substantially the same terms as those adopted by the Senate, together with the Parliamentary Privileges Act, will constitute a significant response to the invitation extended by s 49 of the Constitution 87 years ago.

* * *

safeguarding visitors

A house is a machine for living in.

Le Corbusier, *Vers une architecture*

In a report tabled in Federal Parliament on 13 April 1988 the Law Reform Commission has recommended no change to the law of occupiers' liability as it applies in the Australian Capital Territory. The Commission endorsed the law that all reasonable steps should be taken by the owner/occupier to safeguard visitors from injury. What was reasonable would depend on the circumstances.

Mr Nick Seddon, the Commissioner in charge of the reference, said that during the final stages of the Commission's work on the reference the High Court had held that the principle of negligence applied to occupiers' lilability cases in the ACT. The Commission agreed with this approach and did not consider it necessary to enact legislation that would merely mimic what the High Court has now achieved through judge-made law.

In reaching this conclusion the Commission had examined the old occupiers' liability rules that applied in the ACT prior to the High Court decision. Under these rules liability of the occupier of premises or land depended on whether the visitor was a trespasser, licencee, invitee, entrant as of right (for example visitors to public parks) or a contractual entrant (for example a cinema goer). In each case the standard of care owned by the occupier of the premises to the visitor varied. The Commission considered these distinctions were archaic, difficult to apply and could lead to absurd results.

The Commission had concluded that a flexible general negligence standard which covered all occupiers, from the rural landholder to the suburban householder was the appropriate standard to apply.

One issue which provoked considerable debate during the Commission's research was whether the owner should take reasonable steps to safeguard criminal trespassers from injury. Mr Nick Seddon, pointed out that the flexible negligence standard reflects common sense in the circumstances and it would be highly unlikely for a criminal trespasser to successfully claim compensation.

The Commission did, however, recommend abolition of the common law rule that landlords merely by virtue of their status of landlords, cannot be made liable for damage or injury to visitors to the property. Immunity for landlords based simply on the fact that they are landlords cannot be justified. To the extent that this rule applies in the ACT it should be abolished.

* * *

product liability

The injustice done to an individual is sometimes
of service to the public.

Junius (18th Century)

issues paper released. The ALRC has published an issues paper in its reference on product liability laws (see [1987] *Reform* 170). Launching the issues paper, Professor Jack Goldring, the Commissioner in charge of the reference, said that the major issue confronting the ALRC was who should be legally responsible for any loss or damage caused by a defective or unsafe product, and to what extent. The ALRC is seeking submissions on the issues raised in the paper.

legal shortcomings. The issues paper briefly examines the existing laws that regulate the assignment of legal liability for product related injuries and points out some of their shortcomings.

- Individuals who are injured in similar ways have significantly different rights to claim compensation. A person who has bought a product has a contract with the retailer and can claim compensation from the retailer where a defect in the product causes injury to the purchaser. The purchaser may have similar rights against the manufacturer under the Trade Practices Act 1974 (Cth) or similar legislation in some States and the Australian Capital Territory. In both cases there is no need to prove that someone has been at fault or negligent. However, members of the purchaser's family, guests in the purchaser's home and bystanders have no contract with anyone and any rights they may have are dependent on proof of negligence by the retailer or manufacturer.

- Sellers and distributors of a product may have greater legal responsibility than the manufacturer or designer of the product (unless the provisions of Part V, Division 2A of the Trade Practices Act 1974 (Cth) apply). While the benefits of contractual rules are confined to the parties to a contract, the liability of a retailer under those rules is strict. On the other hand, a manufacturer potentially may be liable to a wider range of people but liability will arise only if the claimant can prove negligence. The result appears contradictory, for it is the manufacturer who has the ability to control the quality and safety of its products, not the retailer. (A recent case involving a worker injured by an exploding beer keg resulted in the employer having to pay about one third of the total settlement, whereas the designer and maker of an allegedly defective pressure regulator said to be the cause of the explosion paid less than one per cent of the settlement. Others involved as defendants were the supplier of the beer supply and regulator system, the owner of the keg, the keg's manufacturer and the servicer of the beer supply system. See *Canberra Times* 24/3/88, 8.) Particularly in the case of products that are sold in sealed containers, or advertised widely by the manufacturer, the public perception is that the manufacturer is responsible for the product's quality and safety. The result is that the legal rules may not provide a positive incentive for the manufacture and marketing of goods that are safe and of high quality.

