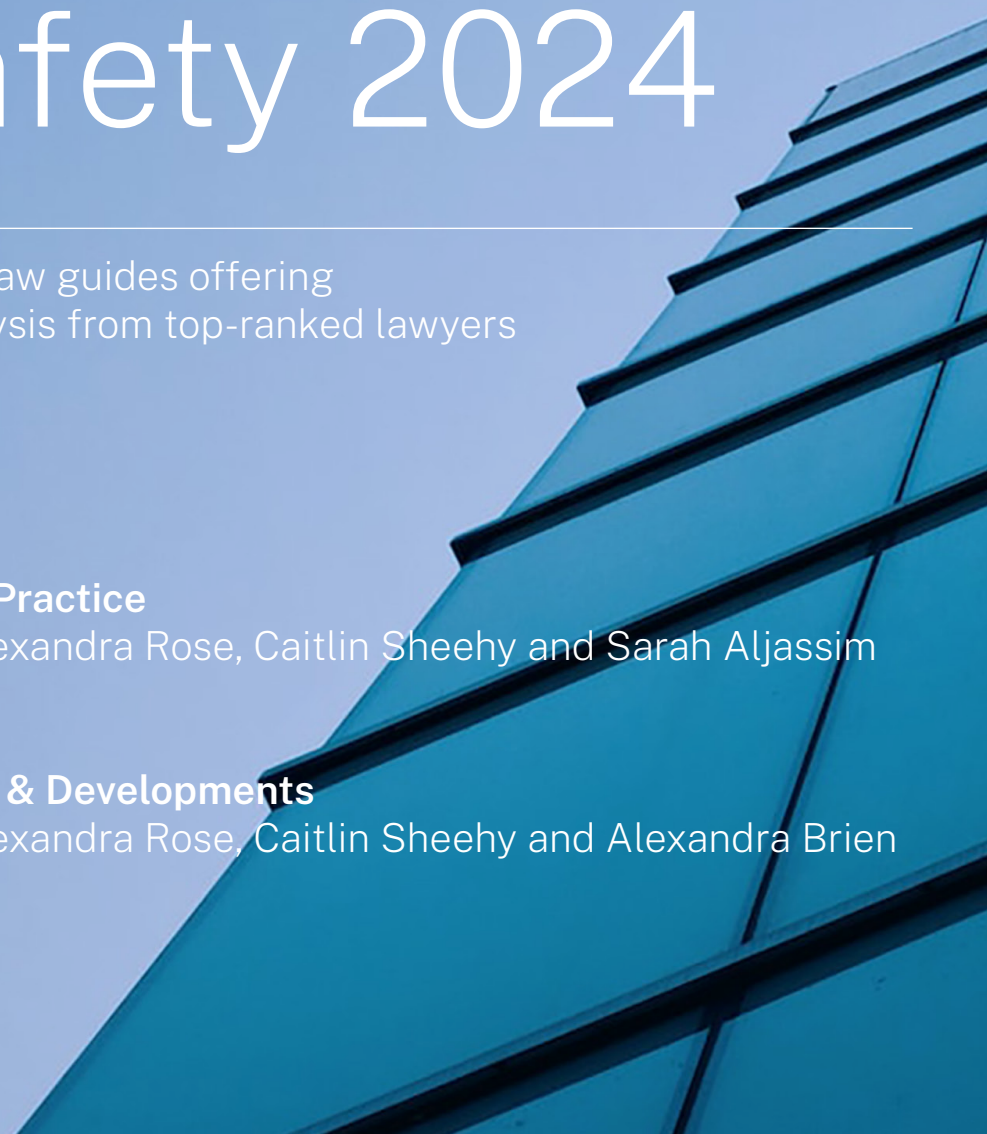
Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Product Liability & Safety 2024

Definitive global law guides offering comparative analysis from top-ranked lawyers



Australia: Law & Practice
Greg Williams, Alexandra Rose, Caitlin Sheehy and Sarah Aljassim
Clayton Utz

Australia: Trends & Developments
Greg Williams, Alexandra Rose, Caitlin Sheehy and Alexandra Brien
Clayton Utz

AUSTRALIA

Law and Practice

Contributed by:
Greg Williams, Alexandra Rose, Caitlin Sheehy and Sarah Aljassim
Clayton Utz

Contents

Clayton Utz is an independent Australian firm established in 1833, with nearly 200 partners and 1,400 employees across six offices, and one of the largest commercial litigation practices in Australia, including a specialist five-partner product safety and product liability team. The firm handles the most complex, significant and high-profile matters for clients, including many of Australia's top financial institutions, multinational corporations operating in a range of sectors, and state and Australian government departments and agencies. Clayton Utz is also a global leader in pro bono, with one of the largest pro bono practices of any law firm outside the USA.

Authors

Greg Williams is the national practice group leader of commercial litigation at Clayton Utz. He is a highly regarded lawyer who specialises in class actions, product liability litigation and products regulatory advice. Greg's impressive track record of success in some of the most high-profile cases across the pharmaceutical, medical device, automotive and financial sectors has earned him a reputation as a skilled and accomplished practitioner. Greg is known for his considered strategic litigation advice and his ability to align litigation strategy with clients' commercial objectives. He is a member of the International Association of Defense Counsel and also has a master's degree in biochemistry.

Alexandra Rose is a leading practitioner in the product liability arena, and has a wealth of knowledge and expertise in the defence of large-scale high-stakes litigation across product liability, class actions, and medical device, pharmaceutical and regulatory matters throughout Australia and internationally. In her rapidly growing practice at Clayton Utz, Alex advises clients across the automotive, health, consumer goods and financial services industries. Clients benefit from her adept ability to manage disputes in a manner that enhances global defence strategies, drives efficiencies and allows clients to focus on their core business priorities. She is a member of the Defense Research Institute (DRI) and International Association of Defense Counsel (IADC).

Caitlin Sheehy is a special counsel in the Clayton Utz product liability team and an experienced commercial litigator who acts in complex product liability litigation, including class actions. She has represented Australian and overseas pharmaceutical and medical device clients both in contentious and advisory matters, including in relation to regulatory issues, advertising and labelling requirements, and product safety and recall issues.

Sarah Aljassim is a lawyer in the Clayton Utz product liability team and has experience in acting in product liability litigation, including class actions. She is also involved in advising clients in relation to regulatory issues, including with regard to the Australian Consumer Law. Before joining Clayton Utz, Sarah was the associate to his Honour Judge Long SC of the District Court of Queensland in 2021.

Clayton Utz

Level 15
1 Bligh Street
Sydney
New South Wales 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
Email: gwilliams@claytonutz.com
Web: www.claytonutz.com

CLAYTON UTZ

1. Product Safety

1.1 Product Safety Legal Framework

Australian Consumer Law

The principal law governing product safety in Australia is the Australian Consumer Law, which codifies a single set of consumer protection laws for the whole of Australia, including (but not limited to) laws relating to product safety and product liability.

The Australian Consumer Law is Schedule 2 to the federal Competition and Consumer Act 2010 (Cth). However, its operation across Australia also depends on state and territory laws, which provide that it has effect as a law of each Australian state and territory.

Other Laws

In addition to the Australian Consumer Law, there are a number of specific types of products that have their own safety regimes. By way of example, gas and electrical safety continues to be regulated at a state and territory level, so that each Australian jurisdiction has its own gas and electrical safety legislation, which applies to gas and electrical appliances. Other areas – such as therapeutic goods (ie, medicines and medical devices), food, agricultural and veterinary products, genetically modified organisms and industrial chemicals (including cosmetics) – have their own federal safety regimes, pursuant to:

- the Therapeutic Goods Act 1989 (Cth);
- the Australia New Zealand Food Standards Code;
- the Agricultural and Veterinary Chemicals Act 1994 (Cth) and the Agricultural and Veterinary Chemicals Code Act 1994 (Cth);
- the Gene Technology Act 2000 (Cth); and
- the Industrial Chemicals Act 2019 (Cth).

In each case, these regimes do not prevent the products in question from being subject to the Australian Consumer Law, subject to certain limited carve-outs.

In addition to these statutory obligations, product manufacturers and suppliers are subject to obligations under the common law. In particular, persons who are injured by a product may have a right to sue the supplier of the product in negligence (as well as under statutory causes of action created by the Australian Consumer Law), and an analysis of a supplier's duty to users of its product in negligence will often be important in assessing the appropriate response to a potential product safety risk.

