The Influence of European Law on Product Liability in Australia

DAVID HARLAND*

1. *Introduction*

European experiments in consumer law over the last 20 years or so have been well known to comparative lawyers in Australia, both through the use of European material made by some Australian scholars in their work and through the publication in Australian journals of accounts of these developments written by European scholars.[1] However, the European developments had until recently relatively little direct impact on the content of the Australian law. They were, it is true, not entirely without influence. European cases were at times referred to by the Australian courts, especially when dealing with commercial matters.[2] Occasional influences could also be found in legislation. For example, patterns which had developed in the Scandinavian countries[3] fairly clearly influenced the format of some tribunals dealing with certain aspects of consumer law when these specialist tribunals were established as including members drawn from panels of persons with experience in business and in consumer affairs.[4] When in 1978 important provisions were inserted into the Commonwealth *Trade Practices Act* 1974 overcoming limitations posed by the privity of contract doctrine and granting consumers a direct statutory action against manufacturers in certain circumstances, the wide definition of "manufacturer"[5] (including importers and "own-branders") was based closely on the definition of a "producer" in what was then a draft of the European Community Directive on products liability. (It is a minor curiosity of legal history that this draft European document directly influenced legislation enacted in Australia some 10 years before the Directive came into force in the European Community.) These influences on Australian law were, however, relatively incidental, but that certainly cannot be said of the very important provisions dealing with product liability which were enacted in 1992.

* David Harland, Challis Professor of Law, University of Sydney.

1 See eg Harland, D, "The legal concept of unfairness and the economic and social environment: fair trade, market law and the consumer interest" in Balate, E (ed), *Unfair advertising and comparative advertising* (1988) at 15–52; Reich, N, "Protection of Consumers' Economic Interests by the EC" (1992) 14 *Syd LR* 23.

2 See Vranken, M, "The Relevance of European Community Law in Australian Courts" (1993) 19 *MULR* 431.

3 See eg the "Swedish Market Court and Public Complaints Board", described in Bernitz, U and Draper, J, *Consumer Protection in Sweden — Legislation, Institutions and Practice* (2nd edn, 1986) at 81–101.

4 For example, *Commercial Tribunal Act* 1984 (NSW); *Market Court Act* 1978 (VIC).

5 Section 74A.

2. *The 1992 Product Liability Legislation*

In 1992 Australia adopted a regime of strict manufacturer liability for injury caused by defective products. The legislation took the form of inserting a new Part into the Commonwealth *Trade Practices Act* 1974.[6] These provisions, which create liability in addition to and not in substitution for liability under the previous law, came into force on 9 July 1992. The provisions are modelled very closely on those of the 1985 Directive on Product Liability of the European Community. (Because of important developments since the adoption of the Directive, one should now refer to the "European Union" rather than the "European Community", but general usage still seems to be in this context to refer to the "EC Directive".) The core of the new regime of liability is that a person may recover from a manufacturer (widely defined) damages for personal injury if that person proves that goods manufactured by the defendant were defective and that the defect caused injury suffered by the plaintiff. The plaintiff must establish each of these elements of defect, injury and causation, but provided this is done liability is strict in that it is not necessary to prove negligence or any element of fault on the part of the manufacturer. A product is defective if its safety "is not such as persons generally are entitled to expect".[7] This emphasises that it is "the objective knowledge and expectations of the community which are to be assessed, not the subjective knowledge and expectations of the injured party".[8] While most actions under these provisions will no doubt be seeking compensation in respect of death or personal injury, in certain cases liability also attaches where a defective product damages or destroys other property.[9] It should be noted that although the motivation for reform of product liability law was essentially that of consumer protection, the ability to recover damages for death or personal injury extends to persons generally and is not limited to consumers. However, when it comes to loss caused where a defective product damages or destroys other property, recovery is limited in effect to consumers.

