

# An unfair exemption?

THE ARGUMENT FOR  
AMENDING PRODUCT LIABILITY  
UNDER PART VA OF  
THE TRADE PRACTICES ACT  
1974 TO ALLOW CLAIMS  
BY WORKERS

Introduced in 1992, Part VA of the *Trade Practices Act 1974* relating to product liability for goods containing a defect where such defect results in loss or damage to a consumer, contains an exemption for a claim for loss or damage where such

loss or damage is claimable under a workers' compensation scheme. This article examines the effects of the exemption and suggests that the exemption produces inequitable results for consumers. It argues that in the balancing of the pros and cons of the exemption that the exemption should be abolished and the remedies available in Part VA of the *Trade Practices Act 1974* be open to all consumers. ►

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### **Product liability under the Trade Practices Act 1974**

The object of the *Trade Practices Act 1974* ("the Act") is, inter alia, to enhance the welfare of Australians through the provision of consumer protection. Part VA of the Act, inserted by the *Trade Practices Amendment Bill 1992*, puts that objective into operation in respect of product liability.

In essence Part VA of the Act allows consumers to recover damages from manufacturers of defective products where the defect in the product has resulted in an injury to the consumer. Part VA of the Act is concerned specifically with unsafe or dangerous goods rather than goods that are not of merchantable quality. Section 75AC(1) of the Act defines when goods have a defect as follows:

"For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect."

The section applies to goods supplied by a manufacturer after 9 July 1992. The test is an objective one. In determining whether goods are safe, under section 75AC(2) of the Act regard can be had to a number of factors including the manner in which and the purposes for which goods are marketed, the packaging of the goods, instructions and warnings on the goods and what is to be done with the goods.

Liability under Part VA of the Act is strict, simplifying actions such that the consumer need only prove that the product had a defect and that defect caused the injury, in order to establish liability of the manufacturer to compensate for the injury sustained. This is significantly simpler than running a negligence action where proving the negligence of a manufacturer may involve the difficult task of obtaining evidence of negligence that may only be within the knowledge of the manufacturer itself.

#### **The exemption**

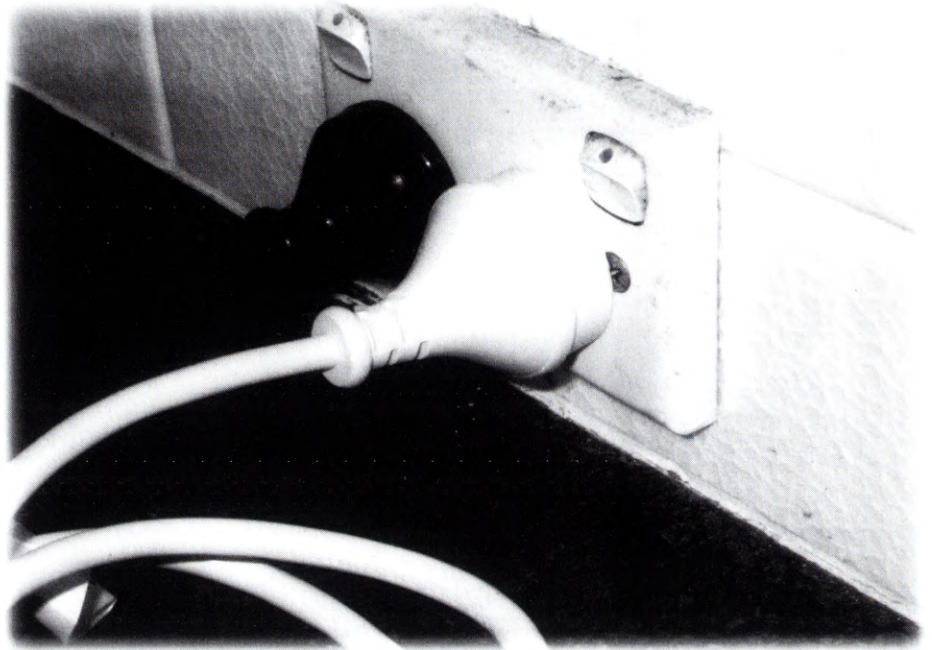
However, section 75AI of the Act contains an exemption from liability for manufacturers (or alternatively a prohibition on injured consumers recovering compensation from a manufacturer of a defective product) where the injury is sustained in circumstances where the loss is compensatable under a workers' compensation scheme.

#### **The practical effect of the exemption**

Imagine this scenario.