1.2 Regulatory Authorities for Product Safety

Federal

The principal Australian product safety regulator is the Australian Competition and Consumer Commission (ACCC), which is responsible for administering the Competition and Consumer Act 2010 (Cth), including the Australian Consumer Law.

The ACCC has regulatory, investigatory and prosecutorial powers granted to it under the Competition and Consumer Act 2010. In relation to product safety, those powers include the power to require the production of documents or the provision of information, including the power to examine witnesses and to enter premises, conduct searches and seize consumer goods, equipment and documents. Typically, the powers of entry, search and seizure must be exercised pursuant to a warrant, unless there are circumstances that require their exercise without delay in order to protect life or public safety.

The ACCC also has powers to take a range of actions to protect consumer safety, including commencing compulsory recall actions, issuing substantiation notices and product safety notices, and prohibiting the making of certain representations in relation to a consumer product. Finally, the ACCC can issue penalty notices for breach of the Australian Consumer Law, or commence proceedings seeking declaratory and injunctive relief as well as civil penalties. It may also refer certain breaches of the Australian Consumer Law to the Commonwealth Director of Public Prosecution for consideration of criminal prosecution, with associated criminal penalties.

State

In addition to the federal regulator, each state and territory has a Department of Fair Trading or similar – although the role of these entities in relation to product safety diminished following the commencement of the Australian Consumer Law in 2011. Each state also has offices or regulators responsible for safety issues relating to gas, electricity and home building products. Product liability issues in these subject areas will often require engagement with both federal and state (or territory) authorities.

Sector-Specific

The other important sector-specific regulators are:

- the Therapeutic Goods Administration (TGA) in respect of medicines, medical devices and a range of other therapeutic goods;
- Foods Standards Australia New Zealand (FSANZ) in respect of the Australian Pesticides and Veterinary Medicines Authority (APVMA) in respect of agricultural and veterinary chemicals;
- the Office of the Gene Technology Regulator (OGTR) in respect of genetically modified organisms;
- the Australian Industrial Chemicals Introduction Scheme (AICIS) in respect of industrial chemicals; and
- state and territory fair trading, electrical safety and home building regulators (as above).

The TGA, the APVMA, the OGTR and the AICIS each operate registration or licensing regimes that require certain products to be assessed and registered before they may be supplied or used in Australia. These regulators also have various investigatory, regulatory and enforcement powers – the precise scope of which varies from regulator to regulator, but which are generally similar in scope to the ACCC's powers in relation to consumer goods, tailored to the particular products in question. Subject to certain carve-outs, the regimes are not exclusive, so a product that falls, for example, within the TGA's remit may also be – in some circumstances – a consumer product that is regulated by the ACCC and subject to the Australian Consumer Law.

1.3 Obligations to Commence Corrective Action

The powers of the ACCC and other Australian regulators, as summarised in **1.2 Regulatory Authorities for Product Safety**, include powers to compel local sponsors, suppliers and/or manufacturers to take certain actions in relation to goods. By way of example, the ACCC may require corrective action or information to be supplied regarding goods, order a compulsory recall (in rare circumstances), issue an interim or permanent ban on the supply of specified products, or create an information or safety standard in relation to particular products.

However, outside situations where the ACCC or the TGA has created a specific obligation in relation to particular goods, the institution of voluntary recall action is generally a matter for manufacturers or suppliers to determine for themselves.

The concept of product recall is well recognised under Australian law as covering a range of corrective actions in relation to products in the marketplace. The analysis of whether a recall is necessary in respect of a particular product safety issue is typically conducted by reference to the standards established by the tort of negligence – that is, what are the reasonable steps required of the supplier as a result of a foreseeable risk of injury to users of the product?

If a supplier initiates a recall action, there are no specific legal requirements as to how such recalls must be conducted. However, the various regulators (in particular, the ACCC, the TGA, FSANZ and the electrical safety regulators) publish guidelines in relation to the conduct of recalls. As a result of those guidelines, there are:

- common notification requirements to regulators regarding recall actions;
- commonly expected formats for recall notices; and
- common ongoing reporting obligations regarding the progress of recalls.

1.4 Obligations to Notify Regulatory Authorities

There are two notification obligations in relation to consumer goods in Australia: one risk-based and one incident-based.

Risk-Based

A supplier who voluntarily takes action to recall consumer goods because of a safety risk (including non-compliance with bans and certain safety standards) must, within two days of taking such action, give the relevant federal minister (which is in effect the ACCC) written notice that such action has been taken (Section 128 of the Australian Consumer Law). Such notice is typically given using the online form available on the ACCC's recalls website. The online form requires the provision of relatively detailed information about the nature of the product, the extent of its distribution in Australia and the reason for the recall.

Careful and detailed completion of the notification is recommended because the information provided could otherwise be formally compelled by the ACCC.

The ACCC continues to take an active and detailed interest in the initiation and continuing conduct of recall actions, so as to ensure that the best possible return rates are achieved and that continuing recall actions are taken by suppliers and manufacturers.

Incident-Based

There is a broad-ranging requirement to report incidents related to products to the ACCC. A supplier of consumer goods who becomes aware of the death or serious injury or illness of any person that was caused, may have been caused, or in the opinion of any other person was or may have been caused, by the use or foreseeable misuse of those consumer goods must notify the ACCC of that fact within two days of becoming aware of it (Section 131 of the Australian Consumer Law).

The Australian Consumer Law defines "serious injury or illness" as meaning "an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a

medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:

- an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or
- the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition."

There are certain limited exceptions to this obligation where:

- it is clear that the death or serious injury or illness was not caused by the use or foreseeable misuse of the consumer goods;
- it is very unlikely that the death or serious injury or illness was caused by the use or foreseeable misuse of the consumer goods; or
- the goods in question are subject to one of a number of alternative incident-based notification regimes in accordance with an industry code of practice or Commonwealth, state or territory law that is specified in the regulations to the Competition and Consumer Act 2010 (Cth) (these include notification regimes relating to therapeutic goods, agricultural and veterinary chemicals, and motor vehicles).

Notification pursuant to Section 131 is also typically undertaken using an online form available on the ACCC's recalls website.

1.5 Penalties for Breach of Product Safety Obligations

Pecuniary Penalties

Under the Australian Consumer Law, the maximum pecuniary penalties that may be imposed for breach of product safety obligations generally are, in the case of a corporation:

- a fine of up to AUD50 million;
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission – a fine of three times the value of that benefit; or
- if the court cannot determine the value of the benefit, a fine of 30% of the adjusted turnover of the corporation during the breach turnover period for the act or omission.

The maximum penalty that may be imposed on an individual is a fine of AUD2.5 million.

In either case, the above-mentioned pecuniary penalties can be sought in either a criminal prosecution or a civil penalty proceeding.

The above-mentioned fines are the maximum fines payable in respect of breaches of substantive provisions of the Australian Consumer Law. There are some breaches that may attract lesser penalties – for example, penalties for breach of the recall notification obligations outlined under **1.4 Obligations to Notify Regulatory Authorities** include (at present) AUD16,500 for a corporation and AUD3,300 for an individual, but can also include orders disqualifying individuals from managing corporations for a period (on application by the regulator).

Infringement Notices

In addition to the above-mentioned criminal and civil penalty regimes, the ACCC also has the power – pursuant to Section 134A of the Competition and Consumer Act 2010 (Cth) – to issue infringement notices in respect of certain breaches of the Australian Consumer Law. The ACCC may issue an infringement notice if it has reasonable grounds to believe that a person has

contravened one of the provisions of the Australian Consumer Law specified in Section 134A.

An infringement notice issued pursuant to Section 134A will specify a pecuniary penalty that must be paid for the purported breach of the Australian Consumer Law. The maximum penalties that may be imposed by an infringement notice vary according to the particular provision said to have been breached. Payment of an infringement notice precludes any further penalty (civil or criminal) being sought from that person in respect of the breach.

Examples of Penalties and Infringement Notices

Civil penalties

There are numerous examples of the ACCC seeking and obtaining civil penalties in respect of breaches of the Australian Consumer Law.

