Bond Law Review

Volume 1 | Issue 2 Article 4

1989

Reforming Australian Product Liability Laws : Processes and Problems of Law Reform

John Goldring
Australian Law Reform Commission

Reforming Australian Product Liability Laws : Processes and Problems of Law Reform

Abstract
[Extract] In the 1960s and 1970s, Governments and the community became aware of the need for institutional machinery to monitor the operation of the legal system and to recommend changes which would ensure that the law, while maintaining its valuable tradition, more readily accommodated changed social expectations and values. Law reform agencies were seen as the answer. They did not provide a panacea, for no single measure or institution could ever hope to address all social problems. They have been reasonably successful within the limited scope of their operations. They have also developed a range of skills and techniques which have assisted both in improving the quality of their work and in building the legitimacy of institutionalised law reform with important centres of power within the community: the public (including special interest groups), the bureaucracy and politicians.

Keywords
law reform, product liability, Australia,

REFORMING AUSTRALIAN PRODUCT LIABILITY LAWS PROCESSES AND PROBLEMS OF LAW REFORM

by **John Goldring***
Commissioner
Australian Law Reform Commission

LAW REFORM AGENCIES AND THE PROCESS OF LAW REFORM

What is law reform?

Mr Justice Kirby has summarised the statutory function of the Australian Law Reform Commission as:

> [t]he review and consideration of the modernisation, simplification, consolidation, development and reform of . . . laws.[1]

This is, however, a partial view. One of his successors as President of the Australian Law Reform Commission pointed out that different agencies and different individuals involved in law reform work have different aspirations—and different perspectives.[2] Mr Justice Kirby's concerns were lawyer's concerns, which focus on the maintenance and renewal of a legal system based on the common law. His formulation may not emphasise sufficiently the role of law reform agencies as policy advisers to governments and parliaments. The common law, fashioned in the courts, today is interwoven with, perhaps dominated by, statute law. The bulk of the law to be maintained and renewed has been made by parliament, but is often the end product of policy-making processes which involve other sections of the community, especially the bureaucracy. Many statutes enacted by federal, State and Territory parliaments are, at least in one sense, measures of law reform: they modernise and consolidate existing statute law.[3] Law reform is part of the policy-making process. Mr Justice Kirby described functions not peculiar to law reform agencies, but performed by many institutions which provide policy advice to governments. Law reform—what law reform agencies do—is policy advice within a specific area.

* The views expressed in this article are those of the author and do not necessarily represent those of the Commission.

1 *Reform the Law*, Melbourne, OUP, 1983, 6.

2 X Connor, 'Aspirations' in *Australasian Law Reform Agencies Conference, Proceedings* 1984-6, 290.

3 See G Sawer, 'Who Controls the Law'? in D Hambly and J Goldring eds, *Australian Lawyers and Social Change*, Sydney, 1976.

Law and policy

Legislation is both the dominant source of the formal rules of law, and an important instrument through which the power of government is exercised to implement policies. Policy is difficult to define, but most meaningful definitions relate it to priorities to be followed in the allocation of resources and to the values that determine those priorities. Implicitly or expressly, all laws embody some sort of policy.

Laws are reformed when government decides that community resources are not being allocated in the way it favours. Suggestions that the policy of the law or the operation of existing legal rules is wrong generally mean that some interest group within society is complaining about inadequate resources. The interest of that group must, in any complex society, be balanced against the interests of other individuals or groups. This task is value-laden. In this context, when judges decide cases in ways that create rules of precedent, they affect interests and make policies. A government enacts legislation after a process of weighing interests that may conflict over the allocation of resources. When judges and parliaments make law, they are both exercising power and imposing values on the community. But what are those values? How are they arrived at?

Over the last 20 years, all Australian States and Territories and the Commonwealth have established specialised agencies to review existing law and make proposals for reform. Their structure, composition and degree of independence of government vary considerably.[4] These agencies are part of the policy-making apparatus of government, though their range of activity is limited. Some law reform agencies can initiate their own work programs. The Australian Law Reform Commission can work only on matters referred to it by the Attorney-General, and it reports to the Attorney-General. Whether or not its recommendations are accepted depends on a policy decision by the government of the day. The law reform agencies alone cannot reform the laws.[5] Ultimately law reform proposals must be translated into legislation, which may or may not be enacted. Law reform—no matter who does it—is always subject to the political process.

When permanent law reform agencies were established, mainly in the 1960s and 1970s, the principal justification was that judge-made law was losing touch with a rapidly changing society. With the growth of democracy, following the introduction of universal suffrage, judges, at least in the UK and Australia, considered—quite properly—that they should defer to the elected legislatures, and not embark extensively or overtly on law-creation and law reform, even when available judicial techniques allowed them to do so. The priorities of governments and the public service

4 The Australian, Victorian, New South Wales and Western Australian Commissions are independent statutory bodies and normally comprise a combination of part- and full-time Commissioners, backed up by full-time support staff. They are perceived to be more independent of government than some other agencies, which, though comprised of independent members, usually working on a part-time basis, function essentially as part of the Attorney-General's Department.

5 The Malaysian Law Revision Commissioner is an exception. That official has a standing reference to revise and consolidate Malaysian statute law. His recommendations—which usually do not affect policy directly or explicitly—become law automatically upon compliance with specified formalities: See *Revision of Laws Act, 1968-71* (Malaysia) s 6.

allowed only ad hoc legislative responses to gaps and anomalies in the judge-made law. Institutional recognition of, and commitment to, law reform was needed. Taking the English Law Commission (established in 1964) as a model, many common law countries established independent bodies of full-time experts to examine areas of law and recommend changes where these were considered necessary or appropriate. Establishment of such specialised agencies symbolises the need for constant monitoring and change in legal rules.

The Australian Law Reform Commission[6] has achieved a considerable amount. The federal parliament has enacted laws relating to criminal investigation, admiralty, insurance contracts and intermediaries and privacy based on ALRC recommendations, and new laws on evidence and service and execution of process have been foreshadowed.

Independent law reform agencies have been mostly concerned with judge-made law. This forms an ever-diminishing proportion of the total body of law. Statute law may become outdated in the same way as judge-made law, but institutionalised reform of statute law may appear less legitimate than reform of judge-made law: statutes made with the authority of the people's representatives have greater political legitimacy. The ALRC currently has a reference on laws relating to customs and excise, which are almost exclusively statutory. This type of law reform activity is likely to become more common.

Law reform commissions are not the only agents of law reform. In fact, most reforms or changes in the law are minor or technical amendments to existing legislation, suggested by the government departments and agencies responsible for administering the particular legislation.[7] In Australia, individual members of Parliament may raise issues, but governments of all political persuasions maintain a monopoly on the introduction of legislation. Cabinet controls the legislative program of Parliament very closely. Legislative priorities are assigned by officials of the Department of Prime Minister and Cabinet and approved by the Cabinet. Once Cabinet has allocated legislation a place in the parliamentary program, it is virtually assured of enactment.[8] Members of parliament as such are not usually initiators of law reform.

The process of law reform

Initiating law reforms

A 'need' for law reform can be justified in at least two ways:

- existing rules have been enacted, or developed, by the courts to meet a particular social need, to implement specific policy objectives, or in some cases simply to dispose of a single issue, but fail to meet the need or to achieve the objective; or
- existing laws do not provide any, or satisfactory, specific rules governing conduct where the legislature, as a matter of policy, considers that such rules are necessary.

6 Henceforth 'ALRC'.

7 See G Sawer 'Who Controls the Law'? in D Hambly and J Goldring eds, *Australian Lawyers and Social Change*, Sydney, 1976.

