
Jane Stapleton*

The Trade Practices Amendment Act 1992 (Cth), which inserted a new Pt VA into the Trade Practices Act 1974 (Cth) (the TPA) and which is the subject of the detailed Comment above,1 was based loosely on the 1985 EEC Directive on products liability. The Products Directive channels liability for "defective products" to the manufacturer and where relevant to the importer (into the EEC) or to an "own-brand supplier" like the British retailers Marks and Spencers, and the TPA follows this strategy. A secondary liability is imposed on suppliers which can be avoided by the latter promptly naming its supplier or the manufacturers. The TPA also employs this liability. The Directive has served as a catalyst and template for reform proposals not only in Australia, but in countries as diverse as Iceland, Israel and Japan. Among the interesting questions this phenomenon raises are how implementation of the new EEC law has proceeded across the EEC, how well harmonisation of product laws has been achieved, the stability of the new law and its impact domestically within a Member State. This note presents a personal look at some of the important lessons which can be learnt from the EEC experience and which may have implications for what can and cannot be expected from the new Part of the TPA.

1. State of Technical Implementation

The current state of implementation of the Directive given in tabular form [see last three pages], shows that all EEC Member States except Spain and France have implemented the 1985 Products Directive, although most only did so after the so-called "mandatory" date for implementation, which was 31 July 1988. Most Member States implemented it by conventional statutory process, although some such as Italy used a special procedure and at least with Greece there has been concern that the mode used was unconstitutional (legislation in 1991 sought to remedy this problem). The particular delay in France and Spain is due to a number of factors that are common to both countries and is of particular interest to comparative lawyers interested in the "price" of harmonisation measures. In both countries there has been a debate between those who preferred to follow the United Kingdom's lead and just to tack on the Directive's liability to the existing set of civil obligations and those who wanted to integrate the new law. In Spain

* Fellow, Balliol College, Oxford.
1 See Ian R Malkin and E Joan Wright, supra, at 63 — Ed.
there is a particularly relevant statute — the Consumer Act of 1984, which introduced strict liability for several products such as food, cosmetics and motor vehicles — and some wanted some positive accommodation between this and the new Products Directive. Even more dramatically, in France Professor Ghestin’s Working Group has recommended that the implementation of the Products Directive should begin a total overhaul of all contractual and tortious obligations.

Now both approaches are falling foul of Art 13 of the Directive which provides that the Directive should not upset existing domestic rules. This goes to confirm fears that “advances” in consumer protection etc at the Community level can freeze local reform initiatives.\(^2\)

An investigation of the state of play in the 10 Member States who have implemented the Directive reveals one of the most striking aspects of the Products Directive: it has options. On three matters it allows a Member State a choice of what to do. This means the practitioner cannot assume the law on these points is the same in another Member State as it is in his or her local implementation. What is more, commentaries on the implementation in the other Member States are often not available in the practitioner’s own language. English is clearly a widely known language but the table shows substantial English commentaries on other Member States’ implementations are available only in a very few cases. One clear lesson for the future is that the European Commission needs to ensure that their initiatives towards harmonisation are not strangled by a failure of communication across the language barriers. It is simply unrealistic to expect practitioners to acquire the sophistication in a foreign language which is necessary to work with and evaluate laws.

It should be part of the Commission’s job to make attempts at harmonising easily accessible to practitioners and other interested parties. There is a growing suspicion that, unfortunately, the personnel of the European Commission sometimes lose interest in an initiative once it gets through the Council of Ministers and becomes a Directive. At this point, they have “runs on the board”. Certainly the Commission was very slow in chasing Member States who were late in implementing the Directive and they have also been slow in prosecuting those whose form of implementation they argue is inadequate. This is the case for both the United Kingdom and Italy with regard to the development risk defence (Art 7(e), adopted virtually unchanged in TPA s 75AK(1)(c)) — the defence being allegedly too wide in the local law — and in Italy’s case there is also a complaint about the nature of the defence relating to conformity with mandatory regulations.

The three options are, first in Art 15 the Directive allowed a Member State to omit the so-called “development risk defence” in Art 7(e), which allows a producer to escape liability if it shows that the state of scientific and technical knowledge at the time it put the product into circulation was not such as to enable the defect to be discovered. The second option

was that a Member State was allowed to include game and unprocessed
agricultural products if it thought fit (Art 15). Finally, Art 16 allowed a
Member State to provide that a producer’s total liability for personal
injuries caused by identical items with respect to the same defect should
be limited to an amount not less than 70 million ECU.

