



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Australia: Product Liability

This country-specific Q&A provides an overview to product liability laws and regulations that may occur in Australia.

This Q&A is part of the global guide to product liability. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/product-liability/>



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1. **Please summarise the main legal bases for product liability**

Australia's product liability laws are a mixture of the common law and statute. A person who claims to have been injured or who has otherwise suffered loss or damage may commence an action for compensation on the following bases:

- the common law tort of negligence which is fault-based;
- contract (although such claims are rare); and
- breach of provisions of a number of statutes, the main one being the Australian Consumer Law (**ACL**).

For the purposes of this chapter, we will focus on consumer products or goods and in that regard, the ACL is the most important Australian statute. The ACL came into effect on 1 January 2011. It applies to transactions occurring on or after that date. The ACL replaces a collection of federal (also known as Commonwealth) and state consumer protection legislation with a single law which applies in all jurisdictions. The ACL is found in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

2. **What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?**

Consumer guarantees

Part 3-2, Division 1 of the ACL attaches a number of guarantees to the supply of goods and services to consumers. Where these consumer guarantees are not complied with, Part 5-4 of the ACL gives a “consumer” who suffers loss or damage as a consequence of the failure to comply a remedy against the goods supplier and, in some cases, manufacturer. This means that under the ACL, liability will arise directly in respect of:

- goods which do not correspond with their description;
- goods of unacceptable quality;
- goods which do not conform to sample;
- goods unfit for a stated purpose; and
- non-compliance with express warranties.

Privity of contract is no barrier to relief.

The operation of these statutory warranties and guarantees is restricted to claims of consumers who have suffered loss or damage as a result of their use or consumption of consumer goods. These are goods that are ordinarily acquired for personal, domestic or household use or consumption.

Liability for injury caused by defective goods

Under the ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if their safety is not such as persons generally are entitled to expect. The ACL also makes it clear for the purposes of applying this test that a defect may exist by reason of product-related design, testing, manufacturing, warnings and directions for use.

Causation

The statutory consumer guarantees and the defective product causes of action under the ACL are often referred to as “strict liability” provisions. For actions for breach of a consumer guarantee, a claimant need not prove fault, but nonetheless must establish, on balance that, for example, the subject goods are not fit for purpose or are not of acceptable quality in the circumstances. For a defective goods action, a claimant needs to prove that the subject goods have a safety defect, i.e. are not as safe as persons are generally entitled to expect (having regard to all relevant circumstances).

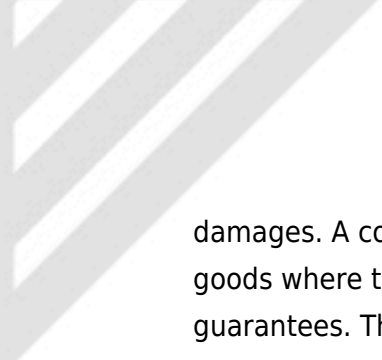
Defective goods actions under Part 3-5 of the ACL may arise where a person has suffered loss or damage because of a safety defect. A person may be able to recover damages for loss or damage suffered where it is reasonably foreseeable that the consumer would suffer such loss or damage as a result of the failure to comply with a consumer guarantee (Part 5-4 of the ACL).

3. With whom does liability sit? If there is more than one entity liable, is liability joint and several?

Consumer guarantees

Under the ACL, affected persons have a number of remedies against suppliers and manufacturers if goods do not comply with consumer guarantees.

If an action is brought against a manufacturer, a consumer’s remedy is limited to



damages. A consumer may seek to recover damages against the manufacturer of goods where there has been a failure to comply with certain of the consumer guarantees. The scope of those damages is limited, and importantly an affected person is only entitled to recover damages for any loss or damage suffered because of the failure to comply with the guarantee if it was reasonably foreseeable that the person would suffer such loss or damage as a result of such a failure.

A broader range of remedies are available against suppliers. The consumer's remedy depends on whether there the failure to comply with the consumer guarantee is a "major failure" (or not a major failure but cannot be remedied) or a "non-major" failure.

Defective products

Under the ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if their safety is not such as persons generally are entitled to expect.

The ACL contains deeming provisions that assist claimants in circumstances where it is not clear who actually manufactured the defective product. Further, under the ACL, the definition of "manufacturer" is very broad and can potentially include anyone in the supply chain, particularly when the actual manufacturer is outside Australia.