By way of example, in relation to product safety, in February 2016 a large Australian retailer was ordered by the Federal Court of Australia to pay a penalty of AUD3.057 million in respect of false or misleading representations about the safety of five consumer products as well as breaches of the obligation to report serious injuries.

More recent examples of civil penalties being imposed in relation to breaches of the Australian Consumer Law that did not relate to product safety include:

- in December 2019, a global car company was ordered to pay AUD125 million in respect of misleading representations made to regulators about the composition, standard or grade of certain vehicles (this penalty was significantly higher than the penalty jointly proposed by the ACCC and the company, and it was upheld on appeal);
- in May 2021, a telecommunications provider was ordered to pay AUD50 million in respect of unconscionable conduct in its dealing with more than 100 Indigenous consumers across Australia;
- in June 2021, an energy retailer was ordered to pay AUD1.2 million in penalties and to pay consumer redress in respect of false or misleading representations that it made in selling electricity plans to consumers;
- in April 2022, a company operating an online hotel booking site was ordered to pay AUD44.7 million in respect of misleading representations in its advertisements about hotel room rates;
- in August 2022, a multinational technology company was ordered to pay AUD60 million in respect of misleading representations made to consumers about the collection and use of their personal location data on Android phones;
- in December 2022, a global ride-sharing company was ordered to pay AUD21 million in respect of misleading representations made about ride cancellation messages and fees associated with a specific ride option available to consumers;
- in March 2023, an Australian online bookseller was ordered to pay AUD6 million in respect of misleading statements made on its website in relation to consumer guarantee rights;
- in July 2023, a former Australian vocational training college and its marketing arm were ordered to pay a record penalty of AUD438 million for acting unconscionably and misleading students into thinking vocational courses they were enrolling in were free;
- in August 2023, an Australian technology company was ordered to pay AUD10 million in respect of false and misleading representations made on its website about discount prices for add-on computer monitors;

- in December 2023, a US-based wearable technology company was ordered to pay AUD11 million after it admitted to making false, misleading or deceptive representations to 58 consumers about their consumer guarantee rights to a refund or a replacement after they claimed their device was faulty;
- in December 2023, an Australian car company was ordered to pay AUD6 million in respect of false or misleading representations made to customers that certain dealerships had closed and would no longer service vehicles;
- in February 2024, an Australian car company was ordered to pay AUD11.5 million in penalties for false or misleading representations it made to nine consumers about their consumer guarantee rights; and
- in March 2024, an Australian online floral company was ordered to pay AUD1 million after it admitted to making false and misleading representations on its website – namely, by publishing misleading star ratings for its products, advertising products at a discount when they had not generally sold products at the "strikethrough price", and added surcharges that were inadequately disclosed.

Finally, in May 2024 Australia's national carrier Qantas reached an agreement with the ACCC to pay an AUD100 million penalty (and, in addition, approximately AUD20 million in compensation) for false and misleading conduct in selling tickets on flights that had in fact been cancelled. This agreed penalty is still to be confirmed by the Federal Court.

Criminal penalties

Examples of criminal penalties and referral to the Commonwealth Director of Public Prosecutions are much rarer and relate to breach of the cartel provisions in the Competition and Consumer Act 2010 (Cth). By way of example, in 2017 Australia's first criminal cartel case concluded with a fine of AUD25 million in a global vehicle shipping company cartel case. In 2022, the Federal Court of Australia sentenced four individuals to suspended prison terms in relation to price fixing of the Australian dollar/Vietnamese dong exchange rate and transaction fees charged to customers. This was the first time that individuals in Australia were sentenced for criminal cartel conduct.

Infringement notices

On the other hand, the use of infringement notices is quite common and almost exclusively related to breaches of Section 29 of the Australian Consumer Law (which prohibits false or misleading representations about goods or services).

The ACCC publishes a register of such notices, which identifies the person or company that is the subject of the notice and the provisions of the Australian Consumer Law (or other applicable industry standard) that have been breached. However, the register does not disclose the particular products or conduct to which the notice relates.

2. Product Liability

2.1 Product Liability Causes of Action and Sources of Law

Liability for a faulty or defective product that causes injury, loss or damage may be brought on a number of grounds. The causes of action most commonly pleaded are the common law tort of negligence or a breach of the Australian Consumer Law. The Australian Consumer Law creates a number of bases for liability, including:

- engaging in false, misleading or deceptive conduct (although these claims may not be relied on in personal injury cases);
- breach by a supplier of consumer goods of statutory guarantees – eg, guarantees of acceptable quality;
- derivative liability for manufacturers in respect of goods that breach the statutory guarantee of acceptable quality; and
- the manufacture of goods with a safety defect.

Negligence

Under common law, a manufacturer or supplier of products also owes a duty of care to both the purchaser and the user to take reasonable steps to protect them from any foreseeable injury when using a product as intended.

The extent of the duty owed by a particular manufacturer or supplier will depend on the role they play in the supply chain and the steps that are reasonably and practicably available to them to address the risk.

Since the early 2000s, common law negligence in Australia has been substantially impacted by statutory reforms designed to create a uniform national approach and curtail excessive negligence claims. These led to the introduction of various civil liability regimes, which are in place in Australian states and territories.

False, Misleading or Deceptive Conduct

The Australian Consumer Law prohibits persons from engaging in false, misleading or deceptive conduct in trade or commerce. It does not matter whether the person intended to mislead. Breach of this prohibition gives rise to a right to sue for loss or damage (although not for personal injury) in respect of losses suffered as a result of that conduct.

This prohibition is relied on in all manner of claims, including product liability claims for economic loss. By way of example, if goods are represented – expressly or impliedly – to have certain qualities that they do not have, a purchaser or end user of the product may sue for damages on the basis that the representations are misleading.

Statutory Guarantees

Part 3-2 Division 1 of the Australian Consumer Law provides that a supplier of goods to a consumer supplies those goods subject to a number of statutory guarantees. These guarantees cannot be limited or excluded by contract. They require that the goods:

- correspond with their description;
- are of acceptable quality;
- are fit for any disclosed purpose;
- conform to any sample provided or demonstration model in quality, state or condition; and
- comply with any express warranties given in relation to them.

Remedies for breach of the above-mentioned consumer guarantees are provided in Part 5-4 of the Australian Consumer Law. For actions against suppliers, consumers have a number of remedies available, including in some cases the right to return the goods and demand a refund, as well as the right to recover any reasonably foreseeable losses suffered by reason of the failure of the goods to comply with the guarantee.

Part 5-4 also provides an extended right to sue the manufacturer of goods for damages if they breach guarantees of acceptable quality, supply of goods by description, as to repairs and spare parts or express warranties.

Strict Liability Regime

Part 3-5 of the Australian Consumer Law imposes liability on manufacturers of goods with safety defects. It is closely modelled on the European Product Liability Directive.

Goods have a safety defect if their safety is "not such as persons generally are entitled to expect". Relevant surrounding circumstances must be taken into account in making this safety inquiry. If such goods cause personal injury or damage to land, buildings or fixtures, persons who suffer loss as a result of such injury or damage may sue the manufacturer for damages.

Expanded Concepts of Consumer and Manufacturer Under the Australian Consumer Law

There are specific definitions of "consumer" and "consumer goods" as well as "manufacturer" in the Australian Consumer Law.

"Consumer goods" or "goods acquired as a consumer" are goods that:

- cost AUD100,000 or less, are a vehicle or trailer acquired for use principally in the transport of goods on public roads or are otherwise goods that are of a kind ordinarily acquired for personal, domestic or household use or consumption;
- were not acquired for the purposes of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or repair or treatment of other goods or fixtures on land; and
- were not acquired:
  (a) (for goods other than gift cards) for the purpose of resupply; or
  (b) (for gift cards) for the purpose of re-supply in trade or commerce.

The term "manufacturer" has a deeming function, and it means not only the actual manufacturer of goods (ie, a person who grows, extracts, produces, processes or assembles goods), but also:

- a person who causes or permits their name, or a name by which the person carries on business or a brand or mark of the person, to be applied to the goods;
- a person who causes or permits themselves to be held out as the manufacturer of the goods; and
- a person who imports the goods into Australia (if the actual manufacturer of the goods does not have a place of business in Australia).

Contract

Another cause of action for a person who has been injured or who has suffered loss or damage is under the law of contract. However, the number of these claims has diminished owing to the growth of statutory remedies and remedies available under the tort of negligence.

