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Part VA of the Trade Practices Act: A Failure to Adequately Reform Product Liability Law in Australia

Abstract

[extract] As the title suggests, this article analyses Part VA of the Trade Practices Act from the perspective of its failure to provide substantial and effective reforms of the product liability laws in Australia. It is stated at the outset that this author has strong pro-consumer views. I believe Part VA reflects a failure to provide Australian consumers with a comprehensive and effective alternative to pre-existing common law and statutory causes of action in the area of loss arising as a result of defective products. I furthermore believe that Part VA betrays the original intention of the Government as indicated by the Explanatory Memoranda to the amending Bills presented to the Federal Senate.

Keywords

product liability, Part VA, Trade Practices Act

PART VA OF THE TRADE PRACTICES ACT: A FAILURE TO ADEQUATELY REFORM PRODUCT LIABILITY LAW IN AUSTRALIA



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Introduction

In 1987, the National Consumer Affairs Advisory Council (NCAAC) released a report which detailed concerns about Australia's product liability reforms.¹ As a result of the report's publication, the Federal Government referred the matter to the Australian Law Reform Commission (ALRC) which, in 1989, recommended that the Government legislate to set up a legal regime under which manufacturers would be held liable for the way goods acted.²

The Government subsequently referred the matter to the Industry Commission (IC), asking it to report on the economic effects of the ALRC's proposals. The IC recommended that the ALRC's proposals should not be implemented, due to the perceived deleterious effects of those proposals upon manufacturing industries and an insufficiency of need for radical reform in the area of product liability.³

A subsequent period of consultation between the Federal Government, business and consumer groups ultimately led to the introduction of the *Trade Practices Amendment Bill 1992*, which was enacted on 9 July 1992, inserting Part VA into the *Trade Practices Act 1974* (Cth). Part VA is based upon the European Product Liability Directive 1985, and provides a statutory right to compensation from manufacturers for persons who suffer loss⁴ as a result of product defects.⁵

The loss covered under the Act ranges from physical injury to property damage.⁶ To establish that a manufacturer is liable, the provisions require that a corporation, in trade or commerce, supplies defective goods manufactured by it, and because of the defect injury, death or property loss occurs. In those circumstances, the manufacturer will be liable for the loss or

1 National Consumer Affairs Advisory Council, 'Consumer Product Safety' (1987).

2 Australian Law Reform Commission, 'Product Liability', Report No 51 (1989).

3 Cth of Aust, Industry Commission, 'Product Liability', Report No 4 (1990). The IC found that 'the more important inefficiencies and inequities which the ALRC's proposals aim to address could be overcome by relatively minor amendments to current laws': p 64.

4 Sections 75AD-AG *Trade Practices Act 1974* (Cth).

5 The precis of events leading up to the introduction of Part VA is taken from: Senate Standing Committee on Legal and Constitutional Affairs ('the Senate Committee'), 'Product Liability: Where Should the Loss Fall?' (1992), para 1.1-3.

6 As above n 4.

damage.⁷

As the title suggests, this article analyses Part VA of the *Trade Practices Act* from the perspective of its failure to provide substantial and effective reforms of the product liability laws in Australia. It is stated at the outset that this author has strong pro-consumer views. I believe Part VA reflects a failure to provide Australian consumers with a comprehensive and effective alternative to pre-existing common law and statutory causes of action in the area of loss arising as a result of defective products. I furthermore believe that Part VA betrays the original intention of the Government as indicated by the Explanatory Memoranda to the amending Bills presented to the Federal Senate.⁸

To test these views, I propose to critically examine the process of evolution in the reform process, examining the conflicting views and evidence presented by consumer groups on one hand and industry and business groups on the other. The debate over consumer protection law in the area of product liability is often couched in terms of the conflict of interests between these two groups.⁹ Therefore, at each stage of analysis of the elements of reform under Part VA discussed in this article, it will be necessary to examine the merits of the arguments put forward by consumer and industry groups. By testing the merits of these arguments it will be possible to determine whether Part VA is effective in fulfilling its stated purposes.

The Explanatory Memorandum to the *Trade Practices Amendment Bill* (No 2) 1991, presented to the Federal Senate in December 1991,¹⁰ stated in its outline that:

The purpose of this Bill is to introduce into Australia a strict product liability regime based on the 1985 European Product Liability Directive by way of amendment to the *Trade Practices Act* 1974. It provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product has a right to compensation against the manufacturer without the need to prove negligence on the part of the manufacturer.¹¹

Two comments need to be made about these statements. First, to the extent that the Bill purports to attain similarity to the European Directive, the legislation *appears* to achieve this purpose. The main area of contention to be taken up in relation to this point, however, is whether or not a comparison with the European Directive is an appropriate yardstick against which to measure the effectiveness of the reforms. Whilst international recognition arguments are

7 Ibid.

8 Four versions of the Trade Practices Amendment Bill were presented to the Federal Senate before the Bill of 26 May 1992 was passed. They will be referred to as follows: 'the first Bill' - June 1991 'the second Bill' - December 1992 'the third Bill' - April 1992 'the fourth Bill' - May 1992.

9 Eg Senate Committee Report, par 3.53.

10 This is the second of four draft Bills presented to the Senate before the Trade Practices Amendment Act 1992 was passed on July 9, 1992. Note also that the Explanatory Memorandum to the fourth and final Bill, presented to the Senate on 26 May 1992, states exactly the same outline.

11 Explanatory Memorandum to the Second Bill, Outline.

mounted by industry groups to rebut consumer arguments for more radical reform, it will be argued that a more appropriate test is whether Part VA adequately serves Australian consumers in the establishment of an effective cause of action for product-related loss. By effective, I mean a cause of action which may be relied on exclusive of other common law causes of action.

The second point, closely connected with the first, relates to the assertion that a person who suffers product-related loss is given a right to compensation without the need to prove negligence on the part of the manufacturer. This assertion suggests that an effective cause of action, which supplants the need for reliance on common law negligence, is created by Part VA. I believe, however, that this is not the case.

The protection of, and adequate compensation for, consumers who suffer loss as a result of product defects was the basis for Part VA and should have remained the primary consideration. The importance of this proposition has been highlighted by Senator Spindler in the Senate.¹² The Senator quoted from a report by the Australian Consumers Association (ACA)¹³ which concluded that an estimated 1800 to 3600 children are injured each year as a result of physical product failure. Figures for adults injured as a result of physical product failure ranged between 9500 and 19000. As Senator Spindler states:

Even taking the most conservative estimates and trying not to be emotional about the particular poignant tragedy of children killed and injured in this way, there is clearly a problem to be addressed.¹⁴

However, it is apparent in the recommendations of the Senate Committee that the foundation of the debate had shifted to an evaluation of the economic impact of product liability reforms upon business and industry. It was producers who had become the victims, consumer groups representing an unreasonable and unrealistically extreme push for legal reform in an economically depressed market-place. Given the importance of the debate in terms of human health and safety (as highlighted by Senator Spindler), it is unfortunate that the emphasis changed in this way.

This is not to say that an appreciation of economic factors should never have entered the debate, or that they should not have been considered by the Government or the Senate Committee. Economic factors will be accorded a substantial amount of space in this article. However, the way in which economic arguments were posed and dealt with throughout the debate reflected a bias in favour of business and industry and a disregard of the factual evidence presented to the Senate Committee.

The fact that they were given such importance, and that the often

¹² *Hansard (Sen)*, Wednesday, 3 June 1992, p 3367.

¹³ Australian Consumers Association, 'An Arm and a Leg: The Human and Economic Consequences of Unsafe Products' (1989).

¹⁴ *Hansard (Sen)*, Wednesday, 3 June 1992, p 3367.

unsupported arguments of industry groups were accorded so much attention during the debate, is to be regretted.

Before proceeding further it would be useful to explain the use of some terminology in this article. The terms manufacturers, producers, business and industry will be used in a relatively synonymous way throughout the following text. Unless otherwise stated, these terms refer to manufacturing companies and industry groups which represent the various manufacturing and producing industries which are inevitably affected by product liability reform. Reference to the industry lobby is intended to encapsulate most of the industry associations and their legal representatives which participated in the evolution of Part VA. Such a conglomerating of industry groups is not intended to infer that they necessarily share the same views; obviously they do not. However, for convenience such terms of reference are necessary.

Reference throughout this article to consumer groups and the consumer lobby relates to the numerous consumer organisations which represent the needs and interests of consumers, such as the Australian Consumers Association and the Federal Bureau of Consumer Organisations. Again, this is for the sake of convenience. Where the views of various groups (industry or consumer) differ starkly, this will be highlighted.

Providing the plaintiff with assistance in establishing a case under Part VA

The discharge of the burden of proof is one of the most contentious issues which has surrounded the debate over Part VA. Whether or not the plaintiff should receive assistance in discharging the legal burden of proof, and what kind of assistance, is quintessential to the effectiveness of Part VA in compensating consumers who have suffered loss as a result of product defects. Tied up in this issue is the fundamental conflict of interests between consumers and industry groups.

It will be argued that the failure of the Federal Government to include a provision in Part VA which assists the plaintiff in this regard is a failure to adequately protect consumers from and compensate for product-related loss. As a consequence, the legislation creates another ineffectual avenue of litigation; ineffectual because it fails to provide a cause of action which supplants the need for plaintiffs to rely on pre-existing statutory and common law causes of action. It therefore fails to contribute substantially to the plight of consumers seeking compensation for product-related loss. It will also be argued that where the interests of consumers and industry conflicted, the interests of the latter were given paramount consideration even though little or no evidence exists to substantiate many of the arguments put forward by industry groups.

Two statements made in the Explanatory Memorandum to the fourth

Bill¹⁵ create the impression that the intention of the Government in introducing Part VA was to create a cause of action reducing the need for reliance upon common law causes of action by plaintiffs.¹⁶ The first is the claim that Part VA provides a regime of strict liability whereby the plaintiff has no 'need to prove negligence on the part of the manufacturer.'¹⁷ The need for negligence under the common law should be unnecessary according to this statement. The plaintiff would not need to establish the negligence of the manufacturer under Part VA and therefore would have no need to run a case in common law negligence.

The second is the statement that the key concept of the new Part VA is that a plaintiff who suffers loss as a result of a defective product, 'will have a right to compensation against the manufacturer of the product.'¹⁸ Although literally speaking Part VA does provide such a cause of action, it will be shown that Part VA is ineffectual in its attempt to introduce a clearly definable, separate regime of liability that is consumer-oriented, and therefore fails consumers.

