within the member states but with no presence within the England.

[127] That is, being a member state but not England.

country has the most significant relationship with the occurrence and the parties.[128] In cases in which the production of a defective product, or the importation of a defective product from outside the member states, takes place within one of the member states which has enacted the Directive into its own law, or, any member state in which the producer of a product can be held liable to compensate a person who suffers personal injury or property damage due to a defective product,[129] and the conditions to establish that liability in that country exist; the first two conditions will always be able to be satisfied[130] and the only issue which will require consideration will be whether the exception applies.[131] A case in which the product was produced outside the UK and the injury or damage occurred outside the UK would, *ceteris paribus*, appear to be a case ripe for the application of the proviso.[132]

In post-*Private International Law (Miscellaneous Provisions) Act* 1995 (UK) cases the CPA will be applicable in the case of a foreign producer or importer if the events constituting the tort occur within the jurisdiction,[133] unless it is substantially more appropriate that the law of another country be applied.[134] In cases of personal injury the relevant events will occur within the jurisdiction if the individual was there when he sustained the injury,[135] and in cases of property damage they will occur within the jurisdiction if the property was damaged there.[136] Therefore, whether or not the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) is applicable, the application of the choice of law rule in tort[137] appears to indicate that the CPA will apply to foreign producers and foreign importers in cases in which the personal injury was sustained, or the property damage occurred, within the UK, unless the exception applies. Therefore, it appears that the CPA is limited in its territorial application to cases in which the personal injury or property damage

[128] *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC).

[129] Such as a cause of action equivalent to the tort of negligence in English law, or a cause of action similar to that under sale of goods type legislation in which the doctrine of privity has been abolished and the purchaser, or persons who take their title through them, can bring the action. Examples of jurisdictions in which such actions exist include: Switzerland, France, and Spain. For the importer to be liable the foreign law must similarly allow, in terms, for the liability of the importer into the member states. It appears that this does not occur except in the case of strict product liability actions.

[130] Compare *Li Lian Tan* v *Durham* [1966] SASR 143; *Koop* v *Beeb* (1951) 84 CLR 629, 644; *Couture* v *Dominion Fish Co* (1909) 19 MR 65; *Young* v *Industrial Chemicals Co* [1939] 4 DLR 392, esp 394; *Kolsky* v *Mayne Nickless Ltd* [1970] 3 NSWLR 511; *Kemp* v *Piper* [1971] SASR 25 (FC); *Plozza* v *South Australia Insurance Company* [1963] SASR 122; *Lucas* v *Gagnon* (1992) 99 DLR (4th) 125; Merkin, op cit (fn 7) 50–1; and Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 81.

[131] Contrast Merkin, op cit (fn 7) 51 para (b)(ii) which statement was made before *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC) was decided.

[132] Compare *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC).

[133] Section 11(1).

[134] Section 12.

[135] Section 11(2)(a).

[136] Section 11(2)(b).

[137] Meaning the combination of the general rule and the exception thereto.

occur within the UK.[138] As against a defendant domiciled within Europe[139] or a defendant domiciled outside Europe,[140] an English court can obtain procedural jurisdiction in such a case.

However, as stated above, the Conventions also provide that a plaintiff may commence proceedings against an EU domiciled defendant in the jurisdiction where: the event giving rise to the damage took place,[141] and the defendant is domiciled.[142] The jurisdiction established under the Conventions' rules is procedural jurisdiction. The question then arises whether the CPA, vis-à-vis perhaps another EU member State's legislation implementing the Directive, is applicable in a case in which the UK court is seized of jurisdiction by virtue of the Conventions' provisions in either of these two cases.[143]

In cases in which an EU but not UK domiciled defendant manufactured the defective goods within the UK, it appears that the CPA was intended to apply to such persons only if the injury or damage occurred within the UK.[144] A territorial scope for the CPA that includes EU domiciled persons who manufacture the defective goods within the UK in cases in which the injury or damage occur within the UK does not breach the presumption against extra-

[138] Compare *Official Report*, House of Lords (UK), 19 January 1987, col 787 per Lord Morton of Shuna; and Morse, op cit (fn 92) 183. Morse would also, perhaps, have other relevant factors in determining the territorial scope of the CPA such as whether the goods were marketed for ultimate sale within the jurisdiction and also acquired there: cf Tebbens, op cit (fn 2) 361ff, where Tebbens proffers a market criteria for the spatial application of Product Liability legislation. However, these factors find no basis in the elements of the cause of action as provided for in the Act, and so find no place in the territorial scope proffered by the present author. Moreover, a market rule would not cater at all for cases of a person injured or suffering damage due to a defective product who did not himself purchase the product (a concession in terms made by Tebbens at 382–3 but cf 379). In a case in which the place of injury or damage and the place of market are not the same, it may appear fair and reasonable to state that the CPA does not apply where the person who purchased the product outside the UK now seeks to rely on the CPA in a UK court for a strict liability cause of action. However, what of a relative or friend of that person, or an innocent by-stander, who was also injured or suffered damage in that accident? During the debates on the Directive, before any Bill enacting the Directive was before Parliament, The Parliamentary Under-Secretary for Trade and Industry (then Mr Alex Fletcher) stated that the development risks defence to be contained in the British legislation implementing the Directive, would protect 'British industry' in its 'domestic market', however, British industry would not be given the protection of that defence in 'export markets, where the importing country does not have such a defence': *Official Report*, House of Commons (UK), 22 July 1985, col 831–2 and cf *Official Report*, House of Lords (UK), 20 January 1987, col 823–4 per Lord Williams of Elvel during the Committee stage of the CPA. The value of these statements is very questionable, particularly so when you consider that they were not made in the context of the consideration of the spatial application of the legislation, however, they could be interpreted to lend support to Morse and Tebbens' 'market' factor.

[139] See the discussion of article 5(3) of the Conventions in the section dealing with RSC (England) O 11 r 1(1)(f).

[140] See the discussion of RSC (England) O 11 r 1(1)(f) itself.

[141] Article 5(3).

[142] Article 2.

[143] As was concluded above, the CPA will be applicable in cases in which an English court has jurisdiction under the Conventions' article 5(3) provision providing for the commencement of proceedings in the jurisdiction in which the damage occurred.

[144] See supra.

territorial legislation because the relevant acts[145] would take place within the UK and, as has already been stated, the CPA potentially applies to all producers domiciled within the EU. If, as has previously been submitted, the cause of action created by the CPA should be characterised as a tort for private international law purposes, then in these cases the *loci delicti* for the purpose of either the pre-*Private International Law (Miscellaneous Provisions) Act* 1995 (UK) or post-Act English choice of law rule in tort would appear to be the UK, as it was in the UK that the defective product was manufactured and the relevant injury or damage occurred. Therefore, according to the application of the rules of private international law, the CPA would be applicable in such a case.

However, a contention that the CPA applies to a person who is domiciled within the UK but who produces the product outside the UK that causes injury or damage to a person outside of the UK,[146] appears to be more problematic. A conclusion that the CPA cannot have this territorial scope would not fail to promote the Act's purpose because an injured party would not be denied a cause of action based upon legislation implementing Directive, merely a cause of action under the CPA — the plaintiff would have to ask the UK court seized of procedural jurisdiction by virtue of a Convention to apply the *lex loci delicti* in accordance with the exception to the general choice of law rule in tort as restated recently in *Red Sea Insurance Co* v *Bouygues SA*,[147] or the general rule itself as provided for in the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) if that Act is applicable.