2.2 Standing to Bring Product Liability Claims

Under the Australian regime, the original purchaser is not the only person who may make a claim for injuries caused by a product. Apart from the remedies available for breach of consumer guarantees, which may only be sought by the consumer who received the goods from the supplier, the other causes of action outlined in **2.1 Product Liability Causes of Action and Sources of Law** may be relied upon by any person who suffers loss and damage that is compensable under the relevant cause of action.

2.3 Time Limits for Product Liability Claims

The limitation period for bringing a product liability claim depends on a number of factors, including the cause of action, the type of claim (eg, in relation to an alleged safety defect), whether the claim is brought under common law or statute, the relevant Australian jurisdiction, and the date of the alleged act or omission.

However, in relation to claims for personal injury, the applicable limitation period for an action to be commenced is:

- in most jurisdictions, either within three years of the date the cause of action is discoverable by the plaintiff (the date of discoverability), or 12 years from the date of the act or omission alleged to have caused the death or injury (the long-stop period); or
- three years from the date the cause of action accrued.

There may also be a mechanism for an extension to be granted by the courts in relation to the applicable limitation period for personal injury claims. In determining whether to grant an extension, a court is generally required to consider a number of factors, including having regard to the justice of the case. Again, in most jurisdictions an extension of up to three years can be granted. There are also circumstances in which limitation periods are suspended, such as where a claimant is suffering from a legal incapacity (eg, the claimant is a minor or suffers from a mental or physical disability), or when a class action is commenced – in which case, the limitation period will not begin to run again until a group member opts out or the proceedings are determined.

The limitation period for claims that do not relate to personal injury is, in most cases, six years from when the cause of action accrued.

2.4 Jurisdictional Requirements for Product Liability Claims

Australia has both a federal court system and a hierarchy of courts in each of the states and territories. The High Court of Australia deals with constitutional disputes and appeals (with leave) from either the Full Federal Court or a state or territory court of appeal. Both federal and state courts may exercise jurisdiction in respect of the causes of action under the Australian Consumer Law outlined in **2.1 Product Liability Causes of Action and Sources of Law**. In so far as a claim relates to defendants and conduct within Australia, proceedings may be commenced in any court of competent jurisdiction, regardless of where the conduct occurred. However, there is cross-vesting legislation that provides that the proceedings may be moved from one jurisdiction to another if they are in an inappropriate forum.

Foreign Corporations

The Australian Consumer Law has long-arm jurisdiction and also regulates the conduct of foreign corporations that are "carrying on business" in Australia. In order for an Australian court to validly exercise jurisdiction over a foreign corporation, that corporation must be validly served with initiating process. Some courts require leave to be obtained to serve overseas corporations, and for the court to be satisfied that the claim has a sufficient nexus to Australia to justify it being brought in Australia. In other courts, there is no requirement to seek leave to serve an overseas corporation when certain claims (such as those under the Australian Consumer Law) are being made. The court rules in each jurisdiction set out a list of circumstances

in which service outside Australia may be permitted. One such circumstance is that the claim is seeking recovery of damage suffered wholly or partly in Australia, and that is often sufficient in product liability claims to justify service on a foreign defendant.

Australia is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, so – if authorised – service may be effected through Hague Convention means on other treaty parties.

2.5 Pre-action Procedures and Requirements for Product Liability Claims

Under Federal Legislation

There are mandatory steps that must be taken at a federal level and in some states and territories in Australia before formal proceedings can be commenced in relation to product liability claims. Federal legislation obliges parties to take "genuine steps" to resolve a dispute before commencing proceedings in the Federal Court. Under the federal legislation, genuine steps include the requirement to file a statement specifying the steps that have been taken to resolve the issues in dispute or the reasons why such steps were not taken.

Under State Legislation

Many states and territories also have various different pre-action procedures in place, which must be undertaken before formal proceedings can be commenced. For example, the Australian Capital Territory (ACT) requires the claimant of a personal injury claim to provide a potential respondent with a notice of their claim (in the approved form), which includes brief particulars and copies of any documents directly relevant to a matter in issue in the claim. The respondent must respond to the notice of claim, acknowledging whether it is in fact the proper respondent to the claim or whether it has knowledge of who may be the proper respondent to the claim. If the respondent on whom the notice of claim was served is the proper respondent to the claim, they have an obligation to provide the claimant with copies of all documents in their possession that are directly relevant to a matter in issue in the claim. There is then an obligation on the respondent to attempt to resolve the dispute by making an offer of settlement or counter-offer to any offer made by the claimant. Queensland has a very similar pre-action procedure provided for by the Personal Injuries Proceedings Act 2002 (QLD), except that – in addition to the obligations of the parties outlined above for the ACT – parties in Queensland must also attend a compulsory settlement conference before formal proceedings are commenced. South Australia also has pre-action procedures that the parties are required to comply with before commencing formal proceedings in relation to most claims.

Consequences of Non-compliance

Non-compliance with the various pre-action procedures may mean that the claimants cannot commence or continue proceedings until those pre-action requirements have been complied with. Furthermore, non-compliance may result in the court awarding costs reasonably incurred because of the non-compliance against the non-complying party once proceedings are commenced.

2.6 Rules for Preservation of Evidence in Product Liability Claims

The general rule is that documents must be preserved as soon as there is a reasonable anticipation or reasonable contemplation of litigation. The definitions of document are extremely broad and extend to information in many forms, and to the product itself. The rule first existed

under common law, where it is expressed as an offence involving perverting the course of justice. In most Australian jurisdictions, the common-law offence has now been supplemented or replaced by statute – examples of which follow.

- The Crimes Act 1914 (Cth) contains an offence for the destruction of "a book, document or thing of any kind" that "is, or may be, required in evidence in a [federal] judicial proceeding", provided the intention is to prevent the book, document or thing from being used in evidence (Section 39).
- the Crimes Act 1958 (Vic) contains an offence for the intentional destruction/concealment of a "document or other thing of any kind" that "is, or is reasonably likely to be, required in evidence in a legal proceeding" (Section 254). The relevant intention here is the "intention of preventing it from being used in evidence in a legal proceeding" – this offence applies to a legal proceeding that is in progress or that is to be, or may be, commenced in the future.

Depending upon the jurisdiction, penalties include up to five years' imprisonment, significant fines and the ability of the court to strike out affected parts of the defence of a contravening party. Lawyers who advise their clients to act contrary to the obligations in legislation may also face sanction and penalties.

From a procedural perspective, if documents that were relevant to litigation are no longer available because of steps taken by a party who was aware of (or should have been aware of) actual or likely proceedings, this may result in that party's claim or defence being struck out, to the extent that the documents would have been relevant to that claim. It may also result in adverse inferences being drawn against the party about the content of the documents, which can then be used as a basis to make findings of fact against the non-producing party.

2.7 Rules for Disclosure of Documents in Product Liability Cases

The rules of the court in which a claim is commenced outline the applicable requirements with regard to discovery. While these rules are similar across the various Australian jurisdictions, there are nuances between the courts. To assist the parties, the Australian courts have published practice notes and directions that provide further guidance, such as in relation to the court's expectations concerning the parties' approach to discovery. Use of technology is actively encouraged by all courts in discovery and many provide suggested protocols for exchanging documents with technological assistance.

Generally speaking, the practice of Australian courts is to try to actively manage the discovery process so as to keep the level of discovery proportionate to the complexity of the issues in proceedings and the amount that is at stake.

In personal injury proceedings, documentary discovery is only available with the court's leave in most courts. Before making discovery orders, a court must be satisfied that the discovery sought is necessary and will assist the resolution of proceedings as quickly and efficiently as possible. Courts will generally not grant discovery requests that are expansive or may be "fishing" expeditions. The additional guidance provided by Australian courts via practice notes and directions emphasises the courts' expectation that parties to proceedings will take all the steps necessary to reduce the burden of discovery.

Subpoenas may also be used to obtain documents that are relevant to issues raised in a pro-

ceeding but that are held by a third party. As with discovery, in many courts a party must approach the court to request leave to issue a subpoena and must demonstrate to the court that the subpoena has a legitimate forensic purpose. A subpoenaed entity will also have an opportunity to object to the scope or timeframe of a subpoena.