One of the biggest problems faced by consumers in establishing a case under Part VA will be obtaining evidence to establish that the product which is alleged to have caused loss was defective. Sections 75AD-AG require that a plaintiff establish that the manufacturer supplied defective goods, and that as a result of the defect the plaintiff suffered injury or loss. This information is invariably in the possession of the defendant manufacturer which has produced the product.¹⁹ The Federal Bureau of Consumer Organisations (FBCO), the ALRC, the Public Interest Advocacy Centre (PIAC) and ACA all argued before the Senate Standing Committee on Legal and Constitutional Affairs that 'the plaintiff would need information relating to the safety standards, design criteria, laboratory and field testing, daily quality checks from the production line and reports of other enquiries' to mount a case against a manufacturer under Part VA.²⁰

In the IC Report,²¹ it was concluded that it would be more economically efficient to require producers to establish that a defect does not exist than to require consumers to prove that a defect does exist:

From an economic perspective, the onus of proof should generally reside with the party in the best position to gather information relevant to the question at issue. This suggests that the onus should lie with producers to prove that products were not faulty and with consumers to prove that negligent conduct did not contribute to the loss suffered.²²

15 Trade Practices Amendment Bill 1992 (introduced into the Senate on May 26, 1992).

16 Eg Negligence or actions under contract law. This point is raised in the introductory chapter to this thesis: see above.

17 Explanatory Memorandum to the Trade Practices Amendment Bill 1992 (Cth).

18 Ibid.

19 J Goldring, LW Maher and J McKeough, *Consumer Protection Law* (4th ed, Federation, 1993), par 102; and see generally Chapter One: 'Consumers, Consumerism and the Law'.

20 Senate Standing Committee par 7.24.

21 Industry Commission Report.

22 Ibid 18.

In analysing the economic theory of product liability,²³ the IC further elaborated on its point that producers should bear the burden of establishing that a product was not defective. It stated that producers have better (ie cheaper²⁴) access to information about the risk of accidents caused by product characteristics than do consumers. This is so for two reasons. First, producers have access to information about design features of goods or are able to collect such information at lower costs. Second, consumers experience difficulties in assimilating or understanding information relating to product characteristics.²⁵ The IC go on to conclude that:

Assigning liability to the party with the best/cheapest access to information about risk will move society closer to the optimal level of loss prevention.²⁶

The IC's reference to 'optimal level of loss prevention' is an economic concept. There is a theoretical point at which minimum loss to consumers and maximum economic efficiency occurs. Overbalancing in either direction creates inefficiency of loss prevention.²⁷

The findings of the IC were the basis of the (then) Minister for Justice and Consumer affairs, Senator Tate, inserting clause 75AJ into the second Bill.²⁸ This provision instructed that in a liability action about loss caused by a defective product 'if, on the evidence (whether direct or circumstantial) and in all the circumstances of the case, it is reasonable to infer that loss was caused by a defect in goods, then the inference must be made.'²⁹

The Explanatory Memorandum accompanying that Bill noted that claimants often experience difficulty in establishing a prima facie case.³⁰ It further noted that:

Australian courts have demonstrated a reluctance to find that a prima facie case exists where the claimant cannot provide any direct evidence (as opposed to circumstantial evidence) of defect or causation beyond the fact that the injury occurred.³¹

One of the rationales for the inclusion of the assistance clause is expressed in paragraph 50 of the Memorandum as bringing Australia's product liability laws into line with those of the European Community.³² Many

23 Ibid Appendix B. The IC states that product liability theory 'examines the way in which liability should be assigned to enhance economic efficiency, particularly as it relates to product safety', 71.

24 Ibid 76.

25 Ibid 76.

26 Ibid 77.

27 Ibid.

28 Trade Practices Amendment Bill (No 2) 1991. Reference to the influence of the IC's findings over Senator Tate in introducing s 75AJ are made by Senator Hill in the parliamentary debates: *Hansard* (Sen) 3 June 1992, p 3365.

29 Clause 75AJ. This clause (or like provision) will from here onwards be referred to as the 'assistance clause' (referring to its aim to provide a plaintiff with assistance in discharging the burden of proof in a Part VA action).

30 Explanatory Memorandum to the Trade Practices Amendment Bill (No. 2) 1991, para 48-52.

31 Ibid par 49.

32 This is a fallacious point of reference in the opinion of this author. The point is taken up below.

countries there have special evidentiary and procedural rules to assist the plaintiff in establishing her or his case where direct technical evidence is unavailable. The application of the *res ipsa loquitur* doctrine, as applied in the United Kingdom, is specifically referred to in the Memorandum as such an example.³³

The difficulty faced by plaintiffs in establishing a case under Part VA comes down to an issue of power. As stated by Goldring, Maher and McKeough:

Information is power, and consumers rarely have the same information as suppliers. They cannot therefore compete as equals in the market.³⁴

In this author's opinion, this statement reflects the key policy consideration behind the Government's proposed 'Aussie Battler' provision.³⁵ This interpretation is born out by Paragraph 51 of the Explanatory Memorandum to the second Bill, which states that the assistance clause would:

...ensure that consumers with 'common sense' claims are not struck out on procedural or technical grounds, but will be allowed their day in court.³⁶

It is important to note the inference in the second part of this quotation: that claimants lacking resources and access to direct evidence concerning the product in question will be given an opportunity to have the case heard. The power of information is implied in the stated need for a provision which assists the plaintiff in getting past the initial stages in the litigation process.

Stated as a general proposition, this concept should not be controversial: direct information which helps to establish a case is a powerful tool. This information, in regard to product defectiveness, is far more likely to be in the possession of the defendant manufacturer rather than the plaintiff.³⁷ Therefore, it is a logical conclusion that the failure to include in Part VA a provision assisting a plaintiff in establishing his or her case, a result of industry pressure on the Government,³⁸ 'will make success extremely difficult' for plaintiffs attempting to utilise Part VA. If this is so, then I have gone some of the way toward establishing that Part VA³⁹ is an ineffectual piece of legislation.

33 In April 1992, the third Bill was presented to the Senate contributing a provision which mirrored clause 75AJ of the second Bill in all but one respect. It added a further sub-section stating that the plaintiff still had to establish the liability of the defendant on the balance of probabilities.

34 Par 102.

35 Clause 75AJ of the first, second and third Bills were described during the parliamentary debates as the 'Aussie Battler' provisions. The use of this emotive terminology serves the purpose of highlighting the difficulties many plaintiffs face in terms of wealth and power in establishing a cause of action for product-related loss. As Senator Spindler stated in the Parliamentary debates, the great concern is the fact that 'manufacturers could escape liability simply because ordinary people...[Aussie battlers]...simply lack the financial power, the wealth, that these days is necessary to get into court.' *Hansard* (Sen), 19 August 1992, p 193.

36 Explanatory Memorandum to the Trade Practices Amendment Bill (No 2) 1991.

37 Above n 7.

38 An account of industry pressure on the Government is given by Senator Powell: *Hansard* (Sen), Wednesday 3 June, 1992, p 3368.

39 Goldring, Maher and McKeough, above n 19 at par 419.

The issue, therefore, is one of access to information. This problem can be dealt with in one of two ways. Either by reforming the procedural process of discovery,⁴⁰ or by legislating to create a statutory provision which assists the plaintiff in establishing a prima facie case.⁴¹ The latter could take the form of requiring the courts to apply the common law doctrine of *res ipsa loquitur* in a similar way to the approach taken by courts in the United Kingdom. The proposed 'Aussie battler' provision⁴² was an attempt to redress the plaintiff's stated difficulties by reforming the application of this doctrine in Australia in actions brought under Part VA.

The issue is, however, inextricably linked to the problems faced by plaintiffs in 'discovering' sufficient information to establish a case under Part VA.⁴³ It should be noted, however, that discovery is a preliminary procedure whereas the use of the *res ipsa loquitur* doctrine is part of the substantive requirements which a plaintiff is required to fulfil to establish a case under Part VA. An analysis of the discovery issue necessarily informs the reform debate over providing assistance to the plaintiff in establishing a case under Part VA, and although the argument in this article turns more on the incidence of the burden of proof the discovery issue must therefore be taken into account.

Res Ipsa Loquitur

Fleming states that allocation of the burden of proof is a function of the substantive law, not evidence, and is 'determined by considerations of policy, fairness and probability.'⁴⁴ This concept of fairness is the basis of the common law doctrine of *res ipsa loquitur*.⁴⁵ The use of the Latin maxim perhaps serves to confuse the true nature of the doctrine which is, in essence, a simple common sense concept. As Fleming explains:

Res ipsa loquitur is no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident itself is sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury.⁴⁶

Generally speaking, two conditions must be satisfied before the doctrine may apply. First, the accident must be of a kind which does not ordinarily occur in the absence of negligence, such as a crane collapsing⁴⁷ or a chicken bone located in a sandwich prepared by the defendant.⁴⁸ Secondly,

⁴⁰ This approach was argued by Senator Schacht in his dissent to the Senate Committee Report (attachment to Report).

⁴¹ Such as clause 75AJ of the second Bill.

⁴² Above n 41.

⁴³ Allusion to this difficulty is made by Goldring, Maher and McKeough, above n 19 at par 419. See also above n 7.

⁴⁴ *The Law of Torts* (1992) at 313 of DM Byrne QC and JD Heydon, *Cross on Evidence* (3rd ed, Butterworths, 1986), pars 4.35 - 4.91.

⁴⁵ *Ibid* 315.

⁴⁶ *Ibid*. See also F Trindade and P Cane, *The Law of Torts in Australia* (1992) at 439.

⁴⁷ *Swan v Salisbury Constructions* [1966] 1 WLR 204 (PC).

⁴⁸ *Tarling v Noble* [1966] ALR 189.

the negligence alleged must be the fault of the defendant and not somebody else.⁴⁹

The application of the principle in Australia, however, varies substantially from its operation in England. In Australia, it merely helps the plaintiff avoid a non-suit where the only explanation for the accident is the defendant's negligence.⁵⁰ It does not absolve the plaintiff of the ultimate burden of persuading the trier of facts that, on the balance of probabilities, the defendant was more likely at fault.⁵¹

In 1972, Professor Atiyah argued that there were two distinct and basic views as to the purposes and effect of the doctrine as applied in Australia and in England.⁵² He argued that in Australia the maxim is not a distinct rule of law or evidence, that it is no more than a summary way of describing a situation in which it is 'permissible to infer from the occurrence of an accident that it was probably caused by the negligence of the defendant.'⁵³ Atiyah goes on to state:

However, on this view, the inference of negligence is merely permissible (not obligatory) and if at the conclusion of the case the tribunal of fact is not satisfied that the accident was more probably than not caused by the negligence of the defendant, the plaintiff must fail.⁵⁴

The Australian case law on the subject bears out this view. In *Mummary v Irving*,⁵⁵ a 4:1 majority of the High Court held that the *res ipsa loquitur* doctrine was merely descriptive of a method by which *prima facie* cases of negligence may be made out. The court is suggesting here that the legal burden of proof is never shifted by the operation of the doctrine, only that the plaintiff may be assisted in avoiding a non-suit. The defendant is under no obligation to prove affirmatively that it was not negligent. The plaintiff must still establish that, on the balance of probabilities, the accident was caused by the negligence of the defendant.

