

The Law  
Reform  
Commission

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Report No 51

Law Reform  
Commission of  
Victoria

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Report No 27

PRODUCT LIABILITY  
Summary of Report

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The Law Reform Commission of Victoria is established by section 5 of the Law Reform Commission Act 1984 (Vic). The first members were appointed in 1984. The offices of the Commission are at 160 Queen Street, Melbourne, Victoria, Australia (telephone 03-602- 4566; fax 03-670-4280).

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# Terms of reference

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## PRODUCT LIABILITY

I, LIONEL FROST BOWEN, Attorney-General of Australia, HAVING REGARD TO:

- (a) the provisions of the *Trade Practices Act 1974* relating to goods which do not comply with certain standards of manufacture, quality, performance or safety;
- (b) the cost to individuals and the community arising from injuries and damage caused by defective or unsafe goods;
- (c) the National Consumer Affairs Advisory Council's report dated January 1987 on Consumer Product Safety;

in pursuance of section 6 of the *Law Reform Commission Act 1973* HEREBY REFER to the Law Reform Commission for review and report the following matters:

- (a) whether the laws to which that Act applies, including the *Trade Practices Act 1974*, relating to compensation for injury and damage caused by defective or unsafe goods are adequate and appropriate to modern conditions;
- (b) the appropriate legislative means of affecting any desirable changes to the existing laws in relation thereto, having regard to any constitutional limitations on Commonwealth power; and
- (c) any related matter.

IN PERFORMING its functions in relation to this Reference, the Commission shall —

- (a) consult relevant government authorities, including the Federal Bureau of Consumer Affairs, representatives of manufacturers, distributors, retailers, insurers, consumers and such other persons and bodies as it thinks fit;
- (b) have regard to the cost to business and the community, and any effects on the cost and availability of insurance and on product innovation and availability, of any increase in the liability of manufacturers, distributors and retailers in relation to defective or unsafe goods;
- (c) consider the desirability of uniformity between relevant laws to which the *Law Reform Commission Act 1973* applies and other Australian laws;
- (d) have regard to relevant law and experience of other countries.

The Commission is to report not later than 30 June 1989.

DATED 11 September 1987

Lionel Bowen  
Attorney-General

# Terms of reference

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Attorney-General  
200 Queen Street, Melbourne VIC 3000

21 October 1987

Professor D St.L. Kelly  
Chairperson  
Law Reform Commission  
160 Queen Street  
MELBOURNE 3000

Dear Professor Kelly,

In the context of my standing reference to the Commission dated 14 September 1987, I authorise the Commission to co-operate with the Australian Law Reform Commission on its reference on Product Liability.

In relation to that reference, the Commission should perform an ancillary role, not involving the diversion of significant resources from its own programs.

The Commission may exercise its own discretion in deciding whether to report to me separately on the subject of product liability in Victoria, or to present a joint report with the Australian Law Reform Commission.

Yours sincerely,

Jim Kennan  
Attorney-General

# Participants

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## **Australian Law Reform Commission**

In accordance with the Law Reform Commission Act 1973 (Cth) s 27(1), this reference was dealt with by a Division of the Commission comprising the following members:

### *President*

The Honourable Justice EA Evatt, AO (from January 1988)  
The Honourable Xavier Connor, AO (to December 1987)

### *Deputy President*

John Greenwell

### *Commissioner-in-charge*

John Goldring

### *Commissioners*

David Hambly  
The Honourable Justice DM Ryan  
Nicholas Seddon  
The Honourable Justice MR Wilcox

## **Victorian Law Reform Commission**

In accordance with the Law Reform Commission Act 1984 (Vic) s 12(1), this reference was dealt with by a Division of the Commission comprising the following members:

### *Chairperson*

David StL Kelly

### *Commissioner-in-charge*

Jude Wallace

### *Commissioners*

Leigh Masel (to December 1988)  
Frank Paton (from December 1988)  
Alan Rassaby (from December 1988)  
Tony Smith (to December 1988)  
Gary Sullivan (to December 1988)  
Philip Williams

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Mr J Dawson, Group Managing Director, Hannan Group Pty Ltd, Melbourne

Mr AJ Duggan, Reader in Law, University of Melbourne

Mr R Gardini, Secretary and General Counsel, Confederation of Australian Industry,  
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Mr M Gill, Solicitor, Phillips Fox, Sydney

Mr PM Greenwood, President, SBP



Mr B Gross QC, Barrister, Sydney  
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Mr F Hoffmann, Hoffmann Consulting Pty Ltd  
Mr PM Holt, Director, NSW Chamber of Manufactures  
Mr BR Kercher, Senior Lecturer in Law, Macquarie University  
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\* The recommendations, statements of opinion and conclusions in this report are those of the members of the Commissions alone. They should not be taken to represent the views of the consultants or of the organisations with which they are associated.



