THE LIABILITY OF MANUFACTURERS AND IMPORTERS UNDER THE TRADE PRACTICES AMENDMENT ACT 1978

BY GARY M. GREGG* AND TED D. TZOVARAS**

The introduction of Division 2A into Part V of the Trade Practices Act has brought Australia firmly into line with current thinking in the Western world on the liability of manufacturers. The new Division has two aspects. First, it provides consumers, and in some cases their successors in title, with a statutory right to compensation from manufacturers and importers in specified circumstances. Secondly, it grants to sellers of goods a right to indemnity from a manufacturer (or importer) where the latter is liable to compensate the consumer under this Division.

This article examines the likely effect that the introduction of Division 2A will have on the liability of manufacturers and importers of goods. The article commences by outlining the liability of manufacturers in Australia prior to the recent amendments. The operation and scope of Division 2A are then described. The article concludes by focusing on certain practical difficulties and problems of interpretation inherent in the new Division.

Recent amendments[1] to the Trade Practices Act 1974 (Cth) represent a significant extension of the existing bases of product liability in Australia. The amendments, which insert a new Division 2A into Part V of the Act, came into effect on 6 December 1978.

Division 2A has two principal objects. First, it provides for manufacturers and importers selling through an intermediary to be concurrently liable with the actual seller of the goods in relation to certain statutory obligations. Secondly, it grants to a seller a statutory right to be indemnified by the manufacturer where the seller is liable to compensate a consumer for a breach of an obligation implied by the Act.

The new Division can be seen as part of a trend in the Western world towards stricter liability for defective products.[2] In the United States the liability of a seller or manufacturer of a defective product has come to be governed by a separate body of law known as "products liability". According to Professor Prosser, "products liability" is ". . . the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of

* B.A. (U.N.S.W.), M.A., LL.B. (Syd.).
** LL.B. (Syd.).

[1] Trade Practices Amendment Act 1978 (No. 206 of 1978).

[2] For a brief international survey of products liability see the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury Cmnd 7054 (1978) Vol. 3.

contract".[3] The courts have been primarily responsible for the development of the law of products liability in the United States. Originally, the courts enabled the purchaser to recover from the manufacturer for an injury resulting from a defective product by giving effect to either express or implied contractual warranties despite the absence of privity.[4] Subsequently, this device was extended to allow persons other than the purchaser to recover.[5] More recently, most jurisdictions have adopted the doctrine of strict liability in tort, which was first applied in *Greenman* v. *Yuba Power Products Inc.*[6] Under this doctrine a plaintiff will succeed in an action in tort if he shows that the product was defective when it left the manufacturer, irrespective of fault on the part of the manufacturer.[7]

The nations of Europe are also moving towards strict liability for defective products. The Council of Europe has recently approved a Draft Convention on Products Liability in Regard to Personal Injury and Death,[8] known as the "Strasbourg Convention", which adopts a system of strict liability. The Strasbourg Convention, which was opened for signature by member states in January 1977, has been signed by Austria, Belgium, France and Luxembourg.[9] Further, the European Economic Community has produced a Draft Directive[10] which contains terms similar to those of the Strasbourg Convention. However, unlike the latter, the Directive also covers damage to personal property.[11]

In the United Kingdom the English and Scottish Law Commissions have also recommended a system of strict liability for defective

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[3] Prosser, *The Law of Torts* (4th ed. 1971) 641.

[4] *Coca-Cola Bottling Works* v. *Lyons* (1927) 111 Southern Reporter 305.

[5] *Henningsen* v. *Bloomfield Motors Inc.* (1960) 161 Atlantic Reporter 2d 69.

[6] (1962) 377 Pacific Reporter 2d 897.

[7] For a comprehensive treatment of the U.S. position see Frumer and Friedman, *Products Liability* (1978). See also: Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)" (1960) 69 Yale Law Journal 1099; Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1966) 50 Minnesota Law Review 791; Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law" (1969) 32 Modern Law Review 1; Leigh-Jones, "Products Liability: Consumer Protection in America" (1969) 27 Cambridge Law Journal 54; Gibson, "Products Liability in the United States and England: the Difference and Why" (1975) 3 Anglo-American Law Review 493; and Waddams, "The Strict Liability of Suppliers of Goods" (1974) 37 Modern Law Review 154. For reform proposals see Gingerich, "The Interagency Task Force 'Blueprint' For Reforming Product Liability Tort Law in the United States" (1978) 8 Georgia Journal of International and Comparative Law 279.

[8] The Convention is reproduced in the Royal Commission's Report, *supra* n. 2, Vol. 1, Annex 10.

[9] The other member states are the United Kingdom, Eire, Federal Republic of Germany, Switzerland, Italy, Sweden, Denmark, Norway, Iceland, Cyprus, Malta and Turkey.

[10] Reproduced in the Royal Commission's Report, *supra* n. 2, Vol. 1, Annex 11.

[11] For a discussion of the European position see: Lorenz, "Some Comparative Aspects of the European Unification of the Law of Products Liability" (1975) 60 Cornell Law Review 1005; Harland, "Products Liability and International Trade Law" (1977) 8 Sydney Law Review 358; Goldring, "Liability of Manufacturers for

products.[12] More recently, a Royal Commission chaired by Lord Pearson has recommended that "producers should be strictly liable in tort for death or personal injury caused by defective products".[13] Although the Pearson Commission's recommendation substantially follows the Strasbourg Convention, the Commission specifically identified the proposed basis of liability as tortious.[14]

A. OUTLINE OF MANUFACTURERS' LIABILITY IN AUSTRALIA PRIOR TO THE INTRODUCTION OF DIVISION 2A

In order to appreciate more fully the effect of the recent amendments, it is helpful to consider briefly the prior legal bases for product liability in Australia, namely liability based in tort, contract and statutory obligations.[15]