- It is often difficult to identify the person against whom a claim should be made. A product such as a car is manufactured using components made by a number of

people. A product such as a bottle of soft drink may go through various processes before it reaches the consumer. In each case it may be difficult to determine the stage at which a defect in the product has arisen. For the purchaser who is injured by the product there is no difficulty because a claim can be made against the retailer. But for anyone else there will be major problems in identifying the person who has caused the defect.

- Manufacturers of finished products or components may take care to use procedures and techniques which have been tested, but the state of the scientific and techincal knowledge may not reveal that the product has harmful effects. Where a claim is based on contract the lack of such knowledge provides no defence, but it will be relevant to a claim in negligence. Again, the retailer appears to be unfairly burdened.

- Compensation may not cover all types of loss or damage. There are differing rules for the award of damages depending whether the claim is made in contract or negligence.

- Conflict of laws problems arise where there are people in the manufacturing and marketing chain in more than one State or Territory and also whenever there is some foreign element involved. There can be difficulties both in bringing a claim and in deciding which law is to apply to the adjudication of the claim.

- From a practical point of view, proof of a claim may be difficult. The law places the onus of proving a claim on the claimant. In a negligence action, it may be difficult for the claimant to establish negligence because the manufacturing processes will be known only to the manufacturer.

proof of negligence: a powerful drop. Several of these shortcomings are demonstrated by the case of *Kilgannon v Sharpe Bros Pty Ltd* (1986). A young boy was seriously injured when a bottle of soft drink exploded in his hand. The soft drink was part of an order of several bottles which the boy's mother had bought from a retailer. The boy claimed compensation from the retailer, the bottler of the soft drink and the manufacturer of the bottle, alleging that one of them had been negligent, and that this negligence had caused his injury. The trial judge directed a verdict for both the retailer and the manufacturer of the bottle, leaving the question of the bottler's negligence to the jury. The jury decided that the bottler was not negligent. The boy applied to the New South Wales Court of Appeal for a retrial against all three defendants. The Court of Appeal ordered a retrail against the bottler, but dismissed the appeals in respect of the other two defendants.

presumption of negligence? The decision of the Court of Appeal focused on the operation of the principle *res ipsa loquitur* (the thing speaks for itself). The plaintiff had relied on the operation of this doctrine in his action against all three defendants, alleging that, because bottles do not normally explode, the fact that the bottle did explode on one occasion raised a presumption that it did so because of the failure of a defendant to take reasonable care. In Australia, the High Court

has applied *res ipsa loquitur* much more restrictively than have courts in other countries, including the United States, the United Kingdom, Canada and New Zealand, by holding that proof that something does not happen in the ordinary course of events does not raise any presumption of negligence or shift the burden of proof from the plaintiff to the defendant. While the members of the Court of Appeal were critical of this approach, they considered that they were bound to adopt the approach of the High Court. An application for special leave to appeal to the High Court has been filed.

identification of proper defendant. A further factor in this case was that there were three defendants. A majority of the court held that the plaintiff could not rely on *res ipsa loquitur* in his action against any of the defendants unless he could identify which particular defendant or defendants was or were negligent. It was not enough to show that one or more of them must have been negligent.

outdated laws? Existing Australian laws are based on common law rules of torts and contracts which evolved in England more than a century ago. At the time these laws were developed by the courts there was no mass production. People who bought products usually dealt directly with local tradespeople who they knew personally and who were also the manufacturers of the goods. Goods themselves were less complex than they are today. While the conditions of trade have changed almost beyond recognition, the laws remain virtually as they were a century ago. In some cases laws may still be as appropriate as they were when they developed, but in other cases they cease to be adequate and appropriate because of changed social or economic conditions.