A number of important defences are available to manufacturers under the legislation. The most controversial of these is the so-called "development risks" defence, namely that "the state of scientific or technical knowledge at the time when [the goods] were supplied by their actual manufacturer was not such as to enable that defect to be discovered".[10] This defence is likely to arise mainly in the case of pharmaceuticals and pesticides, where defects not initially suspected may, perhaps years later, be discovered to have severe or even fatal consequences. The defence is a very narrow one, and it is not sufficient for the manufacturer to prove that it could not reasonably be expected to have discovered the defect; rather, the defect must be one that could not have been discovered by anybody at the time the goods were supplied. The "development risks" defence

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6 Part VA — Liability of Manufacturers and Importers for Defective Goods. See further Harland, D, "The Legal System on Product and Service Liability — the Australian Experience", forthcoming in *Ritsumeikan LR*.

7 Section 75AC(1).

8 Trade Practices Amendment Bill (No2) 1991, Explanatory Memorandum, par 14. This document can conveniently be found reprinted in (1992) 2 *Aust Product Liability Rep* 88.

9 Sections 75AF, 75AG.

10 Section 75AK(1)(c).

was very controversial in the context of the EC document and, indeed, the Directive gives member States an option as to whether or not the defence will be made available. Most member States have, like Australia, elected to adopt the defence in their legislation implementing the Directive. Following also the European approach, there is a limitation period of three years from the time when the plaintiff became aware, or ought reasonably to have become aware, of the loss, the defect and the identity of the manufacturer. More controversial is the additional provision (often referred to as the "statute of repose") that a cause of action is extinguished if not commenced within 10 years from the time of the supply by the manufacturer of the actual[11] goods which caused the injury.[12]

3. *The EC Directive*

On 25 July 1985 the Commission of the European Community adopted the Directive on product liability.[13] This action followed an extensive period of debate. Under the Treaty of Rome a Directive lays down general principles which member States are obliged to incorporate in their domestic law. The Directive gave the then member States[14] three years in which to do this, though in the result only three of them met this deadline and one has still not implemented the Directive.[15] The Directive is, of course, legally binding on member States of the European Union. However, it is not always appreciated just how widespread an influence the European model is having. A further six European countries undertook, as a result of the 1992 European Economic Area Agreement, to implement the principles of the Directive.[16] (Since the 1992 Agreement three of those countries[17] have in fact become members of the European Union). Other European countries have also modelled product liability legislation on the EC Directive, even though they are under no treaty obligation to do so. This has occurred in Hungary and Switzerland,[18] and

11 Despite some argument to the contrary, it seems clear that the period runs from the time when the actual item which caused the injury was supplied by the manufacturer, rather than when the model or class of product to which it belongs was first placed on the market by the manufacturer; see Harland, D, "Product Liability and the Statute of Repose — A further comment on the Report of the Senate Committee" (1993) 4 *Aust Product Liability Rep* 13.

12 Section 75AO.

13 For useful brief discussions see Hondius, E, "The Impact of the Products Liability Directive on Legal Development and Consumer Protection in Western Europe" (1989) 4 *Canterbury LR* 34; Howells, G, *Comparative Product Liability* (1993), ch 3.

14 Belgium, Denmark, France, Germany, Greece, Spain, Ireland, Italy, Luxembourg, The Netherlands, Portugal and the United Kingdom. (As a result of Portugal's legislation, the Directive is also in force in Macau: see von Marschall, W, "The Implementation of the EEC Directive on Products Liability — The German Statute as an Example of some Problems" in Cranston, R and Goode, R, *Commercial and Consumer Law — National and International Dimensions* (1993) 364 at 367.)

15 For a discussion of difficulties felt in implementing the Directive in France see Franck, J, "Product Liability: Incorporation into National Law Impossible?" (1994) 2 *Consumer LJ* 83. Spain implemented the Directive only last year: see Mullerat, R, "New Product Liability Law in Spain" (1994) 22 *Int'l Business Lawyer* 418.