The New South Wales Court of Appeal applied the doctrine propounded by the High Court in *Mummary's* case in *Kilgannon v Sharpe Bros Pty Ltd*.⁵⁶ In that case the plaintiff sought to rely on the *res ipsa loquitur* principle to establish the defendant's negligence. A bottle had exploded in the plaintiff's face and it was argued that the circumstances of the case spoke for themselves in terms of the retailer's liability. It was held by the court that *res ipsa loquitur* is not a cause of action in Australia. It is merely a method of establishing a case. It is insufficient for the plaintiff to allege that a defendant must have been, or

49 Eg *Mahon v Osborne* [1939] 2 KB 14 at 21. 'Negligence in the air will never do': Fleming, 318. See also *Trindade and Cane* at 440.

50 *Trindade and Cane* at 440.

51 Fleming at 323.

52 PS Atiyah, 'Res Ipsa Loquitur in England and Australia' (1972) 35 MLR 337.

53 *Ibid.*

54 *Ibid.*

55 (1956) 96 CLR 99.

56 (1986) 4 NSWLR 600.

that a number of defendants may have been, negligent. The plaintiff must be able to establish that the defendant in the case was, on the balance of probabilities, negligent.

Atiyah argues that the English position on the other hand is that the maxim does operate as a presumption of law. On this view, the legal burden of proof, which in Australia never shifts from the plaintiff, may be cast on the defendant where the res suggests, on the balance of probabilities, that the defendant was negligent. The doctrine becomes one which alters the evidential burden.⁵⁷ Atiyah states:

On this view, once the maxim operates, the plaintiff is entitled to a verdict even though, at the conclusion of the evidence, the tribunal of fact remains in doubt whether the accident was more probably than not caused by the defendant.⁵⁸

In other words the presumption created has not successfully been rebutted.

Fleming argues that this view is now in doubt as a result of a case decided recently by the Privy Council.⁵⁹ The case holds that the legal burden of proof remains unaffected in cases where the res ipsa loquitur doctrine applies.

Fleming also argues that the application of the doctrine in Australia is such as to render it extremely successful when applied by plaintiffs to establish a case on circumstantial, rather than direct, evidence.⁶⁰ He argues that the res ipsa loquitur doctrine has often been invoked, 'even at the cost of distorting its evidentiary basis, in order to advance a distinct policy objective'.⁶¹ Fleming argues that this has been the basis for an increasing leniency in cases involving product liability. In support of this argument, he refers to developments in the years following the decision in *Donoghue v Stevenson*,⁶² but can produce no more recent noteworthy case than *Grant v Australian Knitting Mills*.⁶³ The use of the res ipsa loquitur doctrine in this instance was that:

Control [by the defendant manufacturer] during the process of manufacture was sufficient, once the plaintiff has eliminated himself and other extraneous forces as likely causes of the injury.⁶⁴

57 Examples of this include *Barkway v South Wales Transport Co Ltd* [1948] 2 All ER 460 at 471 (CA) per squith LJ; *Ward v Tesco Stores Ltd* [1976] 1 All ER 219 (CA)

58 Above n 52 at 337. The following are cited as critical cases exemplary of the approach by the English superior court to res ipsa loquitur by Atiyah, 340-6: *Henderson v Henry E Jenkins & Sons* [1970] AC 282 (HL); *Colvilles Ltd v Devine* [1969] 1 WLR 475.

59 *Ng v Lee Chuen Tat* [1988] RTR 298 (Hong Kong) Fleming, 325.

60 *Ibid* 321.

61 *Ibid*.

62 [1932] AC 562.

63 [1936] AC 85. It should be noted that the Privy Council overturned the ruling of the High Court in this instance, (1935) 54 CLR 49.

64 Fleming, 486.

However, to conclude, as Fleming does, that the doctrine of *res ipsa loquitur* enables a plaintiff to establish a *prima facie* case despite a paucity of evidence,⁶⁵ is a simplification of the difficulties faced by plaintiffs in establishing a *prima facie* case in product liability actions before the courts. Despite his position to the contrary, Fleming admits that *Kilgannon* exemplifies the fact that 'unless the plaintiff is able to eliminate the likelihood of other responsible causes', the doctrine will be unavailable to the plaintiff.⁶⁶ The conclusion which must be drawn here, is that Fleming's argument does not sit comfortably with the recent Australian authorities, and is not a realistic representation of the position in Australia with regard to *res ipsa loquitur*.

Furthermore, contrary to the suggestion that in product liability cases plaintiffs are finding it increasingly easy to establish a case by use of the *res ipsa loquitur* doctrine, three recent Australian cases already mentioned suggest otherwise. *Mummery's* case and the recent New South Wales Court of Appeal case of *Kilgannon v Sharpe Bros* (both discussed above) are primary examples of the failure of the *res ipsa loquitur* doctrine to have a positive influence on the plaintiff's ability to establish a case before the court.

The third Australian case is that of *Tarling v Noble*,⁶⁷ discussed by Goldring, Maher and McKeough.⁶⁸ The crucial point made by the authors about this case is that for the doctrine to apply, the presence of circumstances rendering the article dangerous must be explicable *only* because the defendant was at fault. This may be overstating the conservatism with which the *res ipsa loquitur* doctrine is applied in Australia.⁶⁹ The point, however, is essential to an understanding of the need for a provision such as the assistance clause. If the plaintiff must, in an action under Part VA, establish before a court that the *only* explanation (or near to being the exclusive explanation) for the injury occurring was that the product in question was defective, then the *res ipsa loquitur* doctrine will be rendered virtually useless in all but the most obvious cases of product defect.⁷⁰ This application of the doctrine in Australia is most retrograde in comparison with its application in the United Kingdom. To deny a plaintiff access to the courts to try her or his case in these circumstances is unjust. Where direct evidence cannot be obtained by the plaintiff but there is a strong inference of negligence on the defendant's part, the case should be tried and the inference allowed to stand. Under the Australian application of the doctrine, the plaintiffs in *Mummery*, *Kilgannon* and *Tarling* all failed to successfully establish their cases.⁷¹

65 Ibid 324.

66 Ibid 486. This problem has also occurred in other jurisdictions in the case of a defect being due to wear and tear. Eg *Evans v Triplex Glass* [1936] 1 All ER 283; *Hart v Bell Telephone* (1979) 10 CCLT 335. See Fleming, 487. Fleming also cites *Mummery's* case as a *pessimum exemplum* of the application of the *res ipsa loquitur* doctrine by Australian courts, 316.

67 [1966] ALR 109 (chicken bone in sandwich prepared by defendant).

68 Par 458.

69 See *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 200 and *Fredrichberg*. See generally, Byrne and Heydon, para 4.90.

70 Trindade and Cane point out that if the accident remains wholly unexplained, or is open to two hypotheses, one consistent and the other inconsistent with the defendant's negligence, then the plaintiff has failed to discharge the onus upon him or her to prove the issue on the balance of probabilities, 439.

71 See also the decision of the High Court in *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 409 at 413 per Barwick CJ.

It is therefore difficult to agree with Fleming's arguments in relation to the *res ipsa loquitur* doctrine as it applies to product liability cases in Australia. Furthermore, the Senate Committee referred to Dr Beerworth⁷² as stating that the doctrine of *res ipsa loquitur* 'has never been used in design defect litigation'.⁷³ Therefore, Fleming's comments are certainly inapplicable to most cases which will be argued on the basis of Part VA.⁷⁴

It is this author's opinion that the current state of law in Australia is, therefore, expressed more accurately and compendiously by Goldring, Maher and McKeough:

The fact that an event occurs which is consistent with the negligence of the defendant does not necessarily, under Australian law, impute negligence to the defendant, or place upon him any onus of disproving want of care.⁷⁵

Given that this is the state of law, the need for an assistance clause to help the plaintiff discharge her or his legal burden of proof was an essential part of the early draft Bills. Its omission in Part VA is an example of the failure of the Federal Government to create a truly reformist piece of consumer legislation.

Conflict of interests and industry concerns

The position of the common law in Australia with regard to the *res ipsa loquitur* doctrine was, as has just been argued, the basis for the assistance clause in the second Bill.⁷⁶ The claim by Senator Tate that Part VA should include a provision to assist plaintiffs in discharging the legal burden of proof, was a recognition of the practical difficulties facing plaintiffs in product liability cases. In the parliamentary debates surrounding the reference to the Senate Standing Committee on Legal and Constitutional Affairs, Senator Tate stated:

In the end, the plaintiff must prove on the balance of probabilities that the injury was caused by the defect in the goods. But the point is that the *res ipsa loquitur* principle is not strongly weighted in the minds of Australian judicial benches and in that situation I was trying to assist them to give the weight that they ought to give.⁷⁷

So what is it that makes the mere application of the common law legal burden of proof so inequitable to plaintiffs seeking to rely on Part VA? The answer to this question is bound up in the fundamental conflict reflected upon in the introduction to this article: the interests of consumers versus the interests of industry and business. It is submitted that the arguments raised by industry groups before the Senate Committee in relation to the burden of proof issue

72 A participant in the Senate Committee hearings.

73 Appendix III, par 8.24.

74 It is noted that Fleming produced the latest edition of his text (which contains these arguments) prior to the enactment of the *Trade Practices Amendment Act 1992*, and did not have the benefit of the Senate Committee report.

75 Par 458. See also Trindade and Cane, 439-40.

76 Above n38.

77 *Hansard* (Sen), 19 August 1992, p 190.

were inadequate. They failed to convincingly rebut arguments in favour of a provision assisting the plaintiff in establishing her or his case.