Moreover, it would not further the purpose of the Directive because another member state's legislation implementing the Directive would be applicable because the choice of law rule in tort in the majority of the member states of the EU is a *lex loci delicti* rule,[148] thereby ensuring that the injured party has a cause of action based upon legislation implementing Directive, albeit not the CPA, and the enforcement of the judgment within Europe can be accomplished under the Conventions.[149] This territorial scope would also be difficult to reconcile with the presumption against extraterritorial legislation because a plaintiff is attempting to apply a UK Act to a combination of both manufacture and injury or damage occurring outside of the UK. In accordance with the author's favoured method for the determination of the territorial scope of the CPA — the application of the rules of private international law — it would appear that the CPA would not apply in this situation. It has previously been concluded that the cause of action created by the CPA should be characterised as a tort for private international law purposes. In pre-*Private International Law (Miscellaneous Provisions) Act* 1995 (UK) cases, if the cause of action can be described as a foreign tort, then the CPA will be applicable in the case of a foreign producer or importer if the

[145] Viz manufacture of the defective product.
[146] That is, the person's only connection with the UK in a particular case is that he is domiciled within the UK.
[147] [1995] 1 AC 190 (PC).
[148] Compare Dicey and Morris, op cit (fn 123) 1480.
[149] Compare Morse, op cit (fn 92) 182.

production of a defective product or the importation of a defective product from outside the member states, would be actionable both in England and in the foreign country where it was done, unless another country has the most significant relationship with the occurrence and the parties.[150] In cases in which the production of a defective product, or the importation of a defective product from outside the member states, takes place within one of the member States which has enacted the Directive into its own law, or, any member state in which the producer of a product can be held liable to compensate a person who suffers personal injury or property damage due to a defective product, and the conditions to establish that liability in that country exist. The first two conditions will always be able to be satisfied[151] and the only issue which will require consideration will be whether the exception applies.[152]

A case such as that postulated where both the manufacture of the product and the place where the injury or damage was sustained are overseas, would seem to be ripe for the application of the exception. In post-*Private International Law (Miscellaneous Provisions) Act* 1995 (UK) cases the CPA will be applicable in the case of a foreign producer or importer if the events constituting the tort occur within the jurisdiction,[153] unless it is substantially more appropriate that the law of another country be applied.[154] In cases of personal injury the relevant events will occur within the jurisdiction if the individual was there when he sustained the injury,[155] and in cases of property damage they will occur within the jurisdiction if the property was damaged there.[156] A case such as that postulated where both the manufacture of the product and the place where the injury or damage was sustained are overseas, is a case in which the CPA would therefore not be applicable. Moreover, if it somehow were then it would also appear to be a case ripe for the application of the s 12 exception.

These last two points are largely irrelevant for the purpose of the aims of this article. For present purposes it is sufficient that it can be stated that the better view is that the territorial scope of the CPA is that it applies to all injuries or damage that occur within the UK.[157]

The better view is that the CPA was intended to have application to producers both within and without both Britain and the EC, and its territorial scope is that it is limited to injuries or damage that occur in the UK.[158]

[150] *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC).

[151] Compare *Li Lian Tan* v *Durham* [1966] SASR 143; *Koop* v *Beeb* (1951) 84 CLR 629, 644; *Couture* v *Dominion Fish Co* (1909) 19 MR 65; *Young* v *Industrial Chemicals Co* [1939] 4 DLR 392, esp 394; *Kolsky* v *Mayne Nickless Ltd* [1970] 3 NSWLR 511; *Kemp* v *Piper* [1971] SASR 25 (FC); *Plozza* v *South Australia Insurance Company* [1963] SASR 122; *Lucas* v *Gagnon* (1992) 99 DLR (4th) 125; Merkin, op cit (fn 7) 50–1; Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 81.

[152] Contrast Merkin, op cit (fn 7) 51 para (b)(ii) which statement was made before *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC) was decided.

[153] Section 11(1).

[154] Section 12.

[155] Section 11(2)(a).

[156] Section 11(2)(b).

[157] Compare *Official Report*, House of Lords (UK), 19 January 1987, col 787 per Lord Morton of Shuna; and Morse, op cit (fn 92) 183.

[158] Compare Fawcett, op cit (fn 2) 49.

TPA

A number of the considerations which led to the conclusion that the CPA applies to producers outside the UK and outside the EU apply equally to the TPA because Australian and English law on the territorial scope and extra-territorial operation of a statute are presently identical. In this context it is significant that the Explanatory Memorandum to the *Trade Practices Amendment Act* 1992 provides that: 'The purpose of this Bill is to introduce into Australia a strict product liability regime based on the 1985 European Community Directive.'[159]

Further, in the Second Reading Speech in the Senate Senator Tate stated that:

> The Government's intention in introducing this regime is that Australian consumers who are injured by defective goods should be placed in a position which is no less advantageous than that enjoyed by their European counterparts in the same situation... It is this Government's firm hope that in applying this legislation in the Australian context the courts in this country will wish to acquaint themselves fully with both the emerging jurisprudence in Europe and [the rules of evidence and procedure which exist in the Member States of the EC]. It is vitally important that the interests of consumers and manufacturers alike be protected by ensuring that the new Australian law operates in a manner which is consistent with the laws in the marketplace of our major overseas trade competitors.'[160]

The Provisions of the TPA

The Commonwealth Parliament is limited in its legislative capacity to those powers expressly provided for in the Commonwealth Constitution. The *Trade Practices Amendment Act* 1992 relies for its operation, as do the other provisions of the TPA, on a number of Commonwealth heads of power.[161] It may be that the effect of this structure on the TPA is that the extent of the application of Part VA is determined by the provisions of Part VA in the light of s 6(2)(c).[162]

Each of the liability actions[163] apply to both domestic and foreign corporations.[164]

By s 6(2)(c)[165] Part VA has operation in addition to that provided by its own terms.[166] Section 6 of the TPA headed 'Additional Operation of the Act' provides:

[159] Explanatory Memorandum Paragraphs 1 and 28.
[160] Second Reading Speech per Senator Tate *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2662; cf Explanatory Memorandum para 28 and Second Reading Speech per Ms McHugh *Parliamentary Debates*, House of Representatives (Cth), 4 June 1992, 3668.
[161] JD Heydon, *Trade Practices Law* (1989) paras 2.30–2.50.
[162] Compare *Snyman* v *Cooper* (1990) ATPR 40-993, 50 927.
[163] That is, ss 75AD, 75AE, 75AF and 75AG. See s 75AA.
[164] Section 4(1).
[165] See the Schedule to the *Trade Practices Amendment Act* 1992 (Cth).
[166] See s 6(1) and s 6(2)(h).

6 (1) Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

(2) This Act... has, by force of this sub-section, the effect it would have if-

...

(c) ...any reference in... Part VA to the supply of goods, were, by express provision, confined to... the supply of goods...-

(i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia;[167]

(ii) in the course of, or in relation to, trade or commerce among the States; or

(iii) in the course of, or in relation to, trade or commerce within a territory, between a State and a Territory or between two Territories;

...

(h) ...a reference in this Act to a corporation included a reference to a person not being a corporation.

The application to foreign corporations is based upon s 51(xx) of the constitution and the application to corporate and non-corporate trade and commerce between Australia and overseas is based upon s 51(i) — power with respect to trade and commerce with other countries.

At least since the *Statute of Westminster* 1931 (UK) and the *Statute of Westminster Adoption Act* 1942 (Cth) there has been no doubt that these heads of power empower the Commonwealth Parliament to pass laws having

[167] As is demonstrated by '(iii) between a State and a Territory', and the dictionary meaning of 'between', the phraseology 'between Australia and places outside Australia' does not restrict the TPA in its application merely to the supply of goods out of Australia but also includes the supply of goods into Australia, ie it deals with both the export and import of goods (if (iii) only encompassed trade commencing in a state and terminating in a territory then all trade commencing in a territory and terminating in a state would not be within the ambit of the TPA. The wholly improbable result of this would be that those concerns engaging in intranational trade and commerce would be well advised to move their operations to a territory in order to escape the ambit of the TPA and, in the case of those states which do not replicate part of the TPA's provisions in a Fair Trading type Act, perhaps all such consumer protection legislation): cf *Reg* v *Foster; Ex Parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256, 311 per Windeyer J; J Goldring, 'Product Liability And The Conflict Of Laws In Australia' (1978) 6 *Adel L R* 413, 437; PH Lane, *A Manual of Australian Constitutional Law* (5th ed 1991) 44–5; and the relevant provisions of the *Customs Act* 1901 (Cth), which was enacted pursuant to the same constitutional power, as considered in *Baxter* v *Ah Way* (1909) 8 CLR 626; *Radio Corporation* v *Commonwealth* (1938) 59 CLR 170; and *Poole* v *Wah Min Chan* (1947) 75 CLR 218. It appears that s 6(2) should be given broad compass: *Snyman* v *Cooper* (1990) ATPR 40-993, 50 926.

extraterritorial application[168] if it so desires.[169] Section 51(i) clearly enables laws having extraterritorial effect.[170]

As a matter of statutory construction, both under the common law and by s 21(b) of the *Acts Interpretation Act* 1901 (Cth), laws enacted by the Commonwealth Parliament are construed as applying to localities, jurisdictions, matters and things in and of the Commonwealth unless the language of the statute by express words or necessary implication indicates the contrary.