16 Austria, Finland, Iceland, Liechtenstein, Norway and Sweden.

17 Austria, Finland and Sweden joined the European Union on 1 January 1995.

18 See Stauder, B, "Completion of the Internal Market and Consumer Protection — The Spe-

Russia has, as part of a wide-ranging *Consumber Protection Act*, adopted provisions on product liability which to some extent were influenced by the European model.[19] What is perhaps most remarkable is the influence the Directive has had far beyond the geographical limits of the European continent. Israel's *Defective Products (Liability) Law* of 1980 shows a clear influence of what was at the time of its adoption still a draft of the European Directive. In 1990 Brazil[20] and in 1992 the Philippines[21] both adopted comprehensive codes of consumer law, and in each country the new legislation contained provisions on product liability influenced by (though in some respects going further than) the Directive. More recently Japan, after a lengthy period of debate and controversy, enacted its *Product Liability Law* of 1994, legislation which reflects a clear impact of the EC Directive.[22] In Taiwan the *Consumer Protection Law* of 1994 includes provisions on liability for injuries caused by defective products and services and adopts a principle of liability without fault (though imprecise wording has been said to have created some doubt as to the exact impact of these provisions).[23]

4. *Background to the Australian Reform*

There had been in Australia for some time considerable discussion as to the desirability of amending the law relating to the liability of manufacturers where defective goods result in loss or injury. The general law of contract and tort was widely seen as being inappropriate in modern conditions. While the law of contract will often provide an attractive remedy to an injured plaintiff, the doctrine of privity of contract severely restricts both the persons to whom a contractual remedy is available and those in the distribution chain who may be held liable. While lack of privity is no bar to a tort claim against manufacturers of defective products, the necessity to prove negligence can often cause considerable difficulties in practice. A significant measure of strict liability had been introduced in an indirect manner by the provisions inserted in the *Trade Practices Act* in 1978 dealing with the liability of manufacturers to consumers. However, these provisions were essentially concerned with the economic interests of consumers in their relationship with manufacturers of defective or shoddy goods, and the possibility to recover for personal injury or property damage caused by defective products was an incidental (and perhaps largely unforeseen) result of the legislation. Various anomalies remained, particularly as only a "consumer" as defined by the legislation (or a successor in title to that person) could sue (those using goods with the consent of such a person and injured bystanders being excluded). Such anomalies led the National

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cific Case of Switzerland" (1994) 17 *J Consumer Policy* 135.

19 See Reich, N, *Protection of Economic Interests of Consumers by Russian Legislation* (1994) (Revised Report for the TACIS — Project 1/409).

20 See Benjamin, A, "The Brazilian Consumer Protection Code" in Rachagan, S (ed), *Developing Consumer Law in Asia* (1994) at 35–52.

21 See Harland, D, "Product Liability Law in the Philippines" (1993) 4 *Aust Product Liability Rep* 19.

22 See Yoshimura, R, "Product Liability Law in Japan", paper presented at Japan Seminar on Consumer Affairs, Kyoto, August 1994.

23 Liu, L, "Taiwan's New Consumer Protection Law" (1994) 22 *Int'l Business Lawyer* 466.

Consumer Affairs Advisory Council, in the course of a review of product safety policy, to recommend that a comprehensive study be undertaken of any practical difficulties which might arise from the introduction of a regime of strict product liability.[24] Following this recommendation the federal Attorney-General requested the Australian Law Reform Commission (ALRC) to report on whether the laws relating to compensation for injury and damage caused by defective or unsafe goods were adequate and appropriate to modern conditions.