Peta goes to the kitchen and fills the kettle. She plugs the kettle in and touches an adjustment knob on the kettle. Peta is electrocuted because the kettle has a defective design and is unsafe.

If Peta is making her coffee at home, she may sue the manufacturer under Part VA of the Act from her resulting injuries.



If Peta is making her coffee at work, due to the operation of section 75AI of the Act, she has no rights against the manufacturer pursuant to Part VA of the Act.

Based on location alone, the potential outcome for Peta is significantly different even though the kettle may be exactly the same type with the same defective design and the injuries suffered could be identical.

#### **Historical justification for the exemption – the adequacy of workers' compensation schemes**

At first glance, the difference in the outcome in the example above appears to be difficult to justify. The explanatory memorandum to the Act relevantly states that –

"Loss caused by work related injuries has therefore been excluded (from the operation of the Act [*words added*]) as it is considered that this field is **comprehensively regulated** under the **existing compensation scheme.**" [*emphasis added*]

Certainly workers' compensation is an area that is heavily regulated but this is often to the detriment of injured workers. Although it is beyond the scope of this paper to deal with the deficiencies of workers' compensation legislation that are widely debated, it is fair to say that workers' compensation schemes do not always adequately compensate injured workers. In respect of seriously injured workers, workers' compensation schemes can often fall far short of providing proper compensation.

Accordingly, although workers' compensation may be "comprehensively regulated" such schemes may not produce the fairest outcome for an injured worker. This is particularly so in recent times as further restrictions are placed on injured workers operating within the confines of workers' compensation schemes. Statutory caps now limit the amount of compensation recoverable for workplace injuries and common law rights against employers are restricted unless the injury sustained reaches a threshold level. Even though at the time of the introduction of Part VA of the Act, existing workers' compensation schemes may have properly compensated

injured workers, the schemes have been eroded such that this is no longer sufficient justification for the exemption in the Act to continue in operation.

### What is an injury in the workplace

The limits of what is an injury in the workplace are becoming increasingly wide. The High Court in the recent case of *Vetter v Lake Macquarie City Council* [2001] HCA 12 held that an appellant was covered by workers' compensation where she had on her way home from work, travelled some 20 kilometres out of her way to visit her grandmother, even having a meal with her grandmother. She then had a motor vehicle accident on her way home, resulting in injuries.

Arguably, if the accident had been due to a defect in the manufacture of the car, or even if using the previous example, the appellant had been electrocuted making a coffee at her grandmother's house, the appellant, due to the exemption in the Act, would not have a claim against the manufacturer of the defective product and would be restricted to workers' compensation. The workers' compensation payable could be significantly reduced, the appellant having been injured in the course of a journey.

This example of the eroding of workers' compensation benefits further supports the argument that the justification for the exemption in the Act is becoming less valid or is in fact invalid.



### Manufacturers escaping liability

During the second reading speech before the amendment to the Act introducing Part VA was passed, it was suggested that –

“The persons who are responsible for putting the defective goods into circulation will be liable to compensate those persons who are injured.”


Clearly this does not occur where the employer under workers' compensation schemes will be held to be liable for defective products (that they may not have been able to know were defective) and the manufacturer of those defective goods escapes liability simply because the injury occurred in the workplace.

Manufacturers may argue that a removal of the exemption would result in significant price increases on products as manufacturers attempt to recoup increased liability insurance premiums. Manufacturers may further argue that a removal of the exemption could result in businesses being financially harmed. Insurance premiums for manufacturers consist of only 0.2% of total manufacturing costs.<sup>1</sup> It is difficult to see in that case that any price increases as a result of the removal of the exemption would be significant. In any event, the same argument would have existed when Part VA of the Act itself was introduced in respect of non-workplace incidents and that argument failed when balanced against the consumer protection Part VA of the Act provides. ▶



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A further possible concern is that a removal of the exemption may open the floodgates to this form of litigation under the Act, however this view is not supported by statistics. Only 1.2% of adult injuries arise out of product failures.<sup>2</sup> Furthermore, the flood of actions predicted when the current Part VA of the Act was introduced did not result. There is no substantive evidence to suggest that a removal of the exemption will result in an unreasonable increase in the cases brought under Part VA of the Act.

### Shifting the compensation burden

In essence, workers' compensation schemes subsidise negligent product manufacturers where defective products cause injury to a consumer in the workplace. With the changing workers' compensation landscape of eroding consumers' rights, the exemption in the Act is both unfair to the consumer and to the workers' compensation schemes.