It is trite law that a person suffering personal injury or damage to property caused by defective goods may be able to recover damages in tort against the manufacturer of the goods if he can prove that the manufacturer was negligent.[16] In the celebrated case of *Donoghue* v. *Stevenson*,[17] Lord Atkin made it clear that a manufacturer owes a legal duty of care to a consumer in the preparation or putting up of products which are intended to reach the ultimate consumer in the form in which they left him and with no reasonable possibility of intermediate inspection.[18] Although an action in negligence does not depend upon contractual privity, the plaintiff's task of proving that the defendant breached his duty of care is often a difficult one. On the other hand, while the burden of proof which the plaintiff bears in an action in contract is less onerous, he will normally have no such action against the manufacturer unless he is able to establish a collateral contract.[19]

Defective Goods: Some European Trends" (1977) 51 Law Institute Journal 240; Hanotiau, "The Council of Europe Convention on Products Liability" (1978) 8 Georgia Journal of International and Comparative Law 325. For a general survey see Association Européene d'Etudes Juridiques et Fiscales, *Product Liability in Europe* (1975).

[12] Law Commission Working Paper No. 64; the Scottish Law Commission Memorandum No. 20; *Liability for Defective Products* (1975).

[13] *Supra* n. 2, Vol. 1 para. 1236.

[14] For the current law in the United Kingdom, see Miller and Lovell, *Product Liability* (1977).

[15] For a summary of the law relating to the liability of manufacturers for defective products prior to the introduction of Division 2A, see Goldring and Maher, *Consumer Protection Law in Australia* (1979) Ch. 3.

[16] For the manufacturer's liability in tort see Fleming, *The Law of Torts* (5th ed. 1977) Ch. 23.

[17] [1932] A.C. 562.

[18] *Id.* 599.

[19] The terms of such a contract consist of the manufacturer's representations in consideration of which the consumer contracted with the retailer to purchase the manufacturer's goods. For a discussion on the manufacturer's liability for breach of warranty of a collateral contract see Stoljar, "The *International Harvester* Case: A Manufacturer's Liability for Defective Chattels" (1959) 32 A.L.J. 307; Fricke, "Manufacturer's Liability for Breach of Warranty" (1959) 33 A.L.J. 35; Fricke, "Consumers' Remedies" (1962) 36 A.L.J. 153.

Under the common law and certain State legislation[20] there are a number of terms which are implied in contracts for the supply of goods. These terms cover such matters as the merchantable quality of the product and its fitness for the purpose for which it was acquired. However, as such terms may generally be excluded, it has become common-place for agreements for the supply of goods to seek to negate their operation, so that the parties' rights are governed solely by the express terms of the contract. As a result, legislation has been introduced providing similar implied terms which cannot be excluded by contract.[21] Although in such a case a purchaser of defective goods will have a remedy against the seller of those goods, an action in contract remains inadequate at least in two respects. First, as a practical consideration, the purchaser will have no remedy if the seller becomes insolvent or disappears. Secondly, the doctrine of privity of contract operates to prevent a person other than the purchaser from seeking a remedy.

Clearly, the bases of liability which have been referred to reveal a failure of the law to keep pace with modern changes in methods of manufacturing and marketing of products. Several grounds have been advanced to support a move towards strict liability of manufacturers[22] for defective products.[23] Among these are the following. First, modern advertising and marketing methods convey the manufacturer's representations directly to the consumer and they also actively identify the product with its maker. Secondly, in the words of the Trade Practices Act Review Committee[24] known as the "Swanson Committee", "it is the manufacturer placing goods on to the market in the first place who is largely responsible for the quality of goods".[25] In addition, he is "the only person who can adjust the manufacturing process to take account of any persistent defects".[26] Thirdly, modern methods of packaging decrease the likelihood of intermediate examination of the product, so that the ultimate seller will often be unable to ascertain whether a

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[20] Sale of Goods Act 1923 (N.S.W.), ss. 17-20; Goods Act 1958 (Vic.), ss. 16-19; Sale of Goods Act 1895-1952 (S.A.), ss. 12-15; Sale of Goods Act 1895 (W.A.), ss. 12-15; Sale of Goods Act 1896 (Qld), ss. 15-18; Sale of Goods Act 1896 (Tas.), ss. 17-20; Sale of Goods Ordinance 1954 (A.C.T.), ss. 17-20; Sale of Goods Ordinance 1972 (N.T.), ss. 16-19.

[21] *E.g.* Trade Practices Act 1974 (Cth), Div. 2; Sale of Goods Act 1923 (N.S.W.), ss. 62-64, introduced by the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.); Consumer Transactions Act 1972-1973 (S.A.), ss. 8-11.

[22] "Manufacturer" is here used in its ordinary meaning and does not include an importer. The basis for the imposition of liability upon importers is considered *infra* p. 407.

[23] See generally the N.S.W. Law Reform Commission, *Working Paper on Sale of Goods* (1975) Pt 6; Trade Practices Act Review Committee; *Report to the Minister for Business and Consumer Affairs* (1976) paras 9.120-9.127; Royal Commission on Civil Liability and Compensation for Personal Injury Cmnd 7054 (1978) Vol. 1 paras 1227-1235.

[24] Trade Practices Act Review Committee: *Report to the Minister for Business and Consumer Affairs* (1976).

[25] *Id.* para. 9.122.

[26] *Ibid.*

product is defective. Fourthly, it is thought that strict liability may encourage manufacturers to set higher standards of quality control.[27] Finally, the manufacturer is best placed to arrange appropriate insurance[28] against liability for defective products and to pass on to consumers the increased cost of premiums in the form of higher prices.