8 It is possible that the Senate, which is not normally controlled by the Government, may reject it or suggest amendments.

Both justifications are an expression of a value-judgment about policy or allocation of resources. The work of law reform agencies, such as the ALRC, is concerned primarily with law reform of the first kind. The second is primarily a task for governments and their other policy advisers. 'Need' can be identified in many ways.[9] Lawyers, judges, the media and other observers often draw attention to what they perceive as an anomalous or wrong rule. Some law reform agencies collect and monitor such statements. Members of parliament, state or federal, may ask parliamentary questions about law reform. Usually, however, some initiative is taken by the Government. Mere reference of a question to the Commission does not necessarily mean that reform is justified. This preliminary question must be considered as part of the reference.

In September 1987 the Commonwealth Attorney-General referred to the ALRC the question of whether existing laws of the Commonwealth, including the *Trade Practices Act 1974*, relating to compensation for injury or damage caused by defective or unsafe goods are adequate and appropriate to modern conditions and related matters. The Commission reported in mid-1989.[10] The experience of this reference will be used to illustrate this article. Because laws already operated in the area of product liability, the ALRC's task in this reference was typical of that normally entrusted to law reform agencies. It had to assess existing laws in the light of the terms of reference, and to recommend changes where necessary. Such recommendations may take the form either of a new body or code of rules to be enacted by parliament or of specific amendments to existing legislation. In recommending new product liability laws, the ALRC did not recommend that governments step into an area where previously there was no specific rule. Rather, it recommended new rules to replace or add to existing rules of law.[11]

The first necessary step in any law reform exercise is to determine what the existing law is, and to evaluate it in terms of:

- simplicity and comprehensibility and
- internal consistency[12]

Unclear or internally inconsistent laws are undesirable, as they lead to confusion and uncertainty which can only be resolved through time-consuming and expensive litigation.

The law reform agency must then attempt to identify the policy underlying the law. In the case of legislation, this is relatively easy, for law reform agencies may refer freely to parliamentary debates, reports and commentaries to determine what ends the law may have been intended to promote. Courts are often restricted in the reference they

9 See ALRC 34, The Law Reform *Commission Annual Report 1986*, Canberra, AGPS 1987, Ch 1, for the Commission's own views.

10 ALRC 51, *Product Liability*, Canberra, AGPS, 1989. The details of its conclusions and the arguments leading to those conclusions are presented in the Report, to which reference will be made later, but the substance of the report is not reproduced here.

11 The recommendations are for amendments to the *Trade Practices Act 1974* (Cth).

12 Existing laws on product liability have been enacted by State and Commonwealth legislatures, and developed by the courts in individual cases. These laws are described in detail in T Young, ALRC Product Liability Research Paper 1. Product liability: laws and policies, Sydney, 1988.

can make to such material.[13] It is more difficult to ascertain the policy underlying judge-made law, as it is seldom articulated. The courts commonly give only the reasons which lead them to reach particular decisions. The underlying policy may be developed in subsequent cases or through legal scholarship, but it is often difficult to identify 'policy objectives' in the law reports.

Once the the policy objectives underlying legal rules are identified, the agency must assess whether the legal rules attain the policy objectives. This task is neither easy nor mechanical. It requires expert evaluation of technical rules of law, policy evaluation skills, and the making of informed value-judgments. Any value-judgment is coloured by the attitudes of the person making it. Where, as in law reform, an attempt is made to make an evaluation on the basis of public interest, participatory processes of consultation, such as those developed by the ALRC, become significant. They give the law reform agency an indication of how sections of the community that may be affected by changes see the law. That, and the final test of parliamentary approval are better indicators of the public interest than the opinion of individual Commissioners or Commission staff.

There are many views on the skills necessary to evaluate policy, and of the weight that should be given, in that process, to learning developed in various academic disciplines. Relevant factors that have been useful to the ALRC are:

- the historical background or context
- anthropological and sociological factors
- economic impacts
- social and value considerations, including notions of 'justice', 'equity' and 'fairness', however these might be defined

In Australia in the late 1980s, government policy-evaluation functions are heavily influenced by persons whose basic training is in economics or accounting,[14] and this leads to a strong emphasis—perhaps, to those trained in other disciplines, such as the lawyers who constitute the law reform agencies, an over-emphasis—on economic factors.[15] Economic analysis can assist in ensuring that underlying values are identified and articulated in ways that other types of evaluation or analysis cannot. Lawyers are more inclined to give weight to social and moral factors, though reasonable lawyers would never discount relevant economic factors. All policy decisions are to some extent multi-faceted: they must be considered from many perspectives. Policy evaluation functions are not and cannot be precise. Law operates in the real world and affects people. Law reform cannot be reduced to abstract models and theoretical

13 Despite provisions such as the *Acts Interpretation Act 1901* (Cth) s 15AA-AB.

14 R Cranston, 'Creeping Economism: Some Thoughts on Law and Economics' (1978) 4 British Journal of Law and Society 103; M Pusey, 'Our Top Canberra Public Servants under Hawke' (1988) 60 Australian Quarterly 109.

15 There are some—the 'public choice' school of political economy—who suggest that students of public administration are asking the wrong questions, and that some areas of policy should be forbidden to the State. Such views are currently influential, and need to be taken seriously, preferably to be rebutted. Patrick McAuslan has recently shown these purportedly neutral ideas up for the ideological and politically charged prescriptions they are, favouring one group in society at the expense of another: 'Public Law and Public Choice' (1988) 51 Modern Law Review 681.

perfection cannot be attained, but law reform agencies should seek maximum consistency and effectiveness. Laws are seldom totally confused, or totally inconsistent. However, degrees of obscurity, ambiguity and inconsistency often detract from effectiveness in attaining policy goals.

Some interest groups, particularly business interests, assert that all proposed reforms should be justified by cost-benefit analysis. In theory, there may be much to commend such an approach, but a full and accurate cost-benefit analysis of some proposed laws, including product liability laws, is impossible.[16] Laws which are not yet in force may have consequences or implications that cannot be measured, at least before they come into operation. Estimates can be made, but often an attempted cost-benefit analysis of future laws is at best speculative and at worst misleading. Policy analysis is not just cost-benefit analysis. It involves economic analysis, but also analyses of other types, many of which involve the making of value-judgments. For lawyers, considerations of fairness, justice and equity will be important, and few lawyers accept totally the 'free-market' theorists' assertions that market forces are the sole determinants of justice or fairness.

After evaluating all relevant factors a law reform agency may conclude that the existing law is clear and satisfies policy objectives.[17] More commonly, because society is evolving and changing rapidly, the evaluation will find shortcomings in the law. In the product liability reference, the Commission found considerable shortcomings.[18] Once they are identified, the law reform agency must suggest measures to overcome them, taking account of the practical consequences. As a leading American product liability scholar put it, 'logical symmetry of legal doctrine is a desirable thing, but the law's solutions must actually work.'[19]

Proposals for reform of the law must be examined carefully. The legal system is complex, and drastic changes to one area may have significant effects in others. The system is integral to the operation of society, so changes in the law will inevitably affect other social relations. So far as possible, proposals for law reform should neither:

- suffer from the same shortcomings as laws they are intended to replace, nor
- have other adverse effects on social and economic activities.[20]

16 See I Ramsay, 'Framework for Regulation of the Consumer Marketplace' (1985) 8 Journal of Consumer Policy 353-9; cf F Stilwell, *The Use of Cost-Benefit Analysis in the Formulation of Policy on Potentially Unsafe Consumer Goods: A Report Prepared for the National Consumer Affairs Advisory Council,* Canberra 1986; and see ALRC 51 para 10.02-6 and G R Braddock, *Product Liability: Economic Impacts* ALRC RP 2, Sydney 1989, Ch 1.

