

AUSTRALIAN Product Liability reporter

Print Post Approved 255003/00768

Volume 19 Numbers 3

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Australia's Consumer Policy Framework – Inquiry Report: Few Surprises

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On 30 April the Productivity Commission (PC) published its lengthy final Report for the Review of Australia's Consumer Policy Framework, requested by the Treasurer under the former Federal Government.¹ It mostly retains Recommendations from its Draft Report published in November 2007, which is not surprisingly given the tight timetable the PC set for further Submissions and public hearings over the summer period. However, the PC has improved some aspects, following critiques particularly from those concerned that the Inquiry would fail to catch up for a decade of Australia neglecting consumer protection compared to its major trading partners.²

Product Liability and Safety Regulation

Readers of this *Reporter* will be most interested to learn first that the final Report's Chapter 8, headed 'Defective products', mainly concentrates on raising awareness and taking enforcement action against misleading marketing of 'extended warranties' (Part 8.2). The PC now notes that 'merchantable quality' under the *Trade Practices Act 1974* (Cth) (TPA) Pt V Div 2 is not restricted to *safety* of supplied products (Vol. 2, p. 173 n. 2). Practitioners will appreciate that in reality most claims against retailers – and the extended warranties they increasingly sell, probably unnecessarily for most consumers – relate to *quality* problems quite unrelated to safety (for example, the product just stops working properly after a few months or years).

Part 8.3, headed 'Product liability arrangements', does focus on remedies triggered by unsafe goods under the TPA, common law and civil liability reforms. However, the PC does not fully appreciate the 'legal morass' we now face in this field,³ which must surely

limit the role of the civil liability system in encouraging optimal levels of safety and redress. Recommendations 8.2 and 8.3 (also reproduced in Vol. 1 - Summary) largely restate suggestions from its 2006 Report specifically into consumer product safety:

Recommendation 8.2

Consistent with the recommendations in the Productivity Commission's Review of the Australian Consumer Product Safety System, Australian Governments should:

- develop a hazard identification system for consumer product incidents;
- introduce mandatory reporting requirements for voluntary product recalls; and
- require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.

Ideally, these measures should be implemented as part of the development of the new national generic consumer law (see Recommendation 4.1 [and Chapter 4]).

Recommendation 8.3

Drawing on the mechanisms proposed in recommendation 8.2 and on the baseline study examining product related accidents prepared for the Ministerial Council on Consumer Affairs, Australian Governments should monitor trends in product safety, including any impacts of the civil liability reforms, with a view to assessing whether the incentives to supply safe products continue to be adequate.

Confusingly, however, a mandatory reporting requirement for voluntary recalls already exists under TPA s 65R. Further, that is located in Pt V Div 1A, covering product safety regulation rather than 'product liability arrangements'.

Another regulatory matter concerns Recommendation 8.2's requirement that suppliers report serious accidents if

subject to a successful product liability claim or settlements. That could only make a difference in the world's only jurisdiction with high levels of such litigation, namely the US. Australia has only a few dozen reported judgments under Pt VA, and few succeed. Anyway, by the time product liability claims have been filed and settled – let alone ruled on by our courts – years may have elapsed. This further eviscerates the notification requirement, which is designed to allow more timely *ex ante* intervention by regulators to prevent further avoidable injury. The requirement proposed by the PC therefore remains far weaker than that required of suppliers in the EU (and enforced more strictly since 2004) and in Japan (since 2006). It is odd that those jurisdictions have similarly open economies and have been through regulatory impact assessments to justify a stricter standard, but Australia refuses to go that far.

Similarly, Part 8.3 of the PC's Report goes on to discuss another regulatory requirement lacking in our Div 1A compared to the EU, namely a 'General Safety Provision', but it maintains that the evidence at hand is insufficient for Australia to adopt this either (p. 190).