Partial legislative recognition of the above grounds took place in Australia with the introduction of section 82 of the Trade Practices Act 1974. This section gives a right of action to any person who suffers loss or damage by conduct of another person contravening a provision, *inter alia*, of Part V of the Act.[29] The pertinent provisions of Part V are: section 52, which prohibits conduct which is misleading or deceptive or is likely to mislead or deceive;[30] section 53, which prohibits specified false representations in relation to the supply or possible supply of goods; section 55, which prohibits misleading conduct by a person as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods; and sections 62 and 63, which prohibit the supply of goods which do not comply with prescribed product safety and information standards. The Trade Practices Amendment Act 1977 provided further relief for a breach of a provision of Part V of the Act by the introduction of sub-section 87(1A). The sub-section provides that on the application by a person who has suffered *or is likely to suffer* loss or damage through the conduct of another person contravening a provision of Part V, the court may make such order or orders against that other person as it thinks appropriate to compensate for, prevent or reduce that loss or damage.[31]

New South Wales was the first Australian jurisdiction to impose upon manufacturers a limited form of liability for goods of unmerchantable quality. The Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.) inserted section 64 into the Sale of Goods Act 1923 (N.S.W.). Broadly, under section 64(5), in any proceedings for breach of the condition of merchantable quality arising out of a contract for a consumer sale, the court has a discretion to add the manufacturer of the goods as a party to the proceedings and to order him to pay the cost of rectifying the defect.

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[27] A contrary argument is that a manufacturer will prefer to pay higher insurance premiums which may still fall short of the cost of higher standards of quality control.

[28] However, insurers are likely to be faced, at least initially, with great difficulties in correctly underwriting product liability risks.

[29] For a discussion of this area of the law see Donald and Heydon, *Trade Practices Law* (1978) Vol. 2, especially 509-613, 618-619, 676-697, 827-846; and Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (1978), especially 80-83, 477-527, 533-536, 570-579, 616-644.

[30] The words "or is likely to mislead or deceive" were added by the Trade Practices Amendment Act 1977.

[31] For a discussion of s. 87 see Donald and Heydon, *op. cit.* 851-854; and Taperell, Vermeesch and Harland, *op. cit.* 630-633.

It was not until the enactment of the Manufacturers Warranties Act 1974 (S.A.) and subsequently the Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.)[32] that a system of strict liability was introduced in an Australian jurisdiction. The South Australian and Australian Capital Territory legislation influenced the recommendations made by the Swanson Committee in its report in 1976.[33] The Committee's recommendations were adopted by the Federal Parliament in the framing of Division 2A. However, unlike the South Australian and Australian Capital Territory legislation, Division 2A does not create a fictional contract between the manufacturer and the consumer into which certain statutory warranties are implied. Instead, the Division imposes on manufacturers a statutory liability to compensate consumers for "loss or damage" arising in prescribed circumstances.

B. GENERAL DESCRIPTION OF DIVISION 2A

A consumer's right of action under Division 2A[34] will arise where a corporation,[35] in trade or commerce, supplies goods manufactured by it to another person who acquires the goods for re-supply, and that person or some other person supplies the goods (not by way of auction) to a consumer,[36] and the goods or the corporation fail to comply with the obligations arising under the respective provisions.

Under section 4B of the Act a person acquires goods as a consumer where the price of the goods does not exceed the prescribed amount (currently $15,000) or, if the price exceeds the prescribed amount, where the goods are of a kind ordinarily acquired for personal or domestic household use or consumption. On the other hand, goods acquired for the purpose of re-supply, or for the purpose of being used up or transformed in the process of production or manufacture are outside consumer transactions.

The consumer's right of action against the manufacturer is only available in relation to goods of a kind ordinarily acquired for personal,

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[32] For a discussion of the South Australian and Australian Capital Territory legislation see Senate Standing Committee on Constitutional and Legal Affairs, *Report on Manufacturers Warranties Ordinance 1975* (1976) and Taperell, Vermeesch and Harland, *op. cit.* 714-717.

[33] The South Australian Act was itself based on the Ontario Law Reform Commission's *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972) Chs 1 and 9. For a discussion of the Canadian position see Waddams, *Products Liability* (1974).

[34] Note that since this article was submitted for publication, a booklet replacing Ch. 18 of Taperell, Vermeesch and Harland, *op. cit.* has been published dealing with the Trade Practices Amendment Act 1978.

[35] S. 4(1) defines "corporation" but must be read in conjunction with ss. 5 and 6 which extend the operation, *inter alia*, of Division 2A to persons not being corporations. See generally Donald and Heydon, *op. cit.* Vol. 1 Ch. 2; and Taperell, Vermeesch and Harland, *op. cit.*, especially 23-24, 28-30, 33-39, 122, 458.

[36] Note however s. 74D discussed *infra* p. 410. The section gives a statutory right of action to any person who derives title to goods not of merchantable quality through or under a consumer.

domestic or household use or consumption.[37] On the other hand, the manufacturer's obligation to indemnify the seller[38] extends to goods *not* of a kind ordinarily acquired for personal, domestic or household use or consumption.[39]

"Manufactured" is defined widely to include grown, extracted, produced, processed and assembled.[40] A corporation is deemed to have manufactured goods if it holds itself out or causes or permits another to hold it out to the public as the manufacturer;[41] or causes or permits its name, brand or mark to be applied to the goods.[42] Further, a corporation which imports goods into Australia is deemed to have manufactured such goods if the manufacturer of the imported goods has no place of business in Australia.[43]

Sections 74B-74E impose on manufacturers selling goods to consumers through intermediaries a liability to compensate a consumer for loss or damage if:

(1) the goods are not reasonably fit for a particular purpose expressly or impliedly made known by a consumer to the manufacturer, either directly or through the person from whom the consumer acquired the goods or a person by whom any antecedent negotiations in connexion with the acquisition of the goods were conducted (section 74B). No right of action will arise under this section where the circumstances show that the consumer did not rely, or that it was unreasonable for him to rely on the skill or judgment of the manufacturer;

(2) the goods do not correspond with the description by which they were supplied to the consumer (section 74C). A manufacturer is not liable under this section unless the description was applied to the goods by or on behalf of the manufacturer or with its consent, whether express or implied;

(3) the goods are not of merchantable quality (section 74D). The manufacturer's liability under this section extends to "any person who derives title to the goods through or under the consumer". No liability arises under this section as regards defects specifically drawn to the consumer's attention before the sale of the goods, nor if the consumer examines the goods before such sale is made, as regards defects that the examination ought to reveal. Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to the goods by the manufacturer, the price received

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[37] S. 74A(2).
[38] S. 74H discussed *infra* pp. 413-414.
[39] See s. 74H(b)(ii).
[40] S. 74A(1).
[41] S. 74A(3)(a) and (c).
[42] S. 74A(3)(b).
[43] S. 74A(4).

by the manufacturer for the goods (if relevant), and all other relevant circumstances; or

(4) the bulk of the goods does not correspond to the sample by reference to which they were supplied (section 74E). No liability arises under this section where the sample is supplied by someone other than the manufacturer without the manufacturer's express or implied concurrence.

The manufacturers' obligations resulting from the above provisions echo the sellers' obligations arising from the terms implied by the provisions of Division 2 of Part V of the Act in a contract for the supply of goods by the seller to the consumer. Further, the terminology used to express the obligations in the new Division is substantially the same as that used in Division 2.[44] Therefore, it would appear that the law relating to Division 2 would be applicable to the interpretation of the concepts in sections 74B-74E.[45]

In addition, the manufacturer will be liable if:

(1) it fails to make repair facilities and parts reasonably available (section 74F). The manufacturer's liability will not arise under this section where it took reasonable action to ensure that consumers acquiring the goods had notice of the restrictions on the availability of repair facilities or parts;

(2) it fails to comply with any express warranty given or made by it, or which it caused or permitted to be made in relation to the goods (section 74G). "Express warranty" means an undertaking, assertion or statement in relation to the quality, performance or characteristics of the goods or in connexion with the supply or the promotion of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods.[46] Where an undertaking, assertion or statement would, if it had been given or made by the manufacturer or a person acting on its behalf, have constituted an express warranty in relation to the goods, such undertaking, assertion or statement is presumed to have been made by the manufacturer unless the manufacturer proves that it did not make and did not cause or permit the giving or the making of the same.

In most cases, a manufacturer has a good defence to a consumer claim[47] if it can show that the loss or damage resulting from the goods

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[44] Compare ss. 74B-74E with ss. 71(2), 70, 71(1) and 72 respectively. Note the similarity of the definition of "merchantable quality" in s. 74D(3) to that in s. 66(2).

[45] This view appears to be favoured by the Trade Practices Commission in its Information Circular No. 26: *Consumer Protection, Sellers' and Manufacturers' Obligations* (1979) paras 2.3-2.12.

[46] S. 74A(1).

[47] "Consumer claim" here includes a claim by a person who acquires title to the goods through or under a consumer in the case of a claim under s. 74D.

was not caused either by its act or default, or by an act or default of its employee or agent; or alternatively that the loss or damage was due to a cause "independent of human control" occurring after the goods had left its control.[48] Moreover, the manufacturer will not be liable under Division 2A where it sells directly to the consumer,[49] although it may be liable for a breach of a contractual term implied by Division 2.

The new Division also grants to sellers the right to be indemnified by manufacturers for liability which they might incur in respect of any loss or damage suffered by consumers. Under section 74H two requirements must be satisfied. First, the seller's liability must have been the result of a breach of a term implied in the contract of supply by a provision of Division 2 of Part V of the Act. Secondly, it must be shown that either the manufacturer would have been liable in respect to the same loss had it been sued directly by the consumer under Division 2A, or, in the case of "non-domestic" goods, it would have been liable to the consumer had the provisions of Division 2A extended the consumer's right of action to cover such goods.[50] Thus, section 74H extends the manufacturer's liability under Division 2A to goods *not* of a kind ordinarily acquired for personal, domestic or household use or consumption. However, the liability of the manufacturer to the seller is limited by section 74L, in effect, to the cost of replacement or repair of the goods, to the extent that such a limitation is "fair or reasonable".[51] It is suggested that this limitation is related to section 68A of the Act (under which a seller is permitted to limit its liability in the case of goods not ordinarily acquired for personal, domestic or household use or consumption) in that section 74L limits the seller's right to be indemnified under section 74H for its liability to a consumer, to the same extent that its liability is capable of limitation under section 68A.[52]

Any contractual term that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying any liability arising under the Division is void (section 74K). Further, any such term may contravene section 53(g) of the Act which makes it an offence to "make a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy".

The time for commencing an action is limited by section 74J to three years from the day on which the cause of action accrued. A cause of action (other than an action under section 74H) is deemed to have accrued on the day the consumer first became aware, or ought reason-

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[48] Ss. 74B(2), 74C(2) and (3), 74D(2), 74E(2), 74F(2) and (3) and 74G(2).

[49] Paras (a) and (b) of sub-s. (1) of ss. 74B-74G.

[50] S. 74H(b)(ii).

[51] S. 74L(3) sets out a number of factors for the courts to consider when deciding what is fair and reasonable.

[52] Compare s. 74L with s. 68A(1)(a)(i) and (ii).

ably to have become aware of the defect in the goods. However, no action lies against the manufacturer after the expiration of ten years from the date the goods were first supplied to a consumer.