In relation to the defective/unsafe product cause of action, a claimant is entitled to make a written request to the supplier for information about the manufacturer. If, after 30 days, neither the claimant nor the supplier knows the identity of the manufacturer, the supplier is deemed to be the manufacturer.

Proportionate liability and contribution

Whilst no generally established system of market-share liability exists in Australia, as a result of the Tort Reform Process, most jurisdictions have introduced proportionate liability for co-defendants in respect of non-personal injury claims for economic loss or property damage, or claims for misleading or deceptive conduct brought pursuant to

state fair trading legislation. In such cases, each co-defendant will only be liable to the extent of its responsibility.

In personal injury claims, defendants may still rely on a statutory right to seek contribution from any or all other parties that would have been held liable for the same damage had they been a party to the proceedings

4. Are any defences available? If so, please summarise them.

There are a number of specific defences to an action based on a claim that goods have a safety defect:

- the defect alleged did not exist when the goods were supplied by the manufacturer;
- the goods were defective only because there was compliance with a mandatory standard (see further below);
- the state of scientific or technical knowledge at the time the goods were supplied was not such as to enable the defect to be discovered (the so-called 'development risk' or 'state of the art' defence) (see further below); or
- in the case of the manufacturer of a component used in the product, the defect is attributable to the design of the finished product or to any markings, instructions or warnings given by the manufacturer of the finished product, rather than a defect in the component.

Compliance with mandatory standard

Under the defective goods action provisions, it is a defence that the goods had the defect only because there was compliance with a mandatory standard. A mandatory standard is a standard for the goods or anything relating to the goods which, under law, must be complied with when goods are supplied, and which carries a penalty for non-compliance. A standard which simply requires a minimum standard to be achieved is not a mandatory standard.

In an action for negligence and under the statutory guarantee provisions of the ACL, compliance with regulations or standards is a relevant factor in determining whether

goods are as fit for the purpose(s) for which goods of that kind are commonly bought as is reasonable to expect.

Development risk defence

If a product is found to have a safety defect under the ACL, the manufacturer or supplier can argue what is commonly referred to as the “state of the art defence” or “development risk defence”. The manufacturer or supplier must establish that the state of scientific or technical knowledge at the time when the product was supplied by its actual manufacturer was not such as to enable the defect to be discovered.

5. What is the limitation period for bringing a claim?

Defective goods actions brought under Part 3-5 of the ACL must generally be commenced within three years after the time the person becomes aware, or ought reasonably to have become aware, of particular circumstances giving rise to the action. There is also a 10-year period of repose, which requires actions to be commenced within 10 years of the supply by the manufacturer of the goods.

An action for non-compliance with a consumer guarantee (Part 5-4 of the ACL) must be commenced within three years after the time the person becomes aware, or ought reasonably to have become aware, that the guarantee had not been complied with.

For personal injury claims that relate to Parts 2-2, 3-3, 3-4, 3-5 or Division 2 of Part 5-4 of the ACL, the applicable limitation period is the later of the “date of discoverability” or the “long-stop period” as defined above (section 87F of the CCA and Part VIB of the CCA more generally).

6. To what extent can liability be excluded (if at all)?

Neither the consumer guarantees, nor the provisions of the ACL relating to liability of

manufacturers for goods with safety defects, can be excluded or modified.

7. What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?

At common law the claimant must establish:

- that loss or damage has been suffered;
- that the relevant conduct is in breach of a common law duty; and
- that the loss or damage was caused by the defendant's conduct.

While the test varies between jurisdictions, there are basically two requirements for causation in negligence:

- first, that the negligence was a necessary condition of the occurrence of the harm (referred to as "factual causation"); and
- second, that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (referred to as "the scope of liability").

There is, however, an allowance for determining in an "exceptional" case, whether negligence that cannot be established as a necessary condition of the occurrence of harm should nonetheless be accepted as establishing factual causation.

8. What types of damage/loss can be compensated and what is the measure of damages? Are punitive damages available?

The following compensatory damages are available for claims of bodily injury:

- general damages, including pain and suffering, loss of amenities and loss of expectation of life; and
- special damages, including loss of wages (both past and future), medical and hospital

expenses and the like.

The Tort Reform Process has resulted in caps, thresholds and other limitations being placed on the amount of such damages that can be recovered.

Damages are assessed on a once and for all basis.

Damages are also recoverable for mental damage, provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for “pure economic loss” but the nature and extent of such damages is extremely complex.