17 Eg ALRC 42, Occupiers' Liability.

18 These are identified in detail in Young, op cit.

19 F James Jr, 'Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal' (1972) 25 Vanderbilt L Rev 42, 48.

20 See, eg M J Rizzo, 'Law amid Flux: The Economics of Negligence and Strict Liability in Tort' (1986) 9 Journal of Legal Studies 291, 291, where he says:

> 'The law cannot and should not aim towards the impossible . . . in a world of unpredictable flux . . . it is impossible to compare alternative liability systems in terms of judicial cost-benefit analysis or "fine tuning". Instead, they must be analysed in terms of institutional stability --- the certainty and stability these impart to the legal framework'.

Law reform proposals should be tested in every practicable way to assess the effect of their introduction may have on the legal system and on other social activities. Not every consequence can be foreseen. The proposals should be subjected to the same sort of examination and analysis as existing laws are in the process of law reform. Law reform agencies which have already evaluated existing laws will be aware of policy objectives and of some pitfalls which should be avoided. They do not, and cannot, have the evidence provided by actual cases and experience. Assessing the impact of proposed changes is, to some extent, a matter of informed guesswork. The guesswork should be based on information derived from research and from the consultation process. Research can produce a limited amount of information. The consultation process informs the research by bringing the light of the practical experience of consultants and others who provide information to the Commission to bear on the proposals. Experience of legal practice—which is concerned with the day-to-day operation of the laws—is particularly valuable. However, those with experience may often have strong sectional interests in the outcome of the process of law reform, so what they say must be considered carefully.

The Australian Law Reform Commission[21]

The Law Reform Commission Act 1973 (Cth) constitutes the Commission, and its provisions[22] affect all the Commission's activities. Specific Terms of Reference are also important. They may include additional requirements. For example, the product liability reference required that the Commission

21 The work of the Commission is described in its Annual Reports. Probably the best description of its methodology is W H Hurlburt, *Law Reform Commissions in the United Kingdom, Canada and Australia*, Edmonton, Canada, 1986, but relevant material is also contained in M D Kirby, *Reform the Law*, Melbourne, 1983. See also the Senate Committee Report noted at n 26 and the Annual Proceedings of the Australasian Law Reform Agencies Conference.

22 Sections 6(1) and 7 of that Act read as follows:

6.(1) The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise—

(a) to review laws to which this Act applies with a view to the systematic development and reform of the law, including, in particular—
  (i) the modernisation of the law by bringing it into accord with current conditions;
  (ii) the elimination of defects in the law;
  (iii) the simplification of the law; and
  (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
(b) to consider proposals for the making of laws to which this Act applies;
(c) to consider proposals relating to—
  (i) the consolidation of laws to which this Act applies; or
  (ii) the repeal of laws to which this Act applies that are obsolete or unnecessary; and
(d) to consider proposals for uniformity between laws of the Territories and laws of the States, and to make reports to the Attorney-General arising out of any such review or consideration and, in such reports, to make such recommendations as the Commission thinks fit.

7. In the performance of its functions, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring—

(a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
(b) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

consider certain costs and benefits and the experience of other countries. The ALRC has found that effective law reform requires not only thorough technical legal research, but also comment and criticism from people who may be affected by its proposals. Consultation is an important part of its work.

Once the Attorney-General gives a reference the Commissioners and legal staff read widely in the area. A bibliography is prepared. The terms of reference are circulated widely and the public is asked to suggest issues which should be considered. This often results in the publication of an Issues Paper, which is really an agenda for a program of research and consultation. It states what the Commission proposes to investigate.

The Act permits the President to constitute Divisions, which are responsible for the actual work. One of the members of the Commission, usually a full-time member, is given charge of each reference. The President sits on each Division and assigns other Commissioners with relevant expertise to the Division.[23] The Commission has about fifteen legal staff, who are also assigned to the various references.

The ALRC normally appoints a number of consultants early in the course of each reference. Not all are lawyers; they may either represent particular community interests or have special expertise. They meet formally several times during the reference, usually to comment on draft proposals. They also offer advice and comment individually. The consultants offer broad, cross-disciplinary perspectives on the Commission's work. The public is invited to comment on the Commission's publications. The ALRC usually holds public hearings throughout Australia, at which members of the public may offer comment. These may be more or less formal, depending on the the reference. In the Product Liability Reference, the Commission received about 300 written submissions from individuals, organisations and public authorities. Forty addressed the public hearings. Written comments and statements at the public hearings are considered carefully and may influence the Commission's attitude to many important questions. Mr Justice Kirby, the first President of the ALRC, called this 'participatory law reform'. The English, Canadian and some State law reform agencies do not always provide the same opportunities for participation, and although the consultation process involves extra time and expense, the ALRC has found that it improves the quality and legitimacy of law reform significantly, and ensures that the proposals are, so far as possible, practicable.

Where possible, the ALRC's proposals are exposed to the public in the form of draft legislation with an explanation before the final report is submitted to the Attorney-General. This has two purposes:

- the process of drafting forces the Commission to consider the scope and effect of its proposals very precisely and ensures both that the correct issues are addressed and that proposals are capable of operation;
- it allows the public to understand exactly what the Commission is proposing.

23 At present the ALRC has three full-time members (a federal judge, a government lawyer and an academic) and nine part-time members, who include judges, practitioners and law teachers. All Commissioners are currently lawyers.

The expression of policy advice in legislative form makes it more precise and enables the public to make much more specific comments and criticisms.

In Australia, the federal system, which divides legislative powers between the Commonwealth and the States, presents technical obstacles to some law reform. The *Law Reform Commission Act* confines the ALRC's work to areas within the constitutional powers of the Commonwealth parliament. Diversity of State and Territory laws presents practical problems to many sections of Australian society. The Act requires the Commission to take into account the possibility of unification and harmonization of laws.[24] The new, closer economic relations with New Zealand also require that in the areas of business and consumer laws, trans-Tasman interests also need to be considered. Where appropriate, the ALRC may recommend exercise of Commonwealth legislative powers to their full extent. In other cases, it may work co-operatively with State agencies. The choice whether to follow one route or the other will ultimately be made by the federal government on political grounds. In the product liability reference, the Victorian LRC received a parallel reference from the State Attorney-General. It participated in the ALRC's work and the two Commissions reported jointly. The NSW Law Reform Commission, which has had a reference on the law of sale of goods for some years, involving some of the same questions, also participated in the reference. Its Commissioners and staff attended relevant meetings and commented on the proposals of the other two Commissions. Though it did not intend to make any recommendations, its participation was designed to ensure that it had full access to information and that its work was not duplicated. Cooperative law reform of this type is favoured by several Australian law reform agencies, subject to government approval.[25]

In 1979, the Senate Standing Committee on Constitutional and Legal Affairs produced a report, *Reforming the Law*,[26] which arose out of the then government's failure to implement recommendations in several of the ALRC's early reports. It identified two major reasons for this. One was political opposition to the recommendations (especially the proposed reform of the law of defamation);[27] the other was bureaucratic distrust of the ALRC. Traditionally, the Attorney-General's Department had been the sole source of legal advice to the government. The Senate Committee suggested that there was a degree of jealousy and a sense of superiority within that department. This meant that when the ALRC presented a report, the Department would not accept any recommendations unless it had checked every reference and argument in the report. As this activity did not have a high priority within the Department, it meant that little happened, and the law reform proposals languished.

24 Section 6(1)(d), set out at n 22 above. The issue of unification of laws in a federal system is complex. See J Goldring, '"Unification and Harmonisation"of the Rules of Law' (1978) 9 FL Rev 284.