C. APPRAISAL OF DIVISION 2A

1. *Who is a manufacturer?*

A manufacturer may be either a corporation that physically manufactures goods, or a corporation that is deemed to have manufactured goods by virtue of sub-sections 74A(3) or (4). The grounds supporting the imposition of strict liability upon manufacturers of defective goods stated above,[53] are not directed towards supporting the imposition of such liability upon deemed manufacturers, such as importers. Clearly, an importer has not the same degree of control as the manufacturer over the goods which it introduces into the chain of supply. It would appear that the extension of such liability to importers was made on policy grounds, to ensure that the plaintiff has a remedy within the jurisdiction in respect of imported goods.

Where a corporation is deemed to be a manufacturer under section 74A(3), the question arises whether the consumer's cause of action under Division 2A lies only against that deemed manufacturer, or whether a concurrent right of action exists against the manufacturer who in fact produced the goods. The legislation is silent on this point.[54] Section 74A(3) provides:

> If—
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> (a) a corporation holds itself out to the public as the manufacturer of goods;
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> (b) a corporation causes or permits the name of the corporation, a name by which the corporation carries on business or a brand or mark of the corporation to be applied to goods supplied by the corporation; or
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> (c) a corporation causes or permits another person, in connexion with the supply or possible supply of goods by that other person, or in connexion with the promotion by that other person by any means of the supply or use of goods, to hold out the corporation to the public as the manufacturer of the goods,
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> the corporation shall be deemed, for the purposes of this Division, to have manufactured the goods.

Donald and Heydon[55] consider that in the case of section 74A(3)(b) it would appear that "both [the manufacturer in fact and the deemed

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[53] *Supra* p. 401.

[54] *Cf.* Council of Europe: Convention on Products Liability in Regard to Personal Injury and Death (1977), Art. 3 para. 5 and the Draft E.E.C. Directive on Products Liability, Art. 3 which expressly provide for this situation.

[55] *Supra* n. 29, 751.

manufacturer] are liable to the consumer as manufacturers under the Act".[56] Such interpretation could arguably be applied to the whole of sub-section (3). This view is supported by the absence of any provision relieving the actual manufacturer from liability where there is also a deemed manufacturer, and is further strengthened by the consumer protection character of the legislation. The alternative view is that only the deemed manufacturer is liable to the consumer. It is more difficult to find support for this view, both as a matter of strict interpretation and as a matter of legislative intention.

If the deemed manufacturer and the actual manufacturer are both liable to the consumer, another problem may arise. Where a corporation is deemed to have manufactured goods by virtue of section 74A(3)(b) (commonly as a seller of "house brand" goods) and those (defective) goods carry only the name, brand or mark of the deemed manufacturer (commonly the seller), a consumer may have difficulty in ascertaining the identity of the manufacturer who in fact produced the goods. The identity of the actual manufacturer will be of particular concern to the consumer where he cannot pursue his action against the deemed manufacturer, for example, because it has become insolvent or has disappeared. Similarly, the problem of identification will be significant where the consumer's only remedy under this Division is against the actual manufacturer because the supplier is not a deemed manufacturer.

It is unfortunate that the legislation does not expressly delineate the liability of the two types of manufacturers in this situation. Further, it is suggested that the problem of identification outlined above could have been overcome by compelling the deemed manufacturer to identify the actual manufacturer of the goods, failure to do so rendering it liable to a penalty.[57]

Section 74A(4) deems an importer to be a manufacturer. It provides:

> If—
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> (a) goods are imported into Australia by a corporation that was not the manufacturer of the goods; and
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> (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 purposes of this Division, to have manufactured the goods.

Further, under section 74A(7):

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[56] *Ibid.* The authors go on to assert that the rights of manufacturers *inter se* would be governed by the ordinary principles of contribution.

[57] *Cf.* the approach taken by the Strasbourg Convention, *op. cit.*, Art. 3 para. 3 which provides that where "the product does not indicate the identity of any of the persons liable . . . each supplier shall be deemed to be a producer [manufacturer] . . . and liable as such, unless he discloses, within a reasonable time, at the request of the claimant [consumer], the identity of the producer or of the person who supplied him with the product . . .".

> 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.

Donald and Heydon[58] suggest that sub-sections (4) and (7) may, when taken together, attract "double liability". On this view, in addition to the corporation on whose behalf the goods are imported being deemed a manufacturer by virtue of sub-sections (4) and (7), the actual importer (agent) is deemed a manufacturer by virtue of sub-section (4). This interpretation is based upon the absence of any provision negating the actual importer's liability. However, the absence of such a negating provision is equally consistent with another interpretation, namely that the corporation alone is the importer, by virtue of the ordinary principles of agency, and is, therefore, the deemed manufacturer under sub-section (4). It is suggested that sub-section (7) envisages a principal-agent relationship, that is a corporation as principal on whose behalf the goods are imported, and the actual importer as its agent. It is a well established principle of statutory interpretation that an Act is to be taken to alter the common law only so far as it is necessary to give effect to the express provisions of the Act.[59] Under the general principles of agency, the principal is liable for all the acts of the agent which are within his authority. It follows that the importation by the agent will be attributed to the corporation; thus the agent will not be deemed to be a manufacturer under sub-section (4) and no question of "double liability" arises. Sub-section (7) would then appear to have been inserted merely to reinforce the operation of sub-section (4).

The manufacturer's obligations under Division 2A do not arise where it sells its goods directly to consumers. In such a case the manufacturer will be subject to the obligations of a seller of goods arising under Division 2 of Part V. However, it should be noted that no equivalent obligations to those arising under sections 74F and 74G are implied by the provisions of Division 2 in a contract for the supply of goods.