The Commonwealth Parliament has the legislative power to extend the operation of Part VA to foreign manufacturers, the issue is merely one of statutory construction. Is any geographical restriction to be implied limiting the otherwise general words of Part VA?[171]

Section s.75AB of the TPA[172] provides:

> **Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part**
> 75AB. Subsections 74A(3) to (8) (inclusive) operate as if references in them to Division 2A of Part V included references to [Part VA].

Subsection 74A(4) provides, so far as is relevant:

> (4) If-
> (a) goods are imported into Australia by a corporation that was not the manufacturer of the goods; and
> (b) at the time of the importation the manufacturer of the goods does not have a place of business in Australia,
>
> the corporation shall be deemed, for the purpose of this Division, to have manufactured the goods.

Subsection 74(7) provides, so far as is relevant:

> (7) If goods are imported into Australia on behalf of a corporation, the corporation shall be deemed, for the purposes of this Division, to have imported the goods into Australia."

Section 74A, which makes provision for, inter alia, the importer of goods into Australia to be deemed manufacturer if the manufacturer does not have a

[168] See *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294; Lane, op cit (fn 167) 13–14, 44–5. For example, contracts entered into in other countries: *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 31 per Taylor J, 43 per Windeyer J.

[169] *R* v *Foster; Ex parte Eastern & Australian Steasmship Co Ltd* (1959) 103 CLR 256, 275; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 23 per Kitto J (McTiernan and Windeyer JJ agreeing), 38 per Menzies J (dissenting but not on this point); *Croft* v *Dunphy* [1933] AC 156 (PC) esp 164; Lane, op cit (fn 167) 13–14.

[170] *Reg* v *Foster; Ex parte Eastern & Australian Steasmship Co Ltd* (1959) 103 CLR 256, 275; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 23 per Kitto J (McTiernan and Windeyer JJ agreeing), 38 per Menzies J (dissenting but not on this point).

[171] See *Meyer Heine Pty Ltd* v *China Navigation Co Ltd* (1966) 115 CLR 10, 22–5 and 30–3 per Kitto J (McTiernen and Windeyer JJ agreeing), and 38–43 per Menzies J; *R* v *Foster; Ex Parte Eastern and Australian SS Co Ltd* (1959) 103 CLR 256, 267 per Dixon CJ; *Trade Practices Commission* v *Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305, 318 per Lockhart J; and Heydon, op cit (fn 161) para 2.650.

[172] Inserted by the *Trade Practices Amendment Act* 1992.

place of business in Australia at the time of their importation,[173] does not excuse the actual manufacturer from liability so that both the importer and the actual manufacturer would appear to be liable.[174] In these cases the actual manufacturer would necessarily reside overseas.

The *Manufacturers Warranties Act* 1974 (South Australia) creates statutory warranties owed by manufacturers and sellers to buyers and subsequent owners of the goods. The warranties replicate those provided for in the sale of goods type Acts of the various jurisdictions.[175] Section 3(1) of the Act provides:

> 'manufacturer', in relation to manufactured goods means-
> (a) any person by whom, or on whose behalf, the goods are manufactured or assembled; or
> ...
> (d) where the goods are imported into Australia, and the manufacturer does not have a place of business in Australia, the importer of the goods.

In *The Electricity Trust of South Australia* v *Krone (Australia) Technique Pty Ltd*[176] the plaintiff had commenced proceedings under the Act against, inter alia, the importer and foreign manufacturer of the relevant goods. The defendants sought to have the claim against the foreign manufacturer struck out. They claimed that each of the paragraphs of the definition of 'manufacturer' should be construed as being mutually exclusive of each other and it followed that in the instant case the 'manufacturer' was the importer.[177] Von Doussa J disagreed. He held that the paragraphs in the definition

> should be construed as alternatives but not mutually exclusive alternatives. There may be more than one [manufacturer]. In the present case on the footing that a particular switchgear item was manufactured by the second respondent, imported into Australia by the first respondent, and the second respondent had no place of business in Australia, both the first and the second respondents could be a 'manufacturer'.[178]

His Honour's reasons for reaching his conclusion were based in part upon the structure of the definition of 'manufacturer'. He stated:

> It would be surprising if it were the intention of the legislation [sic] that in such cases a consumer seeking to enforce the remedy given by s 5 was required to nominate which of the paragraphs of the definition was relied upon, or that only one of the paragraphs could have application....That would be an odd result, and one which would be avoided if the four paragraphs in the definition were not read as being mutually exclusive.[179]

[173] Section 74A(4); cf s 74A(7). Sections 74A(3)-(8) apply to Pt VA by virtue of s 75AB.
[174] See *White* v *Eurocycle Pty Ltd & Anor* (1994) ATPR 41-330, 42 375; *Trade Practices Amendment Bill* 1978, Explanatory Memorandum para 19; *Trade Practices Amendment Bill* 1992 Explanatory Memorandum paras 11-12; see Miller, *Annotated Trade Practices Act* (1994), 349-50 para 1145.10; Heydon, op cit (fn 161) paras 16.1160 and 16.1190.
[175] That is, warranties that the goods correspond with their description or sample, and are of merchantable quality and fit for their purpose.
[176] Unreported, Federal Court of Australia (von Doussa J), 18/7/94.
[177] Id 7.
[178] Id 12.
[179] Id 8.

The other basis for this conclusion was founded upon a purposive construction of the Act. His Honour referred both to the provision in the South Australian *Acts Interpretation Act* 1915 which provides that a purposive interpretation is to be preferred in the interpretation of legislation, and precedents which allowed the resort to parliamentary materials in order to discover the mischief which the Act was intended to remedy.[180] Reference to the Minister's second reading speech allowed him to conclude that: 'The mischief intended to be remedied was the absence of a cause of action by a consumer direct against a manufacturer for a defect in the quality of goods.'[181] He continued:

> Paragraph (d) of the definition, in a case to which it applies, provides a consumer with a cause of action against the importer where procedural or other difficulties would make it impracticable to bring an action against the foreign manufacturer, but a construction which denies the consumer the right to pursue an action against the foreign manufacturer where no real difficulty exists in doing so, or where the local importer is insolvent or without the means to meet a judgment, does not promote the purpose or object of the Act. A construction which permits action against both the actual manufacturer, and any person who comes within paragraphs (b), (c), or (d) would promote that purpose or object.[182]

He also noted that if the defendants were correct then a plaintiff may sue a person who has held himself out as the good's manufacturer only to find that this person has a defence because the correct defendant was a previously undisclosed importer, a result which his Honour thought did not promote the Act's purpose.[183]

Whilst the structure of the definition of 'manufacturer' in the South Australian Act is arguably more akin to the structure adopted in the CPA than the TPA, it appears that the court's reasons in so far as they are based upon the Act's purpose and arguably in so far as they are based upon the structure of the definition of 'manufacturer', are germane to a consideration of the definition of 'manufacturer' in the TPA, and lend support to the conclusion that the TPA applies to both the importer and the foreign manufacturer in the case of imported goods. The TPA's purpose was, similarly, the provision of a strict liability cause of action whereby a person who is injured or suffers property damage as a result of a defective product can proceed directly against the manufacturer.[184] To construe s 75AB and s 74A so as to exclude the foreign manufacturer as a potential defendant where there may be some value in pursuing them does not promote the Act's purpose. If it were otherwise then this patently ridiculous scenario could arise: a plaintiff with a cause of action under the TPA could have no recourse where the goods were manufactured overseas because the importer is either insolvent or unable to satisfy the judgment, notwithstanding the fact that the foreign manufacturer has assets

[180] Id 8–9. There was no equivalent to s 15AB of the *Acts Interpretation Act* 1901 (Cth) in South Australia.
[181] Id 10.
[182] Id 10–11.
[183] Id 11.
[184] Explanatory Memorandum to the *Trade Practices Amendment Act* 1992 para 1.

within the jurisdiction and/or would satisfy a judgment with its foreign assets.