2.8 Rules for Expert Evidence in Product Liability Cases

Expert evidence is typically an important part of the evidence in product liability cases, in respect of questions of both liability and quantum. This is because they often involve complex, technical questions regarding products, standards and the scientific state of the art.

Experts must be independent and have a duty to assist the court rather than to advocate on behalf of the party that calls them. Powers do exist for courts to appoint their own experts or refer particular matters to referees. Increasingly, the use of these powers is being explored by courts in Australia in complex product liability cases.

The duties of expert witnesses are usually set out in the court rules or practice notes (in addition to the common law). By way of example, the Federal Court of Australia's Expert Evidence Practice Note ("GPN-EXPT") states that any expert witness retained by a party for the purpose of preparing a report or giving evidence should – at the earliest opportunity – be provided with a copy of the Harmonised Expert Witness Code of Conduct Practice Note and all relevant information (whether helpful or harmful to that party's case) so as to enable them to prepare a report of a truly independent nature. Experts must also set out the basis for their opinions and acknowledge that they have complied with their obligations under the practice note.

Most courts also have rules that prohibit the evidence of any expert from being relied on unless the expert has served a written report well before the date for trial.

Co-ordination of Experts

In addition, product liability cases often involve a court-ordered process for the evidence of experts in the same field to be given concurrently – ie, the experts for all parties in the same discipline will be sworn in together to give their evidence. It is also usual for a conferral process to be ordered in advance of the experts giving evidence so that they can produce a joint report that details the areas of agreement and disagreement, as well as the reasons for that disagreement.

2.9 Burden of Proof in Product Liability Cases

Under the law of contract, the law of negligence and the majority of provisions in the Australian Consumer Law, the claimant bears the onus of proving the elements of their claim on the balance of probabilities.

2.10 Courts in Which Product Liability Claims Are Brought

Claimants may bring product liability claims in either the Federal Court or state or territory courts. Each state and territory has either two or three levels of court: a magistrates' or local court, a district or county court and a Supreme Court. The Federal Court has the Federal Circuit Court, the Federal Court and the Full Court of the Federal Court.

There are jurisdictional limits for lower courts, which vary from state to state (they are usually in the range of AUD750,000 to AUD1 million for the district courts). The Supreme Court of each state and territory has unlimited jurisdiction (subject

only to other laws that may separately restrict the quantum of damages payable for certain types of claims, including personal injury claims). Most product liability litigation of any complexity will be brought in either a state or territory Supreme Court or the Federal Court.

Civil juries are very rare in Australia, so in practice most product liability cases are heard by a judge alone. The usual practice in Australia is for a single judge to sit at first instance and a panel of three or more judges at appellate level.

All civil litigation in Australia is adversarial in nature. Individual parties present their evidence to the judge and make submissions on the law. After consideration of all the materials presented, the judge makes findings of fact and law.

2.11 Appeal Mechanisms for Product Liability Claims

In virtually all jurisdictions, unsuccessful parties have the right to appeal a judgment of a trial judge. The applicable appeal procedure is dictated by the jurisdiction in which the trial took place. In the case of interlocutory judgments, it is generally necessary for the unsuccessful party to apply for leave to appeal (from the original deciding judge). Appeals are typically raised on a particular question of law, but it is not unusual for some of the evidence presented at trial to be reviewed in the course of an appeal.

Parties who are unsuccessful on appeal to the Full Court of the Federal Court or a state or territory court of appeal may seek leave to appeal to the High Court, Australia's highest appellate court. There is no automatic right to have an appeal heard by the High Court. The party wanting to appeal must convince the High Court in a "special leave" hearing that the issues in dispute are sufficiently important or that the potential for miscarriage of justice is sufficiently great to justify the appeal being heard by the High Court. Once a matter has been determined by the High Court, there is no further appeal and the decision is binding on all other Australian courts.

Appeals in most Australian courts are by way of rehearing, meaning that the court has the power to consider all of the evidence afresh. However, no new evidence may be put before the appellate court unless that court grants leave. It is extremely rare for such leave to be granted in civil matters.

Timeframes

In the Full Court of the Federal Court, appeals from final judgments must be filed and served within 28 days of the trial decision. Timeframes for state and territory courts of appeal vary based on jurisdiction but are all of a similar order.

2.12 Defences to Product Liability Claims

Negligence

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

- voluntary assumption of risk;
- contributory negligence; and
- the learned intermediary defence.

Voluntary assumption of risk is when a plaintiff consciously decides to take responsibility for injury, loss or damage. In establishing this defence, the defendant must show that the plaintiff properly perceived and appreciated the danger, and voluntarily chose to accept the risk. Contributory negligence may be relied upon when the plaintiff has contributed to their own injury by failing to meet the standard of care for their own safety. Typically, contributory negligence will result in apportionment of damages

according to the degree of fault, but may be a complete defence in some jurisdictions.

The learned intermediary defence has not yet been applied in Australian courts, but the existing common law principles would accommodate its use.

The introduction of various Civil Liability Acts has also led to additional specific statutory defences relating to certain types of claims. By way of example, the state of New South Wales has introduced complete defences where:

- harm was suffered as a result of the materialisation of an inherent risk (unavoidable by the exercise of reasonable care and skill) or an obvious risk (obvious to a reasonable person);
- the conduct was widely accepted at the time by peer professional opinion as competent professional practice;
- the defendant is a good Samaritan or volunteer exercising reasonable skill and care; or
- the defendant is a public or other authority (in certain cases).

Australian Consumer Law

In cases where a safety defect was not discoverable within the limitations of science and technology at the time of distribution, the manufacturer or supplier may rely on the "state-of-the-art defence" (also known as the "development risk defence"). This defence must be established on the balance of probabilities and the claim in question must be in relation to the Australian Consumer Law provisions relating to defective products.

Another defence to an action based on a safety defect may be claimed in circumstances where the defect is brought about by compliance with a mandatory standard. A mandatory standard is a standard for goods or anything relating to the goods that, under law, must be complied with when goods are supplied and which carries a penalty for non-compliance. This defence cannot be claimed in relation to statutory requirements for goods to achieve a minimum standard.

Manufacturers are also entitled to claim a defence where the alleged defect did not exist when the goods were supplied by the manufacturer. Similarly, if an entity is only responsible for the manufacture of a component of the product, that entity will be able to claim a defence against actions for claims relating to safety defects in the finished product.

2.13 The Impact of Regulatory Compliance on Product Liability Claims

Adherence to regulatory requirements is a relevant consideration in product liability cases in Australia – although it does not operate as a complete defence to such claims. In this respect, see **2.12 Defences to Product Liability Claims**. Unlike in the USA, there is no "pre-emption" defence in Australia. Compliance with applicable regulatory requirements or mandated standards will be a relevant factor considered by the courts in actions for negligence and under the statutory warranty or guarantee provisions of the Australian Consumer Law; however, the fact that a product had its safety assessed by a regulator as part of the process of granting a licence to sell that product in Australia does not preclude a product liability claim being brought in respect of it.

2.14 Rules for Payment of Costs in Product Liability Claims

Australia has a "loser pays" costs system. The precise rules that apply to calculate the costs payable by an unsuccessful party to a successful one vary from jurisdiction to jurisdiction, but

are generally calculated on a party/party basis – ie, only some parts of the work undertaken are recoverable (meaning that, in the ordinary course, the costs recovered are only a portion of the costs incurred). However, solicitor/client or indemnity costs – which would be close to the total costs incurred – may be awarded in some circumstances, particularly if a party formally rejected a settlement offer and then failed to do better than that offer at trial.

The approach taken to calculating costs differs from jurisdiction to jurisdiction. Some jurisdictions have a scale of costs, which specifies (and limits) the amount a successful party may recover from an unsuccessful party for tasks undertaken during the course of litigation (such as the drafting of correspondence or electronic document management). Other recoverable costs include court filing fees and other out-of-pocket expenses. In other jurisdictions, an assessment is made as to the reasonableness of the costs incurred.

Depending on the type of proceeding commenced, more particular rules may apply in relation to costs. By way of example, in representative proceedings or class actions, statutory provisions restrict costs orders being made against class members – other than those who commenced the proceedings.