Of the 10 Member States who have implemented the Directive, nine
have chosen to give product manufacturers the development risk
defence. During negotiations for the Directive, Greece, Luxembourg,
Denmark, Belgium, Ireland and France were against the defence, but of
those only Luxembourg has stuck to its guns. This seems to support the
suspicion that whatever the rhetoric of the Commission, the political
(and legal) dynamic of the Community produces stronger pressures for
the levelling down of the consumer protection than pressures for its
levelling up. On the exemption of game and unprocessed agricultural
produce the farming lobby has been successful in all States in winning
special and anomalous protection, except again in Luxembourg. Finally,
Germany’s insistence on financial caps has found favour in Portugal, too,
as well as Greece, where the cap seems to be half the lowest allowed by
the Directive and may be ultra vires. These financial caps may appear
fairly low, but in practice they may not be all that important. If a product
is found to cause serious injury it will usually be quickly withdrawn before
large numbers are injured. The important exception to this is where the
product, such as a chemical or pharmaceutical — and to use my favourite
current example, a defective heart valve — only shows its dangerousness
after a latency period. But here Art 11 of the Directive becomes relevant
because it provides a cut off for claims after a 10 year period from
circulation has passed. This means many victims of this sort of worrying
long tail liability will be excluded from the Directive’s protection anyway.
This means in turn that financial caps are much less important in practice
than they at first may appear.

2. Technical Problems of Harmonisation

Overall then, although the inclusion of the three options threatened to
be the source of a significant diversity between the forms of
implementation adopted across Member States — and this would have
meant corresponding poorer efficiency in achieving the avowed
harmonisation goal — in fact the pattern of choice on the two major
problem options — the development risk defence and unprocessed
agricultural produce — turns out to have been remarkably uniform.

The implementations have been divergent in other ways such as the
terminology adopted. The source of this problem is that there are nine
official languages in the Community, laws are promulgated in these
different languages and translations being inexact, substantially different
meanings can creep in. The main example of this in the Products
Directive is in the area of what are called the “financial thresholds”. Article 9 of the Directive sets out what “damage” is actionable “damage”

3 Ibid.
Implementation of EEC Directive

for the purposes of a claim under it, and for damage to private property it sets a so called "threshold" of 500 ECU. But the different official language versions of the Directive are clearly contradictory on what this means. The English language version speaks of a "lower threshold of 500 ECU", which suggests a person could recover nothing if the defective product ruined a TV set costing 400 ECU, but could recover in full if the TV set cost 600 ECU. The Dutch and Greek versions suggested this interpretation too. But the French, German and Italian language versions suggest that all property loss claims would be subject to a 500 ECU deduction.

Each domestic act of implementation of the Products Directive also displays a whole series of minor variations from the Directive's actual terms. For example, in the United Kingdom's implementation in Pt 1 of the Consumer Protection Act 1987 (the CPA) there are at least five points at which the United Kingdom law seems an inadequate implementation of the Directive — creating differences between the United Kingdom law and what has or should be holding true in other Member States. First, as already mentioned there is the now notorious problem with the Consumer Protection Act's version of the development risk defence, which instead of being couched in terms of the objective discoverability of the defect, refers to the state of knowledge being "not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control" (CPA s 4(1)(e)), although in practice the Directive's form of words would, in my view, be applied in a way much closer to the words of the CPA than most people think. A second point of difference is that the Directive excludes agricultural produce which has not yet undergone "initial processing", but the CPA lengthens the protection until the produce has undergone something called "industrial processing", which seems to be a much later stage of processing. This leads to a third divergence: under the CPA, once the product has undergone whatever the necessary processing must be, the liability falls on the processor, not on the farmer as required by the Directive, even though the defect may well have been created by the farmer's activities as is the case with salmonella in eggs. No wonder Lord Sainsbury attacked this part of the CPA during its passage through the House of Lords on the basis of its brutal unfairness to food processors!

A fourth oddity of the United Kingdom implementation is that the CPA does not allow a claim to be made for the property damage which a defective component caused to the conglomerate product in which it is supplied. For example, a defective electrical component might cause a new TV to burn out or defective brakes might cause a new car to crash. Under the Directive (and presumably the TPA) the private owner of

such conglomerate product should be able to recover by designating the
“defective product” as the component, which is allowed by the definition
of “product” in Art 2. But such claims are explicitly forbidden by the
CPA, just as they are now forbidden in British negligence law after the
recent House of Lords cases of *D & F Estates* and *Murphy*. Actually, this
refusal of claims makes more sense because in virtually all these cases the
owner of the damaged conglomerate product has a perfectly good claim
under the Sale of Goods legislation — indeed it is a superior claim — so
there is a very strong argument that the Directive should not have
confused matters by giving an unnecessary duplicative remedy. Finally,
there are problems with the CPA's definition of crucial terms. In the
Directive the notion of “product” is defined as a “movable”, but the
CPA's term is “goods” and this seems narrower. Similarly, the term “put
into circulation” is vital to three defences, but the CPA uses the term
“supply”, which is considerably narrower, giving business wider defences
than anticipated by the Directive.