25 The ALRC and NSWLRC have also participated cooperatively with the VLRC in a recent report on informed consent to medical treatment.

26 AGPS, Canberra 1979. This Report remains one of the most valuable sources of information on the methodology and political context of law reform in Australia.

27 ALRC 11, *Unfair Publication: Defamation and Privacy 1979.*

It may be wasteful of a department's resources to repeat the research and consultation undertaken by a law reform agency, as the Senate Committee pointed out.[28] If the government wishes to maintain a specialised law reform agency, it should ensure that the agency has proper resources, and trust it. While politically controversial measures may be referred to specialised agencies to keep them out of the political heat, most of the subject-matter of the law reform agencies' work is technical and fairly routine. The agencies have legal expertise. While some of the State commissions have confined their attention to purely technical matters of 'lawyers' law,[29] the ALRC has never been restricted in that way, and has attempted to base its recommendations on a thorough analysis of the social context of the law.[30] It has become a source of policy advice additional to the Department, and its recommendations are to be treated as policy options in the same way as other policy advice received by the minister. If there are other options, there is no reason why a Department of State, or anyone else with access to the minister, should not present alternatives.

The ultimate responsibility is political

Decisions whether or not a case has been made for law reform and whether or not reforms should take the form proposed by a law reform agency, are ultimately for the government and Parliament. Although the work of law reform agencies should assist in the process of policy evaluation, governments are responsible and answerable to the community. Before deciding the fate of law reform proposals, they will consider other policy advice from their departmental and political advisers. Law reform agencies are special only in the sense that they have particular expertise, and follow procedures which give them greater legitimacy. This may entitle their recommendations to certain weight. Other factors associated with the political process also play their part in the ultimate decision whether or not the law will be reformed. Values are as involved much as they are in any other policy process. The exercise of legislative power on matters of law reform—the ultimate in formal legitimacy—is in this respect no different from any other political exercise.

PROBLEMS: PRODUCT LIABILITY LAW REFORM

Specific problems of product liability law reform

'Policy' in the context of law reform

Policy is itself an indeterminate term with a range of meanings and a number of sub-categories. It connotes principles or objectives, especially those which determine priorities in the allocation of resources. These principles operate at different levels of abstraction and in different contexts or discourses. Lawyers speak of 'the policy of the law'—by which they mean principles or objectives that guide or inform the development or

28 Op cit, n 26.

29 A distinction between 'technical' law and other rules of law is largely illusory and is of limited use.

30 See ALRC 34, above n 9.

application of specific rules. Administrators speak of 'departmental' or 'ministerial' policy. Economists speak of 'policy' in terms of allocation of resources. In each of these discourses, both the formulation and the content of what is said will draw much of its meaning from its context. What a lawyer means by 'policy' may be different from what an economist, dealing with the same subject-matter, means by the same term.

In the product liability reference, the need to discuss policy arose out of an expression in the Terms of Reference: 'adequate and appropriate'. If the Commission is to assess the adequacy or appropriateness of laws, it must have some standard by which those characteristics can be assessed. Those standards must take account of policies which give effect to the values. Should those policies be 'legal' policies, 'pure' policies, or some other type of policy? What do these categories mean? A law reform agency could assume that the policy was 'legal policy'. However, the expressions 'adequate' and 'appropriate' and the remainder of the Terms of Reference suggested that the Commission's evaluation required a wider framework. The Commissions[31] were specifically required to consider economic and social impacts of any changes.

The reference arose in part from a report prepared by the National Consumer Affairs Advisory Council.[32] The most significant recent developments in Australian product liability law are contained in a Part of the *Trade Practices Act* which deals with consumer protection.[33] The relevant policies could be those concerning the interests of consumers; in other words the allocation of resources within the community to foster and protect the interests of consumers as such. Yet what interests? How is a 'consumer' to be identified or defined? It is possible to define 'consumer', as the *Trade Practices Act 1974* (Cth) s 4B has done. A policy decision underpins this definition. A class of persons who whom particular legal rights are given is to be defined in terms of the price of the goods—a test of an economic kind—and in terms of the uses to which goods and services are put—a test which evaluates empirical, social and economic elements. These elements are combined. The result is that some people have legal rights while others do not. The policy issues raised by the product liability reference were of a similar, mixed type. They could not be resolved by reference to some 'pure policy' or 'absolute value', a platonic ideal of some kind. Rather, the Commissions had to examine existing laws and policies recommend a policy to assess existing laws, and on which to base proposals for change.

The ALRC's terms of reference referred to 'the cost to individuals and the community' arising from losses caused by goods, and directed the Commission to:

> 'have regard to the cost to business and the community, and any effects on the cost and availability of insurance and on product innovation and availability of any increase in the liability of manufacturers, distributors and retailers . . . .'

These issues could only be addressed by an economic study of the economic impact of the existing law and of possible changes in the law.

31 Henceforth references will be to 'the Commissions', as the ALRC and LRC of Victoria worked and reported jointly.

32 *Consumer Product Safety*, Canberra 1987.

33 *Trade Practices Act 1974* (Cth), Pt V, Div 2A.

A traditional cost-benefit analysis was not possible.[34] None of the Commissioners or legal staff had a sufficient grounding in economics to know the right questions to ask, so the ALRC appointed a consultant economist who had previously worked both in the areas of pricing policy within the firm and in assessment of the economic impact of legal rules, and asked him to complete a detailed study of the costs to business and the community, both of existing laws and proposed changes.[35] This economic study influenced two significant aspects of the Commission's proposals.[36]

In many areas of law reform empirical studies are important. For example, substantial sections of the ALRC's reports on sentencing[37] and matrimonial property[38] depended on extensive empirical surveys. Many critics of the product liability reference questioned the extent of product-related losses in Australia and suggested that empirical evidence was required to support any proposed reform.[39] After considering available information, the ALRC decided that a full empirical study was not justified in the circumstances of that reference.[40]

Determining policy objectives

The Terms of Reference referred to compensation for injury or damage. The terms 'injury' and 'damage' have negative emotive connotations. Even without a detailed consideration of what these terms mean, individuals and society as a whole had a clear interest in avoiding injury and damage. The Commissions therefore accepted that one of the elements of policy should be to prevent or avoid the infliction of injury or damage. However, the world is not perfect: injury and damage cannot be prevented or eliminated totally. Sometimes the cost of preventing loss is so high that it is not justified by the savings. Thus the Commissions did not seek policies or rules designed to prevent loss totally, but rather rules that would encourage measures to prevent possible losses if those measures were cost-effective.

---

34 See text at n 16.

35 G R Braddock, *Product liability: economic impacts,* ALRC Research Paper 2, Sydney 1989. The ALRC subsequently revised some of the proposals on which that study was based, and the consultant was asked to determine these changes would make any difference: *Product liability: economic impact of revised proposals,* ALRC Research Paper 2A, Sydney 1989.

36 The provision of a 'development risks' defence—a manufacturer or supplier of goods bears no liability if, at the time the goods were first placed on the market, the possibility that the goods could have acted in a way that caused damage could not have been discovered—and the exclusion from the operation of the proposed laws of losses by way of personal injury suffered in the course of employment. The former was directly related to the availability of insurance cover against 'unforeseeable' risks; the latter also arose from considerations about the cost of insurance. The economist concluded that if work-related injuries were included, liability insurers would increase premiums substantially, but workers compensation insurers, beset by other problems, almost certainly would not reduce their premiums correspondingly.

37 ALRC 15 and 44.

38 ALRC 39.

39 See ALRC 51 Ch 3.

40 Another consultant (an epidemiologist) assisted the Commission and the economic consultant by obtaining details of the extent to which relevant empirical data was not available.