2.15 Available Funding in Product Liability Claims

Australia has a well-established litigation funding industry. Although the exact number is unknown, in December 2020 the Parliamentary Joint Committee on Corporations and Financial Services indicated that 22 litigation funding companies were known to be operating in Australia (14 of which were foreign owned or based overseas, six were Australian-owned or Australian-based, and the information for the remaining two was unknown).

Litigation Funding Arrangements

Litigation funding arrangements typically involve a funding agreement between the funder and claimant, a retainer agreement between the lawyer and claimant, and an agreement between the litigation funder and lawyer that sets out the terms on which the funder agrees to pay the costs of the litigation. However, the models of litigation funding are evolving and the law in this area is also changing.

At the core of such litigation funding arrangements is an arrangement whereby the litigation funder promises to pay the legal costs and disbursements of the litigation and to meet any adverse costs order – in exchange for which, the claimant promises to pay the funder a percentage of any compensation they receive. Such arrangements are very common in Australian class actions; however, they are traditionally less common in product liability class actions than in other forms of class actions, such as shareholder class actions.

Reform and Development

Litigation funding is an area of rapid reform and development in Australia. Following a decision of the Full Court of the Federal Court of Australia in June 2022, amendments were introduced to the Corporations Regulations 2001 (Cth) that exempt litigation funding schemes from the managed investment scheme regime, where those schemes meet the relevant definition under the regulations. Before these amendments, litigation funding arrangements could be regulated as managed investment schemes under the Corporations Act 2001 (Cth). Further reforms to litigation funding regulations continue to be the subject of review and debate.

Contingency Fees

Australian lawyers are permitted to enter into "no win, no fee" arrangements and, in the case of such arrangements, to charge an uplift on their fees of up to 25% in the event of success. They are not otherwise permitted to charge contingency fees, except in class actions in the Supreme Court of Victoria, where the court approves the arrangement. See further discussion in **3.1 Trends in Product Liability and Product Safety Policy**.

2.16 Existence of Class Actions, Representative Proceedings or Co-ordinated Proceedings in Product Liability Claims

There are six Australian courts that have a class action procedure (referred to as a "representative proceeding"): the Federal Court of Australia and the Supreme Courts of New South Wales, Queensland, Tasmania, Victoria and Western Australia. The class action procedure is often used in product liability claims.

The rules governing representative proceedings are largely identical in each of the six jurisdictions. In order to bring representative proceedings, there must be seven or more persons who have claims against the same legal person, arising out of the same, similar or related circumstances and giving rise to a substantial common issue of law or fact. However, it is not necessary for at least seven persons to be individually identified – nor is there a requirement, as in many other jurisdictions – that the common issues predominate over those that are not common.

Australian representative proceedings are "opt out", meaning that all persons who fall within the group definition will be bound by the outcome of the proceedings unless they choose to opt out. Unlike many other jurisdictions, there is no certification requirement for Australian class actions – meaning that once a class action that meets the basic requirements is commenced, a class action is on foot unless the defendants can convince the court that representative proceedings are an inappropriate vehicle for the dispute in question. Class actions in Australia are very rarely "declassed" in this manner.

2.17 Summary of Significant Recent Product Liability Claims

In recent years, Australia has seen a number of class actions concerning product liability claims. A selection of those cases is included here.

Bayer Essure Class Action

In July 2019, a representative proceeding was commenced by Slater & Gordon on behalf of women who are alleged to have suffered injury as a result of using the Essure contraceptive device. Trial in this matter commenced in April 2023 in the Supreme Court of Victoria and concluded in August 2023. Judgment is currently reserved.

Combustible Cladding Class Action

Two class actions have been commenced by William Roberts Lawyers, funded by IMF Bentham, on behalf of owners of buildings who have suffered or will suffer financial loss due to the need to remove and replace Alucobond PE and Vitrabond PE combustible cladding products. The claimants seek to recover the cost of rectification, loss of property value and the legal cost of experts from the product manufacturers. The Alucobond class action is presently listed for hearing commencing in August 2024.

Mesh Implant Class Action

In 2012, a representative proceeding was commenced by Shine Lawyers on behalf of Australian women who alleged injuries as a result of

pelvic mesh implants. The first-instance trial in the pelvic mesh class action was held in the Federal Court of Australia in 2017. Judgment was delivered in late 2019 in favour of three applicants. An appeal in respect of the trial judgment was heard by the Full Court of the Federal Court in February 2021, with judgment delivered in March 2021 in favour of the three applicants. The appellants sought special leave to appeal to the High Court of Australia. This application was rejected in November 2021. In March 2023, the Federal Court approved a settlement between the parties for AUD300million. Numerous class actions have been filed on behalf of women not captured in the original proceedings against other manufacturers of pelvic mesh.

Roundup

Three competing class actions were commenced in 2019 and 2020 in relation to the weedkiller, Roundup. In June 2020, the Federal Court ruled that the latest of those class actions (commenced by Maurice Blackburn) ought to proceed, in preference over the competing claims. The hearing of this matter concluded in January 2024 and judgment is currently reserved.

Automotive Class Actions

There have been numerous class actions against Australian automotive companies in recent years for a wide range of issues, including emissions non-compliance, Takata airbags and allegedly faulty diesel particulate filters. These claims typically rely on consumer guarantee provisions in the Australian Consumer Law and allege that vehicle owners are entitled to compensation because their vehicles were worth less than they paid for them at the time of purchase. This theory of loss is the subject of a reserved decision of the High Court of Australia on appeal from two Federal Court class actions.

Further Claims

In addition, there have been a number of highly contentious toxic tort class actions relating to bushfires and floods – some of which resulted in significant multimillion-dollar settlements.

Separately, the ACCC has also been active in recent years, particularly in its oversight of product recalls and allegedly unsafe products.

3. Recent Policy Changes and Outlook

3.1 Trends in Product Liability and Product Safety Policy

The maximum penalties for breach of the Australian Consumer Law, as set out in **1.5 Penalties for Breach of Product Safety Obligations**, increased five-fold in late 2022 and substantially increased the penalties available (the previous maximum corporate penalty for a breach of the Australian Consumer Law was AUD10 million). The amendments also introduced penalties relating to unfair contract terms, which came into effect in November 2023.

Even apart from these amendments, the penalties being imposed by courts for breaches of the Competition and Consumer Act 2010 (Cth) (including but not limited to those relating to product safety breaches) have been steadily increasing, with a new high being set by the AUD438 million penalty mentioned in **1.5 Penalties for Breach of Product Safety Obligations**. This trend is expected to continue with the application of the new penalty regime.

Class action procedure, in particular as it relates to litigation funders, has been the subject of considerable activity by the court and the federal

legislature. The following are of particular relevance.

- In January 2019, the Australian Law Reform Commission (ALRC) tabled to Parliament its report on class actions, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*.
- In December 2019, the High Court held that neither the Federal Court nor the New South Wales Supreme Court has the power to make common fund orders (which enabled funders to obtain a commission from group members who had not signed a funding agreement) – at least at an early stage of the proceedings.
- In April 2020, the New South Wales Court of Appeal held that the New South Wales Supreme Court did not have the power to make an order closing an otherwise open class in order to facilitate a mediation.
- In August 2020, the Corporations Regulations 2001 (Cth) were amended to subject litigation funders to regulatory regimes relating to managed investment schemes and the supply of financial products – from which they had previously been exempt. Central to the changes was the requirement that litigation funders were required to hold an Australian Financial Services Licence.
- In December 2020, the Federal Government Joint Committee on Corporations and Financial Services published a report titled *Litigation Funding and the Regulation of the Class Action Industry*. The report made 31 recommendations for further legislative and procedural reforms across class actions and litigation funding.
- In October 2021, the Australian government responded to these recommendations, making its priorities:
  (a) to ensure that Australians receive a fair and proportionate amount of any class action settlement or judgment and to reduce the windfall gains made by litigation funders – draft legislation has been proposed to this effect;
  (b) to expand the regulation and supervision of litigation funders;
  (c) to ensure that "economically inefficient class actions" are not detrimental to Australia's economic recovery from COVID-19;
  (d) to enhance the Federal Court's powers to protect class members and regulate class actions; and
  (e) to consider whether the Federal Court ought to have exclusive jurisdiction for class actions commenced under the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).
- In June 2022, the Full Court of the Federal Court of Australia found an earlier authority of the court to be wrong, which had held that litigation funding arrangements were managed investment schemes for the purposes of the Corporations Act 2001 (Cth).
- In December 2022, the Corporations Amendment (Litigation Funding) Regulations 2022 came into effect, amending the Corporations Regulations 2001 (Cth) to exempt litigation funding schemes that meet the definition under the regulations from the managed investment scheme regime. These amendments apply in relation to litigation funding schemes that meet the relevant definition and were entered:
  (a) on or after the commencement of the Corporations Amendment (Litigation Funding) Regulations 2022; and
  (b) before the commencement of those regulations, but only in relation to as much of the duration of the scheme that occurs on or after that commencement.