Whilst none of the liability actions[185] makes express reference to overseas manufacture or overseas supply it may be that these actions apply to foreign manufacturers.[186] As has been stated, by virtue of s 6(2) Part VA has application to circumstances where the supply of goods is in the course of, or in relation to, trade between Australia and overseas. It may be that the extended application of Part VA which s 6 establishes confirms the application of Part VA to foreign manufacturers. By operation of s 6(2) the subject matter of Part VA is, inter alia, overseas trade — one of the heads of Commonwealth legislative power. By definition this will take place both within and outside Australia. Parliament could therefore be deemed to have intended to deal with the supply of goods whether it occurred within or outside Australia so long as the supply is in the course of, or in relation to, trade or commerce between Australia and places outside Australia.[187] Whilst s 5 of the TPA was inserted in order to make express the application of a number of the provisions of the TPA to foreign conduct, no such express intention is required with respect to the application of a provision of the TPA consequent upon the operation of s 6(2). Provisions in Part VA applying consequent upon the operation of s 6(2) would therefore address the supply of 'matters and things' from or to overseas, and it is a necessary corollary of this that the supplier may be overseas.[188]

This interpretation would appear to be consonant with the views expressed by a number of commentators,[189] and by Barwick CJ in *Robinson* v *Western Australian Museum*.[190]

Lee J of the Federal Court of Australia in *Anglo-Australia Foods* v *Von Planta*[191] was of the opinion that, pursuant to s 6(2) of the TPA, s 52 had application to a foreign national resident in Switzerland who made certain

[185] See s 75AA.

[186] See infra.

[187] Compare Lane, op cit (fn 167) 14 ; and *Steele* v *Bulova Watch Co* 344 US 280 (1952) 283–7 per Clarke J for the majority. Contrast Tonking and Castle (1991) at paragraph [14–680] where the authors stated that 'section 6 is not however a provision which, on its own, gives the Act an extraterritorial operation although, when taken with section 5, it lends support to the express intention of Parliament that the Act should operate extraterritorially, inter alia by way of its additional operation'. However contrast [14–680], Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) esp the Federal Bureau of Consumer Affairs in their written submissions at 6–7; and *Equal Opportunity Commission* v *Arabian American Oil Company* 111 SCt 1227 (1991) per Rehnquist CJ for the majority. However, the present author finds the authorities relied upon by the majority in *Equal Opportunity Commission* to support their view on this point to lend only scant and superficial support to their reasoning; cf Born and Westin, op cit (fn 53) 596 fn 1.

[188] Part VA only makes provision for Australian consumers to sue under it; foreign consumers cannot sue Australian manufacturers under Part VA.

[189] Tonking and Castle (1991) para [14–680] last new paragraph; CD Gilbert, 'Extraterritorial State Laws And The Australia Acts' (1987) 17 *Fed L R 25*, 31 fn 41; and Lane, op cit (fn 167) 14.

[190] (1977) 138 CLR 283, 294.

[191] (1988) 20 FCR 34, 36–7.

representations from Switzerland which were received in Australia, because the foreigners conduct was in 'international trade or commerce'.[192]

The Senate Standing Committee Report considered in detail earlier[193] gave explicit consideration to a similar contention with respect to whether Part VA could operate extraterritorially in the sense of allowing a foreign plaintiff to pursue an Australian manufacturer in the Australian courts for damage sustained due to a product exported to their country. The Committee considered whether s 6(2)(c) of the TPA gives Part VA extraterritorial operation in this sense.[194] The Committee stated, after consideration of the amendment to s 6(2) which the *Trade Practices Amendment Act* 1992 had made and the discussion thereof in the Explanatory Memorandum to the Act, that:

> It appears that the Parliament did not intend that s 6(2)(c)(i) would give Part VA extra-territorial effect... it appears that section 5 was intended to govern the extra-territorial operation of the *Trade Practices Act 1974*.[195]

However the Committee subsequently noted that two eminent Australian constitutional lawyers had published opposing views on this issue. Mr R J Ellicott QC was of the opinion that consumers injured by defective Australian exports could obtain compensation under Part VA because of s 6(2)(c), and Mr D Rose QC was of the opposite opinion.[196]

Mr Ellicott was of the opinion that s 6(2)(c) provides for an 'extra-territorial effect in relation to contracts made or the supply of goods in the course of overseas trade or commerce'[197] because it deals with the overseas trade or commerce head of Commonwealth constitutional power and there is no reason why s 6(2)(c) should not be given its ordinary natural meaning.[198] He contrasted other provisions of the TPA which do not rely on the overseas trade or commerce head of power for their validity which, he opined, could not have any extraterritorial operation 'but for' s 5.[199] This is the interpretation of Mr Ellicott's opinion which Mr Rose preferred. However, as the Committee duly noted, 'Mr Ellicott's opinion could also be interpreted as stating that the presumption that statutes do not operate extra-territorially does not apply to s 6 because s 6 expressly deals with overseas trade — an "extra-territorial" issue.'[200]

Mr Rose disagreed with (his interpretation of)[201] Mr Ellicott's opinion. He noted that other constitutional heads of power have been held to extend to laws having extraterritorial operation. However, it appears that the passage of Mr Ellicott's opinion which Mr Rose was taking issue with was merely addressing some of the other provisions in the TPA not based upon the over-

[192] Compare *White* v *Eurocycle Pty Ltd & Anor* (1994) ATPR 41-330, 42 375; and *Astra AB* v *Delta West Pty Ltd* (unreported, Supreme Court of Victoria, 5/12/94) 22.
[193] See supra.
[194] Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 31–5.
[195] Id 32.
[196] Id 31.
[197] RJ Ellicott, 'Re Trade Practices Amendment Bill 1992' cited in Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15), Submission from Clayton Utz.
[198] Compare Ellicott, op cit (fn 197).
[199] Id 1.
[200] Senate Standing Committee on Constitutional and Legal Affairs, op cit (fn 15) 33.
[201] Ibid.

seas trade and commerce head of power utilised in the TPA and not all possible constitutional heads of power. Mr Rose concluded that 'I can see no reason in principle why a provision relating to overseas trade should be regarded as exempt from the general presumption that legislation is limited to conduct and things within the enacting jurisdiction'.