# Summary of Report

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## Introduction

1. The *Product Liability* report, prepared by the Australian and Victorian Law Reform Commissions, is concerned with compensation laws. It sets out recommendations for reform of the present 'patchwork quilt' of laws that govern when the manufacturers or suppliers of goods should be liable for losses caused by goods.

## Main themes

2. The report takes up the following main themes
- manufacturers, suppliers and consumers should, so far as possible, be free to make their own decisions about the goods they make, supply and use
  - manufacturers, suppliers and consumers need and want certainty and predictability in the laws that apply to them
  - compensation law should not be simply another level of regulation imposed on manufacturers and suppliers
  - compensation law should underwrite what manufacturers and suppliers of goods already do – accept responsibility for the losses their goods cause
  - manufacturers and suppliers – not courts – are in the best position to make commercial, cost-effective business decisions about manufacturing and supplying goods
  - manufacturers, suppliers and consumers should not have to bear responsibility for the mistakes of others – just for their own mistakes
  - market mechanisms – in particular, pricing – are effective and efficient means of spreading the cost of losses caused by goods among those who benefit from the goods.

## Policy considerations

### *Fundamental questions*

3. *Fundamental questions.* The report identifies two simple, basic policy questions in this area:

- when should the burden of costs arising from a loss caused by goods – that is, by something goods did – be shifted from the person who suffered the loss to someone else?
- to whom should it be shifted?

## 2/ *Product Liability*

4. *Manufacturers and suppliers already bear risks.* Existing law already ensures that manufacturers and suppliers of goods bear a significant part of the risk of losses caused by goods or the cost of avoiding the losses.

- *Compensation laws* require them, in many cases, to compensate for losses caused by something their goods did – for example, where the goods do not comply with a term in a contract for the supply of goods.
- *Regulatory controls*, such as pure food regulations, establish standards for goods and require manufacturers or suppliers of goods either to comply with those standards or risk a penalty.

The report acknowledges the sound reasons for shifting such costs to manufacturers and suppliers – and through them, to their consumers:

- it promotes proper pricing of goods
- proper pricing provides the best incentive
  - for manufacturers and suppliers to take the most cost-effective steps to prevent their goods causing loss
  - for both producers and consumers to make economically efficient decisions about the production and consumption of goods
- it uses market mechanisms to spread the cost of the losses efficiently to those who benefit from the goods.

5. *Prices should reflect all costs.* Unless the price of goods reflects all costs associated with goods, including the cost of compensation and loss prevention

- the price is likely to be distorted
- those who suffer the loss, or the taxpayer, will be subsidising manufacturers, suppliers and other consumers
- producers of subsidised goods will be given an unjustified competitive advantage in the market
- because consumers will not be paying the full cost of the goods, consumption will be artificially increased and resources will be inefficiently allocated.

6. *Incentives for optimal loss prevention.* Manufacturers and suppliers decide the extent to which they will build into their goods features that will reduce the risk of losses the goods might otherwise cause. Regulatory controls may require some such features, but leave a discretion about others. The law should provide incentives to make decisions that lead to the *optimal* level of safety or quality of goods: that level of safety or quality at which the cost of adding the next loss preventing feature to the goods is the same as the cost of the losses the feature is designed to prevent.

7. *Providing the incentive.* Compensation policy will maximise this only if the producer's legal liability is close to the cost of loss associated with the

product. Consumers are not in a position to make decisions about the potential of goods to cause loss: they must take the goods on trust. Manufacturers and suppliers make these decisions every day; they are in the best position to do so. They usually have much greater knowledge about the goods and what they might do. They can control the design and construction of the goods and the warnings and other information provided about the goods.