The Senate Committee noted, in its report, that 'a number of criticisms were levelled at both the provision in the 1991 Bill and the provision in the draft 1992 Bill'.⁷⁸ These criticisms highlight the arguments and concerns of industry in relation to the proposed reforms to the burden of proof. It is now proposed to examine these arguments and show how they are inadequate to rebut the case in favour of an assistance clause.⁷⁹

Some industry groups expressed concern that the assistance clause had no equivalent in the EC Directive.⁸⁰ Industry groups argued that if Australian laws are more draconian than those their international trading partners are subject to, then this will detrimentally affect the international competitiveness of Australian business. However, this argument falters once it is understood that part of the reasoning behind the assistance clause is an attempt to create parity between Australian and European product liability laws. One of the primary rationales for the inclusion of the assistance clause is to actually bring Australia's product liability laws into line with those of the European community.⁸¹

It was argued by Senator Tate that the operation of common law rules and procedures in some European countries would put Australian consumers at a significant disadvantage in comparison to consumers in those European jurisdictions.⁸² For example, in England and Wales the *res ipsa loquitur* maxim operates to grant plaintiffs far more effective assistance than in Australia (as discussed above). And in Germany and France the onus of proof is reversed, requiring a manufacturer to prove that it adopted all appropriate measures to avoid damage.⁸³

Furthermore, it is submitted that the true test of whether or not the allocation of the burden of proof in Part VA is positive or not is whether it serves Australian consumers in pursuing claims for product-related loss. The mere fact that a provision may or may not form part of the EC Directive should not require the Australian federal legislature to follow suit. At any rate, the same criticisms levelled at the onus of proof in Part VA as it now stands have been levelled against the EC Directive in its requirement that causal connection be positively established by the plaintiff without any assistance:

However, the greatest barrier, to a fair apportionment of the risks, is the difficulty of proving a causal connection between the product and the injury.

78 Par 7.12. The Committee is referring to s 75AJ of the second Bill (December 1991) and s 75AL of the third Bill (April 1992). These provisions preserved the plaintiff's legal burden of proof whilst instructing that if on the evidence, and in all the circumstances of the case, it is reasonable to infer that loss was caused by defect in the goods, then the inference is to be made.

79 Economic arguments raised by industry groups are dealt with below.

80 Senate Standing Committee, par 7.12.

81 Explanatory Memorandum to the second Bill, par 50.

82 Ibid.

83 Senate Standing Committee, par 7.38.

This problem has various dimensions. It may be impossible to establish with legal certainty that a product is a potential cause of the injury....The Directive does not address these issues simply by stating that the injured person is required to prove the causal relationship between the defect and the damage.⁸⁴

The same problem exists in Part VA. Simply by requiring the plaintiff to establish a causal connection between the defect and the loss does not solve the difficulties the plaintiff faces in establishing a case. The Senate Committee makes no mention of such criticisms of the EC Directive, and perhaps it received no submissions to that effect. However, if one is to argue that a particular provision should not form part of Part VA because it is not part of the EC Directive, it would seem only logical to look at how the Directive works without such a provision. The criticisms made by Howells suggest that it may be failing European consumers. If this is so, then it must be seriously questioned whether Australia should follow the EC Directive in this regard.

The arguments mooted above are the central concerns expressed by industry and business groups about the inclusion in Part VA of an assistance clause. In response to every perceived detriment it has been possible to present consumer arguments to rebut industry concerns. Yet the Senate Committee's findings reflected the concerns and perceived detriment expressed by industry groups.

The Senate Committee's Findings

The Senate Committee ultimately recommended that it should be left to the courts to develop laws of evidence in the context of the common law.⁸⁵ It states:

The Committee holds strongly to the proposition that the person who makes allegations against others ought bear the burden of proving them.⁸⁶

As a justification for rejecting any proposed amendment to the common law position, the Committee asserted that this was basic to the legal system which the community expects, and 'to reverse that principle in respect of one matter puts it at risk in respect of others'.⁸⁷ In my opinion it is extremely difficult for a Committee set up to consider issues of law reform to justify this line of reasoning. To opt for stasis over change merely because the subject of reform is a fundamental legal principle is not in itself a valid justification for sanctification from amendment or abolition. Two points need to be made in regard to this issue. First, the legislative reform of fundamental legal principles is a political issue. If the government of the day undertakes to reform legal principles, as the Government has purported to do with regard to Part VA (and has to a limited extent done), it is not for lawyers to insist that this compromises legal principles which have evolved through the common law or indeed

84 G G Howells, 'Europe's Solution to the Product Liability Phenomenon' (1991) 20 *Anglo-American Law Review*, 204 at 223.

85 Senate Standing Committee, recommendation 3, xi.

86 *Ibid* par 7.49.

87 *Ibid*.

previous legislative enactments. They are entitled to make political comments and participate in the debate. However, to insist that there should be no assistance clause on the basis that it compromises a fundamental legal principle is an argument that has no place in political reforms of such importance.

Secondly, and contrary to the opinion of some critics,⁸⁸ the claim by the Government that Part VA is indeed affecting fundamental legal reform is a fallacy. The insertion of an assistance clause would have gone some of the way toward rendering Part VA a significant and powerful instrument of reform. However, the Government failed to go this far and, as a result, Part VA does have little practical impact upon fundamental legal principles.

Furthermore, there is no reason to suggest that amendment to the laws concerning the onus of proof under Part VA will put the principle 'at risk' in respect of other areas of law. The arguments presented to the Committee by consumer groups concentrated on a special need in these classes of cases for assistance to be granted to the plaintiff in discharging her or his burden of proof.⁸⁹ Indeed, this was the view of the Government in proposing such a provision in each of the first three draft Bills.⁹⁰

In dissenting to the Committee's recommendations, Senator Chris Schacht stated that 'plaintiffs should be assisted to discharge the burden of proof.'⁹¹ Senator Spindler also dissented, stating that he accepted the arguments of the Federal Bureau of Consumer Affairs, the ALRC, the Public Interest Advocacy Centre and the Australian Consumers Association. He did so on the grounds that 'plaintiffs will need information relating to safety standards [and] design criteria...to prove that goods are defective'.⁹² He concluded that the first draft Bill presented to the Senate in 1991 was the preferable amendment.⁹³

The defendant manufacturers in product liability cases are, generally speaking, in a position of greater economic power than the consumer plaintiff.⁹⁴ The information required by plaintiffs to establish that the product in question was defective is inevitably in the possession of the defendant, and may be extremely difficult and expensive for plaintiffs to obtain.⁹⁵ It is also more economically efficient for defendants to be required to disprove that a product was defective, rather than plaintiffs having to prove the product was defective.⁹⁶

This point is important because it serves to exemplify the fact that economic efficiency factors are not necessarily and always the enemy of consumer rights. This is because economics is inextricably linked to certain

88 Eg RC Travers, 'Australia's New Product Liability Law' (1993) 67 ALJ 516.

89 Eg Dr Cashman's proposal at pars 7.17-18.

90 Clause 75AJ of the first and second Bills, and clause 75AL of the third Bill.

91 Ibid attachment to Report.

92 Ibid attachment to Report, para 1.16 of the Senator's dissent.

93 Ibid.

94 Goldring, Maher and McKeough, Chapter One.

95 Above n 7; Senate Committee Report, per Dr Cashman at pars 7.17-18.

96 See IC Report.

values, whether they be consumer or industry motivated. Where it can be proven that legal reform will significantly harm Australian industry then the relative merits of the reforms must be weighed against the deleterious impact upon industry and the economy. However, it is argued later in this article that the detrimental effect of the reforms before the Senate Committee upon industry are unproven, and that the available evidence indeed suggests that the effect is minimal or negligible. Therefore, although it is not suggested that economic factors should be the overwhelming and determining factor in product liability reform, there is certainly some evidence to suggest that economic efficiency is not significantly harmed by more radical product liability legislation.

A combination of these factors leads to the conclusion that it would be unfair not to provide the plaintiff with statutory assistance in discharging the legal burden of proof in these cases. This conclusion is supported by the views of Goldring, Maher and McKeough:

The plaintiff will need to be able to prove every element of the claim in the same way as plaintiffs in most other Australian courts must do so, without the assistance of even the *res ipsa loquitur* rule as it is applied in other common law countries. This will make success extremely difficult.⁹⁷

Unfairness aside, however, a further compelling reason exists in favour of the inclusion of an assistance clause. This is alluded to by Goldring, Maher and McKeough.⁹⁸ Without the provision of such a clause, Part VA is rendered, at least to some extent, an ineffectual piece of legislation. If this legislation does not remove the need for plaintiffs to plead other common law causes of action in a fact scenario where Part VA could apply, then it is far less useful than is claimed by the Federal Government.⁹⁹

Limitation periods under Part VA

Section 75AO (1) of the *Trade Practices Act* provides that a potential plaintiff must bring an action within three years of the time at which he or she became aware, or ought to have become aware, of the alleged loss, the existence of a defect in the goods and the identity of the manufacturer of the goods. This provision accords with Article 10 of the EC Directive on Product Liability.¹⁰⁰

Subsection (2) of s 75AO provides that an action under Part VA must be brought within ten years from the supply of the goods by the manufacturer. This repose period accords with Article 11 of the EC Directive. Clause 72 of the Explanatory Memorandum of the amending Bill¹⁰¹ states that 'the time at which the repose period begins to run is the time at which the alleged defective

97 Par 419

98 *Ibid.*

99 Explanatory Memorandum to the fourth Bill, Outline.

100 European Community Directive, 1985 (85/374 EEC; OJ No L 210/29, 7 August, 1985).

101 This was the fourth and final Bill presented to the Senate, which was passed on 9 July, 1992.

good which caused the loss (not merely a good of that type) was first supplied by its manufacturer.¹⁰²

It will be argued that the existence of a repose period in Part VA, and especially a restrictive period of ten years, is extremely unfair. It fails consumers in the sense that it arbitrarily precludes plaintiffs from bringing an action under Part VA where that claim involves a defective product which was first supplied more than ten years before the injury occurred or manifested itself. Although many claimants suffering loss as a result of product defect will suffer that loss within the first ten years from the date of supply, many claimants who would otherwise seek to rely upon Part VA will be precluded from doing so.¹⁰³ This is especially true of plaintiffs suffering from diseases of insidious onset and other injuries which do not become apparent until at least ten years after the product has been supplied.¹⁰⁴

It will also be argued that the state of the art defence available to manufacturers under s 75AK (1)(c) more than adequately deals with industry concerns over extending or abolishing the repose period. Furthermore, any evidentiary difficulties which manufacturers face in establishing this defence will be no more onerous than the difficulties faced by consumers in establishing a claim under Part VA.

The Senate Committee stated in its report:

The Committee accepts that, in practical terms, it is only pharmaceutical and chemical manufacturers who would face significantly increased liability if the statute of repose were extended or deleted, because these manufacturers produce goods that have the greatest propensity to cause latent injuries.¹⁰⁵

The number of claims which fall under this category is significant. Almost all of the most publicised product liability cases over recent years have involved legal action against chemical or manufacturing companies.¹⁰⁶ The injuries suffered in these cases have often been ones which have not manifested themselves until at least ten years after the product was first produced, and these cases have involved up to hundreds, or even thousands of claimants.¹⁰⁷

It is submitted, therefore, that Part VA must be seen as failing a significant proportion of victims of product defects. Indeed, Senator Tate argued in the Senate that ten years was too short a period of repose for the very reasons outlined above. He stated:

102 Explanatory Memorandum to the Trade Practices Amendment Bill 1992 (Cth).

103 Senate Standing Committee, par 6.26.

104 Ibid pars 6.25-27.

105 Ibid par 6.10.

106 This point was noted by Senator Tate in the parliamentary debates, *Hansard (Sen)*, 19 August 1992, p 190; see below n 7.