The Committee concluded that:

> Given [these two opposing views] the Committee does not feel able to express an opinion on whether s 6 gives Part VA extra-territorial operation. The final resolution of this matter will rest with the courts.[202]

The context of these statements and materials, being the consideration of whether Part VA should be extended to allow foreign consumers to sue Australian manufacturers in Australian courts,[203] must be of some significance in considering them for present purposes. However, the methods applied and evidence taken in the determination of the Committee's views and the opinions of Ellicott and Rose, were the same as those relevant to the instant issue.[204]

Section 75AD[205] read in the light of s 6(2)[206] would provide:

> If:
> (a) A corporation, in trade or commerce, *or a person not being a corporation, in trade or commerce*, supplies goods-
> *(i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia;*
> *(ii) in the course of, or in relation to, trade or commerce among the States; or*
> *(iii) in the course of, or in relation to, trade or commerce within a territory, between a State and a Territory or between two Territories;*
> manufactured by it; and
> (b) they have a defect; and
> (c) because of the defect, an individual suffers injuries;
> then:
> (d) the corporation, *or person not being a corporation*, is liable to compensate the individual.[207]

Whilst, in the case of a foreign manufacturer without a place of business in Australia, the importer and perhaps others deemed manufacturer by s 75AB, may be held liable, to argue that this provision was not intended to apply to a foreign manufacturer appears to fly in the face of common-sense. The liability actions when read in light of s 6(2) do not contain general words which require

[202] Id 35.
[203] Vis-a-vis whether Australian consumers can pursue foreign manufacturers under Part VA.
[204] Senate Standing Committee on Constitutional and Legal Affairs, op cit (fn 15) 28 and 30.
[205] Being a provision representative of the liability provisions of Part VA.
[206] Compare *The Queen* v *Australian Industrial Court; Ex Parte CLM Holdings Pty Ltd* (1977) 136 CLR 235, 245 per Mason J (the rest of the court agreeing).
[207] The emphasis reflects the additions to s 75AD which s 6(2) necessitates.

reading down. Rather they expressly apply to the foreign manufacture of goods and the express compass of the provisions would have to be ignored or restricted in order for them to not apply to foreign manufacturers.

A contrary argument would be that the common law and statutory[208] principles of statutory interpretation relating to extraterritoriality would require that each of the elements contained in s 75AD would be limited to those 'in or of'[209] Australia.[210] Section 75A read in this light would provide:

If:

(a) A corporation, in trade or commerce, or a person not being a corporation, in trade or commerce, *incorporated in or carrying on business in Australia,* supplies goods *in Australia*-
  (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia;
  (ii) in the course of, or in relation to, trade or commerce among the States; or
  (iii) in the course of, or in relation to, trade or commerce within a territory, between a State and a Territory or between two Territories;

manufactured by it *in Australia*; and

(b) they have a defect; and

(c) because of the defect, an individual suffers injuries *in Australia*;

then:

(d) the corporation, or person not being a corporation, is liable to compensate the individual.

However this interpretation would rob s 75AD(a)(i) of any significance in respect of the supply of goods into Australia. In order for goods to be supplied into Australia they must be manufactured outside Australia. Therefore both s 21(b) and the common law principle of statutory interpretation relating to extraterritorial legislation must be restricted in their application to Part VA.

When, as in the case of the liability actions in Part VA, there are a number of matters and things which could be ascribed local content by the common law principle of statutory interpretation relating to extraterritorial legislation and s 21(b), such as: a corporation or a person not being a corporation, supply, manufacture and injuries; ordinarily it is not possible to apply the common law presumption or s 21(b) to each and every one of them as a matter of course.[211] As the New South Wales Court of Appeal stated in respect of the provision from which s 21(b) was copied verbatim:

[208] *Acts Interpretation Act* 1901 (Cth), s 21(b).

[209] Ibid.

[210] Compare Wright, op cit (fn 48) 154–5; and *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 22–3 per Kitto J (McTiernen and Windeyer JJ agreeing).

[211] *O'Connor* v *Healey* (1967) 69 SR (NSW) 111 (CA), 114 per Jacobs JA (delivering the judgment of the court) (approved in *Goliath Portland Cement Co Ltd* v *Bengtel* (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point)), discussing the identical provision in the *Interpretation Act of 1897* (NSW), s 17, from which s 21(b) was copied verbatim; and *Fox* v *Lawson* [1974] AC 803, 809 per Diplock LJ, regarding the common law presumption. Compare Pearce and Geddes et al, op cit (fn 29) 124–5.

> The intention of s.17 is to provide the natural limit of legislation, so that it applies in it subject matter to those situations which have a nexus with New South Wales. However, it is not every aspect of every sentence or clause of legislation which can be given the local New South Wales connotation.[212]

Arguably, the application of s 21(b) and the common law presumption against extraterritorial legislation which is consonant with the extended application of the liability actions which s 6(2) generates, is only that the injuries must be suffered in Australia.

This interpretation is supported by the fact that the Act has no application to goods exported overseas: the relevant Ministers in their Second Reading Speeches stated that Part VA would not allow overseas consumers to sue Australian manufacturers under Part VA in respect of goods exported overseas.[213] It is also supported, for the same reasons, by references to 'Australian consumers' by the relevant Ministers in their Second Reading Speeches and in the Explanatory Memorandum.[214]

If a contrary view is taken then a provision based upon s 51(i) which expressly applies to overseas trade or commerce cannot have any application to any persons or matters which are or occur overseas in the course of that overseas trade or commerce unless the provision additionally expresses that it is to have that application also.

To construe s 6(2)(c)(i) as not extending Part VA in its application to foreign manufacturers would require, as a matter of statutory construction, that an entity in Australia supplies goods in the course of, or in relation to, trade into Australia from outside Australia — an illogical and impossible proposition. If Part VA is to be construed so as not to have extraterritorial effect then this construction is all the more ridiculous because it will be the only operation that Part VA can have pursuant to s 6(2)(c)(i): Part VA has no application to exported goods therefore the only reasonable construction which would be left utilising s 6(2)(c)(i) (ie an Australian entity manufacturing and supplying goods in Australia for trade outside Australia) is not available.

Sections 74AB and 74A(4) can be resorted to in order to identify a defendant apart from any foreign manufacturer in cases of products manufactured outside Australia, viz the importer, whether or not the TPA has any extraterritorial operation. If the TPA has no extraterritorial operation then in order to satisfy the conditions of s 74A(4) the manufacturer must be outside Australia for the purpose of s 74A(4) — otherwise s 74A(4)(b) cannot be satisfied and the importer be deemed manufacturer. However, the manufacturer must also be within Australia for the purpose of the original liability provision because these provisions do not have any extraterritorial operation. This tortured and illogical construction of ss 74AB and 74A(4) is, however, necessary

[212] Ibid.
[213] *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2663.
[214] Id 2662–3, Explanatory Memorandum para 28, respectively. Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 27–35, 46, and 79–83.

if the TPA does not apply to foreign manufacturers and the plaintiff is to have some right of recourse under the TPA.

Accordingly, it appears that pursuant to s 6(2)(c) the TPA applies to foreign manufacturers and its territorial scope is that it is limited to injuries or damage which occur in Australia.

However, some Australian jurists have stated that it may be that any attempt to apply the TPA to a company involved in international trade pursuant to ss 6(2) and (3) will additionally require the satisfaction of s 5.[215]

Section 5(1) of the TPA provides:

> **[Certain conduct outside Australia caught]** Parts IV, IVA and V extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

In the case of s 50 — and perhaps Parts IV, IVA and V in their entirety — s 5(1) has been held to provide exhaustively for that section's extraterritorial operation.[216] However, it appears that in some circumstances some provisions of the TPA do have extraterritorial operation without any reference to s 5. Section 74A(3) renders the importer liable only if: (a) goods are imported into Australia by a person who was not the manufacturer of them, and (b) at the time of the importation the manufacturer does not have a place of business in Australia. If a manufacturer who manufactures goods overseas does have a place of business in Australia when he imports the goods then, whether or not he had a place of business within Australia at the time of manufacture, the TPA will apply to the manufacturer[217] only if references in ss 75AD(a), 75AE(a), 75AF(a) and 75AG(a) to the supply and manufacture of goods overseas include references to the supply and manufacture of goods overseas.[218] Therefore it cannot be said that the TPA does not have any application to foreign manufacture.

The policy behind the provisions of s 74A(3) and (7) is manifestly to facilitate the recovery of a judgment against someone in those cases where, due to the overseas origin of the goods, proceedings against the actual manufacturer may prove impractical or too costly or complicated for a consumer to initiate

[215] Tonking and Castle, op cit (fn 39) para [14–680].