*Basic policy objectives: matching the risk of loss with the benefits*

8. *Matching risks and benefits.* The basic policy underlying the laws that govern entitlement to compensation for loss and injury caused by something goods do should be that those who manufacture and supply goods – and through them, their customers, who use and enjoy the goods – should bear the risk of losses caused by what the goods do. The risks of losses caused by goods should be ‘matched’ with the benefits derived from those goods, so that those who benefit pay the full cost of their benefit. This basic policy applies only to the risks of losses caused by something the goods do, not other losses. The state or condition of the goods and the conduct of the manufacturer or supplier are irrelevant. It also promotes

- freedom of manufacturers, suppliers and consumers to make their own choices in relation to goods, knowing that the law will hold them responsible for what they do, and
- prudence by manufacturers, suppliers and consumers.

9. *Cost containment.* The costs of ascertaining rights to, and of delivering, compensation should be minimised. Compensation laws do not affect the actual cost of losses to society (except to the extent that the incentive which they provide reduces the total amount of loss). They determine how losses are spread. The costs of spreading loss are called ‘transaction costs’, and include legal costs. These become unnecessarily high if laws are obscure or complex or litigation is too long, too complicated or involves unnecessary parties or witnesses. Where possible, consistent with fair procedures and the basic policy objectives, efficiency requires the elimination of unnecessary transaction costs.

### **Characteristics of a good product liability law**

10. A good product liability law should

- ensure that those who manufacture and supply goods – and their customers, who use and enjoy the goods – bear the risk of losses caused by what the goods do
- take full account of other causes of those losses, and
- provide the cheapest, most efficient means of determining compensation claims.

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### **The need for reform**

#### *Policy grounds*

11. The existing law does not ensure that those who manufacture and supply goods – and their customers – bear the risk of losses caused by what the goods do. It does not ‘match’ the risks with the benefits because

- the standards by which goods are assessed automatically exclude from compensation some people who suffer loss through no fault of their own
- differing standards apply depending on the class of person claiming compensation, but the class into which a person falls is based on arbitrary and often fortuitous circumstances
- it may be impossible to identify the party who is liable for what goods did
- within the chain of manufacture and supply, the law may impose liability on the wrong person
- the measure of damages differs depending on the cause of action pleaded, which does not necessarily bear any rational relation to the loss suffered
- rules for the assessment of compensation lead to uncertainty in personal injury and death cases where future losses are involved.

The existing law does not properly take account of other factors involved in the occurrence of losses because

- the conduct of the claimant may increase the risk of loss but, in a negligence action, will be relevant only if the defendant can show that it is negligent
- the conduct of the claimant is usually irrelevant in actions for breach of contract and under the Trade Practices Act 1974 (Cth) Pt V, Div 2A
- regardless of the cause of action, proper account may not be taken of the involvement of others in causing loss.

The existing law does not minimise costs because

- it is costly to identify the proper defendant, particularly in negligence actions, and even in contract and under the Trade Practices Act 1974 (Cth) Pt V, Div 2A, successive actions may be required before the proper defendant is identified
- it is costly to establish a breach of the standard applicable to the cause of action pleaded, particularly the negligence standard
- the varied sources of rights can cause confusion and, because more than one right may be available in a particular case, several causes of action may be pleaded in the case
- the lump sum payment rule can result in dissipation of damages awards, meaning that costs are imposed on publicly funded health and income maintenance schemes.

### *Economic efficiency*

12. The existing law is not economically efficient because

- reliance on standards that are vague and indeterminate, and thus do not determine liability clearly, will generally produce inefficient allocation of resources by manufacturers and suppliers of goods
- inefficient resource allocation results in distortions in the price of goods
- the cost barriers to enforcement of rights to compensation means that losses caused by goods are under-reported, which also results in price distortions
- price distortions produce ill-informed purchasing decisions by consumers and inefficient allocation of purchasing resources by consumers
- the irrelevance of contributory negligence in contract actions means that consumers are not encouraged to be prudent or adopt risk avoidance measures.

### *Empirical evidence*

13. While views differ as to the significance of the empirical evidence, the report finds that the evidence available gives cause for concern about

- the number of injuries and deaths caused by goods
- the degree to which several aspects of the existing law present a barrier to the enforcement of the rights it confers.