Does the parallel behaviour of most Member States on the three
options, plus the fact that the technical divergences from the Directive of
domestic implementing legislation are or could nearly always be made to
be trivial, mean that a practitioner in the United Kingdom or, say,
Germany can simply assume that the product regimes in the two
countries are well-harmonised? No! There are still large differences
between Member States' regimes. There are two reasons for this. First
and most obviously, the liability in the Directive is not in substitution for
existing local product-relevant rules, but in addition to them (see Art 13).
Indeed, it seems remarkable that the European commission was able to
convince anyone that *adding* a common layer of liability on top of each
Member State's diverse gateaux of liabilities could be justified in terms of
harmonisation at all! What the additive nature of the Directive means for
practitioners, regardless of whether they represent plaintiffs or
defendants, is that the Directive's implementation can hardly be said to
have simplified their task of determining key issues — for example, what
the relevant rules on post-supply warnings and product recalls is or what
the relevant burden of proof is. This is because on these matters the local
rules outside the Directive vary very greatly between Member States. For
example, on these two issues of post-supply duties and burden of proof
German rules are substantially more pro-plaintiff than in the United
Kingdom.

Secondly, even the operation of the Directive’s liability itself, its scope
and therefore the value of a plaintiff's claim varies greatly between
Member States because it is not a comprehensive liability system: it
leaves crucial matters to local rules and local judicial interpretation.
These matters include procedural rules; issues relating to the possible
suspension or interruption of the limitation period (Art 10(2)); laws
governing rights of recourse (Art 5) which, by the way, are notoriously

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variable across the Member States; and laws governing so-called “non-material damage” (Art 9). Take, for example, the contrast between the United Kingdom and Germany on this last point. Under the CPA the plaintiff can claim for personal injuries and it is assumed that, as with other statutory creations of tortious liability such as the Occupiers’ Liability Acts, this will enable claims under the CPA to include not only heads of pecuniary loss, such as loss of wages, but also heads of non-pecuniary loss, such as pain and suffering and loss of amenity. In contrast, in the German implementation of the Directive, non-material damage is excluded so that a victim would need a parallel claim under traditional German negligence principles, if he or she wanted to recover non-material damage related to a product injury. Of course, the traditional law in Germany is now, at least in theory, pretty favourable to plaintiffs, particularly in areas of the burden of proof,8 but for the non-German practitioner the Directive has hardly harmonised and simplified German law!

Another more well-known feature of the German implementation which confirms this is that it preserves the existing special scheme relating to pharmaceuticals. That is, the Directive allows Germany to exclude pharmaceuticals from its implementation of the Directive and to continue to subject them to the existing strict liability regime. European Free Trade Association (EFTA) countries, which are required under the European Economic Area agreement with the EEC to implement parallel legislation to the Directive, are keen to include similar separate schemes, which should then survive if the EFTA country is finally admitted to full membership of the EEC. But, as with each of the other local variations in domestic rules, these schemes make the rules of product liability in the various Member States less transparent, not more transparent, to practitioners from other Member States.

Finally, practitioners in each Member State need to remember that even if another Member State has the same approach in the three options, even if it has the same or equivalent wording in its implementing statute and even if it has the same procedural and substantive background rules, there is still a large potential for variation in the way local law courts interpret key concepts, such as causation, and key terms, such as “movable” and “put into circulation”. Is software a “product”? What does “processing” mean? Has a laundromat machine been “put in circulation”? It is quite conceivable that United Kingdom, German and Greek courts will differ on these questions and indeed they could well differ on the key value judgment in the Directive’s definition of “defectiveness”, namely about what a victim is “entitled to expect” in the way of safety. For example, there is evidence German courts may well be more sympathetic to the technical and cost constraints on manufacturers than United Kingdom judges. The technical authority of the ECJ to

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8 See eg “Limonaden-flaschen decision” [June 1989] Prods Liab Internat 100 and references in note 18, infra.
harmonise such issues of interpretation depends in practice on enough litigants thinking it worth the money to appeal to the court many miles from their home base. And it also depends on whether the ECJ wants to risk rocking the Community boat by disagreeing with a domestic interpretation when it can easily retreat behind the assertion that such matters are ones of fact and not appropriate for appeal.