The ALRC's report[25] was published in 1989. The ALRC concluded that, based on basic policy objectives which it identified and the economic efficiency of existing rules, there was a clear need for reform. It proposed that manufacturers and suppliers of goods be liable for loss caused by the goods if the loss was caused by the way the goods acted. (This concept would include the effect the goods had and their failure to act or behave in a particular way or to have a particular effect.) The concept proposed was one of causation — the plaintiff would not need to establish that the goods did not comply with a standard of safety, or quality (for example "merchantable" or "acceptable" quality), or that the conduct of a person did not meet a particular standard (for example negligence).[26] However, manufacturers and suppliers would not be liable for loss caused by other factors and in certain cases the amount of compensation would be reduced. Central to the ALRC's recommendation (and the cause of much of the criticism of its approach) was its rejection of the alleged need to limit liability by reference to, in addition to the factor of causation, some concept such as "defect" or failure of the goods to comply with some standard such as one of "safety" or "acceptability".[27] It argued that compliance with such a standard cannot be determined in advance with any degree of certainty, making it impossible for either claimant or defendant to make fully informed choices and to allocate resources efficiently. In the ALRC's view, a test based on a general standard relating to the condition of the goods (such as their being "unsafe") "while appearing to eliminate the need to explore the production process and the conduct of the manufacturers and suppliers of the goods, gives rise to the same problems as the test based on 'reasonable care' in the existing law of negligence" and indeed "is even more unclear and indeterminate than the test of negligence and gives courts even more discretion than they presently enjoy".[28] The ALRC argued that its approach provided a clear criterion of liability and, in contrast to the existing law, a much higher degree of certainty as to when compensation is not payable or is reduced. Accordingly, manufacturers and suppliers would be able to make market-based decisions about the optimal level of safety of goods and related matters, decisions which the ALRC considered are not appropriate to be determined by courts.[29]

It seemed generally recognised that the law relating to product liability in Australia was in need of reform. Leading business groups put forward a proposal

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24 *Consumer Product Safety* (1987), National Consumer Affairs Advisory Council.
25 Law Reform Commission (Report No 51), Law Reform Commission of Victoria (Report No 27), *Product Liability* (1989).
26 Id, especially at 39–40.
27 Id, especially at 55–60.
28 Id at 60.
29 Id, ch 10.

based on the EC Directive, and one may be permitted to doubt whether this would have occurred in the absence of the catalytic effect of the ALRC's proposals. Certainly the latter proposal prompted much criticism as imposing too heavy a burden on industry and as producing, despite its aims of simplifying the law, its own new uncertainties. One commentator, for example, expressed "grave doubts that the novel concept of how a product 'acted' is any clearer than whether it is defective" and argued that, although the ALRC acknowledged that "unreasonable conduct" (an essential concept under the proposals in determining whether compensation should be reduced because the act of the claimant or another person increased the risk that the goods would cause the loss) is a vague basis of liability, yet "it is precisely the reasonableness of other persons' acts that will determine the extent of the manufacturer's liability".[30] When the Treasurer asked the Industry Commission to report on the economic effects of the ALRC's proposals, the Commission concluded that the benefits of the proposals would be small and that they would reduce economic efficiency.[31] The Commission considered that the proposals would create new inefficiencies and would impose excessive liability on producers, believing that in large measure these adverse efficiency effects stemmed from what it saw as the inadequacies of the defences available to producers under the proposals and the absence of a standard of "defect". In response to the Industry Commission's report the President of the ALRC said, inter alia, that the report did not address the ALRC's criticisms of a requirement of "defect" and that the Industry Commission's proposals would "see pricing and safety decisions about goods made, not by the market or by the manufacturer, who are in the best position to know, but by courts and judges, years after the event and in the highly artificial atmosphere of a court room".[32]

In the event, the approach recommended by the ALRC proved too radical to be acceptable to the Commonwealth Government. It is in this context that the decision that Australia would follow the European model is to be understood. The Government was committed to some measure of reform of the law of product liability, and in these circumstances the EC Directive was seen as an acceptable model convenient to be adopted, the more acceptable because it was an approach which was being adopted by many of Australia's major trading partners. The Minister for Justice and Consumer Affairs, in introducing the reform proposals in the Parliament, emphasised that the European Directive appeared to be "the emerging international standard for product liability legislation" and that it had "proven to be a generally acceptable model to both business and community groups, and the introduction in Australia of a regime consistent with the Directive will ensure that no undue impediments to trade are imposed".[33]

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30 Luntz, H, in a submission cited in Industry Commission, *Product Liability* (Report No 4, 1990) at 103.