107 Senate Standing Committee, par 6.26 provides an inexhaustive list of examples: the Dalkon Shield and Copper 7 IUD; silicone breast implants; Bjorke-Shile heart valves; benzene; asbestosis and mesothelioma; agent orange; pesticides; Thalidomide, et al.

In some earlier drafts of the Bill [*Trade Practices Amendment Act 1992*] I took the view that 10 years was probably too short a time. I did so because, when one looks at the product liability cases of some notoriety over the last several years—claims against manufacturers in relation to the Dalkon shield and the Copper 7 IUD's and the asbestosis and diazepam cases—they all involved chronic long term effects which were manifested more than 10 years after the product was put into the marketplace.¹⁰⁸

As a result of the inclusion of a ten year repose period, Part VA is dramatically less effective than it was intended to be.¹⁰⁹ It has been argued already that the omission of a provision assisting the plaintiff in discharging her or his burden of proof has resulted in Part VA being an ineffectual avenue of litigation. This is so because it requires potential litigants to rely upon other common law and statutory causes of action as well as, or to the exclusion of, Part VA.

Malkin and Wright make the crucial point that 'the inclusion of the repose period is not necessary, in terms of reaching some sort of balance between consumers' needs and manufacturers' fears.'¹¹⁰ They argue that:

Its inclusion is even more undesirable in our new system, where the basis of liability is dependant on the plaintiff having to prove the existence of a defect.¹¹¹

The point is developed in consumer submissions made to the Senate Committee. A number of submissions argued that the statute of repose would sever claims of consumers 'who were injured by defective pharmaceuticals or chemicals because the statute of repose would run out' before the injury was suffered; before the plaintiff became aware of the injury; or before the state of knowledge had developed to the point where the plaintiff could be assisted in establishing that the injury was caused by the goods.¹¹² The Public Interest Advocacy Centre (PIAC) submitted to the Senate Committee that:

In very difficult product liability cases, such as those involving toxic chemicals or defective pharmaceuticals, negligence is hard to establish because of the legal and evidentiary problems. Product liability reforms were designed to assist in these cases and yet many just actions will be excluded by the statute of repose.¹¹³

This point made by PIAC is crucial to an understanding of the argument that Part VA is an ineffectual piece of consumer legislation. The Senate Committee, in expressing its views, stated that the ten year statute of repose is a wholly arbitrary one, and that 'there is no compelling evidence

108 *Hansard (Sen)* 19 August 1992, p 190.

109 See Explanatory Memorandum to the Trade Practices Amendment Bill 1992 (the fourth Bill), Outline.

110 'Product Liability under the *Trade Practices Act* - Adequately Compensating for Personal Injury?', *Australian Torts Journal*, Vol 1 No 1, 63 at 88.

111 *Ibid.*

112 Senate Standing Committee, par 6.25.

113 *Ibid* par 6.27.

pointing to any particular period being the right and proper one'.¹¹⁴ Yet the Committee went on to recommend that the ten year period be retained.¹¹⁵ The basis for this was that it was consistent with Article 11 of the EC Directive.¹¹⁶

It is submitted that by fixing the statute of repose at ten years, the Government has failed to represent the interests of a significant portion of Australian consumers who would have access to Part VA but for the existence of an arbitrary and restrictive period of repose. In this sense s 75AO (2) renders Part VA, to some extent, an ineffectual avenue of litigation. The Explanatory Memorandum to the fourth Bill claims that Part VA will provide the consumer with a right to compensation 'without the need to prove negligence on the part of the manufacturer'.¹¹⁷ In actual fact, consumers who suffer from loss or injuries which are not manifested in an actionable form until after ten years, will not be able to rely upon Part VA as a cause of action. These consumers, who are often suffering from mutilating, debilitating and/or fatal diseases and injuries, will have to rely upon actions in common law negligence, with its inherent legal and evidentiary problems.¹¹⁸

It is important to look at the development of Part VA to see how s 75AO (2) came to be included in the legislation. The concerns of industry groups appear to have had a significant influence upon the legislature and the Senate Committee, and these concerns will now be analysed.

Industry arguments in favour of the statute of repose

Malkin and Wright mention the conflict between 'consumers' needs and manufacturers' fears'.¹¹⁹ This raises the fundamental conflict which pervades the product liability debate: the conflict between the interests of consumers and those of business and industry. The position taken by these authors was that, given the basis of liability under Part VA being dependant upon the plaintiff having to prove the existence of a defect (and without any statutory assistance in doing so), the statute of repose was unnecessary and unfair to consumers. It tipped the balance too far in the manufacturers' favour. A critical appraisal of the arguments raised by manufacturers reveals that they fail to convincingly establish a case in support of a restrictive repose period. These arguments will now be considered.

Dr Beerworth argued before the Senate Committee that an extended repose period or no repose period would have a detrimental effect upon product

114 Ibid pars 3.11-12, 6.33.

115 The Committee recommended one exception to the statute of repose. This exception was that where it is shown that, on or before the date the good was supplied, the manufacturer knew or ought to have known that the product was defective, a court should have the discretion to extend the period. To this author's knowledge, this recommendation has not at the time of writing, been accepted or passed by the Commonwealth Parliament. Pars 6.34-36.

116 Ibid par 6.33.

117 Explanatory Memorandum to the fourth Bill, Outline.

118 Senate Committee, par 6.33.

119 Above n 6 at 88.

design and innovation within the pharmaceutical and chemical industries.¹²⁰ She argued that the possibility of facing strict liability in twenty or thirty years time means that manufacturers in these industries will be less likely to produce experimental products:

...the longer you make the tail of liability, the less willing is going to be the manufacturer to get that new experimental product onto the market.¹²¹

Argument as to the effects of a long tail of liability upon insurance premiums was also made early in the debate. In a submission by the Insurance Council of Australia to the Australian Law Reform Commission, it was stated that:

The certainty that no liability may be imposed after expiry of the repose period is said to be an advantage for potential defendants and insurers in pricing the risks covered by an insurance policy, because it means that there will not be a 'long tail' of potential liability.¹²²

However, recommendation 52 of the ALRC Report¹²³ stated that there should be no statute of repose. The ALRC believed that the inclusion of such a provision would be inconsistent with the principles of spreading costs, providing incentives for optimum loss-prevention and the matching of risks with benefits, even at the cost of some uncertainty.¹²⁴ The ALRC raised a number of other concerns regarding the implementation of a statute of repose. First, manufacturers might produce their goods on the basis that they can continue to be used safely for a period that exceeds the statute of repose, and would be shielded from liability whilst obtaining a marketing advantage on that basis.

Secondly, manufacturers might misrepresent or conceal information in relation to goods, such as information regarding their effects on long-term health, and may then rely on the statute of repose because the effects do not become manifest until after the period of repose has expired. Finally, the statute may operate arbitrarily to bar consumers' rights to claim compensation before a cause of action accrues, an example of which is where a product takes a long time to manifest its defect or causes a disease of insidious onset.

The ALRC pointed out in its report that the age of goods will be a determining factor in whether the defendant manufacturer has a defence to a claim for compensation against it. The known age of the goods will be relevant in determining whether the goods could be expected to act in the way that they did or in determining the reasonableness of the claimant's conduct in relation to the goods.¹²⁵ These considerations are reflected in Part VA. Section 75AC

120 Senate Committee, par 6.17.

121 Senate Standing Committee, par 6.17.

122 ALRC Report, par 9.17.

123 Ibid p xxvi.

124 Ibid par 9.19.

125 Ibid par 9.19.

(2) of the *Trade Practices Amendment Act 1974 (Cth)*¹²⁶ requires regard to be given to 'all relevant circumstances' in determining the extent of the safety of goods. These include what might reasonably be expected to be done with or in relation to the goods,¹²⁷ and the time at which the product was supplied by the manufacturer.¹²⁸

The ALRC concluded:

It is not necessary to place a further time barrier in the path of prospective claimants and it would be undesirable to impose a time barrier which, in the case of a statute of repose, is entirely arbitrary.¹²⁹

The 'State of the Art' defence

It is submitted that the arguments presented to the Senate Committee by Dr. Beerworth and others,¹³⁰ are adequately answered by s 75AK of the *Trade Practices Act*. This provision allows for certain defences against an action, including the 'state of the art' defence whereby if at the time of supply, the state of scientific or technological knowledge was not such as to enable that defect to be discovered, then the manufacturer will not be liable.¹³¹ It is noted by Goldring, Maher and McKeough that whilst this obligation places a heavy onus upon manufacturers to 'keep abreast of the relevant literature',¹³² it also has the positive effect of encouraging the testing of products 'thoroughly in the light of contemporary technical knowledge'.¹³³

The advantages of the state of the art provision to consumers and manufacturers alike are clear. Nobody benefits from the production of defective products. Financially, manufacturers suffer in terms of liability and reputation, and consumers suffer in terms of property damage, physical injury and sometimes death. However, with the combined existence of the state of the art defence and an extended or abolished period of repose, manufacturers would be compelled to invest in thorough research and testing of their product. If they did so in compliance 'with the state of scientific or technical knowledge at the time when they [the products] were supplied'¹³⁴ then no liability would ensue, even where the plaintiff proves that the product is defective.

It is submitted that the state of the art defence therefore stands as a strong argument against the existence of a repose period, and especially one restricted to ten years. Malkin and Wright argue that the statute of repose is

126 As amended by the Trade Practices Amendment Bill 1992.

127 Section 75AC (2)(e).

128 Section 75AC (2)(f).

129 Ibid par 9.19. Epstein and Goldman in 1988 reached the same conclusion as the ALRC in regard to a statute of repose: 'Responsibility for Defective Products in Australia' (1988), par 10.2.2.

130 Eg the ICA above and oral argument by Mr. Lowder (member of the committee for product liability reform of the Business Council of Australia) before the Senate Committee hearing in Melbourne, 21 October 1992, pp 225-6.