2. *Who is entitled to sue?*[60]

The Draft Bill circulated for public comment in 1977 and the Bill first presented to Parliament on 13 April 1978 limited the right of action under Division 2A to the consumer who purchased the goods. It has been argued that a consumer who suffers loss or damage by reason of the failure of goods sold to him by another consumer may have a right to compensation, provided that the goods were originally sold by the manufacturer through an intermediary.[61] The wording of paragraph

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[58] *Supra* n. 29, 751.

[59] *Hocking* v. *Western Australian Bank* (1909) 9 C.L.R. 738, 746 *per* Griffith C.J.

[60] The seller's right to indemnity from the manufacturer is discussed *infra* p. 413.

[61] Tonking, "Manufacturers Warranties" in *Recent Legal Developments in Trade Practices* (The College of Law 1978) 8-9.

(b) of sub-section (1) of each of the relevant sections lends support to this argument.[62] Paragraph (b) merely refers to "a person (whether or not the person who acquired the goods from the corporation) [who] supplies the goods (otherwise than by way of sale by auction) to a consumer". On this interpretation a consumer purchasing second-hand goods from another consumer is entitled to the same rights of action against the manufacturer as the original purchaser of the goods.

Nevertheless, the Draft Bill's restriction of the rights of action to consumers who purchased the goods provoked strong criticism.[63] The subsequent amendment of the Bill expressly extended a right of action to "any person who derives title to the goods through or under the consumer", but only in the case of section 74D. The wording of section 74D removes some of the restrictions in the operation of Division 2A resulting from the definition of consumer in section 4B of the Act. Thus, a person who acquires "domestic" goods from or under a consumer may maintain an action under section 74D even though he acquired such goods for the purpose of re-supply (for example as second-hand goods). So, donees now have a right of action against the manufacturer where goods are not of a merchantable quality. However, under the South Australian and Australian Capital Territory legislation, a donee is regarded as a consumer for the purpose of *all* rights of action under that legislation.[64] It is difficult to see why Division 2A departs in this respect from its South Australian and Australian Capital Territory counterparts. It is anomalous that a donee may recover for loss or damage resulting from goods of unmerchantable quality, but cannot recover where the loss is attributable to some other defect for which a consumer could have recovered, such as the manufacturer's failure to comply with an express warranty in relation to the goods.

The donee's right of action under section 74D may in some cases be difficult to establish. In particular, a person claiming to be a donee may be faced with an onerous task in proving that he is, in fact, a successor in title. This problem is most acute in the family situation, where the donor and the donee both have use of the goods. For example, a spouse who sustains injuries from a defective electric toaster given to her by her husband, will have difficulty in proving that she is in fact the owner.[65] It is suggested that such difficulties of proof could have been overcome either by a presumption that a user has title to the goods unless the contrary is shown by the manufacturer, or by an outright

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[62] Ss. 74B-74G. However, it would be difficult for a claim based on this argument to succeed under ss. 74B-74E.

[63] Harland, "Product Liability: The Proposed Commonwealth Legislation" (1978) 52 Law Institute Journal 231, 240-241; Tonking, *op. cit.* 8.

[64] Manufacturers Warranties Act 1974 (S.A.) s. 3 and Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s. 3(3)(b).

[65] *E.g.* see such cases as *Broughton* v. *Beard Watson & Co. Ltd* (1944) 44 S.R. (N.S.W.) 62 and *Re Cole (A Bankrupt)* [1964] Ch. 175.

extension of the right of action to any lawful user of the goods.[66] The latter alternative would also remove the possibility of hardship to a family unit, which may occur because the family member who suffered the loss or damage had no title to the goods. If the wife in the above example clearly did acquire title to the electric toaster, any loss or damage subsequently suffered by the husband-donor from a defect in the goods, would not, in the absence of negligence, give rise to any right of action.

The present writers respectfully agree with Professor David Harland, Chairman of the National Consumer Affairs Advisory Council, who has advocated a comprehensive review of the whole area of product liability law in so far as it affects persons other than the purchaser or successor in title, including lawful users and mere bystanders.[67]

3. *Repair facilities and parts*

The obligation to ensure the availability of repair facilities and parts under section 74F is the first of two obligations imposed by the Act exclusively on the manufacturer.[68] Under this section the manufacturer must satisfy two separate standards of reasonableness. It must take *reasonable action* to ensure that repair facilities and parts are *reasonably available* to the consumer. Whether a manufacturer has reached the appropriate standard of reasonableness is a question of fact to be determined in the light of the circumstances of each particular case.[69]

A manufacturer may exclude or limit its obligations arising under section 74F by complying with the notice requirements contained in sub-sections (2) and (3). It will so comply if it takes reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he acquired the goods, either that it did not promise the availability of repair facilities or parts, or that some restriction on such availability existed. In certain circumstances, reasonable action in this context may comprise nothing short of extensive advertising of the notice.[70] But even in the ordinary case where something less will satisfy the requirement of reasonable action, it is doubtful whether it would be commercially viable for a manufacturer to rely on sub-sections (2) and (3).[71]

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[66] In contrast, in the United Kingdom the Pearson Commission has recommended a system of strict liability in tort. Hence anyone who suffers injury from a defective product has a cause of action. Further, neither the Strasbourg Convention (Art. 3 para. 1) nor the E.E.C. Draft Directive (Art. 1) limit the liability of producers of defective products to any particular class of persons.

[67] Harland, *supra* n. 60, 245.

[68] This obligation has no counterpart in the Pearson Commission Report, the Strasbourg Convention, or the E.E.C. Draft Directive.

[69] S. 74F(4).

[70] *E.g.* where there are a number of intermediaries in the chain of supply separating the manufacturer from the consumer.