31 Id at 59–65.

32 Law Reform Commission, Media Release, 20 September 1990.

33 Trade Practices Amendment Bill (No 2) 1991, Second Reading Speech, 19 December 1991.

5. *The Impact of the Australian Legislation*

Discussion continues as to how far a regime based on the concept of a product "defect" (defined in terms of the level of safety which "persons generally are entitled to expect"), especially when combined with the controversial "development risks" defence, in fact avoids the value judgments and indeterminacies inherent in traditional fault based regimes of liability. Strict liability is most easily applied in the case of manufacturing defects (that is where a particular item or batch, because of some miscarriage in the production process, fails to meet the manufacturer's own specifications for the product), and it is here that the test of a product "defect" (widely described, not entirely accurately, as the "consumer expectation test") is easiest to apply. The product, as it were, condemns itself because it fails to meet the criteria established by the manufacturer. It is probably in this situation that the new regime will have the greatest impact. Although the standard of care insisted upon by the courts had no doubt in practice increased over the years so as often to be in practice little short of strict liability, nonetheless cases arose where consumers found it difficult or impossible to establish negligence and the new approach marks in this type of situation an important advance for plaintiffs. However, in the area of design defects and failure to warn the application of a test based on the level of safety which can be legitimately expected becomes much more problematic, and some commentators on the EC approach argue that at least in many of these cases the courts cannot avoid making value judgments and balancing risks and benefits in a manner very reminiscent of the law of negligence.[34] (In the United States it seems generally recognised that this is the case.)[35] This problem would, of course, be avoided if a principle of causation such as proposed by the ALRC were adopted, and it was considerations such as those just mentioned which prompted the ALRC's approach. As we have seen, however, this approach proved politically unacceptable to the Federal Government and I am not aware of any country which has adopted a principle of causation alone.

In addition to the question of what might be the implications of requiring a plaintiff to establish that a product was defective, there has also been much debate on the question of whether manufacturers should have available to them the "development risks" defence. This issue was so controversial in Europe that the EC Directive permits member States to derogate from the Directive by removing this defence. Most member States have not exercised this option. A review which the Directive itself provides to be undertaken this year will have to consider the effect of this defence on consumer protection and the functioning of the common market, and whether the availability of the defence should be removed.[36] It has been forcefully argued that the provision of the defence is fundamentally inconsistent with the principle of strict liability

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34 See in particular Stapleton, J, "Products Liability Reform — Real or Illusory?" (1986) *Oxford J Leg Studies* 392; Stapleton, J, *Product Liability* (1994).

35 For a recent useful review of the US developments see Henderson, J A Jnr and Twerski, A D, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992) 77 *Cornell LR* 1512.

36 Article 16(2).

and looks very like a reintroduction (though with a reversal of the onus of proof) of the types of consideration inherent in the law of negligence which the reform was designed to avoid.[37] The argument which ultimately prevailed was that denial of the defence would impose on manufacturers a liability both too extensive and unpredictable in scope, and might inhibit socially desirable innovation in the development of new products.

It needs to be remembered that the European document was very much a product of compromise and was criticised by many as making too many concessions to producers. In at least some member States, developments prior to the Directive adopting more stringent standards of liability in domestic law were such as to lead some commentators to claim that the new regime will, usually at least, not make major differences in practice to the results of cases, and indeed in some respects may even worsen the position of plaintiffs.[38] The emergence of the Directive as coming to set an international model for reform of product liability law was not necessarily an unmixed blessing. In Australia a reluctance to depart from the EC model seems at least partly to explain the government's decision not to proceed with some provisions which would have made the reform legislation more responsive to consumer needs. I have in mind here the issues of reversal of the onus of proof and the statute of repose.