Compensation[41] is not a perfect way of providing reparation for some kinds of loss or damage. However, the common law has traditionally provided compensation by way of money damages, which shift part of the financial burden of injury or damage from the person who suffered it to some other person. The task was to identify ways of determining when and how this should be done. The policies involved are not so much legal as social and economic policies. People who suffer severe injury or damage caused by goods may be unable to work: they may require health care of various types, without which they will die or their disability will be prolonged. In the absence of legal rules providing compensation, an injured person would have to bear the cost of his or her own loss or become dependent on public funds—that is, publicly funded health care or social security. If they do not bear the loss, someone else must. But who? The clear answer seems to be a person who is in a better position to prevent or avoid the loss, if there is such a person. The threat of liability is an incentive to all concerned to take steps that will avoid the risk of loss.

There is a further dimension. People faced with the risk of loss will not only attempt to prevent the loss, but will also, if economically rational, seek ways of spreading the impact of the loss. Pricing and insurance are common mechanisms for distributing loss. Existing laws influence and direct loss prevention and loss-spreading, for example when they prescribe specific safety and information standards for goods.[42] Persons who manufacture and supply goods which do not comply with these standards face sanctions: usually criminal penalties, but sometimes also liability to pay civil compensation. The rules of negligence and contract law impose civil liability on manufacturers and suppliers of goods that do not meet certain standards—standards of behaviour in negligence cases, standards of quality of goods in contract cases. All these laws operate on manufacturers or suppliers of the goods, who are forced to consider how they can prevent the risk of losses which the goods may cause before they put the goods on the market. They must take prudential measures of loss prevention; they are likely to design, produce and market the goods in a way that will minimise the risk that the goods will cause loss—for example, by incorporating safety features and by providing instructions and warnings. However, they will not incorporate such risk-preventing features if the cost of doing so is likely to price the goods out of the market, or if the safety features would make the goods less useful. In this process, economists say that the cost/price mechanism requires the manufacturer or supplier to make a decision which reflects 'optimal' levels of loss prevention. Insurance is also a factor.[43] The cost of insurance premiums is reflected in the prices of the whole range of the insured's products. Thus the mechanisms of pricing and insurance spread the cost of loss prevention, of insurance and of compensation to

41 As discussed in J Goldring and T Young, *Product liability: enforcement and remedies*, ALRC Research Paper 5, Sydney 1989.

42 See Goldring, Maher and McKeough, *Consumer Protection Law in Australia* (3rd ed) Sydney, 1987, Ch 5.

43 In return for the payment of a premium, the insurer agrees to indemnify the insured against part to whole of a specified risk. In perfect conditions, that risk is calculated on an actuarial basis, so that the probability of the risk occurring is predicted on a quasi-scientific basis, and factors such as the nature of the product and the insured's previous claims history are taken into account.

all those who consume the products. A system of loss-distribution based on these market forces ensures that, to some extent, those who receive benefits from goods, either in the form of profits or through the use and enjoyment of goods bear a share of the costs associated with the product.

The policies involved clearly related to incentives for loss prevention and costs. Costs associated with goods can be spread either efficiently and equitably or inefficiently and unfairly. An examination of all the factors relevant to the determination of policy objectives led the Commissions to the conclusion that the basic policy objectives of the law in this area should be:

- the provision of incentives for the optimal level of risk-prevention; and
- the efficient provision of adequate and appropriate compensation where goods caused loss because they act in ways that could not reasonably be expected.

These objectives were reflected only haphazardly in the existing law. The best instruments—efficient and equitable mechanisms—for achieving these objectives were laws that ensured that the risks of loss caused by something the goods do were matched to the benefits derived from those goods. Such a policy:

- ensures that prices of goods reflect all costs associated with their production and do not create hidden subsidies provided by the people who suffer loss
- provides compensation without unnecessary procedural and evidentiary burdens.

Efficient delivery of compensation requires that costs be minimised. Costs, in this context, are of two main types:

- compensation costs: the actual amounts required to compensate those who suffer the loss
- transaction costs: the costs associated with the recovery of compensation.

Both existing law and proposed reforms had to be assessed in terms of whether compensation and transaction costs could be reduced.[44] The Terms of Reference and the Commissions' appreciation of political realities led them to exclude two options which might otherwise have been attractive. A general accident compensation scheme, such as the New Zealand model, would have been attractive if the only objective was efficient delivery of fair and adequate compensation, but such a system was not feasible if it covered only personal injuries, disease or death resulting from something that goods did. It would neither cover other types of goods related injury (such as damage to property) nor provide incentives for loss prevention. Secondly, a system of regulatory controls[45] would be the most effective way of preventing goods related loss, but requires administrative machinery. Regulatory controls are not a satisfactory framework for compensation laws.[46]

44 See ALRC 51, Ch 2.
45 Perhaps based on the *Trade Practices Act 1974* (Cth) Pt V, Div 1A.
46 See text at n 64-66.

An assessment of existing laws showed that they did not satisfy the identified policy objectives.[47] They operated on criteria of liability which varied according to chance, denied compensation to people who suffered loss because of something goods did, and imposed significant procedural and evidentiary burdens before compensation could be delivered. Assessment of existing laws revealed some other difficulties of a more logical nature, but which also had to be avoided in the proposed changes in the law.

Some misleading terms

Julius Stone has explained how courts exploit language in order to develop, modify and change norms which have been commonly accepted by lawyers as statements of legal principle. They find expressions which contain 'illusory' or 'indeterminate' references, and apply them in ways which do not depart from the literal text, but which encompass situations often markedly different from that in which the expression first arose.[48] These indeterminate or illusory references are essential for the development of the law through precedent. Law reform, however, is largely concerned with change and renewal of rules that have developed or expanded through the judicial process, but which, in the view of the political decision-maker, are no longer adequate or appropriate in policy terms. A ground for finding the law inadequate or inappropriate is that it is uncertain, vague or contains expressions which may be exploited as 'indeterminate' or 'illusory' references, especially if judicial interpretation of these terms has led to results which are seen to misallocate resources. The indeterminate or illusory character of these expressions is not always obvious.

In the product liability reference, the ALRC found that its Terms of Reference contained such expressions: the words 'unsafe' and 'defective'. These words occur in common usage without causing difficulty. However, when used in legislation, they have no precise meaning. 'Defect' is used in the 1985 *Directive of the European Economic Communities on Product Liability* and in the *Consumer Protection Act 1987* (UK), Pt I.[49] It is there defined in terms of goods not providing the degree of safety which a person is entitled to expect. During the first year of the reference, the ALRC assumed that this definition, or something similar, would form the basis of liability under changes in the law which it might recommend, and made a provisional proposal to this effect in its first Discussion Paper.[50] It was not fully aware of the illusory nature of the term. Responses to the Discussion Paper put the view that the definition was unsatisfactory and subject to the same criticisms as the Commission had made of other expressions used in the existing law, such as 'merchantable quality', 'fitness for purpose' and 'unreasonable conduct'. All these expressions contain an element of indeterminacy: only the courts can give them precise applications and then only after some loss has been inflicted. No one can know in advance what, precisely, any of these expressions means. When courts apply the expressions they are aware not only that some

47 ALRC 51, Ch 3.

48 See *Precedent and Law*, Sydney, 1985, Ch 7.

49 See T Young, *Product liability: laws and policies*, ALRC Product Liability Research Paper 1, Product liability: laws and policies, Sydney 1987, para 210-224.