### *New laws needed*

14. Product liability laws must be reformed. It is not possible to make them conform with the desirable characteristics merely by tinkering with existing laws. For example, merely to change the basis of liability from negligence or unmerchantable quality to 'lack of safety' would not

- alter the fact that some persons are not compensated even though they have not contributed to their loss, because liability would be based on breach of a similarly indeterminate standard, or
- reduce transaction costs related to proof of breach of the standard.

It is necessary to construct a new scheme of liability for compensation for losses caused by what goods do.

## When should compensation be paid?

### *Basis of liability*

15. A person should have a right of compensation if the person suffers loss or damage caused by the way goods acted and the goods were manufactured or supplied in trade or commerce.

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### *Defences*

16. A number of defences should be available.

- *Acceptance of risk*. There should be no right to compensation if what the claimant knew about the goods before the loss or damage occurred would have enabled a reasonable person to assess the risk that the goods would act as they did.
- *'Development risks'*. There should be no right to compensation if, when the goods were first supplied by retail, it could not have been discovered, using any scientific or other technique then known or in any other way, that the goods could act in the way that they did.
- *'Mandatory standards'*. There should be no right to compensation if, the goods acted as they did only because they, or a person involved in their manufacture or supply, complied with a mandatory standard applicable by law to the goods. (In this case, the government that made the standard mandatory should assume liability.)

### *Reduction of amount of compensation*

17. The amount of compensation payable should be adjusted to exclude that part of the loss that was caused by

- an act of the claimant
- an act of some other person (who is not involved in manufacture or supply of the goods) or
- something independent of human control.

It should be further reduced to take account of any unreasonableness, if the unreasonable act of the claimant or of a third party or unreasonable advice to use, or about how to use, the goods increased the risk that the goods would cause the loss.

### *Is a further element necessary?*

18. Liability for losses caused by the way goods act should not be limited by a requirement that a general standard, for example, that the goods are 'unsafe' or 'defective', has not been complied with. An earlier proposal by the Australian Commission that liability should be based on failure to comply with a standard either of 'safety' or 'acceptability' was subjected to trenchant criticism in consultations and was abandoned. The problems which arise from the use of such standards in the existing law must be avoided in proposals for new law. The problems include the following.

- Non-compliance with a standard fixed by a regulatory law is not an appropriate basis of liability to pay compensation. *Manufacturers and suppliers*



*of the goods would only bear the risk of loss if the goods, or some person, did not comply with the standard. Other losses would be borne by the victim. This would not encourage proper decision making by manufacturers and suppliers.*

- Regulatory standards are precise but become outdated quickly. General standards apply to all cases, and must be flexible. *A general standard is necessarily vague and uncertain.* Whether or not the standard has been breached can only be determined *after* the goods have caused loss. Neither the person liable for the consequences of a breach of the standard nor anyone else can be certain whether or not the standard has been breached until the court decides the matter.
- Courts give vague or uncertain standards specific application to particular cases. How they do so cannot be predicted accurately. Courts may have to make decisions based on policy, which requires the balancing of competing interests. The policy which determines how decisions are made should be established by Parliament and expressed in the law, not determined by the courts after the event. If a court has to decide such matters, it must examine the process of manufacture and supply, which is expensive. To determine whether or not goods are 'safe', for example, the court must consider
  - whether or not they could have been made any safer. This requires a close examination of the process of production – as it operated many years previously. The court may do a risk/utility analysis of manufacture and supply of goods of the type that have caused loss. Little guidance is provided by the law as to the factors to be considered or the weight to be given to those factors.
  - how safe is 'safe enough', taking into consideration such matters as availability of alternatives, price and consumer preferences. Under existing law courts do this, but are not well suited to it. In particular, they are not subject to the pressures imposed by the commercial environment, as manufacturers are when they make these decisions.
- Whether a defendant or particular goods complied with a standard is decided by the court *only if the goods have in fact caused loss*: this is a fact to be taken into account in determining whether or not the standard has been breached. There is a logical problem.
- Unpredictability in the operation of general standards increases with uncertainty. As the discretion of the court in determining whether or not the standard has been breached becomes more extensive, the operation of standards that are already vague and unclear become even more unpredictable.