Under the Australian legislation (as under the EC Directive) plaintiffs, while no longer having to establish fault on the part of the manufacturer, must nonetheless prove both that the product was defective and that that defect caused the plaintiff's injury. The Australian Government originally proposed that if the question of whether the product was defective was an issue, the onus would shift to the manufacturer to prove by way of defence that the product was not defective. In Europe consumer groups had argued that such an approach should be incorporated in the Directive, but this approach was not adopted,[39] even though some member countries had in their domestic law moved to stricter liability by introducing to various degrees a reversal of the onus of proof in actions based on negligence.[40] In the light of this experience in a number of European countries, placing on the producer the onus of proof that a product was not defective would hardly have been a radical step. In Japan there was during the debate on product liability reform, a strong argument put that a presumption both of a defect in the product and of a causal relationship between the defect and the injury should be incorporated in the legislation. This approach was not adopted and some Japanese lawyers have

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37 See generally Clark, A M, *Product Liability* (1989), ch 6; Newdick, C, "Risk, Uncertainty and 'Knowledge' in the Development Risk Defence" (1991) 20 *Anglo-Am LR* 309; Stapleton, J, *Product Liability*, above n34, ch 10.

38 For comparisons of the position under previous law and under the Directive see eg Markovits, V, *La Directive CEE du 25 Juillet 1985 sur la Responsibilité du Fait des Produits Défectueux* (1990) at 357–62; Reich, N, "Product Safety and Product Liability — An Analysis of the EEC Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products" (1986) 9 *J Consumer Policy* 133.

39 See Taschner, H C, *Produkthaftung — Richtlinie des Rates vom 25 Juli 1985* (1986) at 59–63.

40 This development was perhaps most pronounced in Germany: see eg Brüggemeier, G, "Produkthaftung and Produktzicherheit" (1988) 152 *ZHR* 511.

expressed the fear that it may as a result be difficult for plaintiffs to succeed in actions based on the new law. This is essentially because under the Japanese procedural law a civil plaintiff has a high onus of proof (higher than the common law concept of proof on the balance of probabilities) and because there is no procedure of discovery in Japan.[41] (It is interesting to note that that effect of very limited defences made available under both the Brazilian[42] and Philippines[43] product liability provisions is apparently to reverse the onus of proof on the issue of whether the product was defective.) In the result, the Australian Government did not persist with an approach which it originally suggested, a result which from the viewpoint of consumer policy is unfortunate, because, in cases where there is a real dispute as to whether a product was defective, the manufacturer is in a position of great advantage over the plaintiff in terms of possessing or having access to technical information about the product and the design and production process.[44]

We have seen that under the "statute of repose" provision contained in the EC Directive and the Australian legislation a cause of action is extinguished if not commenced within 10 years from the time of supply by the manufacturer of the actual goods which caused the injury. The ALRC considered that its regime of strict liability should have no such provision.[45] The 10 year period is capable of causing injustice in cases where goods such as pharmaceuticals or pesticides have adverse effects which do not manifest themselves until many years after the use of the product (and in this case it is not necessary that the injured person have knowledge of the damage). To take account of such cases the Government originally proposed that in the case of death or personal injury the period should be 20 years, but in the event, and following the EC Directive, the 10 year period was adopted. One justification for this approach is that it is said it will enable the extent of the manufacturer's potential liability to be calculated more accurately and thus enable insurance costs to be lowered. However, in the development of the European document this provision was partly intended to be a trade-off for strict liability at a time when it was proposed that manufacturers should be liable even for development risks,[46] and in my view it is difficult to justify the retention of the repose period while allowing the defence of development risks. The period of the statute of repose has been a matter of concern to some European States adopting legislation based on the Directive. In Sweden, the original reform proposal contained a 25 year period in respect of personal injury, though the legislation as finally passed has a period of 10 years.[47] The Norwegian Act originally provided a period generally 20 years but in some cases 10.[48] The Australian Government

41 See Yoshimura, above n22.

42 *Consumer Protection Code* 1990, Art 12(3). See Benjamin, above n20 at 41.

