

# The role of the Australian Competition and Consumer Commission (ACCC) in product safety and liability

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The *Trade Practices Act 1974* (the Act) relies on both prevention and cure in its approach to product safety and product liability.

Prevention is the key to Division 1A of Part V: the product safety regime. It provides for the making of product safety and information standards by the Minister for Consumer Affairs and, where necessary, the banning and recalling of unsafe goods. The objective of the provisions is essentially to protect the public from injury by prescribing a level of safety for particular kinds of consumer goods.

The curative provisions appear in Part VA of the Act, which grants remedies to those who suffer loss or injury caused by defective goods, whether a mandatory standard applies or not.

Of course, the line between the two is fuzzy. Division 1A, Part V includes provisions to assist injured consumers to claim damages where they suffer loss or damage from goods which breach relevant mandatory standards. Part VA also performs a preventative role by creating an incentive for manufacturers and importers to improve the safety of goods they supply.

The Australian Competition and Consumer Commission (the ACCC) similarly has both preventative and a curative roles in enforcing safety standards and taking representative actions under the product liability provisions. And here too, the ACCC may smudge the line between prevention and cure by seeking to achieve both objectives using the most suitable provisions of the Act.

## 1. Provisions of the TPA relevant to product safety and liability

### Part V, Division 1A

Responsibilities under Division 1A of

Part V are shared between the Minister for Consumer Affairs and the ACCC. In brief, the Division gives the Minister the power to:

- make regulations for consumer product safety standards (s. 65C(2)) and information standards (s. 65D) (referred to as 'mandatory standards');
- adopt standards published by other bodies (mainly Standards Australia) as mandatory standards (s. 65E);
- issue warning notices to the public where the safety of specified goods is under investigation (s. 65B);
- issue notices that specified goods are 'unsafe goods' (s. 65C(5));
- impose permanent bans on specified goods (s. 65C(7));
- monitor voluntary recalls (s. 65R);
- order compulsory recalls of goods which do not comply with a relevant mandatory standard or which are covered by a ban or unsafe goods notice, where the supplier has not taken satisfactory action to prevent the goods causing injury (s. 65F); and
- to obtain information, documents, and evidence (including samples) where there is reason to believe that these relate to consumer goods which may cause injury (65Q).

These powers are exercised by the Minister on advice from the Consumer Affairs Division (CAD) of the Department of Industry Science and Tourism. The power to issue standards is used regularly, and CAD is currently updating and re-issuing many standards. (A list of products covered by mandatory standards is available from APLA on request.) The other powers have (fortunately) been required less frequently.

The ACCC has several functions under Division 1A of Part V. As with other

parts of the Act, the ACCC is charged with encouraging compliance with mandatory standards and, where necessary, taking enforcement action. These functions are discussed further below. The ACCC may also take representative actions on behalf of consumers under s. 87(1A), where a supplier has breached a mandatory standard, a ban or a notice declaring goods unsafe.

Where the Minister proposes to take action under ss. 65C(5) or (7) or s. 65F, the ACCC is required to hold a conference to allow a hearing to suppliers who may be affected by the proposed action. Following the conference, the ACCC will make recommendations to the Minister. The Minister is required to have regard to the recommendations and, where he or she does not act in accordance with them, to set out the reasons in a *Gazette* notice (s. 65P).

To assist private litigants prove causation, the Division contains several deeming provisions. Where a good is supplied in breach of a relevant mandatory standard and a person suffers loss or damage which would have been avoided had the goods complied, 65C(8) deems the loss or injury to have been caused by the act of supply. Similar provisions apply where goods contravene an information standard, a ban or unsafe goods notice, and where a corporation fails to comply with a compulsory recall order.

### Division VA

Division VA is a regime of strict product liability, introduced into the Act in 1992. The provisions will be well known to many readers and a detailed discussion is beyond the scope of this article. In brief, though, the Division establishes strict lia-

bility (ie it is not necessary to prove negligence or privity of contract) against a manufacturer or importer of 'defective' goods for loss or injury suffered by people in the following circumstances:

- where an individual suffers injury caused by the defective good (s. 75AD);
- where a person suffers loss as a result of another's injuries caused by the defective good, other than where the loss comes about because of a business relationship (s. 75AE);
- where a person suffers loss when other goods or buildings are damaged or destroyed because of the defective good (ss. 75AF and 75AG).

A good is regarded as having a defect where its 'safety is not such as persons generally are entitled to expect', taking into account what could reasonably be expected to be done with it, its marketing, instructions, packaging and labelling, and the time when it was supplied by the manufacturer (s. 75AC).

Defences to liability are provided in s. 75AK and include the 'state of the art' defence, under which a manufacturer will not be liable where the state of scientific knowledge would not have allowed the defect to be discovered. Where a good is defective only because it complies with a Commonwealth mandatory standard, liability shifts from the manufacturer/importer to the Commonwealth (ss. 75AK(b), 75AL).