3. Overlapping Enterprises and the Channelling Effect of Piecemeal Legislation

Although it is true that the Directive gives consumers in some marginal cases a tactical advantage because defendants have the burden of proof on some issues, in general it is a pretentious law. It holds out a promise of increased protection to consumers which it fails in most cases to deliver, while at the same time distracting business and insurers in an unnecessary way. But more than being a mere pretence, there is an important danger in this sort of legislation and it is a danger which the TPA also creates. If the law selects out only one of the particular facts which may be relevant in an accident and creates a special separate liability rule in relation to it, then, even if it in fact creates no greater chance of success because its doctrinal boundaries are no wider than existing remedies, litigants are attracted to framing their claims in this apparently preferential way. The effect is de facto to channel claims to particular types of defendant. This is unfair and will distort both our rules of justice and, if claims ever became numerous, it could well distort markets.

Take the example of the following accident. A bus being driven carelessly on a badly lit, badly maintained road has to brake suddenly when a pedestrian carelessly steps into its path. A passenger is unable to reach one of the few guard rails in the bus and she falls sustaining injury. Under a general liability rule, such as a rule of negligence, the law is able to treat potential defendants equally and fairly. It allows the plaintiff to sue the driver, the driver's employer, the local authority, the pedestrian and/or the designer and manufacturer of the bus. But if there is introduced a special high profile liability rule directed solely at the condition of the product and within that enterprise solely to the manufacturer, suddenly the bus manufacturer appears as the more obvious target of the claim, a result exacerbated by the fact that product manufacturers are often the deepest pocket among available defendants. Certainly this has been the phenomenon in the United States in the decades following the adoption of the special products rule reflected in s 402A of the Second Restatement of Torts. Is this really fair? In time will we regret exposing product manufacturers to a special liability for which a coherent justification has yet to emerge? Would we not think it odd in the next Zeebrugge disaster — when a large car-ferry sank after putting to sea with open bow doors — if it was the ship's designer who bore the initial brunt of liability claims? Can we rely on the rules of recourse to readjust losses in a predictable and appropriate way?

9 See note 5, supra.
In the real world many accidents are caused by the interaction of a number of enterprises, only one of which may be a product enterprise. How much more complex now will be the practitioner’s job of preparing claims in such cases where the assiduous and careful practitioner eager to avoid a malpractice claim himself or herself tries to ensure all relevant causes of action have been exploited and all relevant parties joined? The tactical dilemma for the practitioner will become even more grotesque were a Services Directive along the lines of the draft currently before the EEC Council of Ministers to be adopted. This is not simply because an extra cause of action has to be separately considered. The draft Services Directive does not just put some burdens of proof on the defendant, as does the Products Directive, it puts the key one of disproof of fault. This is such a temptation to plaintiffs one can expect, for example, claims to be directed at any one at all who had serviced a product which eventually caused injury. Say a relatively new car has a massive accident and is a write-off. It will be hard, or at least very costly, for a garage to prove that it was not at fault in servicing it before the accident. It will become more advantageous for a person injured by an allegedly defective chair in a hotel, theatre or playground to sue the service provider than to sue the manufacturer. This would at the very least disrupt the domestic rules on occupiers’ liability. Of course the result would be that product manufacturers would then gain from just the sort of discrimination they now suffer from because then claims would be channelled towards the often small enterprises of the services sector and away from manufacturers of goods. But is this really a sensible way to structure legal rules? Would recourse rules be adequate to the task of readjustment of losses which would be needed? Separate future liability directives are mooted for areas such as injuries relating to hazardous waste and to the construction industry which would add yet further complications. If more consumer protection was needed it would have made better sense simply to reverse the burden of proof in negligence against all defendants who act in the course of a business. Given the very small advance in substantive consumer protection achieved by the Products Directive’s terms, this would have been more sensible, would have avoided the needless complexity now facing practitioners and would have avoided the incoherent channeling to subsectors of the market which we may yet see.