[71] Clearly, a manufacturer that gives notice that it cannot promise the availability of repair facilities and/or parts, is unlikely to achieve a successful level of

The manufacturer's obligations under section 74F, like its other obligations to consumers under Division 2A, exist only where it sells to consumers through an intermediary.[72] Thus, if goods are sold directly by a manufacturer to a consumer, since section 74F has no application the consumer must turn to the implied terms contained in Division 2 for protection. However, the statutory obligation imposed by section 74F (and also that imposed by section 74G) has no equivalent in the contractual obligations implied by Division 2. Accordingly, in a direct sale the consumer receives no protection under the Act regarding the availability of repair facilities and parts.

It is suggested that the consumer's right of action for failure to provide repair facilities and parts ought not to depend on the manufacturer's election as to the procedure it adopts in supplying its goods. It is unfortunate that the Federal Act here departs from the legislation upon which the Swanson Committee's recommendations were largely based. Under the Australian Capital Territory Ordinance[73] and probably under the South Australian Act[74] the consumer retains a right of action even where the goods are purchased directly from the manufacturer.

4. *Express warranties*

The right of action against a manufacturer for breach of an express warranty may well prove to be the most significant right conferred on consumers by Division 2A.[75] Leaving aside Division 2A, where the goods purchased by the consumer fail to possess characteristics or qualities which the manufacturer stated them to have, the consumer is restricted to a cause of action either under section 82 of the Act for breach of a provision of Division I of Part V such as sections 52 or 53,[76] or, at common law for breach of a collateral contract.[77] The consumer is generally faced with considerable difficulty establishing the facts necessary to found either of these actions.

Since the introduction of Division 2A, the consumer's task in establishing a right of action for a failure of the goods to comply with the manufacturer's statement is greatly facilitated by the additional cause of action provided by section 74G. Under this section it is sufficient for the consumer to show that the loss or damage he suffered was the result of the manufacturer's failure to comply with an express warranty given or

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sales of its product unless the potential purchaser is convinced that the product is highly unlikely to require repair, that alternative facilities will be reasonably available, or that the product is of the "throw-away" type.

[72] S. 74F(1)(b).

[73] Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s. 6(b).

[74] See Manufacturers Warranties Act 1974 (S.A.), s. 4(1)(a).

[75] *Supra* p. 405.

[76] See generally Donald and Heydon *op. cit.*, Chs 11 and 12; and Taperell, Vermeesch and Harland, *op. cit.* Ch. 14.

[77] *Supra* n. 19.

made by it in relation to the goods. However, the consumer will still be faced with the difficulties mentioned above where the manufacturer elects to sell its goods directly, since as noted,[78] section 74G has no operation in such circumstances.[79]

The wide definition of express warranty[80] raises the question of whether traditional manufacturers' "guarantees" fall within the definition, and therefore within the operation of section 74G. Clearly, section 74G is applicable if the consumer has knowledge of such a guarantee before or at the time of the sale the natural tendency of which is to induce him to acquire the goods.

Where the breach of an express warranty also constitutes a contravention of a provision of Division 1 of Part V of the Act, the resulting overlap of remedies would appear to require the consumer to elect whether to institute proceedings under section 74G or under section 82.[81] This choice will have a significant bearing on the costs of the consumer's action in two situations. First, where the amount claimed does not exceed the jurisdictional monetary limit of an inferior court the consumer may minimise his costs by proceeding under section 74G in the inferior court. The Act specifically provides that the action can be heard by any "court of competent jurisdiction".[82] On the other hand, an action under section 82, which may only be heard in the Federal Court of Australia,[83] will necessarily result in higher costs. Secondly, where the same facts also give rise to an action in tort, the consumer's costs may be less if he brings his common law action together with his action under section 74G in the same "court of competent jurisdiction". The consumer may well incur higher costs if he elects to proceed under section 82 in the Federal Court since he will usually have to institute separate proceedings for the common law action. However, it should be noted that it may be possible for the Federal Court, by virtue of section 32 of the Federal Court of Australia Act 1976 (Cth) to hear matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is involved.[84]

5. *Seller's indemnity*

Section 74H considerably improves the position of a seller of defective goods. Under this section, a manufacturer may be liable to indemnify a seller in respect of the latter's liability to a consumer under Division 2.[85]

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[78] *Supra* p. 406.

[79] *Cf.* Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s. 6(a) and Manufacturers Warranties Act 1974 (S.A.), s. 5(1)(a).

[80] S. 74A(1).

[81] *Supra* n. 29.

[82] S. 74G(1). Similar provisions are found in ss. 74B-74H.

[83] S. 86.

[84] See Gummow, "Pendent Jurisdiction in Australia—Section 32 of the Federal Court of Australia Act 1976" p. 211.

[85] *Supra* p. 406.

The effect of the section is to redistribute the burden of liability for defective products which previously was primarily borne by the seller. In so doing, it implicitly recognises that the seller, the final link in the chain of supply, has little, if any, influence over the production of goods.

However, the section fails to provide express safeguards against possible abuses by the seller of its right to indemnity. While in many cases the seller would not settle a consumer's claim without notifying the manufacturer, in other cases it may be encouraged by the statutory indemnity and its desire to maintain goodwill to settle over-generously (that is, in excess of the "loss or damage" suffered by the consumer). In the latter situation the manufacturer would resist the seller's claim to indemnity on the ground that the settlement was unrealistic, thus necessitating legal action on the part of the seller to enforce its claim under section 74H. Accordingly, it would have been desirable for the section to have required that notice be given to the manufacturer by the seller, of any intended settlement of a consumer's claim; and to provide that unless such notice were given, the seller would forfeit its statutory right to indemnity. Such a requirement would have encouraged settlement and minimised litigation.