Part VA delivers essentially private remedies to those harmed by defective goods. However, the ACCC is also granted the power to take representative actions by s. 75AQ, which states:

- (1) The Commission may, by application, commence a liability action on behalf of one or more persons identified in the application who has suffered the loss for whose amount the action is commenced.
- (2) The Commission may only make an application under this section if it has obtained the written consent of the person, or each of the persons, on whose behalf the application is being made.

Representative actions may also be taken by the ACCC (and other parties) under Part IVA of the *Federal Court of Australia Act 1976*.

### The role of the ACCC in product safety and liability

As in other areas of its work, the ACCC adopts a multi-layered approach to fulfilling its product safety and liability responsibilities. The approach is often referred to as the 'pyramid of enforcement' and can be depicted thus:



- **ACCC litigation** - injunctions, fines, declarations;
- **other ACCC action and remedies** - enforceable undertakings; injunctions; negotiated settlements;
- **civil remedies** - private rights of consumers or affected parties, including representative actions;
- **industry self regulation and consumer affairs agencies**;
- **codes of conduct and compliance systems** - includes self-regulatory systems and customer service initiatives as well as other market sensitive measures of ensuring compliance.

The pyramid reflects the fact that the ACCC bases enforcement action on widespread education and compliance activity. Generally, action at the base of the pyramid is less costly for all parties and, in the ACCC's experience, produces superior results in terms of long-term compliance and prevention of injury. So, overall, the ACCC will concentrate on action at the base of the pyramid.

This action includes publishing guidelines on individual standards and suppliers' obligations and participating in industry forums. The ACCC conducts nationally coordinated random surveys which are useful for uncovering potential compliance problems and raising suppliers' awareness of their obligations under the Act. Where appropriate, the ACCC will work in conjunction with State and Territory consumer affairs agencies.

The pyramid should not be taken too literally - in individual matters, the ACCC

will take the approach which seems likely to produce the best results - in terms of lasting compliance with the law and redress for injured parties. Nor do the size of the 'slabs' necessarily reflect the resources allocated to different functions.

### Enforcement of mandatory standards

Where breaches of mandatory standards are detected and enforcement action is necessary, the ACCC will in the first instance work with traders to ensure corrective action is taken promptly. Longer term resolutions will then be sought, usually in an enforceable form.

In March 1995 ACCC officers found non-complying children's nightwear on sale in a number of Woolworths supermarkets and related outlets. Following urgent discussions with the ACCC, the company agreed to recall the products the following week. The Federal Court later granted an injunction by consent including requirements that Woolworths to implement quality control, inspection and recall procedures as well as a trade practices compliance programme.

The ACCC obtained similar undertakings from Sterns Playland Pty Ltd in February 1997, preventing the supply of a children's swimming vest which unbuckled when the child jumped or dived into water. The company also undertook to run television and newspaper advertisements alerting parents to the safety problem.

The ACCC can also accept court enforceable undertakings under s. 87B of the Act, which may be an alternative to court action.

Breaches of mandatory standards may attract fines of up to \$200,000 in the case of a corporation and \$40,000 in the case of an individual. Where suppliers refuse to take appropriate corrective action, the Commission believes that a vigorous approach to enforcement is necessary and it will not hesitate to prosecute.

In 1996, the ACCC prosecuted a retailer of gymnasium equipment for a failure to comply with the standard on exercise cycles. In *ACCC v Nordic Lust Pty Ltd*, the Court found the company guilty and, taking into account the circumstances of the sale, imposed a modest fine. The ACCC has also taken prosecutions relating



to non-complying sunglasses, fire extinguishers and children's swim aids.

### Product liability

Contrary to some predictions at the time Part VA was introduced, litigation under the regime remains fairly sparse. The ACCC has also been involved in few product liability matters and to date has only instituted proceedings in one instance, against Glendale Chemical Products Pty Ltd, discussed below.

In 1995, the Commission was keen to take on a representative application against Garibaldi Smallgoods Pty Ltd in relation to its contaminated meat products. As noted above, s. 75AQ requires the written consent of the consumers affected. In the Garibaldi case, the majority of the consumers had retained the one solicitor to act on their behalf. That solicitor had taken responsibility for obtaining compensation measures from the South Australian government and Garibaldi's insurers. In the absence of any of the potential claimants consenting to have the ACCC represent them, it was not in a position to act in this case.

Given the potential value of product liability matters as test cases, the ACCC remains vigilant for appropriate instances of product-related injury. However, the extensive demands on the ACCC's budget require careful prioritising of matters to be pursued.

### How the ACCC decides when to get involved Product safety

As indicated above, the ACCC will not hesitate to take strong action where issues of public safety are involved. However it recognises the need for a measured response to breaches of standards which takes into account the level of the hazard involved.

In a report in October 1995, the Australian National Audit Office recommended that Commonwealth product safety regulators adopt and use an organisational risk management approach involving a structured, scientific approach to identifying and analysing risks, prioritising these risks and assessing treatment options.

The ACCC moved quickly to introduce a risk management approach to product safety enforcement activities.