4. Practical Impact of the Products Directive in the United Kingdom

Whether there will even be the pressure for repealing the Products Directive or at least generalising its provisions to all activity in the course of a business, not just product manufacture, depends on how many claims are being made under it. The United Kingdom was the first to implement the Directive four and a half years ago and as yet no claim

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under the Directive has appeared in the law reports. This is not to say there have not been claims. The Consumers Association have evidence that claims are being made and there is also a perception that people are making more claims than five years ago, although this could be strongly influenced by the deepening recession in the United Kingdom economy, rather than a response to the new law. When faced with CPA claims it seems that insurers are choosing to settle them out of court rather than to incur the expense of the trailblazing cases needed to determine the boundaries of the new law. The aim of those settling claims for the defendants might also be to prevent the boost to claims consciousness which the high profile nature of such novel litigation would threaten. There is also anecdotal evidence that defence interests are simply unsettled by the notion of European law in general and this Directive in particular and so are more keen to settle than they would otherwise be. In any case, the new law only relates to products supplied after March 1988, so some current product injuries may not even be covered by the Directive. High street practitioners may also simply be preferring the well-trodden and probably almost as generous rules of negligence law.

Whatever the reason, there does not seem yet to be a crisis of confidence in the Directive, nor has there been the large wave of new claims which some commentators predicted would follow the introduction of the Directive. Similarly, against all the fears preceding the directive, there is no evidence of significant insurance premium increases, although interestingly the Consumers Association say there is some evidence that some manufacturers have tightened up quality control. The experience in other Member States such as Germany seems to parallel the United Kingdom experience in terms of impact on claims rates, the rate of success of those claims and on insurance premiums. In general, though, it is still early days. Perhaps the first sign of a significant impact by the Directive will be when a mass tort occurs and plaintiffs go forum shopping to escape jurisdictions with financial caps.

5. The Initiatives in Non-EEC Countries

The most significant effect of the European Community's adoption of the Products Directive has been outside the EEC. A number of the seven EFTA countries have subsequently adopted legislation parallel to the EEC products Directive and this will become obligatory under the agreement between the EEC and EFTA to form the European Economic Area. Similarly, after Australia, other countries in the South East Asia area such as Taiwan, South Korea and in particular Japan, may introduce parallel legislation in the very near future. Given this external approval and such little local impact, could it be that when the 10 year European review of the Directive's financial limits and development risk defence is undertaken by the Commission both will be abandoned? The latter would involve a real shift to strict liability for manufacturers, but this reading of future developments ignores the opposite movements now taking place within the United States system which served as the template for the Directive itself.
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It is now well known that the United States products liability experience is not directly applicable to Australia or Europe. The United States has juries, contingency fees, and punitive damages and so on which create a fundamental separation of our legal cultures. But it is still interesting to note that eminent United States commentators\(^{12}\) on products liability have recently argued that after a quarter of a century of expanding liability at least some United States courts are reigning in liability. Certainly in cases like *Brown v Superior Court*,\(^ {13}\) a decision of the Californian Supreme Court in 1988, major jurisdictions appear to be doing this, although in the main these cases seem simply to be making the fault basis of the United States regime plain for all to see. There has been some real legislative reform at the State level, but in general on peripheral issues: reform of limitation law and in some cases long-stop rules or “useful life” provisions for products; caps on pain and suffering and punitive damages; partial removal of joint and several liability.

United States products liability commentators seem more sanguine than in previous decades. The general feeling seems to be that as the negligence basis of their regime becomes more apparent and judges try to exercise more control over juries there will be no great need for radical reform. Instead, a new *Third Restatement of Torts*\(^ {14}\) will be drawn up to set out more clearly what the United States products regime does and does not mean and in particular it will reaffirm the fault basis of all but manufacturing defect cases. In this context, the removal of the development risk from the EEC Products Directive seems unlikely.

For Australian lawyers faced with the new Pt VA of the TPA and curious to know the broad lessons from the EEC experience these are:

- first, a scepticism of whether any substantial harmonisation across jurisdictions is achieved by these sorts of additional laws;
- secondly, a realisation that they can make life considerably more complex and costly for practitioners without achieving very much for anyone;
- and, thirdly, a realisation that they impact unfairly and haphazardly on different market sectors without any clear justification.

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<tr>
<th>Country</th>
<th>Form</th>
<th>Commencement Date</th>
<th>Is development risk defence available?</th>
<th>Are game and unprocessed agricultural produce excluded?</th>
<th>Is there a financial Ceiling of ECU 70 million?</th>
<th>European Commission action?</th>
<th>Discussion in English</th>
<th>Separate Scheme for Pharmaceuticals?</th>
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*** Mandatory date for implementation (31.7.88) *** *** *** *** *** ***


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*Signatories of the Strasbourg Convention on Products Liability


## Non-EEC Developments (Legislation "Shadowing" Directive) 85/374/EEC

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<td>Trade Practices Amendment Act 1992 (Cth), inserting Part VA in the Trade Practices Act 1974 (Cth)</td>
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