Removing the exemption from the Act would shift the burden for workplace accidents resulting from defective products from the already labouring workers' compensation schemes (NSW being the most recent example of how workers' compensation is being scaled back on the pretext of the scheme's alleged inability to cope with the demands being placed on it) to the party at fault for the injury, namely the manufacturer of the defective product.

The inclusion of the manufacturing sector in bearing the

cost of damage arising from defective products would also ease the burden on Centrelink and the public health system that often incur costs of sustaining and treating injured workers when adequate compensation is not received under workers' compensation schemes.

At the end of the day, it may be argued that it really does not matter to the injured person which insurance company pays (either workers' compensation or the manufacturer's underwriter) but this argument ignores four fundamental issues -

- 1 Workers' compensation is a cost on employment. Increased claims against employers where claims could have more properly been made against the party liable for injury, namely the manufacturer, have a flow on economic effect, increasing the cost of employment, leading to lessened opportunities for employment and the wider issues of increasing unemployment.
- 2 Workers' compensation may not provide the same level (or an adequate level) of compensation to an injured worker as might otherwise be available if the exemption under the Act was removed.
- 3 Workers' compensation being the responsible entity to compensate an injured worker where the true tortfeasor is the manufacturer is an unfair and unnecessary drain on workers' compensation schemes' funds.
- 4 The law operates not only to provide compensation to an injured worker but as a guide for best practice and to act as a deterrent to unacceptable behaviour. For example, one of the functions of tort law is to provide guidance to the community about relevant standards of care to prevent future accidents. Where manufacturers escape liability for their defective products simply because the injury occurred in the workplace, a guide for best practice is not being set for the manufacturer. While there is no deterrent to the manufacturer, the employer, and the workers' compensation scheme standing behind the employer, are punished as a result of an injury to a worker that may have been caused, for example, by a defective product which the employer installed in the workplace in good faith and without any knowledge of the defect.

### The exemption in the international context

An amendment of the Act to remove the exclusion would be in line with the operation of the *European Community Product Liability Directive 1985* on which the Act was based. The directive specifically states that product liability rights are to be in addition to any existing rights and are not to restrict workers' rights.

Even in the United States where by statute common law claims cannot be made with respect to workplace accidents, access to product liability claims is unrestricted.

### The advantages of running an action under the Act for the injured worker

As it stands, the advantages of running an action under the Act are unavailable to workers injured by defective products in the workplace. Such advantages include as discussed:

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- 1 There exists strict liability under the Act (such that the consumer need not prove that the manufacturer was negligent, simply that the product had a defect and that the defect caused the resulting injury);
- 2 Under the Act there are no statutory caps on the amount of damages recoverable as exists under workers' compensation schemes;
- 3 There is no threshold level of injury required to allow the running of an action.

#### Amending Part VA to remove the exemption

The change necessary to allow product liability claims to proceed, where workers' compensation would be available for the injury, is small. Similarly with the workers' compensation/motor vehicle insurance claims and workers' compensation/public liability claims, a device would be inserted in the legislation to prevent double recovery by injured persons.

The operation of the Act would be amended such that:

- (a) a consumer (including a person injured in a workplace or in the course of employment) can recover damages against the manufacturer of a defective product;
- (b) but the consumer must refund any benefits received from a workers' compensation scheme if damages are awarded against a manufacturer for the same loss as compensated by the workers' compensation scheme.

No business should profit at the expense of any consumer's (including workers') safety. It seems trite to suggest that the entity causing harm should be the entity responsible for compensating the victim but that is all the suggested amendment seeks to achieve.

Currently the exemption in the Act has the effect that the costs of injury are being shifted from those who have the incentive and opportunity to control the costs (that is, manufacturers and their insurers) to those who are unable to control the costs (that is, employers, workers' compensation schemes and ultimately tax payers).

It is unfair to draw a distinction in the remedies available under the Act to an injured person on the basis of whether or not injuries are suffered at work, where the circumstances surrounding the injury may be identical. It needs to be emphasised that accidents caused by defective products may occur without there being any fault on the part of employer, such that whether the accident occurs in the workplace or another place should be irrelevant as to whether a person can obtain a remedy under the Act for such an injury. <sup>PL</sup>

#### Footnotes:

<sup>1</sup> ALRC Research Paper 2, *Product Liability: Economic Impacts*, 1989.

<sup>2</sup> Australian Consumer Association, *An Arm and a Leg: The human and economic cost of unsafe products*, April 1989.

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