[216] *Trade Practices Commission* v *Australian Iron and Steel Pty Ltd* (1990) 22 FCR 305, 319–20 per Lockhart J; and semble *Hunter Grain Pty Ltd* v *Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507, 519–21 per Sheppard J, s 5(1) and ss 52 and 53. Compare *Nauru Local Government Council* v *Australian Shipping Officers Association* (1978) 34 FLR 281, 289 per Northrop J; Heydon, op cit (fn 161) para 2.650; Senate Standing Committee on Legal and Constitutional Affairs, op cit (15) per the Federal Bureau of Consumer Affairs in their written submissions at 4 and 6–7.

[217] As the 1976 Report of the Trade Practices Act Review Committee states that it should at para 9.126 (the report of the 'Swanson Committee' which in his second reading speech on the *Trade Practices Amendment Act* 1978, which Act introduced s 74A in its present form into the TPA, the Attorney General described as recommending the provisions which the Act included: *Parliamentary Debates*, Senate (Cth) 23 November 1978, 2469–70).

[218] Albeit by a manufacturer who, at the time of importation, is carrying on business in Australia.

them.[219] It may be that, in accordance with this policy, the better view is that the liability provisions of Part VA apply to foreign manufacture and supply, however it will only be in rare cases that a plaintiff will wish to avail themselves of the extraterritorial operation of the TPA and commence proceedings against a foreign manufacturer. It appears therefore that s 5 may not provide exhaustively for the extraterritorial operation of the entire TPA.[220]

Moreover, a submission that the inclusion of an additional defendant in the TPA in cases in which the product was manufactured outside Australia restricts the possible defendants, appears to run counter to the very intention of the legislature in providing for the additional defendant in the first place.

Another argument which may militate against reliance on s 5 in an effort to demonstrate that Part VA has no extraterritorial operation is that the terms of s 5 are such that even if it included Part VA, Part VA could not apply to a foreign manufacturer.[221] Section 5(1) would only extend Part VA to cover bodies corporate incorporated or carrying on business within Australia or Australian citizens or persons ordinarily resident within Australia. Therefore it does not purport to cover the field of all possible foreign defendants and the failure to amend s 5(1) to include Part VA may not be able to be taken as a manifestation of a parliamentary intention that Part VA is not to apply to foreign manufacturers.

It therefore appears that s 5 may not provide exhaustively for the extraterritorial operation of the entire TPA.

It appears that the strict product liability legislation of Australia's major

[219] The Attorney General in his second reading speech on the Act which inserted s 74A into the TPA: *Parliamentary Debates*, Senate (Cth), 23 November 1978, 2470.

[220] Compare Tonking and Castle, op cit (fn 39) paras [14–700] and [14–710]. However contrast id paras [880] and [14–900]; *Trade Practices Commission* v *Australian Meat Holdings Pty Ltd* (1988) 83 ALR 299, 355–6 per Wilcox J; and *Anglo-Australia Foods* v *Von Planta* (1988) 20 FCR 34, 36–7. Contrast *Trade Practices Commission* v *Australian Iron and Steel Pty Ltd* (1990) 22 FCR 305, 319–20 per Lockhart J; Heydon, op cit (fn 161) para 2.650; semble Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) 32 and per the Federal Bureau of Consumer Affairs in their written submissions at 4 and 6–7; semble *Tycoon Holdings* v *Trencor Jetco Inc* (1992) 34 FCR 31, 37; semble *Hunter Grain Pty Ltd* v *Hyundai Merchant Marine Co Ltd* (1993) 1217 ALR 507, 519–21 per Sheppard J of s 5(1) and ss 52 and 53; semble *Nauru Local Government Council* v *Australian Shipping Officers Association* (1978) 34 FLR 281, 289 per Northrop J. It has been stated by jurists that some of the definitions in s 4, such as those for 'corporation'and 'trade or commerce', display a clear parliamentary intention that the Act is to have extraterritorial effect: R Wright, 'Aspects Of The Extraterritorial Application Of Sections 50 And 50A Of The Trade Practices Act' (1992) ABLR 152, 155.

[221] *Hunter Grain Pty Ltd* v *Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507, 521 per Sheppard J. Contrast Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 15) per the Federal Bureau of Consumer Affairs in their written submissions at 4 and 6–7.

trading partner (Japan[222]),[223] the strict product liability common law cause of actions in the USA,[224] the Directive,[225] and the legislation implementing the Directive in the UK[226] and Europe,[227] all apply to foreign manufacturers.

In their second reading speeches addressing the legislation that inserted Part VA into the TPA[228] the relevant Ministers stated that 'it is vitally important... that the [TPA] operates in a manner which is consistent with the laws in the marketplace of our major overseas trade competitors'.[229] Accordingly, the TPA must similarly apply to foreign manufacturers.[230]

Reference will now be made to a number of extrinsic materials in aid of assisting in the determination of whether or not the TPA applies to foreign manufacturers. Reference to these materials is permissible by virtue of s 15AB(1) of the *Acts Interpretation Act* 1901 (Cth) to confirm that the meaning of the provisions is the ordinary meaning conveyed by the text, or, to determine their meaning because the relevant provisions are ambiguous. Section 15AB(2) specifically allows resort to be had to: (b) any relevant Law Reform Commission Report, (e) any Explanatory Memorandum relating to the Bill, and (h) any relevant material in Hansard.

The Parliamentary speeches are of no assistance for present purposes.

Indications of Parliament's Intention in the Australian Law Reform Commission's *Product Liability, Report No 51* (1989)

The Australian Law Reform Commission's *Product Liability, Report No 51* (the 'Product Liability' Report) was produced in June 1989 and expressly referred to on a number of occasions in the debates on the *Trade Practices*

[222] Viz *Product Liability Law* (No 85 of 1 July 1995), legislation that is based upon the European Product Liability Directive. A country whose product liability law, along with South Korea and Taiwan, was specifically referred to by the relevant Ministers in their Second Reading Speeches: *Parliamentary Debates* Senate (Cth), 3 June 1992, 2661 per Senator Tate; and *Parliamentary Debates*, House of Representatives (Cth), 4 June 1992, 3666 per Ms McHugh.

[223] Advice from Professor Yoshiaki Nomura, Chair of Private International Law, Osaka University, to the present author dated 19 December 1995; and Advice from Professor Shigeru Kagayama, Chair of Civil Law, Osaka University, to the present author dated 21 December 1995.

[224] See eg *World-Wide Volkswagen Corp* v *Woodsen* 444 US 286 (1980); and *Asahi Metal Industry Co* v *Superior Court of California* 480 US 102 (1987). They can apply to a foreign manufacturer pursuant to the application of the relevant choice of law rule.

[225] See supra.

[226] That is, the CPA.

[227] See supra.

[228] See infra for a discussion of the law allowing for the use of the Second Reading Speeches and the Explanatory Memorandum to an act in the interpretation of the relevant legislation.

[229] *Parliamentary Debates*, Senate (Cth), 3 June 1992, 2662 per Senator Tate; and *Parliamentary Debates*, House of Representatives (Cth), 4 June 1992 3668 per Ms McHugh. See supra for a quote of the entire passage that this quote comes from. Compare Explanatory Memorandum *Trade Practices Amendment Bill* 1992 (Cth) paras 28 and 30 in which the CPA is specifically referred to as the 'equivalent British legislation'.

[230] See supra for quote in full. Compare *Trade Practices Commission* v *Australian Iron and Steel* (1990) 22 FCR. 305, 319.