43 *Consumer Act of the Philippines* 1992, Art 97. See Harland, D, "Product Liability in the Philippines" (1993) 4 *Aust Product Liability Rep* 19.

44 See further Industry Commission, above n30 at 18; Harland, D, "Reform of the Law of Product Liability" (1991) 2 *Aust Product Liability Rep* 33.

45 Above n25 at 116–20.

46 See Taschner, above n39 at 6–9, 140–1. See also Harland above n11; Howells above n13 at 39–40, 43–4.

47 See Wagenius, C, "Sweden" in Kelly, P and Attre, R (eds), *European Product Liability* (1992) at 375–409.

48 See Matheson, W, "Norway" in id at 297–313. I understand that the provision was later

recently announced that it proposed to amend the legislation to allow claims to be brought outside the 10 year period in cases where harm manifests itself only after a long latency.[49] This would deal with the so-called toxic harm cases. A provision in Japan's new product liability law appears to be directed at the same point.[50]

6. *The Future Influence of the Directive*

In retrospect, the extent to which the European model has influenced internationally, reform of the law of product liability is quite remarkable and largely unforeseen. In part this occurred because there was a widespread desire for change combined with a strong desire by many to avoid perceived excesses of the original catalyst for reform, the modern American law. (Whether these perceptions were in fact accurate is largely beside the point, because they were widely held and clearly influenced the approach of reformers outside of the United States.)[51]

Because the Australian legislation is so recent (there are yet so far as I am aware no reported cases on it) it is not yet possible to measure its effect. There certainly seems no evidence of an explosion in product liability claims, and none should be expected, for the new regime is not as radical as has sometimes been assumed. I believe that the adoption of that regime was an important, if relatively modest, advance in terms of consumer policy. The very fact that the reform debate and the existence of the new law will have raised consciousness of product liability issues among many lawyers, business people and consumers and their advisers, is likely in itself to be important as resulting in claims for injuries, which would otherwise have gone uncompensated, being asserted. The very fact that the new legislation is clearly based on a philosophy of liability without the necessity to attribute fault to the manufacturer is, no matter what the effect of the new regime may be in such cases in terms of strict jurisprudential analysis, likely to make the courts more willing to hold plaintiffs to be entitled to compensation.

Although the European Directive seems rapidly to be establishing an international standard for reform of the law of product liability, it remains to be seen how far that standard will in fact result in similar practical effects in different countries. The countries referred to above differ enormously in terms not only of economic and social conditions, but also of legal, political and cultural traditions, and it will be fascinating as experience develops to learn how the new regimes of strict liability based on the notion of a product "defect" do in fact operate in widely varying contexts. One distinguished European

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amended so as to be consistent with the Directive.

49 See "Government's Response to the Senate Report on Product Liability" (1994) 5 *Aust Product Liability Rep* 29.

50 *Product Liability Law* 1994, Art 5(2). See the English translation of the law by Yukihiro Asami, reproduced (1994) 5 *Aust Product Liability Rep* 79.

51 For a useful comparison of the US Law with the position under the EC Directive see Borer, P, "Bringt uns die EC — Richtlinie zur Produkthaftung 'Amerikanische Verhältnisse'?" in Zäch, R (ed), *US and EEC Product Liability — Issues and Trends* (1989) at 105–53. See also Stapleton, J, *Product Liability*, above n34, ch 4.

commentator has expressed the view that one beneficial effect of the EC Directive may be to make lawyers in member countries less parochial in outlook and to look to precedents in other States.[52] Certainly, in Australia one is already finding reference in professional journals to European cases which would previously have been unlikely to be the subject of comment in the Australian literature.[53] One immediate effect of the derivation of the new Australian legislation may be that in future, Australian lawyers concerned with product liability issues, may well consider much material on developments in many other countries to be of an immediate practical importance to them, which would until recently have seemed quite improbable.

52 Hondius, above n13 at 43–4.
53 See (1994) 5 *Aust Product Liability Rep* at 51 and 97.