While rare, exemplary, punitive or aggravated damages can be awarded by the courts, although in some jurisdictions (as a result of the Tort Reform Process), not in negligence actions seeking damages for personal injury.

9. How are multiple tortfeasors dealt with? Is liability joint and several? Can contribution proceedings be brought?

It is generally accepted that the manufacturer of goods owes a duty of care to the purchaser and user to safeguard them against the foreseeable risks of injury when using the product as intended.

Retailers, importers and distributors are not expected to test or inspect products which the manufacturer delivers in sealed containers which would not normally be opened until they reach the ultimate consumer. However, in these circumstances, the retailer still has a duty to guard against those dangers known to it or which it has reasonable grounds to expect.

To the extent that any party in the supply chain adds to or modifies a product including packaging and labelling, that party will also owe a common law duty to the purchaser and user in respect of those changes.

A plaintiff may commence proceedings against one or more alleged tortfeasors. Liability is joint and several.

In personal injury claims, defendants may still rely on a statutory right to seek contribution from any or all other parties that would have been held liable for the same damage had they been a party to the proceedings.

10. **Are any defences available? If so, please summarise them.**

The following defences may be available to a claim in negligence:

- volenti non fit injuria (voluntary assumption of risk);
- contributory negligence; and
- the learned intermediary defence.

Voluntary assumption of risk is a deliberate decision by the plaintiff to assume the risk of injury, loss or damage. To establish the defence of volenti, the defendant must show that the plaintiff not only perceived the existence of the danger, but also fully appreciated it and voluntarily accepted the risk. This defence is difficult to establish, but is a complete answer to any claim.

Contributory negligence may be relied on where the plaintiff's conduct fails to meet the standard of care required for his or her own protection and safety, and is a contributing cause in bringing about his or her injury. Damages are apportioned by the court in accordance with each party's degree of fault. In certain jurisdictions, contributory negligence can be a complete defence to an action if the court thinks it is just and equitable in the circumstances.

There is no express authority in Australia for a learned intermediary defence, although there is no reason why the defence cannot be accommodated within existing common law principles.

The Tort Reform Process has created new statutory defences to an action for

negligence, although these differ from jurisdiction to jurisdiction.

For example, in New South Wales, a defence will arise where the harm was suffered as a result of the materialisation of an inherent risk, which is defined as the risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

11. **What is the limitation period for bringing a claim?**

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories.

In general terms, limitation periods are routinely defined by reference to the nature of the cause of action. In most jurisdictions, the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff (“the date of discoverability”) or 12 years from the date of the alleged act or omission (the “long-stop period”); or
- three years from the date the cause of action accrued.

Limitation periods including those applicable to personal injury claims are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability which impedes them from properly managing their affairs

12. **To what extent can liability be excluded (if at all)?**

Suppliers of goods can attempt to exclude tort liability through contract through the inclusion of waivers, acknowledgements and releases, however as noted in question 6 above neither the consumer guarantees, nor the provisions of the ACL relating to liability of manufacturers for goods with safety defects, can be excluded or modified.

13. **Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.**

The importance of contract as a cause of action in product liability claims, in particular B2C contracts, has diminished in recent times as a result of the statutory causes of action which overcome privity of contract.

The ACL has affected the relationship between contract and product liability by introducing provisions which render void any unfair term in a standard form B2C contracts, and the “statutory guarantees” discussed above exist independently of any contract of supply. These statutory guarantees have replaced the previous regime which implied terms into B2C contracts.

14. **What types of damage/loss can be compensated and what is the measure of damages?**

Damages for breach of contract are compensatory.

Not all damages or loss that flow from breach of contract will be recoverable. The common law has recognised that a party to a contract may be compensated by way of damages for:

- losses which flow naturally from the contract itself; and
- losses contemplated which would probably result from a breach or a particular breach

15. **To what extent can liability be excluded (if at all)?**

As noted in question 6 above, the consumer guarantee provisions cannot be excluded or modified by contract. Any such attempts to exclude or modify the guarantees by

contract are rendered void by the ACL.

Further, the ACL contains an unfair contract provision which operates to remove unfair terms in standard form consumer contracts. While this would be assessed on a case by case basis, It could be used to challenge provisions seeking to limit liability in standard form consumer contracts.

16. **Are there any recent key court judgements which have had a significant impact on the approach to product liability?**

There are a number of product liability class actions that are currently before the courts which are likely to be significant in terms of further defining some key issues concerning product safety and risk assessment.