50 ALRC DP 34, Sydney, August 1988, para 51-9.

person has suffered a loss, but also of a range of expert opinion as to why that loss occurred. Much of this evidence is not available in advance of the loss. The thrust of submissions to the Commission was that businesses and consumers wanted to know in advance, and as precisely as possible, what the law required them to do. This is understandable. If rules are uncertain or indeterminate the possibility of litigation, and potential costs, increase proportionately. The policy was to reduce costs, to provide incentives for loss prevention and, if loss did result from something goods did, to provide adequate and appropriate compensation in the most efficient way.[51] Incentives are effective only if they indicate clearly what they are designed to achieve. Where the incentive is to provide 'safety', it is important to state clearly exactly what 'safety' means. The Commission attempted to work out exactly what 'defective' and 'unsafe' denoted. These expressions seemed to encompass the notion that the thing to which they applied caused some loss or injury because it did something which reasonable people could not expect. They were not, however, capable of precise definition.

When judges decide cases they rarely take policy considerations into account explicitly. Their concern is primarily with the merits of the dispute between the litigants in the light of legal norms that bear on the resolution of that dispute. Legislators and policy makers—including law reform commissions—need to take a wider view. Law reform proposals must not include elements which might impede the attainment of policy objectives. Existing rules creating liability to compensate persons who suffer loss caused by goods are all based on failure to comply with a standard. Because those standards are indeterminate, they may impede attainment of policy objectives such as those identified by the Commissions. In common law systems lawyers are conditioned to think of law in particular ways. They find it difficult to think of civil liability being imposed unless the law provides a standard, and the person seeking the remedy establishes that the standard has been breached. This is particularly true of negligence liability.[52] Other types of liability, such as liability for trespass, conversion, the *Rylands v Fletcher*[53] tort and liability for some breaches of contract, do not fit this model, because in them the law does not construct a standard and require proof of compliance or non-compliance with it before a legal obligation is created. Rather, the existence and nature of liability is measured in accordance with objective facts about the existence or action of physical objects. The intention of any person, or of the hypothetical 'reasonable person' is totally irrelevant. Under existing laws providing compensation for loss caused by something goods do, liability can arise in negligence, for breach of terms implied in contracts by the operation of statutes[54] or it may be a statutory obligation, independent of any contract.[55] In each of these cases the law relies on an indeterminate standard, or 'category of indeterminate reference'.

51 See text at notes 43-44.

52 This mode of thinking probably demonstrates the dominance which the rules of negligence have attained in our law.

53 (1986) LR 1 Ex 265; (1868) LR 3 HL 330.

54 Like the *Sale of Goods Act 1923* (NSW) and the *Trade Practices Act 1974* (Cth) Pt V, Div 2.

55 As under the *Trade Practices Act 1974* (Cth) Pt V, Div 2A.

In negligence, the plaintiff must establish that the defendant owed him or her a duty of 'reasonable care'. The nature and extent of this duty allows the court considerable leeway, after the event, to determine whether or not the defendant should be liable to pay compensation. Where the right to compensation depends on the plaintiff establishing that goods were not 'fit for purpose' or not of 'merchantable quality', again, despite the existence of statutory definitions of 'merchantable quality' which vary considerably[56] demonstrating the essential indeterminacy of the term, the court has considerable leeway, after the event, to make findings which determine whether or not compensation is payable. What the courts will do in any given case cannot be determined precisely in advance. The best that any lawyer can do is to make a prediction, based on what courts have done in the past.

At times policy may require that the general principles of law contain loopholes and leeways. This allows people to work out the precise details of their activity within a general framework, knowing that a court, after the event, may decide that relevant legal standards have not been complied with. This is probably most obvious in the context of contract law—a body of law whose greatest effect is on commercial transactions. Contract law assumes that the contracting parties are roughly equivalent in economic strength and in access to information. One of the main functions of contract law is to allow these people to arrange their affairs so that, to the greatest extent possible, they know what the consequences of particular events will be. Where parties do not enjoy equal economic strength or access to information and have little real opportunity to make agreements with others about the consequences of particular actions, general laws are required. Laws governing compensation for loss or damage caused by goods apply in situations where the actors meet none of the preconditions for the optimal operation of contract law. If policy requires incentives for cost-effective loss prevention, a law which allows widespread exclusion of, or opportunity to escape, liability provides much weaker incentives. If loss prevention has a cost, economically rational actors will seek to avoid that cost. If the policy requires cost-minimisation, a law which allows exceptions to a general principle may not be effective in achieving the objective, because there will inevitably be disputes, and therefore litigation, about the extent of the exceptions. If the law stating the general principles contains loopholes or leeways in the form of expressions whose frame of reference is indeterminate or illusory, it may, in policy terms, contain the seeds of its own destruction. The Commissions determined that the introduction of indeterminate or meaningless references into the basis of liability to pay compensation for goods-related losses had the potential to defeat the policy objectives.[57] They therefore provided that liability to pay compensation would arise if the claimant established that the loss was caused by the way goods acted—a clear, simple test—and then provided a series of defences and a formula

56 Compare the common law rules, developed in cases like *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387, 418; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31; *B S Brown & Sons Ltd v Craiks Ltd* [1970] 1 All ER 823 and *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 with the *Trade Practices Act 1974* (Cth) s 66(2), the *Goods Act 1958* (Vic) s 89 and the *Sale of Goods Act 1923* (NSW) s 64(3).

57 See ALRC 51, Ch 2.

for calculating the amount of compensation. The occurrence of indeterminacies at the basic level was avoided.[58]

Challenging accepted legal categories

Once the Commissions had decided that the only answer to the Terms of Reference was not to use the words 'unsafe' or 'defective' in the legislation, they faced the problem of persuading the public that the proposals would work, This proved to be difficult. The public, especially the lawyers, expected that the proposed laws would look either like the negligence rules or the contract rules which they would replace. Businesses wanted the proposals to provide a 'check-list' of items which they would be able to comply with and then rest assured that they would be free of liability.[59] Such a test would be quite impractical to frame for the whole range of goods that are used in modern society. Goods vary almost infinitely. The only practicable standard would have to be general. Many business groups favoured a standard based on accepted concepts of negligence, though some conceded that the evidentiary and procedural problems with the current law would require at least the reversal of the traditional onus of proof. Their argument was that if they took 'reasonable care' to ensure that something their goods did not cause loss, they should not be liable to pay compensation. They maintained that they knew best what level of care was 'reasonable'.

Up to a point, the Commissions agreed. People who manufacture or supply goods are likely to know far more about the potential effects of those goods than most people who use them. The existing common law asserts that manufacturers and suppliers of goods have a duty of care to ensure that those goods do not injure persons who, in law are their neighbours. That is one of the major specific principles to be derived from *Donoghue v Stevenson*,[60] itself a fairly typical 'product liability' case, framed in negligence because the plaintiff was not in a contractual relationship with the defendant manufacturer. The decision as to the optimal level of risk prevention must be made by the person with the greatest information about the goods and their potential effects. Decisions about loss prevention must be made before the loss occurs. If the court lays down the required standard of loss prevention after the event, the manufacturers are disadvantaged because they cannot know that standard in advance. They may be encouraged to cut corners to save costs; alternatively, the frightening prospect of large awards of damages against them may lead them to build too many safety features into goods, which then become impractical to use, or the price rises beyond a level that the public can be expected to pay. This is both inefficient and a misallocation of resources. What is more, courts depend for information on what counsel choose to place before them in evidence. This choice is necessarily selective and based on forensic rather than technical or economic considerations. It also includes information about actual losses that the goods may have caused. Few things influence the most rock-hearted and impartial judge to decide to award compensation more than

58 Ibid.

59 Eg Business Council of Australia, Confederation of Australian Industry and others, *Proposals for Reform*, May 1989.

60 [1932] AC 382.

a mutilated quadriplegic plaintiff. For these, and other reasons, courts should not make initial decisions about the level of safety or loss preventing features to be built into goods.