## **Allocating liability: how should the cost of compensation be distributed?**

### *Who should be sued?*

19. *A representative defendant.* The claimant must be able to bring the claim against a person involved in the manufacture and supply of goods who should be clearly identified by the law. That should be the person who is in the best position to identify the person or persons involved in the manufacture and supply of goods whose acts caused the goods to act as they did. This is normally the manufacturer of the goods. There are some exceptions:

- if the goods are imported, the importer should also be liable in the same way as the manufacturer
- if the manufacturer cannot be identified, a supplier of the goods should be liable if, within a reasonable time after being asked for the information, it does not identify the manufacturer or a previous supplier
- if the only remedy sought is repair or replacement of the goods or a refund of the price, existing rights against retail supplies should be preserved.

20. *The 'manufacturer' and the 'goods'.* The term 'manufacturer' should be defined in the same way as in the Trade Practices Act 1974 (Cth), Pt V, Div 2A. All corporeal chattels should be covered except human blood and tissue and electricity. Where the goods acted as they did because of something a component part did, the claimant should be able to choose between suing the manufacturer of that part or the assembler of the final product.

### *Contribution and indemnity*

21. The representative defendant should be able to recover indemnity or contribution from another person or persons involved in the manufacture and supply of the goods whose acts caused or contributed to the way the goods acted or who supplied a component part that acted in a way that caused or contributed to the way the goods acted. That person is called a 'contributor'. If there is more than one contributor, the contribution should be paid equally by all the contributors unless the court considers this would be unjust. If so, the amount of the contribution should be proportional to the input of the contributors (measured by price). Contributors should be able to agree among themselves to bear part or all of any liability resulting from the way goods act, provided they are of equal bargaining power.

## **What losses should be compensated?**

### *Types of loss for which compensation should be recoverable*

22. Compensation should cover the following types of loss caused by the way goods acted:

- economic and non-economic loss arising from personal injury, disease or death

- economic and non-economic loss arising from loss of or damage to property in which the claimant had a proprietary or possessory interest
- if the claimant had a proprietary or possessory interest in goods which failed to perform so that the claimant suffered economic loss or damage – the amount of that loss or damage.

Dependants of a person who died as a result of the way goods acted should only have limited rights to compensation. Other types of loss should not be recoverable. No limits should be placed on the amount of compensation, but there should be a review of the law of damages generally which should consider such questions as

- the desirability of damages for non-economic loss
- alternatives to the 'once and for all' lump-sum payment of damages.

#### *Exclusion or restriction of liability*

23. Businesses which supply goods to other businesses for business purposes should be able to agree among themselves to bear part or all of any liability resulting from the way goods act, provided that their bargaining power is equal.

#### **Relationship with other laws**

##### *A national law of wide scope*

24. Liability to pay compensation for loss caused by goods should be uniform throughout the national market. Federal law already constitutes a major part of existing law. The rules should be contained in the Trade Practices Act 1974 (Cth) and there should be complementary State laws in Victoria and other States and Territories.

##### *An exclusive remedy*

25. *Exclusive remedy.* To reduce transaction costs generated by the availability of multiple causes of action, the recommended rights should supersede any other right to compensation against a person involved in the manufacture or supply of the goods (except where the remedy sought is the repair or replacement of the goods or a refund of the price) if, in a proceeding to enforce that right, the way the goods acted must be proved. No other rights under existing law, including rights to injunctive and declaratory relief and other contractual rights, should be affected.

26. *Exceptions.* There should be two exceptions to this rule.

- *International obligations.* Rights created by a law giving effect to Australia's international obligations may be inconsistent with the rights proposed, and should prevail over those rights.

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- *Workers compensation schemes.* Most States and Territories have introduced special schemes providing benefits for persons injured at work. Some injuries suffered at work are caused by goods. If claims could be made under the proposed laws in respect of such injuries, the manufacturer, rather than the employer, would be liable. Increased claims would result in significant increases in liability insurance premiums, but in practice it is virtually certain that workers compensation insurers would not reduce their premiums and so offset those increases. The increased cost would create too great a burden for the Australian economy. The proposed laws should not apply to loss suffered at work where the person injured may receive benefits under workers compensation laws.

### *Other remedies*

27. The reference concerns laws providing compensation, so no changes to laws providing other remedies are recommended. Exemplary damages should not be available where loss results from something goods do. Criminal law, which is not affected by the proposals, provides proper safeguards, and should be relied upon where punishment is to be inflicted.