suggestion for reform. In his judgment in *Kilgannon's* case Justice Hope pointed to the outmoded nature of the law. He said

> The failure of a person in the position of the present plaintiff to recover damages because of his inability [to identify which of the defendants was negligent] seems unjust and calls for remedy. If the plaintiff's mother rather than the plaintiff had picked up the bottle and had been injured, [the retailer] would have been under a strict contractual liability for any injury she suffered. Depending on the facts [the retailer] may have had an action against the bottler, and the bottler against the manufacturer. The compartmentalisation of our law denies the plaintiff any such remedy; he must rely on negligence. As the President points out in his judgment, American courts have developed the common law to impose a strict liability in this class of case. If the common law cannot develop such a liability, there would seem to be good reason for the legislature to fill the gap. ((1986) NSWLR 628)

evaluating existing law and options for change. The issues paper illustrates a range of possible solutions for changes to the law and points out that, in evaluating the existing law and those options, the potential economic and social consequences, for example, in the availability of beneficial goods such as medicines and the level of employment in particular sectors, have to be considered. Also requiring consideration are several policy factors, including

- the safety and welfare of the general public, including

  - prevention of injury to individual members of the community
  - prevention or reduction of the social cost of the provision of health and rehabilitation services
  - prevention or reduction of the economic cost of lost productivity and efficiency and
  - creation of a general climate of public confidence in the safety and wholesomeness of goods,
- the maintenance of an environment which does not impede innovation and technical progress in the manufacture and marketing of products, which requires the minimization of costs to business, especially avoidance of
  - unnecessary production costs
  - excessive insurance costs, and
  - excessive costs of litigation,
- the encouragement of manufacturers, distributors and suppliers to place safe goods on the market, which requires that legal and financial responsibility for providing compensation for injuries and damage should be imposed on those in the best position to control the quality of goods in the form in which they reach the market place,
- encouraging consumers to act prudently and wisely, which requires that
  - information be provided to consumers so that they may make informed decisions about their purchases and
  - consumers should not be able to profit from their own mistakes.

effect on insurance. The issues paper notes that few consumers have insurance which covers loss or injury resulting from unsafe or defective products as such, though some losses may be covered by fire and accident insurance. Most businesses do have liability insurance which covers claims for compensation. Insurance does not change the loss or damage, but it does, to some extent, shift the burden of cost. Insurance has a cost, both to the consumer and to the supplier or manufacturer.

developments in U.K. A major development in the law has been the enactment of the Consumer Protection Act 1987 in the United Kingdom. One purpose of the Act is to establish controls on the safety of consumer products. The Office of Fair Trading is empowered by Part II to administer a system of warning notices, bans and recalls in respect of goods which might endanger people. The system is similar to that established in Part V, Division 1A of the Trade Practices Act 1974 (Cth) which was enacted in 1986. Part III prohibits the giving of misleading information in relation to prices and establishes a system for giving legal recognition to voluntary codes of practice for businesses. So far as concerns the prohibition on giving misleading information, the protection to consumers is far less than that provided to Australian consumers under Part V, Division 1 of the Trade Practices Act 1974 (Cth).

relevance to alrc reference. The provisions of the Consumer Protection Act 1987 (UK) that have the greatest relevance to the alrc's reference are found in Part I. This Part is intended to

fulfil the UK's obligation to implement a 1985 Directive of the EEC regarding liability for defective products. The UK legislation came into effect on 1 March 1988. The other member states of the EEC have until 30 July 1988 to enact laws conforming to the Directive. In respect of most EEC countries, including the UK, the Directive represents a major departure from the present law regarding compensation for injuries caused by defective products.