Recent judgments that have certainly had an impact arose from a series of prosecutions by the relevant regulator, the Australian Competition and Consumer Commission (ACCC), against product suppliers and manufacturers for breaches of the ACL. Not only is the ACCC becoming more active in its role as regulator, but these legal penalty actions (together with other regulatory actions such as the publication of Safety Warning Notices or the ordering of Compulsory recalls in respect of consumer goods) have often then led to subsequent civil claims being brought in the form of class actions.

17. **What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?**

There are a number of litigation related steps that a company can take if facing a product liability claim or threatened claim in Australia. Some steps which should be considered include:

- **Litigation Hold:** there are potentially serious consequences if a document which is relevant to any actual or reasonably anticipated litigation is not retained or destroyed.

These include the risk of adverse findings in future legal proceedings (including drawing of adverse inferences) to fines/gaol. Putting in place a "litigation hold" when facing an actual or threatened claim is a sensible early step.

- **Communication Management:** ensure that internal communications and documents in respect of the claim are managed in a way that maximises the prospects of later claiming privilege over that material. Ensure that external communications are managed to ensure that statements are not made that will impact the prospects of defending the claim.
- **Consider Pre-filing requirements:** Recently, there has been significant legislative activity in the area of 'pre-litigation protocols', which are mandatory steps a potential litigant must undertake before commencing civil proceedings. These protocols oblige litigants to pursue a range of alternative dispute resolution steps before commencing proceedings. Consider whether pre-filing requirements exist in the jurisdiction in which the claim is brought, and if they do, the obligations they impose on both the plaintiff and defendant.
- **Consider Service or Jurisdictional Issues and Summary Disposition:** any challenge to the jurisdiction of the court in which the claim is made must be considered at an early stage. Defendants should also give consideration to whether the an application for summary disposition could be brought. While seldom successfully used to strike out the entirety of a pleading, interlocutory procedures exist for parties to move to strike out the whole or any part of a pleading where the court determines that the pleading discloses no reasonable cause of action has a tendency to cause prejudice, embarrassment or delay, or is otherwise an abuse of court process.

18. **Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?**

Yes.

Product liability litigation usually commences in the Federal Court of Australia (the Federal Court) or the supreme, county or district courts of one of the states or territories.

The consideration of choice of law questions, the causes of action alleged and the quantum of damages sought will usually determine the forum for a product liability matter. In complex product liability matters this will often be the Federal Court.

Specialist jurisdictions

No formal schemes for particular products exist, except for asbestos-related claims. In New South Wales, the Dust Diseases Tribunal has exclusive jurisdiction to determine “dust diseases” claims. Similarly in South Australia, the District Court has exclusive jurisdiction to hear such matters.

Prevalence of jury trial

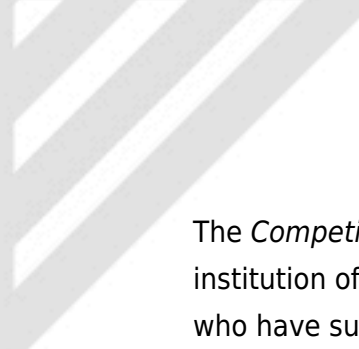
With one exception, the trial of civil actions involving claims arising from alleged product defects are heard by a judge sitting alone (as both the tribunal of fact and law). The exception is Victoria; where civil trials before a judge (as the tribunal of law) and jury of four (as the tribunal of fact) are still available. However, they are relatively uncommon.

19. Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available

There are detailed class action procedures in the Federal Court of Australia, the Supreme Court of Victoria, and the Supreme Court of New South Wales. The legislation in each of these jurisdictions is very similar. There are also older-style representative action procedures available in other state jurisdictions, but these are rarely used. An action can only be commenced in the Federal Court where it attracts federal jurisdiction, for example, if it involves a claim under federal legislation.

Class actions have involved products including weight loss drugs, heart pacemakers, aircraft fuel, motor vehicles, gas, water, tobacco, pharmaceuticals, financial products and a variety of foodstuffs.

Federal, Victorian and New South Wales legislation provides for the commencement of a class action where seven or more persons have a claim against the same person and the claims are in respect of, or arise from, the same, similar or related circumstances and give rise to a substantial common issue of law or fact.



The *Competition and Consumer Act 2010* (Cth) (CCA) expressly provides for the institution of proceedings by the government regulator, the ACCC on behalf of those who have suffered or are likely to suffer loss as a result of contraventions of federal legislation.