### **Ancillary matters**

28. The report makes a number of proposals about ancillary matters:

- *Limitation periods.* There should be a three year limitation for both compensation act and contribution actions.
- *No statute of repose.* A statute of repose cuts off the right to make a claim after a fixed period, arbitrarily extinguishes rights and is not consistent with the policy objectives referred to in paragraphs 3-9. It would shield manufacturers and suppliers from liability, even when they had made specific representations about durability of goods.
- *Jurisdiction.* Jurisdiction over claims based on the proposed legislation should be conferred on the widest possible range of federal, State and Territory courts, subject to any restrictions which may currently apply. Legislation should not specifically confer jurisdiction on specialised tribunals established to deal with matters arising out of consumer contracts.
- *Enforcement.* If a judgment against a subsidiary company is not satisfied within 60 days, it should be enforceable against a holding company. There are no other specific recommendations for changes in the law to deal with abuse of corporate forms, but a separate review of this question is recommended.
- *Conflict of laws.* The proposed rules should apply to all goods manufactured or supplied in Australia.

## Procedural requirements – notice before action

29. To discourage fraudulent and spurious claims and to encourage negotiated settlements of claims where issues of fact are not disputed, claimants should have to serve a verified notice setting out the circumstances of the claim and other relevant matters, so far as he or she knows about them, before commencing proceedings to enforce a right of compensation. The proposed laws specify what must be contained in the notice.

## Assessment and implications

### *Assessing economic impacts*

30. A traditional cost-benefit analysis of the impact of the proposed laws was impossible. Much of the necessary data needed for a traditional cost-benefit analysis is not available or could only be retrieved at a prohibitive cost. Exact costs and benefits, especially any reduction in the amount of loss caused by goods which would result from greater incentives, could not be ascertained. The role of cost-benefit analysis in the assessment of proposals for reform of such laws may be limited to ensuring that implicit value judgments and potential consequences of a policy or law are identified. The Commissions addressed the questions of cost and economic impact on various sections of the community through an exhaustive study of the possible economic effects of the recommended changes in the law, which identified the kinds of costs and benefits that would flow from adoption of the recommendations and gave a perspective of the economic effects, so far as available information permitted.

### *Types of costs and benefits*

31. *Kinds of costs and benefits.* Costs and benefits of the recommended changes in the law occur at the national level and at the level of individuals – those who suffer loss, manufacturers and suppliers of goods.

32. *Effects on the community as a whole.* Possible national costs include:

- increased cost of liability insurance resulting from rights to claim compensation being conferred on a wider section of the community and being more easily enforced than under existing law
- the cost of the increased risk management and quality control levels which manufacturers would be likely to establish in response to this increase in liability exposure (this may be offset against premium decreases).

Such costs will be reflected in prices of goods and will affect the calculation of the inflation rate. They may impact on broader macro-economic issues such as employment and the balance of payments. Other costs include the effect of the recommended changes on

- research, development and product innovation

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- the competitive position of Australian business in both domestic and export markets.

Potential national benefits include:

- a reduction in loss caused by goods and consequent effects on productivity at both national and individual level, including reduction of
  - absenteeism, sick leave etc
  - the cost of publicly funded health care services and social security
- increased efficiency of delivery of compensation, including
  - reduced litigation
  - savings in transaction and infrastructure costs associated with litigation, such as the cost of the court system
- improved quality of goods affecting the export competitiveness of Australian business and its competitiveness domestically against imports
- achievement of better competition in domestic markets through ensuring proper pricing of both imported and domestically-produced goods.

### *Macro-economic effects – summary*

33. The economic study conducted for the Commissions concluded that

- laws of the type recommended will produce an overall increase in economic welfare
- a reduction in costs borne by the whole community is likely
- at the macro-economic level, the proposals will re-distribute the costs between persons involved in manufacture and supply of the goods, rather than increase the total costs borne by the community
- social welfare would be improved as burdens are shifted from those suffering the loss or injury to manufacturers and suppliers, who can bear them at the lowest cost.