Access to Remedies and Enforcement

On the other hand, the PC remains more ambitious regarding 'Access to remedies' (Chapter 9). For example, Recommendations 9.4 and 9.5 state:

Recommendation 9.4

In the light of the Victorian Law Reform Commission's Civil Justice inquiry and recent decisions by the Federal Court of Australia regarding third-party financing of private class actions, Australian Governments should assess the desirability of clarification (or amendment) of the relevant legislation

and the use of other policy approaches to facilitate appropriate private class action, taking into account any risks of excessive litigation or other unintended effects.

Recommendation 9.5

Australian Governments should ensure a provision is incorporated in the new national generic consumer law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

The latter envisages amendment of TPA s 87(1B), long overdue since the limited powers of the ACCC (compared to ASIC) were highlighted in *Medibank Private Ltd v Cassidy* [2002] FCAFC 290; BC200205361 (p 217). However, the PC still rejects a ‘super-complaints mechanism’, as in the UK, allowing designated consumer advocacy bodies to obtain explanations from regulators in response to identified consumer problems.

The PC is perhaps even more ambitious regarding ‘Enforcement’ reforms (Chapter 10). Recommendations 10.1 and 10.2 state (emphasis added):

Recommendation 10.1

The new national generic consumer law should give consumer regulators the capacity to:

- seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, *for all relevant provisions*;
- apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred;
- issue notices to suppliers requiring them to reasonably substantiate the basis on which claims or representations are made; and
- subject to guidelines informed by the current Treasury review of infringement notice powers under corporations law, issue infringement notices for minor contraventions of consumer law.

The possible inclusion of naming and shaming powers in the new law should be the subject of further examination and consideration by the Australian and State and Territory Governments under the auspices of the Ministerial Council on Consumer Affairs.

Recommendation 10.2

The Australian Government should commission a review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

It is unclear whether ‘all relevant provisions’ or the like extend to minimum statutory warranties (Pt V Divs 2 and 2A) or product liability (Pt VA). However, the TPA and certainly the regulators do not see those as ‘prohibited conduct’ triggering enforcement powers, since attempts to restrict those warranties by contract are rendered void. Enforcement action seems to be only available if the warranties are misrepresented, or if there is (possibly overlapping) misleading conduct or unconscionable conduct (clearly prohibited under Pt IVA and Pt V Div 1 s 52). If this distinction is maintained in implementing Recommendations 10.1 and 10.2, product safety lapses seem unlikely to trigger the expanded responses proposed for regulators.

Consumer Contracts in General

Similarly, Chapter 7 on ‘Unfair Practices and Conduct’ ends with Recommendation 7.1 that significantly improves protections for consumers from unfair contract terms, compared to the draft Report’s proposal (summarized at p 158):

Recommendation 7.1

A provision should be incorporated in the new national generic consumer law that addresses unfair contract terms. The Commission’s preferred approach would have the following features:

- a term is established as ‘unfair’ when, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of

consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment, with suppliers also potentially liable to damages for that detriment. The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.

The operation and effects of the new provision should be reviewed within five years of its introduction.

In particular, the PC no longer suggests that the regulator and court should have to prove a net public benefit from remedial action. It acknowledges that this would be unprecedented (p 160), and arguably it would make the legislation virtually toothless. Instead, the PC requires consideration of ‘the broader interests of consumers’, which may — on one theory, and not necessarily in practice — involve higher prices and/or less variety in providing goods or services without the ‘unfair’ term. Nonetheless, the PC still proposes an ex post approach rather than allowing ex ante ‘abstract control’ by regulators, as in the EU. Anyway, such new unfair terms legislation will probably make little difference regarding product safety, since minimum standards in that more traditional field are supposedly guaranteed by TPA Pt V contractual warranties already anyway.

Short- and Long-Term Impact

Directly, therefore, the Inquiry Report offers very little in practice for consumers increasingly concerned about lapses in product safety in Australia over recent years, as in other countries. This will be so even if all Recommendations like those above are implemented promptly by federal and state governments. Fortunately, there is more hope for some action under new federal government, especially if Recommendation 6.3 is followed to allow the Ministerial Council on Consumer Affairs (MCCA) to vote on reforms if the federal

government can get agreement from three other jurisdictions (Australian states or territories, but also New Zealand). It will be interesting to see when and how MCCA and various Ministers respond to the PC's final Report this year.