20. **How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?**

Third-party funding of claims is permitted in Australia. While lawyers are restrained from entering into contingency agreements, non-lawyers are not. Consequently, litigation funders have emerged to promote and fund class action litigation. The mechanism is relatively straightforward. Traditionally, a non-lawyer or corporation (the litigation funder), identifies a potential claim, contacts potential claimants and then enters into express contractual arrangements with potential claimants. These agreements provide for the litigation funder to receive an agreed percentage of any monies that come to the claimant by way of settlement or judgment. In addition, the claimants will often assign the benefit of any costs order they receive to the litigation funder who is, under the contractual arrangement, also given broad discretion to conduct the litigation as they see fit. The litigation funder then retains a lawyer who agrees to conduct the litigation on behalf of the litigation funder on the basis of the 'normal' rules governing the legal profession.

More recently, the process has evolved to permit so called "common fund" orders, which permit litigation funders to receive a (court approved) percentage of monies that come to the claimant by way of settlement or judgment without the need to enter into express contractual arrangements with individual claimants. Rather, the funder undertakes to the Court to comply with specified funding terms.

Litigation funders are required by Australia's corporate and financial regulator to have adequate procedures to deal with conflicts of interest, but are not otherwise required to be licensed or to have their funding arrangements approved.

Under the court rules lawyers who have commenced proceedings that have third-party funding arrangements are required to notify the Court of the details of that funding

arrangement and notify the other party of the fact of that funding arrangement.

Rules prohibiting lawyers from entering into contingency fee arrangements have been relaxed and a variety of arrangements are now sanctioned. These arrangements allow lawyers and clients to enter into an agreement that provides for the normal fee, or a fee calculated by reference to some predetermined criteria such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an 'uplift fee' where an additional fee may be levied, calculable by reference to the initial fees. Not all jurisdictions allow such arrangements in personal injury cases. All jurisdictions continue to prohibit contingency fee arrangements where the lawyer's fee is calculated by reference to a percentage of the client's verdict.


On 24 January 2019 the Australian Law Reform Commission (ALRC) tabled its report *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report)*. The ALRC Report recommended, inter alia, that:

- the legislation governing class action procedure should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion;
- Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.

While the first of these recommendations is likely to have limited practical application given recent court authority, the second recommendation (if implemented) will likely have a significant impact on how cases are funded in Australia.

21. **How common are product liability claims and what factors influence their frequency?**

Australia has a long history of product liability litigation. More than 70 years ago,



Australia's highest appellate court considered the application of sale of goods implied warranties to the consumer model. More recently, product liability litigation has been influenced by a focus on consumer protection and product safety. In the 1990s, Australia introduced its version of the EC Product Liability Directive and a class action procedure. Both had been significant forces in shaping product liability litigation and consumer activism.

Indeed, much of Australia's product liability litigation in the two decades commencing from 1990 mirrored the mass tort cases that were being conducted in the United States. While the introduction of the ACL was primarily designed to establish uniform laws concerning consumer protection and fair trading, it provided the federal regulator with new powers. The federal regulator is noticeably exercising its powers both in terms of enforcement action and regulatory overview of product safety and product recall actions. This demonstrates the current importance politically of consumerism and consumer protection.

22. What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?

In recent times Australia has witnessed the commencement of multiple class actions in a range of industry sectors and products and services. Another increasing trend is the increasing number of competing class actions that have been commenced. Multiple claimant law firms will commence overlapping class action claims. While there have been a number of cases on this latter point.

The other area of keen interest is common fund applications which have been received by the Courts with varying results. In February 2019 challenges were brought against common funds in both the Full Federal Court and the New South Wales Court of Appeal on a number of grounds - including that they were unconstitutional. Both challenges were unsuccessful, and therefore unless the results are successfully appealed to the High Court of Australia, common funds appear to be here to stay.



Electronic trials utilising new technologies are now increasingly the default position in Federal and State Courts. E-trial providers are delivering highly sophisticated services, both in and out of the Courtroom. Australia is also starting to see discovery orders shaped around new technology available for searching documents, such as text searching for particular phrases. To assist parties in relation to the use of technology in Court proceedings, a General Practice Note - *Technology and the Court (GPN-TECH)* - was published by the Federal Court of Australia in October 2016. The purpose of the Practice Note is to facilitate the effective use of technology in the preparation for and at all stages of a proceeding, as well as to assist parties in the use of technology within the Court.