131 Section 75AK (1)(c).

132 Above note 19 at par 420.

133 Ibid. See also Professor Goldring's submission quoted in the Senate Standing Committee, par 6.14.

134 Section 75AK (1)(c).

undesirable in a system where the plaintiff must first prove the existence of a defect before liability will ensue.¹³⁵ The ALRC also saw the state of the art defence as the answer to industry concerns over the exclusion of a statute of repose.¹³⁶

An analysis of the arguments discussed above by industry groups is easily answered by reference to the state of the art defence. If manufacturers are forced to test their products thoroughly and consistently with contemporary scientific technology, then product design and innovation should not be detrimentally affected. Neither should insurance premiums escalate substantially.¹³⁷ This is because the state of the art defence would provide manufacturers with a thorough defence to liability so long as they test thoroughly. The very nature of the defence indicates that thorough testing will be determined by reference to the state of technical and scientific knowledge available at the time.

Furthermore, there would be pressure from insurance companies for manufacturers to comply with the state of the art testing procedures. As stated by Goldring, Maher and McKeough:

If the aim of the legislation [Part VA] is to ensure safer products and the avoidance of loss to consumers, then, in practice, the requirements which liability insurers impose upon their policy holders in terms of 'risk management' in order to prevent claims will be crucial in determining the effectiveness of the legislation.¹³⁸

If manufacturers act responsibly in carrying out state of the art research and testing on experimental and potentially highly dangerous products, and can prove that they have done so, they cannot be held liable for loss arising out of any defect of the product. The difficulty they may face in establishing a defence under s 75AK (1)(c) after the lapse of fifteen or twenty years is no more (and perhaps less) onerous than the difficulty plaintiffs face in attempting to establish a case under Part VA.¹³⁹

In a recent article, R.C. Travers argued that the state of the art defence may be 'illusory'.¹⁴⁰ This conclusion is reached by reference to a hypothetical example of a carcinogenic product, a defect which was not discovered until after the time of supply. He argues that the product would be defective under the definition provided in s 75AC because the product's 'safety is not such as persons generally are entitled to expect'. This much is not contended. However, Travers goes on to say:

Axiomatically, the defect will have been discovered by the trial. How will the

135 Above n 106 at 88.

136 ALRC Report, par 9.19.

137 It is argued below that the claims of manufacturers with regard to increased insurance liability are completely unfounded and unproven.

138 Par 411.

139 See above.

140 'Australia's New Product Liability Law' (1993) 67 A L J 516 at 524.

manufacturer argue that the defect proved at trial was not capable of being discovered at the time of supply?¹⁴¹

I fail to see the difficulty with such a concept. The manufacturer would be faced with a situation in which it would be forced to adduce evidence to establish that at the time of supply the state of the art scientific or technical knowledge could not have shown the product in question to be carcinogenic. To conclude that 'in practice, therefore, the state of the art defence may prove to be illusory'¹⁴² seems an inadequate and inaccurate deduction. I have argued above that manufacturers are in a better position to bear the onus of producing evidence that their products are not defective than injured consumers are to prove that a product is defective. I fail to see how requiring a defendant manufacturer to establish on the balance of probabilities that a product's defect was not, at the time of supply, detectable by the state of the art knowledge renders the state of the art defence illusory in any way. Indeed it might be argued that this merely places the onus of proof upon the party in the best position to discharge it.

The ALRC's proposal and the Government's response

The ALRC's recommendation that there be no period of repose and the reasons for this view have already been discussed. However, it also recommended in the alternative that if the legislature decided to include a statute of repose, such a provision should be formulated as a ten year period, but would be subject to a number of qualifications.

A draft provision published by the ALRC¹⁴³ in its report suggested that the repose period would not apply where the loss or damage caused by the way the goods acted was not, and could not reasonably have been, discovered within that period. It further recommended that where a person involved in the manufacture or supply of the goods, or a servant or agent of the person, misrepresented or concealed information concerning the way in which the goods would act, the statute of repose should not apply. Finally, where it would be unfair or unreasonable having regard to the terms of an express warranty given in relation to the goods, the draft proposal recommended the repose period should not apply.¹⁴⁴

The draft provision allowed for a multiplicity of scenarios where the repose period should not apply, thus rendering it inapplicable where it would be unreasonable or unfair to allow a manufacturer to rely on it. A similar recommendation is made by Epstein and Goldman in their 1988 report, again in the alternative to their primary recommendation that a repose period not apply.¹⁴⁵

141 Ibid.

142 Ibid.

143 ALRC Report, par 9.20.

144 Ibid.

145 Above n 125, recommendation 46, par 10.2.2.

The government rejected the ALRC's primary and secondary recommendations but at first supported a 20 year repose period, based on the need to provide for consumers afflicted by product-related loss which did not manifest itself until after ten years had elapsed.¹⁴⁶ The Explanatory Memorandum to the second Bill explained that:

A longer time period is allowed for personal injury to take into account injury which may be caused by diseases which develop slowly (such as cancer) and injuries which cause genetic problems.¹⁴⁷

At the Australian Industry Commission Product Liability Conference,¹⁴⁸ Senator Tate (the Federal Minister for Justice and Consumer Affairs at the time) supported such a period so that in cases of toxic harm and products with possible long-term carcinogenic effects, a cause of action was still available under the new provisions.¹⁴⁹ This line of argument was adopted again later by Senator Tate in the parliamentary debates surrounding the reference of Part VA to the Senate Standing Committee on Legal and Constitutional Affairs. Senator Tate stated there:

I believe that, under the proposal I put forward, it was reasonable to say that the fact that a good was, say, 11 or 14 years old when it caused the damage should not debar the plaintiff from seeking to take advantage of this new product liability regime.¹⁵⁰

The crucial element of Senator Tate's parliamentary comments is the statement that a ten year repose period simply debars certain aggrieved consumers from access to Part VA, and it does so arbitrarily. A reasonable inference which may be drawn from this statement is that the existence of s 75AO (2) renders Part VA an ineffectual cause of action for consumers who suffer loss as a result of a defective product over ten years after that product was first supplied.

Why is this so? The arguments raised by industry groups to oppose the extension or abolition of a repose period have been canvassed above, and it has been argued that they do not stand up to scrutiny. The state of the art defence under s 75AK (2)(c) offers protection for manufacturers so long as they have been scrupulous in their research and testing. Any evidentiary difficulty they have in establishing the defence will not be as onerous as the difficulties faced by a plaintiff attempting to establish that the product was defective.

As with the burden of proof issue, the Senate Standing Committee approached the statute of repose issue from the perspective of 'whether there is

146 Second Bill (December, 1991): s 75AN (2) provided for a 20 year repose period where loss resulted from death or injury, and 10 years where loss resulted from destruction of, or damage to, goods.

147 Explanatory Memorandum to the Trade Practices Amendment Bill (No 2) 1991, cl 62.

148 Held in Sydney on 11 November, 1991.

149 Senator the Hon M Tate, 'New Product Liability Laws Proposed' (1991) 62 *Trade Practices Commission Bulletin*, 8 at 11; also above n 106 at 87.

150 *Hansard* (Sen) 19 August 1992, p 190.

any reason for departing from the EC Directive on this issue'.¹⁵¹ It has been argued that this is not the most appropriate yardstick for determining whether or not there should be a restrictive repose period. The true test should be whether such a provision fails to provide Australian consumers with an effective avenue of litigation.

It is submitted that an analysis of the intentions of the Government in introducing a new product liability regime, reveals that Part VA falls far short of its aims. In the Outline to the fourth Bill, it was stated that Part VA:

provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product has a right to compensation against the manufacturer without the need to prove negligence on the part of the manufacturer.¹⁵²

I have argued above that the assertion that a person who suffers product-related loss is given a right to compensation without the need to prove negligence on the part of the manufacturer, implicitly suggests that an effective cause of action supplanting the need for reliance on common law negligence, is created by Part VA.

It has been argued that the existence of s 75AO (2), however, necessarily limits the availability of Part VA to a significant category of potential litigants. For claimants suffering from diseases of insidious onset (such as asbestosis or certain cancers), genetically inherited defects (such as Thalidomide) and many other forms of injury caused by product-defects, Part VA will be completely ineffectual (after ten years from the date the product was first supplied) as an avenue of litigation.

The consumer groups argued that the statute of repose should be eradicated entirely or substantially extended, or that it should be removed in cases of personal injury. It was argued by Professor Goldring¹⁵³ that the state of the art defence rendered the statute of repose unnecessary, and all consumer interest groups pointed to the effect of such a restrictive repose period upon claimants who suffered product-related diseases or injuries as a result of pharmaceutical or chemical goods.

The conclusion here must be that Part VA is an inadequate and ineffectual piece of legislation; one which fails consumers and falls far short of its stated purpose.

Economic issues surrounding the proposed reforms

Economic issues were one of the most significant factors behind the substantial concessions made by the Government to the industry lobby in the evolution of

151 Senate Standing Committee, par 6.2.

152 Explanatory Memorandum to the Trade Practices Amendment Bill 1992.

153 Ibid par 6.14.

Part VA. It will be argued here that economic factors as they were presented by industry and business usurped what was originally a consumer protection reform process, and that the concerns of industry became the paramount concerns of the legislature. Without setting up an economics versus morality argument, an unrealistic and unhelpful polemic, it will be argued that the crucial debate surrounding the implementation of Part VA was indeed about the morality of assisting consumers in the protection from and adequate compensation for defectively manufactured products.

The insertion in the legislation of a restrictive repose period of ten years and the omission of a provision assisting plaintiffs in discharging their burden of proof are the direct result of pro-industry lobbying. It is necessary to examine the validity of arguments raised by the industry lobby, the undue weight given to these arguments, and the effect they had upon Part VA as a cause of action.

Economic issues were of paramount concern from the inception of the debate over Part VA. A number of these issues were considered by and dealt with in the ALRC report,¹⁵⁴ the IC's report¹⁵⁵ and the Senate Committee's report.¹⁵⁶ The effect of product liability reform upon Australia's international competitiveness was considered. So too was the potential increase in insurance costs for producers and the effect of a perceived increase upon the economic well-being of many manufacturers, especially small businesses. Finally, the flow-on effects of product liability reform upon employment, and the availability and purchase price of products on the market were given consideration by these bodies.

The Industry Commission's Views

The economic issues just mentioned were addressed by the IC in its report on the ALRC's proposals in 1990. The conclusions it reached reflect the view that the concerns expressed by industry groups were largely exaggerated and did not reflect the likely impact of the product liability reforms.

The IC received over 120 submissions¹⁵⁷ from the same interested groups as the Senate Committee did. In determining the overall effects of the ALRC's proposals, the IC found that they would have an impact on economic efficiency factors, but that the impact would be relatively small.

