

Product Liability - Latest Developments

It is some months since we reported on the new product liability scheme which, at the time, "had consumer groups smiling and business groups up in arms". In the last few weeks, however, there has been a total turn around with a swing in the balance of power from consumers in favour of business.

The developments have been very rapid. As at May 4, 1992 the Minister of Consumer Affairs, Senator Tate, was being attacked by business and consumer groups, and by Caucus, for announcing details of a revised bill to amend the Trade Practices Act in respect of product liability, without first seeking Caucus approval. It appeared that the new bill, said to contain nearly 20 substantial amendments to the draft legislation, would be withdrawn until such time as Caucus decided how its various elements could be appeased.

At that stage, business lobby groups were still being very critical of some of the proposed amendments.

Although Senator Tate said that the new bill did not represent a U-turn on policy, by May 7, 1992 manufacturers were celebrating a significant victory when it was announced that what has become known as the "Aussie battler" provision would be removed from the bill. This apparently occurred as a result of pressure on Senator Tate by Caucus which considered the provision would be detrimental to the interests of Australian industry.

The "Aussie battler" provision was the one providing that a court must draw an inference that a defect in the goods caused the loss where it was reasonable in all the circumstances of the case to do so. The provision enraged manufacturers because it was seen to give consumers the upper hand as it was designed to ensure that consumers with "common sense" claims were not struck out on technicalities. The provision was supposed to redress the imbalance between manufacturers which have data and expertise at their fingertips and consumers who do not have access to such technical information or advice, which is critical in the event of litigation.

A further provision on extraterritoriality, which Senator Aulich said would "have made Australia a mecca for consumers with a claim against manufacturers", was also dumped. Changes are also expected to the period of repose, i.e. the period of time after which actions cannot be brought. Currently the period of repose is set at 20 years and is being strongly opposed by business groups because of the burden which it places on manufacturers to keep relevant records for that period.

The test of the new bill has not yet been produced at the date of this article.

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