Amendment Act 1992, most notably the second reading speeches in both Houses.[231]

The Report provides that 'assuming jurisdictional problems can be overcome',[232] the amendments to the TPA that the Report recommends, should apply to 'persons who export goods to Australia' in addition to the importer.[233] The recommended amendments to the TPA, which were included as an appendix to the Report and designated 'Part VA', contained two provisions which might be thought to have been intended to facilitate the desired effect of making a foreign manufacturer liable under Part VA in addition to the importer. An amendment to s 6(2)(c) in identical terms to the amendment which was eventually enacted by the *Trade Practices Amendment Act* 1992,[234] and wording in the provision which designated who would be liable under Part VA[235] that made it clear[236] that the importer of a product manufactured outside Australia was liable in addition to the foreign manufacturer.[237]

Indications of Parliament's Intention in the Explanatory Memorandum to the *Trade Practices Amendment Act* 1992

During the Second Reading Speeches of the *Trade Practices Amendment Act* 1992 in both Houses the relevant Minister stated that:

> The Explanatory Memorandum is likely to be important in the development of the body of jurisprudence which will surround the new regime.[238]

[231] *Parliamentary Debates*, Senate (Cth) 26 May 1992, 2661 per Senator Tate in his Second Reading Speech; *Parliamentary Debates*, Senate (Cth) 3 June 1992, 3364 per Senator Hill, 3367 per Senator Powell. See also *Parliamentary Debates*, House of Representatives (Cth) 4 June 1992, 3666 per Ms McHugh in her Second Reading Speech ; 3693 per Mr Hulls; 3695 per Mrs Bailey; 3698 per Mr Rocher.

[232] The Commission is here referring to matters of service of process out of the jurisdiction: see paras 9.30 and 9.31.

[233] Paragraphs 5.14 and 9.29.

[234] Australian Law Reform Commission, *Product Liability, Report No 51* (1989) 175–6 and 191.

[235] Then designated as s 75AF(2).

[236] Contrast the doubts which some commentators believe exist in s 74A.

[237] Australian Law Reform Commission, op cit (fn 234) 67, 167 and 184. Note however that the proposed Part VA in the report does not make use of the mechanism provided by s 74A to make an importer liable under the TPA and instead provides expressly for their liability in Part VA and it may be that it was the, possibly false, assumption that s 74A excused the foreign manufacturer which prompted the Commission to include the express provision for the liability of the foreign manufacturer in the proposed legislation.

[238] *Parliamentary Debates*, Senate (Cth) 26 May 1992, 2662 per Senator Tate in his Second Reading Speech; and *Parliamentary Debates*, House of Representatives (Cth) 4 June 1992, 3667 per Ms McHugh in her Second Reading Speech.

Paragraphs Dealing with s 75AB

The Explanatory Memorandum to the *Trade Practices Amendment Act* 1992 provides[239] that:

> 11. Division 2A of Part V of the TPA also provides a liability regime against manufacturers in certain circumstances. Subsections 74A(3) to (8) provide an extended definition of manufacturer for the purposes of Division 2A. A corporation will be held to be the manufacturer of goods:
>
> where the corporation manufactures goods;
>
> ... or ...
>
> where the corporation is the importer of goods.
>
> 12. Section 75AB provides that this extended definition will apply for the purposes of the new Part VA. Thus all references to the corporation which manufactured the goods in Part VA include those deemed to be the manufacturer by virtue of this section."

These paragraphs appear to indicate that both the importer and the foreign manufacturer can be liable under Part VA. The legislature has expressly provided for the liability of the importer in the circumstance where there is a foreign manufacturer and they have not sought to limit liability to the importer only, therefore allowing an action to be brought against the foreign manufacturer where eg the foreign manufacturer has assets within the jurisdiction and the importer is impecunious.

Paragraphs dealing with s 75AJ

However, para 42 of the Explanatory Memorandum which deals with s 75AJ(1)(a),[240] states:

> It should be noted that it is the manufacturer for the purposes of section 75AB which is referred to in this context, as it would be of little assistance to a consumer if a foreign manufacturer was identified rather than the Australian importer.

There are three possible explanations for this statement. Section 75AB does not deem the actual manufacturer, be they foreign or domestic, to be a manufacturer and s75AJ(1)(a) does not deal with the actual manufacturer; a foreign manufacturer was never intended to be a manufacturer under the TPA; or, s 75AJ(1)(a) includes within its ambit all potential manufacturers — the actual manufacturer and all those deemed manufacturer by ss 75AB and 74A.

If the first explanation is correct then s 75AJ(1)(a) refers only to those deemed manufacturer by s 74A and not the actual manufacturer.

Section 75AJ(1) provides:

> 75AJ.(1) If a person who wishes to institute a liability action does not know who manufactured the action goods, the person may serve on a supplier, or each supplier, of the action goods who is known to the person a written request to give the person particulars identifying:

[239] Paragraphs 11–12.

[240] Entitled 'Unidentified Manufacturer'. The provision which allows for a person to identify potential defendants.

(a) the corporation which manufactured the goods (having regard to section 75AB); or
(b) the supplier of the goods to the supplier requested.[241]

Section 75AJ(2) provides for the consequences of a failure to answer the request within 30 days.

The reference in s 75AJ(1)(a) to s 75AB was unnecessary if it was meant to include within s 75AJ(1) those deemed to be a manufacturer by s 74A because this result has already been achieved by s 75AB. It appears that para 42, and the reference to s 75AB in s 75AJ(1)(a), may require that s 75AJ(1)(a) be interpreted as referring only to those deemed a manufacturer by ss 75AB and 74A.[242] This interpretation would not result in the actual manufacturer not being able to be identified by a s 75AJ notice: subsection (1)(b) would allow for identification of the actual manufacturer because at some stage they must have supplied someone with the goods and a series of s 75AJ requests must eventually reveal this[243] or else, they will have already led the potential plaintiff to a manufacturer[244] or, pursuant to s 75AJ(2), operated to deem a dilatory supplier to be the manufacturer.

This interpretation is rendered more plausible when one considers that whilst subsection (1)(b) will eventually enable the identification of the actual manufacturer, it may never be able to identify some of the persons deemed manufacturer under ss 75AB and 74A. For example, there may be cases in which an entity holds itself out, or causes or permits another to hold itself out, to the public as the manufacturer of goods[245] without ever itself supplying the goods to anyone.[246] Section 75AJ(1)(a) would require the identification of these entities whilst s 75AJ(1)(b) would allow them to go unidentified.

Another factor favouring this interpretation is that s 75AJ(1)(a) states '(having regard to section 75AB)', an expression which appears to require that that definition, and that definition alone, of manufacturer be utilised for s 75AJ(1)(a). This point is reinforced if reference is made to the 'exposure

[241] Contrast eg *Product Liability Act* (Austria) 99, Federal Act of January 21, 1988 on liability for a defective product s 1(2); *Act of February 25, 1991 on Defective Product Liability* (Belgium), s 2; and, *Products Liability Act 1989* (Denmark) s 4(4) and 4(5); each of which implements article 3.3 of the EC Directive (which s 75AJ(1)(b) replicates in the TPA) in their jurisdictions and provide merely, that if the product was manufactured outside the European Community a written request can be issued if the importer into the European Community cannot be identified, ie the importer is specifically referred to.

[242] Contrast *Parliamentary Debates*, House of Representatives (Cth), 24 June 1992, 3701–2 per Mr Sinclair (opposition member); and Kellam, op cit (fn 36) 87, 89. However Kellam's comments do not appear to take any account of the words used in s 75AJ(1)(a). This interpretation would appear to have important ramifications for the content of the s 75AJ notice issued by the consumer.

[243] Note however that s 75AJ may be of little utility if it leads a person to an overseas distributor or supplier as they may be able to ignore the request with impunity.

[244] Whether or not the actual manufacturer.

[245] See s 74A(3)(a) and (c).

[246] Contrast s 74A(3)(b) which requires that the 'own brander' corporation supply the goods.

draft'[247] of the *Trade Practices Amendment Act* 1992, that is, the *Trade Practices Amendment Bill (No 2)* 1991. The 1991 Bill was introduced to facilitate and encourage debate, rather than as the final form of the Bill.[248] In the version of s 75AJ in the 1991 Bill — 's 75AG Unidentified Manufacturer' — s (1)(a) referred only to 'the corporation which manufactured the goods'. No reference was made to s 75AB of the 1991 Bill which was in identical terms to s 75AB as enacted. Further, the relevant provisions of the Explanatory Memorandum which accompanied the 1991 Bill[249] similarly made no reference to s 75AB. The changes which were made to both the Bill and the Explanatory Memorandum appear to indicate that by making those changes Parliament intended to restrict the meaning of manufacturer in s 75AJ(1)(a) to a manufacturer as defined solely by s 75AB, thereby not including the actual manufacturer.