Indirectly, enacting new generic consumer legislation nation-wide based on the TPA (with the additions along the lines suggested by the PC), and centralizing more law-making and enforcement at the federal level (discussed in Chapter 4), may generate considerable educative effects. They will be enhanced by measures for 'Empowering consumers' (Chapter 11), such as:

Recommendation 11.3

Within the broader consumer policy implementation framework agreed to by CoAG, the Australian Government, in consultation with MCCA, should take the lead role in developing arrangements to provide additional public funding to:

- help support the basic operating costs of a representative national peak consumer body;
- assist the networking and policy functions of general consumer advocacy groups; and
- enable an expansion in policy-related consumer research.

Part of the latter funding component should be used to establish and support

the operation of a dedicated National Consumer Policy Research Centre (NCPRC), with the remainder provided as contestable grants for research on specified consumer policy issues. An independent review of the effectiveness of the NCPRC in delivering beneficial research outcomes should be conducted after 5 years.

The new funding arrangements should be subject to appropriate guidelines and governance requirements to help ensure that taxpayer support contributes to high quality advocacy and policy research in priority areas, and that the national interest is appropriately represented.

These suggestions point the way towards a broader rethinking of consumer law and policy in Australia. In turn, that may still build up into more ambitious reform proposals for consumer product safety over the longer term. But, as the PC's economists will recall from the work of their colleague John Maynard Keynes in 1923: 'in the long run we are all dead'.⁴ ●



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Endnotes

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Pty Ltd. Thanks, but no responsibility attributed to, Adj Prof Dr Jocelyn Kellam for helpful comments on a first draft.

1. Available via <<http://www.pc.gov.au/inquiry/consumer>> along with 262 Submissions and a major Consultancy Report.

2. See the draft Recommendations, following Nottage L, 'The Productivity Commission's Inquiry into Australia's Consumer Policy Framework: A Partial Response' (2008) 18(9) *Australian Product Liability Reporter* 122. The Draft Report no longer seems to be available on the PC's website.

3. Kellam J and Nottage I, 'Happy 15th Birthday, T.P.A. Part V.A.! Australia's Product Liability Morass' (2007) 15(1) *Competition and Consumer Law Journal* 26. For a recent judgment illustrating confusion about basic features of TPA Pt VA, namely that it applies to suppliers of unsafe goods rather than services, see *James Spittles v Michael's Appliance Services Pty Ltd* [2008] NSWCA 76; BC200802923. It is unclear why the plaintiff simply did not sue the retailer of the dangerous refrigerator, Harvey Norman, under TPA Pt V Div 2.

4. From Keynes J M, *A Tract on Monetary Reform* (1923) chapter 3, reproduced in the *Columbia World of Quotations* (1996), <<http://www.bartleby.com/66/8/32508.html>>.

Canada proposes tough new product safety laws

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The Canadian federal government recently introduced new legislation which, if enacted, will significantly change the regulatory regime for foods, therapeutic products (which includes drugs, natural health products and medical devices), cosmetics and other consumer products. Bill C-51, which will revamp the *Food and Drugs Act*, and Bill C-52, the new *Consumer Products Safety Act*, fulfil a promise made by the Conservative government in its 2007 Speech from the Throne to 'introduce measures on food and product safety to

ensure that families have confidence in the quality and safety of what they buy'. The 'precautionary principle' stated as 'a lack of full scientific certainty is not to be used as a reason for postponing measures that prevent adverse effects on human health if those effects could be serious or irreversible' is enshrined in the preamble to both bills.

If passed, the new legislation will have significant implications for pharmaceutical, medical device and other health product companies, food manufacturers, and anyone that

manufactures, imports, advertises or sells consumer products. While these bills will likely be amended before they become law, and much of the detail will be contained in regulations not yet available, a review of some of the central features of this proposed legislation provides a preview of new regulatory requirements to come.

Bill C-51 – Amendments to the Food and Drugs Act

Bill C-51 proposes significant amendments to the *Food and Drugs*