- In October 2023, the Full Court of the Federal Court of Australia confirmed that section 33V of the Federal Court Act 1976 (Cth) does empower the court to make a common fund order when approving settlement of a class action proceeding.
- In October 2023, the Victorian Supreme Court of Appeal reaffirmed that contingency fees are limited to proceedings in the Supreme Court of Victoria until such time as they are introduced in other courts.

In relation to product liability, the current product liability regime has remained relatively unchanged since its introduction in 2011 as part of the Australian Consumer Law. However, class actions are now a significant driver of a number of different forms of litigation, including product liability litigation.

3.2 Future Policy in Product Liability and Product Safety

Amendments to the Australian Consumer Law

In March 2017, Consumer Affairs Australia and New Zealand published the report of its review of the Australian Consumer Law. The report made a number of recommendations in relation to amendment of the Australian Consumer Law – some of which (eg, the increased penalties described in **3.1 Trends in Product Liability and Product Safety Policy**) have already been implemented. However, one that has not been implemented is the recommendation that Australia should introduce a general safety provision that imposes:

- an obligation on suppliers in Australia to ensure the safety of a product before it enters the market; and
- penalties on suppliers in accordance with the new penalty regime for failing to do so.

Product Safety Priorities

The ACCC remains committed to minimising and raising awareness of the risks posed by unsafe consumer goods. In its product safety priorities for 2023–24, the main areas of focus for the regulator include:

- undertaking compliance, enforcement and education initiatives focused on high-risk safety issues for young children in products such as sleep aids, toys for children under the age of three, products with button batteries and toppling furniture;
- implementing strategies to prevent injuries and deaths related to infant sleep products;
- strengthening product safety online, including through using technology to prevent unsafe product listings online, as well as using best practices to reduce safety risks from second-hand goods sold online; and
- supporting Australia's transition to a sustainable economy through education and awareness raising.

Product Liability Perspective

From a product liability perspective, much will depend on:

- how the recent amendments to the Corporations Regulations 2001 (Cth) to exempt litigation funding schemes from the managed investment schemes regime shape the product liability landscape in Australia; and
- the impact of contingency fee reforms in Victoria, where legislative changes in 2020 permitted lawyers to charge – under some circumstances – percentage-based contingency fees in class actions before the Supreme Court of Victoria.

Since the introduction of the contingency fee reforms, there has been a consistent increase

in class action proceedings filed in the Supreme Court of Victoria, including for the reasons described in the case summary of the October 2023 decision of the Victorian Supreme Court of Appeal in **3.1 Trends in Product Liability and Product Safety Policy**.

Finally, the High Court's judgment on appeal regarding the above-mentioned two Federal Court automotive class actions will have a significant effect on the future conduct of such claims, which have been particularly frequent in recent years.

Trends and Developments

Contributed by:
Greg Williams, Alexandra Rose, Caitlin Sheehy and Alexandra Brien
Clayton Utz

Clayton Utz is an independent Australian firm established in 1833, with nearly 200 partners and 1,400 employees across six offices, and one of the largest commercial litigation practices in Australia, including a specialist five-partner product safety and product liability team. The firm handles the most complex, significant and high-profile matters for clients, including many of Australia's top financial institutions, multinational corporations operating in a range of sectors, and state and Australian government departments and agencies. Clayton Utz is also a global leader in pro bono, with one of the largest pro bono practices of any law firm outside the USA.

Authors

Greg Williams is the national practice group leader of commercial litigation at Clayton Utz. He is a highly regarded lawyer who specialises in class actions, product liability litigation and products regulatory advice. Greg's impressive track record of success in some of the most high-profile cases across the pharmaceutical, medical device, automotive and financial sectors has earned him a reputation as a skilled and accomplished practitioner. Greg is known for his considered strategic litigation advice and his ability to align litigation strategy with clients' commercial objectives. He is a member of the International Association of Defense Counsel and also has a master's degree in biochemistry.

Alexandra Rose is a leading practitioner in the product liability arena, and has a wealth of knowledge and expertise in the defence of large-scale high-stakes litigation across product liability, class actions, and medical device, pharmaceutical and regulatory matters throughout Australia and internationally. In her rapidly growing practice at Clayton Utz, Alex advises clients across the automotive, health, consumer goods and financial services industries. Clients benefit from her adept ability to manage disputes in a manner that enhances global defence strategies, drives efficiencies and allows clients to focus on their core business priorities. She is a member of the Defense Research Institute (DRI) and International Association of Defense Counsel (IADC).

Contributed by: Greg Williams, Alexandra Rose, Caitlin Sheehy and Alexandra Brien, **Clayton Utz**

Caitlin Sheehy is a special counsel in the Clayton Utz product liability team and an experienced commercial litigator who acts in complex product liability litigation, including class actions. She has represented Australian and overseas pharmaceutical and medical device clients both in contentious and advisory matters, including in relation to regulatory issues, advertising and labelling requirements, and product safety and recall issues.

Alexandra Brien is a lawyer in the Clayton Utz product liability team. Alexandra has experience acting in product liability litigation, including class actions. She also has experience of advising clients in relation to regulatory issues (including with regard to the Australian Consumer Law) and product safety and recall issues.

Clayton Utz

Level 15
1 Bligh Street
Sydney
New South Wales 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
Email: gwilliams@claytonutz.com
Web: www.claytonutz.com

CLAYTON UTZ

The Australian Competition and Consumer Commission's Crackdown on Greenwashing by Businesses

A continuing focus of the Australian Competition and Consumer Commission (ACCC) and the financial consumer regulator, the Australian Securities and Investments Commission (ASIC), in 2023-24 has been greenwashing in the advertising of goods and services to consumers. In December 2023, following the receipt of submissions from more than 150 stakeholders, the ACCC published guidance in an attempt "to improve the integrity of environmental and sustainability claims made by businesses and protect consumers from greenwashing" – in recognition of a shift in consumer preferences towards more environmentally sustainable goods and services as well as to help businesses facilitate consumers making informed choices.

The Australian government is also considering legislative changes that may deliver the ACCC and ASIC further powers to protect consumers.

The ACCC broadly defines "greenwashing" as false or misleading environmental claims and indicates that it will consider a business to have been engaging in greenwashing in circumstances where claims are made that present goods or services as "better for or less harmful to the environment than [they] really [are]". The ACCC similarly defines an "environmental claim" broadly as any representation made by a business in relation to its environmental impact, including claims that the goods or services offered by the business – or the business itself – have a neutral or positive impact on the environment, are less harmful for the environment than alternative goods or services, or have specific environmental benefits.

An environmental or "green" claim made by a business on (among other things) packaging or labelling, in advertisements, or on social media and websites without an accurate or factual basis may amount to a breach of the Australian Consumer Law – specifically, of the prohibitions against:

- engaging in misleading or deceptive conduct in trade or commerce; and/or
- making false or misleading representations about specific aspects of goods and services.

Importantly, it is enough for the conduct only to be likely to mislead or deceive for a breach to be established, and it is not necessary to prove that the conduct was intentional or actually misled or deceived any person and resulted in actual loss or damage. In certain circumstances, silence or omitting information may also be considered misleading or deceptive conduct or amount to a false or misleading representation. The ACCC will consider whether the "overall impression created would be misleading to the ordinary and reasonable consumer".

The release of the guidance follows a speech made by the then ACCC Deputy Chair Delia Rickard at the Sydney Morning Herald Sustainability Summit on 20 September 2022, where she warned that the ACCC would be actively targeting greenwashing and that businesses would be expected to "back up" any claims they are making, including by providing "reliable scientific reports, transparent supply chain information, reputable third-party certification, or other forms of evidence". Delia Rickard further commented that the ACCC would "be asking businesses to substantiate their claims" in circumstances where the regulator had concerns about their veracity.