Risk assessment has been incorporat-

ed into the matter selection criteria, under which matters are prioritised for further investigation, for product safety activities. Risk assessment is also taken into account in deciding on priorities for market surveys and appropriate enforcement action in response to detected breaches i.e. whether a matter should be resolved administratively or through stronger enforcement measures.

### ***The ACCC is primarily a law enforcement agency, rather than a legal aid body***

The approach introduced by the ACCC involves the use of a risk assessment 'nomograph' which includes criteria relating to potential injury severity, probability of hazard recognition and product availability. The nomograph provides a graphical reckoning of the level of risk, taking into account four factors:

- severity of potential injury;
- probability of hazard occurrence;
- the likelihood of consumers recognising the hazard; and
- the availability of the product.

The nomograph allows for an objective assessment of the risks that is applied by the ACCC in planning action in individual matters and in designing compliance strategies.

### Product liability

In regards to product liability matters, the types of claims the Commission is likely to take up in a representative action are those which accord with its broader priorities, namely those matters where there is:

- a blatant breach of the law;
- significant and widespread public detriment;
- the potential for a successful action to have a worthwhile deterrent or educative effect; and/or
- a significant new market issue (eg arising from economic or technological change).

Where the ACCC decides that court action is warranted, it will consider the following (non-exhaustive) list of issues in determining whether a representative action is the appropriate remedy:

- the number of persons affected and the damage each has suffered;
- the resources available to those affected to bring their own action;
- whether legal action by an individual is a realistic method (eg where a number of people have suffered damage but the sum involved in any individual's case is insufficient to warrant the legal costs likely to be incurred in seeking an award); and
- the likelihood that the action will succeed.

For the product liability laws to be effective, it is important that the rights they provide be asserted. Where those who have suffered harm lack the resources to pursue their own rights, mechanisms for their enforcement must be available. Here lies an important reason for ACCC's involvement via representative actions. Without it, there would be a chance that the law would fail to achieve its full potential.

However, the ACCC is primarily a law enforcement agency, rather than a legal aid body. Its overall aim is to '*foster competitive, efficient, fair, efficient markets through securing compliance with the Act, for the benefit of all Australians*'. The ACCC will make an assessment of the overall damage or loss suffered in a particular matter and will tend to give priority to those matters where the loss or injury is potentially widespread or serious.

Solicitors often assist clients to approach the ACCC. They play an important role in advising on whether to pro- consent for the ACCC to take a representative action. In advising clients, it is important to stress that the ACCC will be primarily responsible for the conduct of the litigation and that it may at times have different objectives to those of the client. However, the ACCC will seek to work closely with solicitors and clients in working towards successful resolutions.

### Current litigation - Glendale caustic soda

The ACCC has instituted representative proceedings against Glendale Chemical Products Pty Ltd following a complaint from a Tamworth resident who, it is alleged, suffered injury while using caustic soda (sodium hydroxide) manufactured by it. The ACCC is seeking damages on behalf of the consumer under Part

VA of the Act and is claiming misleading or deceptive conduct under s. 52 and 53©.

In handling the matter, the ACCC has taken the multi-layered approach outlined above. The ACCC wrote to all known suppliers of caustic soda and requested that they relabel containers to warn of the dangers of using the product with hot water. The letter explained the potential liability under s. 75AD of the Act, and the suppliers willingly cooperated with the request.

The ACCC brought the matter to the attention of the National Drugs and Poisons Schedule Committee (NDPSC) of the Therapeutic Goods Administration. NDPSC resolved to change the required labelling for sodium hydroxide-based products to include the warning statement 'Irritates skin and eyes' and a safety direction 'Do not mix with hot water'.

Glendale provided undertakings to the Federal Court on an interlocutory basis requiring the re-labelling of the caustic soda at the wholesale level. The company further undertook to provide those it had supplied with the product with sufficient labels to relabel their stock and to inform

them of the substance of the undertakings. It was also required to publish notices in major newspapers warning of the dangers of incorrect use of the product.

A final hearing in the matter has been set down for 23 February 1998. The ACCC will publish further details following resolution of the matter.

#### Conclusion

As high profile cases such as Kraft, Garibaldi and Woolworths have demonstrated, the risk of unsafe consumer goods will always be with us. The ACCC recognises that to provide the public with protection against these risks requires a vigorous approach to the exercise of its product safety and liability functions.

The ACCC's approach draws equally on preventative and curative strategies through providing compliance information, conducting product surveys, seeking administrative resolutions and, where necessary, taking court action. ■

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#### Case note addendum

Assessing damages in unwanted pregnancies (page 24 of December 1997 *Plaintiff*)

The solicitor for the plaintiff in *M v Dr McCormack & Anor*, Simpson J, NSW Supreme Court, 24 February 1997, (see page 24 of *Plaintiff*, Issue 24, December 1997) was APLA member Ian Bryden of Bryden's Law Office in Liverpool, NSW. He can be contacted on phone 02 9965 7000.

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