Section 74H will have a notable effect in at least one area of commercial practice. Until the introduction of Division 2A it was common for large retailers to enter an agreement with manufacturers whereby the seller would fulfil the service requirements under the manufacturer's "warranty/guarantee" (commonly to supply parts and/or labour for a limited period) in return for a reduction in the wholesale price. With the introduction of Division 2A, a retailer can now disregard any such contract that it might have entered into by relying on section 74K, and claim a right to indemnity under section 74H. Alternatively, a retailer could disregard its statutory right to indemnity and merely channel consumer claims to the manufacturer by informing consumers of their direct rights of action against the manufacturer.

6. *Limitation period*

The effect of section 74J is that a consumer must bring his action under the Division within three years after he becomes aware or should become aware of the breach, provided, however, that no action may be brought after ten years from the date of the first supply to a consumer of the goods to which the action relates.

The overriding ten year limitation period on actions is in line with recommendations made overseas, in particular, the Pearson Commission's report,[86] the Strasbourg Convention,[87] and the European Economic Community's Draft Directive.[88] The ten year period is arbitrary, in that

[86] *Op. cit.* Vol. 1 para. 1269.
[87] *Op. cit.* Art. 7.
[88] *Op. cit.* Art. 9.

it fails to discriminate between products with varying life expectancies. Any element of arbitrariness involved, however, is outweighed by the certainty achieved by the use of a fixed ten year period. The manufacturer is thus able to determine more accurately the proportion of the price of its goods which must cover its future liability. Further, the ten year cut-off point will assist insurers in their already-difficult task of underwriting product liability policies.

7. *Exclusion of liability*

Section 74K makes void any contractual term that purports to exclude any liability arising under Division 2A. However, it should be noted that nothing in the section, nor in any other provision of the Division precludes manufacturers from restating certain of the rights granted by the legislation nor from promising additional remedies. Consequently, manufacturers may continue to provide their traditional "guarantee" for a limited period without breaching Division 2A, as long as such "guarantee" does not in any way mislead the consumer as to the rights or remedies available to him.[89] To this end the Trade Practices Commission recommends that such guarantees be expressed to be "... in addition to all other rights and remedies . . . which the consumer has under the Trade Practices Act and other State and Territory laws".[90] However, it is doubtful whether section 53(g) requires a manufacturer to go as far as to inform the consumer of the rights and remedies available to him.[91] Finally, it should be noted that the general prohibition on contractual terms which purport to exclude or restrict any liability arising under this Division is qualified by the express provisions of section 74F(2) and (3).[92]

8. *Measure of damages*

While imposing liability on the manufacturer where a consumer suffers "loss or damage" caused by a breach of one of its provisions, Division 2A is silent as to the proper measure to be applied in the assessment of such "loss or damage".[93] The fundamental object of any award of damages is "to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had

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[89] S. 53(g) provides that it is a criminal offence to make a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

[90] Trade Practices Commission Information Circular No. 26: *Consumer Protection, Sellers' and Manufacturers' Obligations* para. 4.8.

[91] Donald and Heydon, *op. cit.* 720.

[92] *Supra* p. 411.

[93] A similar problem exists in respect of an action for damages under s. 82. There, it is thought that the measure of damages is probably the measure applicable to one in tort for deceit: see Harland, "The Application of Consumer Law to Commercial Transactions: Some Further Implications of the Trade Practices Act 1974" (1978) 8 Commercial Law Association Bulletin 23.

been observed".[94] It has been suggested as likely that "the courts will apply traditional concepts of the law of torts or contracts and award damages which are 'foreseeable consequences of' or which 'arise naturally from' the breach by a manufacturer of its obligations".[95] However, different results may in some cases follow depending on whether the contractual or tortious measure is applied.[96]

Unlike the South Australian and Australian Capital Territory legislation which employs the device of a fictional contract between the manufacturer and the consumer into which statutory warranties are implied,[97] Division 2A grants statutory rights of compensation to consumers and sellers. This departure lends some support to the view that the tortious and not the contractual measure of damages will be applied under Division 2A.

The writers' view is that the contractual rules as to the measure of damages should be applied. Since in an action against the seller for a breach of a term implied by Division 2 of Part V of the Act, a consumer's loss or damage would be assessed by a contractual measure, *ex hypothesi* the same measure of damages should be applied in assessing the *same* loss or damage when the consumer sues the manufacturer directly under Division 2A.[98]

CONCLUSION

In most respects Division 2A is a welcome addition to the law dealing with defective products in Australia. It has brought such law into line with current thinking on the liability of manufacturers in a way the common law has been unable to do.

An attempt has been made in the above appraisal to draw attention to some of the problems of interpretation and practical difficulties inherent in Division 2A. The resolution of any such problems of interpretation must await judicial determination. In this regard, the South Australian and Australian Capital Territory legislation are of no assistance, since as yet there have been no reported cases dealing with it.

However effective its operation may be, the new Division is generally restricted to "corporations" as defined by section 4 of the Act. It is therefore desirable for the remaining State Parliaments to introduce similar legislation. Nevertheless, Division 2A of the Trade Practices Act

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[94] *Victoria Laundry (Windsor) Ltd* v. *Newman Industries Ltd* [1949] 2 K.B. 528, 539 *per* Asquith L.J.

[95] Blunt, "Product Liability Under the Trade Practices Act 1974" 13. A paper delivered at a Seminar on Product Liability held at Macquarie University, 15th March, 1979.

[96] Byrom, "Do Damages Depend on the Same Principles Throughout the Law of Tort and Contract?" (1968) 6 University of Queensland Law Journal 118.

[97] Manufacturers Warranties Act 1974 (S.A.), s. 5; and Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s. 5.

[98] See also Tonking, *supra* n. 58, 5 who appears to favour this view.

establishes some degree of uniformity in the law dealing with the liability of manufacturers, as well as placing Australia in the mainstream of current trends in the Western world towards strict liability for defective products.