producers strictly liable. Under the Consumer Protection Act 1987 (UK) 'producers' are made strictly liable for defects in their products. The imposition of strict liability means that persons who have previously had to establish negligence on the part of the manufacturer in order to claim compensation (like the plaintiff in Kilgannon's case) will now need only to establish that the product was defective. The strict liability regime thus focuses attention on the quality of the product in question rather than on the conduct of the producer. A product will be regarded as defective 'if the safety of the product is not such as persons generally are entitled to expect'. In determining this issue, a number of factors must be taken into account, including the manner in which the product has been marketed, warnings given in respect of it, what might reasonably have been expected to be done with the product and the time at which it was supplied.

defences. The UK Act establishes several defences to a claim for compensation. These are

- that the product was defective because it complied with any mandatory standards for products of that type
- that the producer did not in fact supply the product
- that the product was not supplied in the course of a business
- that the defect did not exist in the product at the time it was produced
- that the state of scientific and technical knowledge at the relevant time was not such that the producer could reasonably have been expected to discover the defect while the goods were under its control
- that the defect was in a component of the finished product and its lack of safety was entirely due to the design of the finished product.

The penultimate of these defences has attracted some controversy. Known as the 'development risks' defence, it is an optional aspect of the EEC Directive. It is said to protect manufacturers from liability for dangerous characteristics of goods of which they did not know and to to be necessary to ensure that innovation is not stifled. However, the terms of the defence in the UK Act differ from those of the Directive and this has prompted a formal complaint from the Commission of the European Communities to the UK Government. The status of the defence in the UK Act ultimately may have to be decided by the European Court in Luxembourg. The last defence has also attracted some criticism, being much more restrictive than the that available in the United States and also under the provisions of the Strasbourg Convention, which was promoted by the Council of Europe and was agreed to in 1975.

relevance of U.K. Act to Australian exporters. The term 'producer' in the UK Act, as the EEC Directive requires, includes not only manufacturers of goods, but also (amongst others) those who import goods into the

EEC. This extension of strict liability beyond those who actually produce goods is intended to enable consumers to find someone in the country where injury occurs who will be amenable to a claim for compensation. (The pursuit of compensation claims is facilitated by the 1968 EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.) Australian exporters who maintain offices in the UK, or in other EEC countries, are thus made strictly liable to pay compensation for injuries caused by defects in their products. Those exporters who do not have such offices may nevertheless feel the effects of the UK Act through claims made against them by their trading partners in the EEC who have had to pay compensation to persons injured by defective products.

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class actions — opt in or opt out?

> Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take $5 from one person at the point of a gun than it is for a corporation to take $5 each from a million customers at the point of a pen.
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> Vice President Mondale,
> Address to the Second
> Judicial Circuit Conference
> (10 Sept 1977)

introduction. Debate surrounding the merits of class actions has been long and heated. There are many contentious legal, social and economic issues involved. This article focuses on one of those issues, the opt in/opt out debate. Should citizens have to give their written consent before they can be bound by any judgment or is it acceptable that claims be made on behalf of a group of people, described, but not named in the proceedings?

traditional representative procedure. There are many kinds of representative or class actions. The traditional representative procedure which originated in the English Chancery Courts and which operates in most Australian jurisdictions, allows a representative plaintiff to bring an action on behalf of numerous unnamed persons who have the same interest in the proceedings. The consent of group members is not required but they will be bound by the result of the proceedings regardless of whether they wish to pursue the claim or not. The only option open to a group member who does not wish to be a member of the group is to apply to the court to become a defendant and to oppose the representative plaintiff's claim. The representative procedure has not been used a great deal mainly because the courts have interpreted the 'same interest' requirement to mean that actions claiming damages cannot be brought in representative form if each individual's entitlement to damages would have to be independently assessed.

class actions. The traditional representative procedure differs from class actions in the United States in two important respects. Firstly a class action can be brought even though group members may ultimately have to prove the extent of their own damages and secondly where damages are claimed, group members can opt out of the proceedings and either have nothing further to do with the litigation or commence their own individual proceedings against the defendant. The rule allowing group members to opt out