The trigger mechanism which s 75AJ(1) provides which allows a potential plaintiff to issue a written request is that that person 'does not know who manufactured the action goods'. By virtue of s 75AB and s 74A 'who manufactured the action goods'[250] includes, inter alia, the importer of the goods,[251] if any. This conclusion appears manifest in the terms of s 75AB and 74A. Moreover, the consequences if this were not so would also appear to reinforce that conclusion. If a foreign manufacturer were to indicate on their product their identity then a prospective plaintiff could not issue any written requests even if they did not know the identity of the importer. This would render s 75AJ futile in the effort to identify all of the persons made liable by s 75AB and s 74A and would render s 75AB and s 74A futile in their attempts to establish a defendant within the jurisdiction, viz the importer, and is surely a wholly improbable intention to attribute to Parliament.[252] This result, that first paragraph of s 75AJ(1) refers to the manufacturer and all those made liable by s 75AB and s 74A, was achieved without any requirement, such as there is in s 75AJ(1)(a), that regard is to be had to s 75AB. These considerations would appear to support the contention that by including the reference to s 75AB in s 75AJ(1)(a) Parliament intended to limit the operation of s 75AJ(1)(a) to those deemed manufacturer by ss 75AB and 74A.

The better view is that the interpretation of s 75AJ and the remarks in the Explanatory memorandum which has been suggested is correct — they do not indicate that a foreign manufacturer is not within the compass of Part VA.

Indeed, if this interpretation of s 75AJ(1) is adopted, then para 42 of the Explanatory Memorandum can be regarded as some indication that foreign

[247] *Parliamentary Debates*, Senate (Cth), 19 December 1991, 5094 per Senator Tate on the occasion of the second reading speech of the *Trade Practices Amendment Bill (No 2)* 1991; and *Parliamentary Debates*, Senate (Cth), 26 May 1992, 2661 per Senator Tate on the occasion of the second reading speech of the *Trade Practices Amendment Act* 1992.

[248] Ibid.

[249] Paragraphs 33–6.

[250] Section 75AJ(1).

[251] Section 74A(4).

[252] Compare *Air-India* v *Wiggins* [1980] 1 All ER 192, 197 per Lord Widgery CJ (Eveleigh and Kilner Brown LJJ agreeing) (CA); *Thwaites* v *O'Sullivan* [1965] SASR 34, 37.

manufacturers are within the compass of Part VA. Whilst, as para 42 states, it will be of little assistance[253] to a consumer if a foreign manufacturer was identified rather than the Australian importer, there will be some case where the Australian importer is impecunious whilst a judgment against a foreign manufacturer may have some value even if it does have to be enforced overseas and more so if it can be enforced against assets within Australia.

If the third interpretation be correct then this passage in the Explanatory Memorandum is of no significance for present purposes.

Paragraphs Dealing with s 75AO(2)

Section 75AO(2) creates a repose period of 10 years for Part VA. That period begins to run upon 'the supply by the manufacturer of the action goods.'[254] When discussing this provision the Explanatory Memorandum provides: 'Note that, in the case of importers, the relevant time is that when it was first supplied by the importer.'[255] It might be argued that the express reference to cases of importers is evidence of Parliament's intention that Part VA is not to extend to foreign manufacturers and it merely applies, in the case of imported goods, solely to the importer. Otherwise, it might be argued, if the TPA applies to both the importer and the foreign manufacturer then in the case of imported goods the repose period will commence running at different times for different defendants, and it cannot have been the intention of Parliament to allow for a situation in which an action may still be able to be brought against the importer whilst suit against the foreign manufacturer has been barred. However, it appears that this situation is not unique. Neither s 75AO(2) nor the Explanatory Memorandum make any express provision for other persons deemed manufacturer by s 74A and s 75AB. However, even without any reference to the Explanatory Memorandum it appears clear that the reference to manufacturer in s 75AO(2) must be read, in accordance with s 75AB, as including those deemed manufacturer by s 74A and therefore the time of supply will vary depending upon which manufacturer, which includes a deemed manufacturer, the plaintiff is suing. One problem with this interpretation is that, as was noted above, it is plausible that in some cases of persons deemed manufacturer under s 74A the manufacturer may never supply the goods and therefore it will be impossible to calculate a commencement date for the repose period. An alternative interpretation of both s 75AO(2) and the remarks in the Explanatory Memorandum is that in the case of domestically manufactured goods the repose period commences to run upon supply by the actual manufacturer and in the case of goods manufactured overseas the repose period commences to run upon supply by the importer. However, if Parliament had intended to refer in s 75AO(2), to the time of supply by the actual manufacturer or the importer exclusively, it could have specified this as it did in s 75AK.[256] An ambiguous remark in the

[253] Vis-à-vis no assistance.
[254] Section 75AO(2).
[255] Explanatory Memorandum to the *Trade Practices Amendment Act* 1992 para 72.
[256] See s 75AK(2)(b).

Explanatory Memorandum is not a sufficiently clear statement of intention for the Act to have that effect, particularly so when it was deemed necessary by Parliament to include an express provision to accomplish this in the case of s 75AK.

It appears that the better view is that the time of supply by the manufacturer referred to in s 75AO(2) will vary depending upon which manufacturer or deemed manufacturer the plaintiff is suing, and the specific reference in the Explanatory Memorandum to the position in the case of an importer will merely be regarded by the courts as an example of the operation of s 75AO(2) in the case of persons deemed manufacturer by s 74A. It may be that any perceived injustices which different repose periods for different manufacturers under the TPA may impose will be adequately rectified by the process of the importer seeking contractual contribution or indemnity.[257] The importer may be able to claim contribution or indemnity from their supplier pursuant to the contract of supply and it may be that a chain of contribution or indemnity will eventually produce liability on the part of the actual manufacturer.

Conclusion on the TPA

There are convincing arguments which could be made to support either case on the question whether the TPA applies, in addition to the importer into Australia, to the foreign manufacturer.[258]

On purely doctrinal or positivist grounds the present author would favour the view that s 5 of the TPA provides exhaustively for the extraterritorial operation of the TPA. On this view Part VA would not extend in its operation to foreign manufacturers in addition to importers. However, there are a number of considerations which suggest to the present author that the better view is that Part VA does apply to foreign manufacturers. There is a strong body of opinion that can be identified in support of a contention that, by virtue of the additional operation ascribed to Part VA by s 6(2), Part VA has application to the foreign manufacturer in addition to the importer. Extraterritorial operation may be necessary to enable Part VA to operate in a manner consistent with the manner in which the European Directive operates and to place Australian consumers in no less advantageous a position than their European colleagues with respect to possible avenues of relief in the event of damage due to a defective product manufactured overseas. Application to foreign manufacturers promotes the Act's purpose, or rather, to deny the Act application to a foreign manufacturer does not promote the Act's purpose in that it excludes a potential defendant where the Act was intended to create a new cause of action and create new rights of recourse for an injured consumer. The words of Part VA and the expressions of intention in the accompanying

[257] Vis-à-vis statutory contribution which could not be sought if the repose period against the foreign manufacturer has expired.

[258] Senator Vanstone, then Shadow Minister for Consumer Affairs, was of the opinion that the TPA does apply to foreign manufacturers: Senate Standing Committee on Constitutional and Legal Affairs, op cit (fn 15) in the transcripts of evidence at 301.

Explanatory Memorandum appear to make it patent that Part VA applies to the importer in addition to the actual manufacturer of the goods, a manufacturer who will necessarily reside overseas. In accordance with the purposive approach it appears that Part VA must have application to foreign manufacturers in order to prevent Part VA being too easily evaded and/or the purpose of the statute being defeated by devices employed by foreign manufacturers such as the manipulation of corporate structure. The better view is that Part VA has extraterritorial operation and its territorial scope is that it is limited to injuries or damage which occur in Australia.