If, however, a manufacturer is certain that it will have to pay compensation when its goods cause loss because they do something that could not reasonably be expected, it will have an incentive to make better business decisions. It will work out what loss prevention measures can be provided at a cost consumers of the goods will pay. It will consult its insurer or broker about the costs of liability insurance. The Commissions hope that, as a result of the proposals, insurers will provide incentives for quality control and risk management analogous to the no-claim bonuses available in household and motor vehicle property insurance markets.

Another benefit is that the price of the goods will reflect all the costs associated with its production, including the cost of insurance or of providing for the contingency of a damages claim. The vicissitudes of litigation will not operate to subsidise manufacturers or prevent those who suffer goods-related loss from recovering compensation. The Commissions have accepted from the outset that in the end, consumers pay for the losses caused by goods. The policy objectives require that if an injured person is not to bear the whole of his or her loss, it should be shifted to some other person as efficiently and fairly as possible. This requires that if the loss is not to be shifted through an administrative mechanism, such as the general compensation scheme operating in New Zealand, the pricing mechanism and the legal machinery for the enforcement of rights must operate with the fewest possible distortions.

Ideology, politics and policy

Legal rules are political in the sense that they allocate resources and priorities within the community on the basis of a value-judgment. Most legal rules favour some people at the expense of others. Those who gain from lack of clarity or confusion in the law are invariably most resistant to suggestions for changes which would remove the uncertainty, and most likely to act politically to frustrate law reform. For example, if it were shown that legal rules relating to compensation for loss or damage caused by defective or unsafe products were unclear or uncertain, so that some of those whose products caused such loss or damage were able to manipulate the legal system to reduce or avoid liability to pay compensation, those persons would be the most likely to resist reform. Political realities mean that they would not articulate the real reasons for their opposition to reform. Rather, they would rely on other arguments with emotive and political appeal. Such arguments, in the context of evaluation of existing law, must be examined extremely carefully. The evaluation must not be influenced unduly by the arguments of special interest groups. Apart from bias, such arguments may introduce emotive issues irrelevant to the central question. For example, some sections of the legal profession have a vested interest in confusion within the legal system if it produces litigation, and often deny the need for law reform at all.

In the United States of America, the question of tort liability has become highly politicised, for a number of reasons largely connected

with the absence of comprehensive publicly-funded health and welfare systems and the different political traditions of that country.[61] There can be no argument that tort liability rules, including those rules usually described as 'product liability' rules, have had a very significant economic impact. Many Australian businesses, especially in industries particularly sensitive to product liability claims—such as the motor vehicle, pharmaceutical and chemical industries—are subsidiaries or close associates of United States businesses. These businesses formed a strong interest group opposed to any extension of the liability of manufacturers and suppliers. Another interest group comprised the 'peak' organisations of Australian businesses. A number of these organisations compete for membership. Each of them must convince individual businesses that the cost of membership subscription is justified. If changes in the law appear to bring disadvantages to business, there is a forum in which opposition to change is apparently consistent with the interests of business. It was not surprising that groups of business organisations, including the Business Council of Australia, the Confederation of Australian Industry, the Australian Chamber of Manufactures, the Insurance Council of Australia and the Metal Trades Industry Association made common cause in opposing first, the need for reform in this area, and later, specific proposals put forward by the Commission. They invested large sums in preparing economic and legal studies designed specifically to counter the Commissions' proposals. They developed very close links with the Opposition spokesman on business, privatisation and consumer affairs, and many of their views were adopted by the various organisations claiming to represent small business. This opposition posed difficulties for the Commissions. It was vital to the Commissions to have a channel of communication to business, which would clearly be affected by any reforms proposed. In fact the Commission participated in a number of successful discussions and seminars organized by business groups. However, because of the perceived opposition of the business groups to reform, some of these discussions took place in an atmosphere tinged with a degree of suspicion.

Many consumer protection laws do not threaten business. Rather, they merely reinforce practices accepted as sound by reputable businesses. This was certainly true of the provisions of the *Trade Practices Act 1974* (Cth), Pt V, Div 1, introduced in 1974.[62] Improved laws on product liability fall into the same category. They may, in fact, enhance competition within the domestic market, by removing price advantages enjoyed by lower-quality goods, especially imports. Where goods competing on foreign markets come from countries with stricter product liability laws and higher expected levels of quality they may enjoy a market advantage over goods produced in countries with less stringent laws, because there is greater assurance that they will be of higher quality. Improved export competitiveness appears to have been a major factor leading to the

61 See eg, J G Fleming, *The American Tort Process*, Oxford, Clarendon Press, 1988; and ALRC 51, Ch 1.

62 This Division requires 'truth-in-advertising' and prohibits misleading and deceptive conduct in trade and commerce. Businesses which did not misrepresent their products in the marketing process welcomed these laws: they destroyed the competitive advantages gained by their less scrupulous competitors who were prepared to make misrepresentations when marketing their goods.

United Kingdom government's change in attitude to the European Economic Community's Directive on Product Liability.[63] While businesses generally welcomed proposals for a uniform national law on product liability, they were less willing to acknowledge publicly other advantages which the proposed laws might bring them.

As a group, Australian business has tended to oppose the idea of state intervention in the economy, even when the stated objective of the intervention is to enhance competition.[64] Business tends naturally to support policies based on the operation of 'free market' forces, because, in imperfect markets, business tends to gain most from such policies. In the product liability reference, the Commissions determined that the focus of the reference should be on laws providing compensation, and that compensation laws were usually not an effective means of economic regulation. No matter how strong the arguments in favour of a general accident compensation scheme, such as that operating in New Zealand, might be, the Commissions could not advocate it in the reference.[65] The costs of the administrative machinery necessary to operate a New Zealand type scheme limited only to product related injuries would not be justified, and such schemes do not provide incentives for loss prevention. The Commissions found that the system of rules most consistent with the policy objectives they identified depended on the operation of market forces. It relied on the pricing of goods at levels determined by the manufacturers and suppliers to implement the policies, rather than having the level of safety, or of loss prevention, to be built into goods determined by courts operating after the event or by bureaucracies. The Commissions formed the impression in discussions of these proposals that businesses preferred to be told what to do, rather than having to make decisions for themselves. Yet, if they were to be consistent with their rhetoric, they could not oppose these aspects of the proposals.

Regulatory controls are highly desirable in achieving product safety. Indeed, if the policy had been the prevention of loss, regardless of overall costs and irrespective of the need to provide compensation for the injured, a system of regulatory controls would have been far more effective. However, such controls need to be tailored fairly specifically to the requirements of particular classes of goods. A rule whose object is to provide compensation for losses caused by each and every type of goods cannot be sufficiently specific.

POSSIBILITIES

Unexplored matters

Because of the way the Commissions interpreted the scope of the reference, they did not explore in depth a number of areas of law which require attention and possible reform. It was not necessary to follow these issues through in order to produce adequate proposals for reform of laws governing compensation for goods related loss. Some of the possibilities are mentioned below.