Taking as an indicator increases in product liability insurance costs (including not only premium costs but also costs incurred in risk avoidance and loss prevention, such as improved systems of quality control), the study used a mathematical model of the economy to test the effects of changes in product liability insurance costs in three different scenarios. In a 'realistic' scenario, assuming that insurance costs were 1% of total production costs, the results showed that, for each 1% annual increase in product liability insurance costs, the following effects would occur in each year over a 5 year period:

- a rise in prices of between 0.12% and 0.5%
- a rise in domestic production costs of between 0.13% and 0.42%
- a fall in productivity of less than 0.005%

- a fall in the output of the economy as a whole of between 0.02% and 0.08%
- a rise in the unemployment rate of between 0.02% and 0.6%.

If firms absorb the costs, rather than passing them on through prices, and if they increase loss prevention successfully, impacts would be less. Overall, the macro-economic effect of the proposed changes represent an improvement in the delivery of economically efficient compensation and would confer net benefits on society.

*Effects of redistribution of costs on those who suffer loss*

34. *Costs.* In the long run, consumers of goods will bear most of the cost generated by goods related loss because increased production and insurance costs of manufacturers and suppliers will be passed on through prices.

35. *Benefits.* The proposed changes in the law will provide benefits for those who suffer goods related loss, including

- a more accessible remedy
- a clear criterion of liability: the claimant need only
  - identify the manufacturer of the goods (or another representative defendant)
  - prove that the loss was caused by the way goods acted
  - notify the defendant of the circumstances in which the loss occurred
- reduced transaction costs because
  - the difficulty and cost of obtaining evidence will be reduced
  - parties who may be sued are identified more precisely
  - more compensation dollars go to claimants
- greater incentives for consumers and users of goods to take care in their own interests.

*Effects on those involved in the manufacture and supply of goods*

36. *Insurance premium charges, quality control and risk management.* Increased exposure to the risk of claims is likely to lead to some increase in insurance premium costs, but the economic assessment suggested that this increase, realistically, would not be significant, because of potential savings and benefits resulting from the recommended changes. The incentives for manufacturers and suppliers of goods to take measures leading to optimal loss prevention are likely to increase production costs.

37. *Perceived effect on product innovation.* Policies of Commonwealth and State governments encourage product innovation. The 'development risks' defence should foster the development of innovative products without a major

## 14/ *Product Liability*

risk of litigation. Manufacturers must decide how much testing should be done and what risks to try to prevent. Where there are doubts about the way goods may act in particular circumstances, warnings to the public or learned intermediaries who advise on the use of goods may allow defences to be raised or compensation to be reduced.

37. *Other benefits.* Among the benefits which the recommended changes in the law will provide for manufacturers and suppliers are:

- a clear criterion of liability because terms that produce uncertainty, like 'fit for purpose' or 'reasonable conduct', are avoided where possible
- account is taken of all factors causing, or contributing to, the loss in calculating the amount of compensation
- clear defences in cases of
  - acceptance of risk by the claimant
  - 'development risks' which are quite unforeseeable
  - loss caused where goods acted as they did only because of compliance with a mandatory standard
- decisions about production and distribution must be made by the manufacturer or supplier before the goods are placed on the market, not by the courts after they have caused loss
- businesses may agree to limit or exclude operation of the recommended changes
- enhanced competition generally and enhanced competitiveness of individual businesses
- reduced transaction costs associated with compensation claims.

## Other matters

### *Vaccines*

39. Vaccines used in mass immunisation programs have social benefits which outweigh the known risks associated with their use. The report recommends that they might be excluded from the operation of the general rules, but only if and when a special scheme providing compensation for loss, illness or injury resulting from their use is established.

### *Relationship with ALRC proposals for grouped proceedings in the Federal Court*

40. If the Australian Commission's proposals for grouped proceedings in the Federal Court are adopted, where the same or similar goods have caused damage to a large number of persons, proceedings might be 'grouped' as there might be common questions of law or fact arising out of similar material facts. Each



claimant would still need to establish matters particular to himself or herself. A grouped proceeding would reduce some, but not all, of the transaction costs.

## Conclusion

41. The recommended changes in the law will achieve the policy objectives – that the law should ensure that those who gain benefits from an economic activity should bear the risks associated with that activity – so that

- goods are priced properly
- there is an incentive to produce goods at the optimal level of loss prevention, and
- compensation, where payable, is delivered as efficiently as possible

to a far greater extent than the existing law.