As far as Australia's international competitiveness was concerned, the IC considered that the direct effect of the ALRC's proposals would be adverse, 'but generally small.'¹⁵⁸ The effect on production costs and product prices would closely reflect the increases in the direct costs of insuring goods, and the

154 ALRC Report.

155 IC Report.

156 Senate Standing Committee Report.

157 Appendix A. A vast majority of these submissions are by industry and business groups or their representatives.

158 Industry Commission, p 58.

effects upon economic efficiency and competitiveness would not be significantly deleterious, nor the effect on business substantially adverse:

Firms should be able to increase prices to cover most of these higher costs, for three reasons. First, the cost changes would generally be small. Second, they would apply to all goods, including imports: hence, the prices of particular products should change little relative to the competing goods. Third, consumers should be willing to pay more for goods because of the additional safety features or 'insurance' they would contain.¹⁵⁹

Furthermore, whilst the IC accepted that adopting the ALRC's proposals would reduce product innovation and availability, it considered that 'for most products, they [the ALRC's proposals] would be unlikely to have the major effects in Australia claimed by many enquiry participants'.¹⁶⁰ This was because of the substantial difference in legal systems between Australia and the United States (the comparison relied on heavily by some participants), as well as the fact that changes in production incentives would not be substantially affected and therefore, innovation or availability would not be affected.

The views of the IC clearly express concern for the economic impact of Part VA upon manufacturers and the Australian economy. However, it is significant that one of the Government's most formative and influential think tanks on economics is also sceptical of the alleged economic impact of the reforms on industry and the economy. Whilst the IC was critical of the original ALRC proposals, it does not believe the economic impact of substantive reform to be as serious as industry groups argue.¹⁶¹

The Senate Committee's Views

The Senate Committee reasoned that for Australia to emerge out of economic recession the strengthening of our export markets, as well as increased productivity, investment and international competitiveness, were essential.¹⁶² The Senate Committee stated:

Of particular relevance to product liability laws is the fact that Australia's exports of elaborately transformed manufactures grew by 17 per cent per annum between 1983/4 and 1989/90....This growth is to be encouraged not curbed.¹⁶³

The Committee was concerned that increased prices resulting from higher insurance premiums would reduce the incentive for manufacturers to produce new products and cause some products to be taken off the market as a result of overly stringent product liability laws.¹⁶⁴

159 Ibid p 51.

160 Ibid p 53.

161 Ibid Chapter 8.

162 Senate Committee, par 3.5.

163 Ibid par 3.6.

164 Ibid par 4.32.

It is true that a deprivation of *good* new products on the market is detrimental to consumer interest. However, a lack of defective or imperfect products is not. It was noted above that the IC believed these fears to be exaggerated and unfounded to the extent claimed by industry and business lobbies. The Committee does not take cognisance of these IC findings and appears swayed by the weight of economic concerns voiced by industry submissions:

The Committee has to determine where the balance lies so as to maximise the benefit to Australia's economy. Both manufacturers and consumers may lose if this objective is not achieved as manufacturers lose business and workers lose their jobs.¹⁶⁵

The findings of the Committee clearly reflected their concern that the views of consumer groups were adverse to economic growth and efficiency.

It is important at this point to note, however, that whilst the interests of consumers are often perceived to be contrary to the interests of economic benefit and efficiency, this is not necessarily the case.¹⁶⁶ It was briefly argued earlier that economics is not always the enemy of consumer rights.

It is certainly true that an over-representation of the importance of economic factors in the product liability debate will be to the detriment of consumers, and this is indeed a central argument of this article. However, it is not true that a reasonable and balanced approach to these issues will cause undue hardship to either consumers or manufacturers.

Industry Arguments and the Senate Committee's Findings

The conclusions reached by the Senate Committee were derived from subjective speculation as to the perceived economic effects of the proposed reforms.¹⁶⁷ This speculation was the same speculation which the IC criticised as being exaggerations of the realistic likely effects.¹⁶⁸ Indeed, the Senate Committee often admits that the submissions it received from industry groups had little evidentiary foundation. For example, it states:

The Committee was told that there would be a significant increase in insurance costs to cover the increase in the potential liability of manufacturers that would occur if the proposed amendments were made....However, no evidence was provided to back up these assertions.¹⁶⁹

A balance of economic issues requires an appreciation of the tangible effects upon all the economic factors discussed in the IC Report. However, the Committee cites only the evidence of counsel for the industry lobbies as a basis

165 Ibid par 3.5.

166 The debate surrounding the second reading of the Trade Practices Amendment Bill 1992 and the reference to the Senate Standing Committee, highlight this.

167 Ibid pars 4.31-32.

168 Industry Commission, p 58.

169 Ibid par 4.7.

for its conclusions on the perceived economic impact.¹⁷⁰ It cites with approval the Council of Small Business Associations as saying that the argument over the proposed reforms is 'essentially a moral case'.¹⁷¹ The Committee goes on to state:

No evidence has been provided that adequately quantifies the increase, if any, in liability of manufacturers that would arise if the proposed amendments to Part VA were made. This point is, in itself, an argument against making the amendments.¹⁷²

The Senate Committee stated that no adequate evidence exists upon which a determination of the likely economic impacts can be made. In the absence of such evidence it gave preference to the concerns of manufacturers over those of consumers.¹⁷³ As a result, the Senate Committee failed to live up to its expressed belief that the issue requires a balanced approach.¹⁷⁴ It rather gave preference to the concerns expressed by industry.

This is particularly unfortunate given that the evidence both outside of submissions to the Committee and within submissions made, appears to point to relatively modest impacts of product liability reform upon the economy and competitiveness. The Senate Committee received from the Federal Bureau of Consumer Organisations (FBCO) a report by the National Insurance Consumer Organisation (NICO) in the United States which stated that 'insurance premiums paid to American insurance companies amounted to only fourteen one-hundredth of product retail sales'.¹⁷⁵ This point is extremely significant. If insurance costs under strong pro-consumer product liability regimes represent a minute proportion of the purchase price of a good, then there is no reason to believe that insurance costs will escalate exponentially under more radical product liability laws in Australia. This is in clear contradiction to the claims of a number of industry groups.¹⁷⁶

Furthermore, Professor Goldring states¹⁷⁷ that the experience of insurers in the United States has been that 'insurance premiums would not, in general, rise markedly, and that there might be some marginal improvements in quality as a result of the imposition of strict liability'.¹⁷⁸ He adds, however, that there is as yet little concrete evidence to determine the actual impact upon the insurance market and, in turn, the effect on prices and competitiveness.

170 Ibid pars 4.30-32: the Committee's views as to the economic impact of the proposed amendments.

171 Ibid par 4.30.

172 Ibid par 4.31.

173 Ibid.

174 Ibid par 3.3.

175 Ibid par 4.7.

176 Eg the claim before the IC by Suncorp Insurance and Finance that insurance premiums could rise 100 to 200 per cent on present costs, p 49; the claim by Mr Lowder from the Business Council of Australia that insurance market rates are 'hardening at an increasing rate' and that more stringent product liability laws will accelerate this trend dramatically: Cwlth of Aust, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, oral hearing in Melbourne, 21 October 1992, p 225.

177 Above n 19.

178 Ibid par 4.11. Professor Goldring travelled extensively to other countries as part of the ALRC's analysis of other product liability regimes and authored Discussion Paper No 34, which analysed the operation of product liability laws in other jurisdictions.

The IC in analysing the adoption of stricter product liability laws in Europe deriving from the EC Directive, stated that these laws do not appear to have dramatically affected insurance charges there.¹⁷⁹ Whilst the extent of the effect on insurance charges in Europe is not stated by the IC, it mentions that business and insurance groups have recently modified their early predictions made about the adverse effects of reform upon insurance costs.¹⁸⁰ Furthermore, the ALRC submitted to the IC that 'European business and insurance groups have recently moderated the predictions they made during the debate that surrounded the drafting of the directive'.¹⁸¹ The IC quoted the Insurance Council of Australia as saying that it could require 'more than five years' experience under the proposed regime to gain a confident understanding of its effects on insurance premiums.¹⁸²

This point is further supported by Howells¹⁸³:

The European business community had little to fear that the introduction of strict liability in Europe would lead to a United States style crisis, which was largely due to the culmination of several features of the American legal system and society i.e. contingency fees and the lack of liability for the winning side's fees, jury determinations of both liability and damages, liberal awards of punitive damages and the high cost of private health care.¹⁸⁴

These arguments raised by Howells are also relevant to the introduction of stringent product liability laws in Australia. The point is made by the ALRC¹⁸⁵ and by Epstein and Goldman¹⁸⁶ that Australia will not follow the United States in regard to product liability, for similar reasons to those raised by Howells in the preceding quote.

Howells goes on to state:

In any event the European businessmen were able to strongly resist changes to their domestic laws. In addition to raising the spectre of an American style product liability crisis, at the national level they could also utilise the powerful argument that they should not be placed at a competitive disadvantage to their European trading partners.¹⁸⁷

This was exactly the sort of argument raised by industry and business groups in Australia¹⁸⁸ and, contrary to all the comparative evidence which was available, the Committee concluded that reform to Part VA along the lines suggested by consumer groups would be economically disadvantageous for Australia.¹⁸⁹

¹⁷⁹ IC Report, p49.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² IC Report, p50.

¹⁸³ G Howells, 'Europe's Solution to the Product Liability Phenomenon', (1991) 20 *Anglo-American Law Review*, 204.

¹⁸⁴ Ibid at 205.

¹⁸⁵ ALRC Report, pa: 1.22.

¹⁸⁶ 'Responsibility for Defective Products in Australia' (1988), Chapter 12.

¹⁸⁷ Above n184 at 205.

¹⁸⁸ Senate Committee, par 4.14: see generally chapter five.

¹⁸⁹ Ibid pars 4.31-32.

It is therefore submitted that the arguments raised by industry groups regarding the deleterious effects of the reforms considered by the Senate Committee, were either questionable or lacked a solid evidentiary foundation. The Senate Committee accepted the views of industry groups, and in the process of doing so compromised the professed balance which is necessary in the product liability debate.

Economic Theory and the Product Liability Debate

So far I have discussed economic factors relevant to the debate over Part VA in terms of their broad policy application to product liability reform. Whilst this article is ostensibly concerned with the application of social, political and practical economic issues as to whether Part VA is an effective piece of consumer protection law reform, it is necessary to examine how the concept of economic theory fits into the product liability reform debate.

Tony Duggan¹⁹⁰ states:

Law and economics is the study of law from an economic perspective, using (among other things) price theory and the economist's concept of cost to yield insights into how the law works.¹⁹¹

This simple proposition reflects the way in which economic theory is often applied to the law. It attempts to determine the most economically efficient model in any given area of law by assessing the law not in terms of its content but rather its effect.¹⁹²

The work of two economic theorists shows the difficulty faced in determining whether strict liability or negligence based liability provide a better model of product liability law from an economic efficiency perspective.¹⁹³

It is submitted that the economic theory debate (as opposed to taking into account practical economic factors) over whether strict liability or negligence is a more efficient legal approach (which neither Shavell nor Posner are able to finally conclude on) is an unsatisfactory addition to the debate over Part VA. This is primarily because it analyses product liability in isolation from other essential features of the product liability debate, such as social and moral characteristics.¹⁹⁴

By looking at the approach taken by economic theorists to strict liability it is clear that such an approach fails to contribute substantially to the subject-matter of this article. Posner states:

190 'New Directions in Legal Theory: Law and Economics' (1989) 63 LII 852.