63 Other advantages of the ALRC's proposed laws for manufacturers and suppliers are listed in ALRC 51 Ch 10.

64 But see A Hopkins, *Crime, Law and Business*, Canberra 1978.

65 ALRC 51 Ch 1.

Implied terms of contracts of supply

Although they assumed their present form at a time when 'consumer' transactions could not meaningfully be separated from commercial transactions,[66] implied terms in contracts for the supply of goods and services have become a principal form of consumer protection. Though limited by the doctrine of privity of contract[67] and by the rule that, in the absence of a statutory provision to the contrary,[68] their operation may be excluded by 'agreement'—even a standard form 'contract of adhesion'—they provide a minimum level of consumer protection. The terms are of compliance with description, fitness for purpose, merchantable quality, and of good title. Implied terms of compliance with description (to some extent) and of title were not relevant to the product liability reference, but the implied terms as to quality are an important part of the existing law of product liability, not only because they occur in the sale of goods legislation and the *Trade Practices Act 1974* (Cth), Pt V, Div 2, but also because they have been taken up in Div 2A of that Part and in other laws imposing liability upon manufacturers and importers. The terms 'fit for purpose' and 'merchantable quality' may be criticised on the grounds of indeterminacy[69] and anachronism.[70] The question of implied warranties is now under consideration in Australia, not only by the NSWLRC but also by the Standing Committee of Consumer Affairs Ministers. These matters have a significance beyond 'consumer' contracts (however defined) and need reform.

In Discussion Paper No 34, the ALRC took up the suggestion of the English Law Commission that the terms of fitness for purpose and merchantable quality might be subsumed under an implied term of 'acceptable quality'. However, in its report, the ALRC was able to avoid the need for reliance on such terms. A movement away from contract-based liability to liability based on general obligations is consistent with modern requirements of consumer law, where contracts—truly consensual arrangements about the quality of goods—are largely a fiction. The content of implied terms generally needs to be examined in the light of modern trading conditions.

Corporate liability

A major function of the modern corporation is to protect individuals from the risk of business liabilities. It has been an instrument for the mobilization of capital. Yet, especially since the permissive interpretation of Australian tax laws by the Barwick High Court, it has also been an instrument of fraud.[71]

Both in Europe and in Australia, the introduction of new laws imposing liability on manufacturers, and especially on importers may lead to the

66 See eg *Jones v Bright* (1829) 5 Bing 533; 130 ER 1167.
67 See ALRC DP 34 Ch 3.
68 Eg *Trade Practices Act 1974* (Cth) s 68.
69 See text at n 48-51.
70 Great Britain, The Law Commission, Report No 160, Sale and Supply of Goods HMSO London 1987; NSWLRC, Issues Paper No 5, Sale of Goods, Sydney 1988.
71 See A Freiberg, 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour' (1987) 10 University of New South Wales Law Journal 67.

use of 'dummy' or 'shelf' corporations,[72] with no assets and no purpose other than to act as a formal repository of legal title and formally to attract liability. This is clearly an abuse of the corporate form. Where such a company is financially and commercially part of another business, and legally is a subsidiary of that other group, it is clear that the legal fiction should be penetrated.[73] However, where the incorporators or managers of the corporation are individuals, or other corporations that do not control the 'dummy', there is a conflict between the desirability of retaining the corporation as an instrument for the mobilisation of capital and the policy of ensuring that those who incur liability should bear it. This problem arises not only in relation to product liability but in most cases where either criminal or civil liability is imposed on a corporation. It therefore raises wider issues than the Commissions could deal with properly in the course of the reference.

Money damages and compensation for loss

The question of whether the traditional remedy of lump sum damages provides adequate and appropriate compensation was another question which was not central to the reference, but which clearly requires close attention. The introduction of new and controversial statutory schemes to provide benefits for those injured in the workplace and on the road, which emphasise rehabilitation and payment of benefits over an extended period rather than as a lump sum show that even in Australia alternatives are possible. In other countries common law damages have been converted into 'structured settlements'. Damages have been limited by the imposition of 'caps' overall, or on the amounts to be paid for particular types of damage. The making of awards of money damages for pain and suffering and loss of enjoyment of life is now being questioned.[74] Questions concerning the nature of money damages as a legal remedy must, however, be considered in a much wider context than the area of losses caused by goods.

Criminal penalties and exemplary damages

Criminal sanctions are commonly used in support of regulatory controls. They are quite clearly a sanction or punishment, and commonly accepted notions of justice and the rule of law require that they should not be imposed without procedural safeguards—the presumption of innocence, proof beyond reasonable doubt etc. Such procedural safeguards are not part of the civil law—including laws which provide rights to compensation. Such questions are traditionally determined on the basis of civil standards of proof and deal with restitution rather than punishment.

Exemplary or 'punitive' damages are established in Australian law, in cases of intentional wrongs or where a defendant acts in 'contumelious disregard' of the rights of another person,[75] and probably also in some

72 This question is explored in detail in J Goldring and T Young, *Product liability: remedies and enforcement* ALRC Product Liability Research Paper 5, Sydney 1989, Ch 9.

73 See ALRC 51 para 5.18-5.21.

74 See ALRC 51 Ch 6.

75 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J). See Goldring and Young op cit n 72 Ch 6 for a full discussion of this issue.

cases of negligence.[76] Though widely used in tort cases in the United States, they really constitute a criminal penalty. They are an anachronistic vestige of the time when English law made no distinction between tort and crime. Accepted notions of the rule of law—including the *Law Reform Commission Act 1973* (Cth), s 7[77]—would preclude the extension of exemplary damages. There are, indeed, strong arguments for the abolition of such damages.

Procedural reforms

Two of the ALRC's recent references, those on class actions[78] and product liability, have driven home to the Commission the need to ensure that reforms of the law reduce the cost of litigation where possible, for example, by eliminating unnecessary parties or steps in proceedings.[79] If the cost of litigation is prohibitive, legal rights mean nothing.

Parties must be able to present their cases fully, and to test the other side's case. Wealthier parties have an advantage, because of their greater resources. Insurance companies often know they can force individual claimants into settlement not because of the merits of the case but because of the cost of litigation. Where parties are more likely to have roughly equivalent resources, both have an interest in saving costs. In the Commercial Division of the Supreme Court of NSW procedures have been adopted for the quick determination of issues and in relation to expert evidence.[80] Such procedures could be adopted in other courts. However, law reform agencies tread hesitantly in the area of procedural reform. Court procedures are normally governed by rules of court made by the judges, who guard their preserves jealously, and who claim expert knowledge.

CONCLUSIONS

In the 1960s and 1970s, Governments and the community became aware of the need for institutional machinery to monitor the operation of the legal system and to recommend changes which would ensure that the law, while maintaining its valuable tradition, more readily accommodated changed social expectations and values. Law reform agencies were seen as the answer. They did not provide a panacea, for no single measure or institution could ever hope to address all social problems. They have been reasonably successful within the limited scope of their operations. They have also developed a range of skills and techniques which have assisted both in improving the quality of their work and in building the legitimacy of institutionalised law reform with important centres of power within the community: the public (including special interest groups), the bureaucracy and politicians.

76 *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

77 See n 22.

78 See ALRC 46 *Grouped Proceedings in the Federal Court* Canberra 1988.

79 The question of the cost of litigation is currently under consideration in Australia by the Senate Standing Committee on Constitutional and Legal Affairs: See Senate Hansard, 10 May 1989. In Great Britain, it has been the subject of a Review by a committee to review civil justice established by the Lord Chancellor's Department. This Committee reported in 1989.

80 See NSW Supreme Court Practice Note No 39, Commercial Division.

The ALRC reference on product liability provides some useful illustrations. Its subject-matter was both technically complex and potentially politically controversial, because of the experience of tort liability law in the United States. The Commission's experience in the course of the reference illustrates a number of technical and other problems which law reform agencies may expect to encounter. The Commission was called upon to develop not only skills of legal analysis and drafting, but also to employ cross-disciplinary perspectives and the learning of other disciplines and communication skills. It showed that, closely related to the central focus of the reference, were a number of other areas of law which require the attention of law reform agencies, but which were excluded from consideration by the Commissions' disciplined approach to the reference.