It also follows an internet sweep conducted by the ACCC in October and November 2022 of the environmental and sustainability claims made by 247 businesses in Australia. Overall, the ACCC found that 57% of businesses had made claims that were potentially misleading or deceptive and, more specifically, that:

- in the cosmetics and personal care sector, 73% of businesses made concerning claims;
- in the clothing and footwear sector, 67% of businesses made concerning claims; and
- in the food and drink sector, 65% of businesses made concerning claims.

ACCC's eight principles to follow for good practice

The ACCC guidance outlines eight principles that businesses should apply to avoid misleading consumers and promote "good practice", as follows.

- Make accurate and truthful claims – it is important that the claims made by businesses are accurate, true and factually correct, even in circumstances where products are provided by a third party in a business' supply chain. The ACCC expects that businesses will not exaggerate the benefits of a claim, will only make claims that represent a "genuine environmental impact", and will take reasonable steps to verify information provided by suppliers.
- Have evidence to back up claims – any claims should be supported and substantiated by "clear evidence" (ie, preferably independent and scientific evidence or research). Businesses should avoid making claims in relation to future matters where they do not have "reasonable grounds" for making the representation, as this may be misleading or deceptive under the Australian Consumer Law.
- Do not hide or omit important information – consumers need to be provided with all the relevant information in order to make an informed decision. As such, providing incomplete information or hiding relevant or important information from consumers will also be considered misleading.
- Explain any conditions or qualifications on claims – if claims will only be accurate or true in certain circumstances or after certain steps are taken (especially by the consumer), these conditions or qualifications should be explained to consumers "clearly and prominently". By way of example, if a business claims that their product is "recyclable", but the consumer would need to take the product to an industrial recycling facility, this may be misleading if not clearly drawn to the attention of the consumer.
- Avoid broad and unqualified claims – claims should be clear and specific, as opposed to broad and unqualified, which may more easily mislead consumers. If there are any qualifications to a business's environmental claims, the ACCC expects these to be accompanied by prominent disclaimers. In addition, the ACCC recommends that businesses avoid using vague and ambiguous terms that do not inform consumers of the environmental benefits of products or services (eg, "green" or "clean", "environmentally friendly" or "eco-friendly", and "sustainable"). The ACCC also expects certain terms to be qualified or explained if used by businesses, including "recyclable", "recycled content", "renewable energy" and "free", in order to ensure that consumers do not get the wrong impression.
- Use clear and easy-to-understand language – scientific and technical language should be avoided, as this language is likely to be diffi-

cult for ordinary and reasonable consumers to understand, and can therefore be misleading.
- Visual elements should not give the wrong impression – as images and logos will influence a consumer's impression of the environmental impact of a product or service, these should be avoided in circumstances where they would give the wrong impression about the environmental benefits of a product or service. Any visual elements (including images, colours, symbols and logos) will be considered by the ACCC along with wording when considering the "overall impression" on the consumer that is created.
- Be direct and open about sustainability transition – the ACCC is aware that transitioning to a more environmentally sustainable business model takes time and, during the transition, a business' products are likely to continue to have a negative impact on the environment. The ACCC expects businesses to be direct and open with consumers in relation to this impact and not overstate environmental improvements and initiatives where they have not been formally and genuinely committed to. This applies to, for example, claims made by businesses in relation to future net-zero emissions targets.

ASIC's guidance includes Information Sheet 271 ("How to Avoid Greenwashing When Offering or Promoting Sustainability-Related Products"), which contains analogous guidance for sustainability-related financial products. Concepts of interest include:

- truth in promotion – using clear labels and defining sustainability-related terminology; and
- clarity in communication – providing clear explanations of how sustainability-related considerations are factored into investment strategies.

Compliance and enforcement action

It is likely that the guidance will form the basis for the ACCC's approach to surveillance and enforcement, with environmental claims and sustainability at the top of the ACCC's list of compliance and enforcement priorities for 2023–24 and 2024–25.

The ACCC has various powers to investigate and commence action against misconduct, including:

- issuing Section 155 notices (to obtain information and documents and/or require a person to attend an examination and give evidence to investigate potential contraventions of the Australian Consumer Law);
- issuing substantiation notices (to require a person to give further information and/or produce documents that could be capable of substantiating or supporting an environmental claim);
- issuing infringement notices (where there are reasonable grounds to believe that a person has contravened certain provisions of the Australian Consumer Law); and
- commencing civil and/or criminal proceedings.

The maximum penalties available for contraventions of the Australian Consumer Law are not insignificant and (for a body corporate) will be the greater of:

- AUD50 million;
- if the court can determine the value of the benefit that the corporation (and any corporation related to it) obtained directly or indirectly and that is reasonably attributable to the act

or omission – three times the value of that benefit; or
- if the court cannot determine the value of the benefit – 30% of the company's adjusted turnover during the period of the act or omission.

The ACCC will consider a number of factors when determining whether to take enforcement action, including:

- whether the ACCC's action will help clarify aspects of the law, especially newer provisions of the Australian Consumer Law; and
- whether the conduct:
  (a) is of significant public interest or concern;
  (b) results in substantial consumer or small business detriment;
  (c) is national conduct by large businesses, recognising the potential for greater consumer detriment and the likelihood that the conduct of large businesses can influence other market participants; and
  (d) involves a significant new or emerging market issues or where the ACCC's action is likely to have an educative or deterrent effect.

Court proceedings and enforceable undertakings

The ACCC accepted a court-enforceable undertaking from MOO Premium Foods Pty Ltd (MOO) in November 2023 in relation to claims it made for a number of years that its yoghurt tubs comprised "100% ocean plastic". The ACCC was concerned that the statements gave the impression that the plastic was collected from the ocean, when it was in fact collected from coastal areas. Although the products included disclaimers on the top and back of its packaging to this effect, they were considered inadequate to overcome the headline "100% ocean plastic" representation. As part of the undertaking, MOO committed to – among other things – conducting internal audits of the "ocean bound plastic" resin used in its packaging.

Most recently, in April 2024, the ACCC (for the first time) commenced proceedings in the Federal Court of Australia against Clorox Australia Pty Limited (Clorox) for allegedly making false or misleading representations that some of its GLAD-branded kitchen and garbage bags were made of 50% recycled "ocean plastic". Despite qualifying statements included in small font on the back of the packaging, the ACCC considers that the headline "ocean plastics" statement – together with the wave imagery and blue colour of the bags – created the impression that they were made from plastic waste collected from the ocean or sea. Instead, the ACCC alleges the bags were partly made from plastic collected from communities up to 50 kilometres in land.

Notably, both MOO and Clorox had disclaimers on the back of the packaging of their respective products to qualify the claims made in relation to the composition of the plastic, but these are (or have been) considered insufficient by the ACCC to avoid or prevent misleading consumers. Moving forwards, businesses should refer to the ACCC guidance and ensure any disclaimers or qualifications with regard to environmental claims are of appropriate size and readily visible to consumers on the product's packaging.

In addition, enforcement action has been taken by ASIC under the analogous provisions of the ASIC Act, which serve to protect consumers from misleading or deceptive conduct in relation to the supply – in trade or commerce – of financial products and services. Although the ACCC will focus on consumer products and services, and ASIC will focus on financial prod-

ucts and services, the regulators have indicated an intention to work closely together to address misconduct in circumstances where there may be overlap between their jurisdictions.

Outlook

The ACCC has indicated plans to release further guidance for businesses and consumers in relation to emission and offset claims, the use of trust marks, and consumer guidance to assist with assessing environmental claims. ASIC will also release updated guidance in connection with foreshadowed mandatory climate disclosures reporting. In the meantime, it is likely that the ACCC and ASIC will continue to work together on the detection and investigation of potential greenwashing claims, and further enforcement action by both regulators can be expected. In turn, this area is becoming one of increasing interest for private litigants and potential consumer class actions against government and corporations.

The Australian government is also expected to continue to consider further options in this area, with the Senate committee inquiry "into greenwashing, particularly claims made by companies, the impact of these claims on consumers, regulatory examples, advertising standards, and legislative options to protect consumers" due to report in 2024. Its terms of reference include legislative options to protect consumers from greenwashing in Australia.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com