191 Ibid.

192 Ibid 853.

193 Steven Shavell, 'Strict Liability versus Negligence' (1980) 9 *Journal of Legal Studies* 1; Richard A Posner, *Economic Analysis of Law* (2nd ed, 1977), 139-42.

194 This is admitted by Shavell, above n 194 at 24.

...a pure rule of strict liability would frequently result in inefficient solutions to conflicting resource use problems because it would give the victim of the accident no incentive to take steps to prevent it even if these steps cost less than prevention by the injurer.¹⁹⁵

This fundamental argument raised by Posner against the value of strict liability over negligence is inappropriate in relation to Part VA for two reasons. First, certain provisions under Part VA require the 'victim' (consumer) to take into account the way they act in relation to the goods alleged to be defective. Under s 75AC (2), in determining the extent of the safety of the goods regard must be had to 'the manner in which, and the purposes for which, they have been marketed'¹⁹⁶ and 'what might reasonably be expected to be done with or in relation to them'.¹⁹⁷ The latter of these two criteria relates to the contrast between the purpose for which the good was intended and the way in which it was actually used. Furthermore, the defences under s 75AK (especially the 'state of the art' defence¹⁹⁸), and provision under s 75AN for contribution by the claimant where her or his acts or omissions have contributed to the loss, provide substantial incentive for claimants to take steps to prevent injury occurring.

Second, and most importantly, the incentive for consumers to engage in preventative measures to avoid injury caused by defective products lies outside of an economic rationalisation of product liability law. The greatest incentive for consumers to act appropriately in regard to goods is self-preservation and the desire to protect themselves and others from injury. This is essential to an understanding of the way in which consumers act in relation to goods.

Therefore, pure economic theory cannot be used to determine whether product liability laws should be regulated by strict liability or negligence. It does not take into account non-economic factors and does not perceive the positive economic impact of stringent product liability laws upon industry and the economy. These two points now need to be addressed.

The importance of Non-Economic Factors

The reasons for the Government's 'watering down' of Part VA were purely economic.¹⁹⁹ Senator Hill, debating Part VA in the Senate, claimed that the pressures of industry through the Caucus committee were responsible for the pro-industry development of Part VA.²⁰⁰ This view was later supported by Senators Powell and Spindler.²⁰¹ Political rhetoric aside, however, the views of the Senate Committee certainly reflect the proposition that industry concerns regarding the perceived deleterious economic consequences of the proposed

195 Ibid 139.

196 Section 75AC (2)(a).

197 Section 75AC (2)(c).

198 Section 75AK (1)(c).

199 Eg Senate Committee, para 4.31-32.

200 *Hansard* (Sen), 3 June 1992, p 3366.

201 *Hansard* (Sen), 3 June 1992, p 3368 (Senator Powell); 19 August 1992, p 193 (Senator Spindler).

reforms were given priority over the needs and concerns of consumers.²⁰²

This again raises the point that the Senate Committee failed to live up to its own claim that the needs of consumers and manufacturers must be given balanced consideration. However, this criticism is not confined to the Senate Committee. It is appropriate to level this criticism at the Government itself, which had the support of the Democrats to pass the legislation in the form of one of its earlier Bills.²⁰³

The cost of watering down the legislation is a reduced incentive for manufacturers to test their products' long-term safety and to adequately compensate consumers when their products are defective. The importance of this is reflected in the views of McHugh J.A. (as he then was) in reference to negligence, in *Western Suburbs Hospital v Currie*²⁰⁴:

Negligence is not an economic cost/benefit equation. Immeasurable 'soft' values such as community concepts of justice, health, life and freedom of conduct have to be taken into account.²⁰⁵

It is obvious that a purely economic analysis of the product liability debate cannot satisfactorily deal with these issues referred to by his Honour. During parliamentary debate, Senator Powell, after referring to statistical research undertaken by the Australian Consumers Association,²⁰⁶ stated that 'market forces do not protect consumers'.²⁰⁷

This view is shared by Goldring, Maher and McKeough.²⁰⁸ In the introductory chapter to their book, the authors state:

We do not agree with those economists who believe in the complete free play of market forces; social, as well as purely monetary, costs and benefits must be taken into account....We consider it is a mistake to attempt to justify all or any consumer protection legislation by any single grand theory, in particular we are suspicious of attempts to explain legislative policy entirely in economic terms.²⁰⁹

The concept of consumer protection law is that it adequately protects consumers. Its economic ramifications are important considerations, but as noted by McHugh J.A. in the *Currie* case and the views of the authors and Senator Powell above, other values should play an important role in the determination of product liability laws. These values include health, safety and

202 Senate Committee, pars 3.5, 4.31-32.

203 Senator Spindler makes it clear that the Democrats supported the earlier Bills containing stronger consumer protection provisions, and that the numbers existed to pass the legislation in such a form: *Hansard (Sen)*, 3 June 1992, p 3370.

204 (1987) 9 NSWLR 511.

205 At 523-4. See also above n106 at 65.

206 Australian Consumers Association report, 'An Arm and a Leg: The Human and Economic Cost of Unsafe Products' (1989).

207 *Hansard (Sen)*, 3 June 1992, p 3369.

208 Consumer protection Law (4th ed, 1993), pars 103-5.

209 *Ibid* pars 104-5.

justice, and other related moral concepts.

If economic efficiency arguments are allowed to dominate the debate then the result will not be a balanced one, and the most important issues of human life and well-being will be lost in an analysis of economic abstracts. It is submitted that this is precisely how Part VA evolved. Essential issues, including protection of consumers and providing an effective avenue of legal action for loss caused by defective products, were given less weight than the economic issues involved.

Positive Economic effects of Proposed Reforms

The Senate Committee either failed to consider, or failed to comment upon, the potentially positive economic impact of the proposed reforms. A number of factors, including the competitiveness and reputation of Australian manufacturers, may positively affect Australia's standing locally and in the international community as a well regulated jurisdiction requiring the production of high quality goods.

Senator Spindler, in debating the reference of Part VA to the Senate Standing Committee on Legal and Constitutional Affairs, stated:

I believe the Bill [in reference to the 1991 draft Bill which contained some of the elements under scrutiny by the Committee] has been painted wrongly as being anti-business....If we are to be competitive in world markets, if we are to build up a viable export industry, we need manufacturers and we need products which are produced to the highest quality standards.²¹⁰

This argument is essential to an understanding of the fact that the needs of consumers are not necessarily completely antithetical to economic growth and manufacturers' well-being. This is because Australian manufacturers will be required to produce goods of the highest quality in the international market. The advantage to consumers of having access to good quality products will also create an advantage to manufacturers in terms of enhanced reputation and reduced litigation. Senator Spindler indeed argues that the enhanced reputation which can be built by more stringent product liability laws would benefit not only consumers and the community, but also manufacturers. This is 'because we will be able to establish a reputation for quality, for consistency and for taking responsibility if something does go wrong'.²¹¹ As a result, consumers here and overseas will buy Australian made products with confidence.²¹² Such a proposition is further advanced by the obvious fact that Australia simply cannot compete on economies of scale with many of our trading partners. As a result, the quality of Australian merchandise is essential to success in the international market.

It has just been argued that the expressed concerns of manufacturers,

210 *Hansard* (Sen) 19 August, 1992, p 193.

211 *Ibid.*

212 *Ibid.*

which were given paramountcy in the Senate Committee's considerations, have little merit or empirical support. Both the ALRC and the IC separately expressed the view that the concerns of industry were exaggerated and were not a reflection of the realistic likely impact of the reforms considered by the Senate Committee. Furthermore, much of the available evidence suggests that strong product liability reforms will have a small or negligible effect upon the economic well-being of manufacturers, if they have a negative effect at all.

If these factors are combined with an understanding that the proposed reforms may indeed have some positive effects upon manufacturing in Australia, as Senator Spindler argues,²¹³ then it is possible to construct an economic picture which is vastly different to that painted by industry. This picture is of comprehensive product liability legislation which is not deleterious to the economic well-being and financial security of Australian manufacturers. It has been argued that there is insufficient hard evidence which has been presented by industry groups to establish that product liability laws in the nature of the amendments discussed by the Senate Committee will severely effect this well-being. It is further submitted that a comprehensive product liability regime will, quite contrary to the claims of industry, reflect positively Australia's commitment to quality and fairness in the manufacturing of consumer products.

Conclusion

I have stated from the outset of this article that I have pro-consumer views. The protection of, and adequate compensation for, consumers in relation to product liability law is of paramount importance in the opinion of this author.

Part VA of the *Trade Practices Act 1974* (Cth) is a failure in a number of respects. It fails to live up to the claim of the Government in the Explanatory Memorandum to the amending Bill²¹⁴ that a person suffering from product-related loss will be given a right under Part VA to compensation without the need for reliance on common law negligence.²¹⁵

Furthermore, Part VA fails to go far enough in providing manufacturers with sufficient incentive to protect consumers from the manufacture of defective goods. The difficulties plaintiffs face in establishing that a product was defective and the onerously short time limit within which an action may be brought,²¹⁶ do not encourage manufacturers to increase their safety procedures sufficiently.

Part VA is a piece of legislation which cost millions of dollars in private and public moneys to achieve. The Government undertook to fundamentally reform elements of Australia's legal system, and to achieve a

213 Ibid.

214 Trade Practices Amendment Bill 1992 (Cth).

215 Explanatory Memorandum to the final Bill, Outline.

216 Section 75AO (2) requires an action to be brought under Part VA before ten years after the product was first supplied, or the action is statute-barred.

comprehensive product liability regime which reflected growing concern for consumer protection. Part VA does not live up to these aims. It is a disappointing compromise which fails consumers and provides no great advantage to industry.

The Senate Committee recommended that the operation of Part VA be reviewed in 1998.²¹⁷ If this review occurs, it may again be possible to achieve reforms which reflect the needs of Australian consumers, providing an effective cause of action for product-related loss, as well as achieving a proper balance between the needs of manufacturers and the needs of consumers. Until then, Part VA will not achieve its purpose as a comprehensive and balanced product liability regime which provides consumers with adequate protection from and compensation for product-related loss.

217 Senate Standing Committee, xi.