

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

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*(Presented and read a first time, 19 December 1991)*

(MINISTER FOR JUSTICE AND CONSUMER AFFAIRS, SENATOR TATE)

## A BILL

FOR

**An Act to amend the *Trade Practices Act 1974* to provide for the compensation of persons who suffer loss caused by defective goods**

The Parliament of Australia enacts:

### Short title etc.

1.(1) This Act may be cited as the *Trade Practices Amendment Act (No. 2) 1991*.

5 (2) In this Act, "Principal Act" means the *Trade Practices Act 1974*.

### Commencement

2. This Act commences on the day on which it receives the Royal Assent.

### Application

3. Part VA of the Principal Act as amended by this Act applies to goods supplied by their manufacturer after the commencement of this Act (“**supplied**” and “**manufacturer**” having the same meanings as in that Part).

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4. After Part V of the Principal Act the following Part is inserted:

### “PART VA—LIABILITY OF MANUFACTURERS AND IMPORTERS FOR DEFECTIVE GOODS

#### Interpretation

“75AA. In this Part:

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‘**action goods**’, in relation to a liability action, means the goods whose supply and defect is, or is to be, alleged in the action;

‘**Commonwealth mandatory standard**’, in relation to goods, means a mandatory standard in respect of the goods imposed by a law of the Commonwealth;

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‘**defendant**’, in relation to a liability action, means a person against whom the action is brought (however described);

‘**individual**’ means a natural person;

‘**liability action**’ means an action under section 75AD;

‘**loss**’ includes damage;

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‘**mandatory standard**’, in relation to goods, means a standard:

(a) for the goods or anything relating to the goods; and

(b) that, under a law of the Commonwealth, a State or a Territory, must be complied with when the goods are supplied by their manufacturer, being a law creating an offence or liability where there is such non-compliance;

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but does not include a standard which may be complied with by meeting a higher standard;

‘**manufactured**’ includes grown, extracted, produced, processed and assembled;

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‘**plaintiff**’, in relation to a liability action, means the person who brings the action (however described);

‘**use**’ includes consume.

#### Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part

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“75AB. Subsections 74A(3) to (8) (inclusive) operate as if references in them to Division 2A of Part V included references to this Part.

**Meaning of goods having defect**

“75AC.(1) For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.

5 “(2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances including:

- (a) the manner in which, and the purposes for which, they have been marketed; and
- (b) their packaging; and
- (c) the use of any mark in relation to them; and
- 10 (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
- (e) what might reasonably be expected to be done with or in relation to them; and
- 15 (f) the time when they were supplied by their manufacturer.

“(3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

20 “(4) An inference that goods have a defect is not to be made only because:

- (a) there was compliance with a Commonwealth mandatory standard for them; and
- (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they
- 25 were supplied by their manufacturer.

**Liability for defective goods**

“75AD.(1) If:

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
- 30 (b) they have a defect; and
- (c) because of the defect, an individual dies or suffers injuries; and
- (d) a person, other than the corporation, suffers loss as a result of the death or injuries;

then:

- 35 (e) the corporation is liable to compensate the person for the amount of the loss; and
- (f) the person may recover that amount by action against the corporation.

“(2) If:

- 40 (a) a corporation, in trade or commerce, supplies goods manufactured by it; and

- (b) they have a defect; and
- (c) because of the defect, goods of a kind ordinarily acquired for personal, domestic or household use (not being the defective goods) are destroyed or damaged; and
- (d) a person who so used the destroyed or damaged goods, other than the corporation, suffers loss as a result of the destruction or damage;

then:

- (e) the corporation is liable to compensate the person for the amount of the loss; and
- (f) the person may recover that amount by action against the corporation.

#### **Death of individual results in loss by individual's estate**

"75AE. For the purposes of subsection 75AD(1), if an individual dies, his or her personal representative is taken to suffer loss as a result of the death.

#### **Section 75AD not to apply where workers' compensation or law giving effect to an international agreement applies**

"75AF. Section 75AD does not apply to a loss in respect of which an amount has been, or could be, recovered:

- (a) under a law of a State or Territory relating to workers' compensation; or
- (b) under a law of the Commonwealth, a State or a Territory giving effect to an international agreement.

#### **Unidentified manufacturer**

"75AG.(1) If a person who wishes to institute a liability action does not know who manufactured the action goods, the person may request, in writing, a supplier, or each supplier, of the goods known to the person to give the person particulars of:

- (a) the corporation which manufactured the goods; or
- (b) the supplier of the goods to the supplier requested.

"(2) If, a reasonable time after the person has made the request or requests, the person still does not know who manufactured the action goods, then the corporation, or each corporation, that is a supplier:

- (a) to whom a request was made; and
- (b) who did not comply with the request;

is taken, for the purposes of the action, to have manufactured the action goods.

#### **Defences**

"75AH. In a liability action, it is a defence if it is established that:

- (a) the defect in the action goods that is alleged to have caused the

loss did not exist when they were supplied by their manufacturer;  
or

(b) they had that defect only because there was compliance with a  
mandatory standard for them; or

5 (c) the state of scientific or technical knowledge at the time when  
they were supplied by their manufacturer was not such as to  
enable that defect to be known; or

(d) if they were comprised in other goods (in this section called the  
**'finished goods'**)—that defect is attributable to:

10 (i) the design of the finished goods; or

(ii) the markings accompanying the finished goods; or

(iii) the instructions or warnings given by the manufacturer  
of the finished goods.

### **Inferences from evidence**

15 "75AJ. In a liability action, 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.

### **Commonwealth liability for goods that are defective only because of 20 compliance with Commonwealth mandatory standard**

"75AK.(1) If a defendant in a liability action raises the defence  
that the action goods had the alleged defect only because there was  
compliance with a Commonwealth mandatory standard for them, that  
defendant must serve on the Commonwealth a prescribed notice of the  
25 action and of that defence together with a copy of that defendant's  
defence in the action.

"(2). Service of the notice and defence makes the Commonwealth a  
defendant in the action.

30 "(3) If, in the action, the Court finds that the plaintiff would have  
succeeded against the defendant who served the notice but for the  
action goods having the alleged defect only because there was compliance  
with a Commonwealth mandatory standard for them, then:

(a) the Commonwealth, and not the defendant who served the  
notice, is liable to compensate the plaintiff for the amount of  
35 the loss caused by the defect; and

(b) the Court is to enter judgment against the Commonwealth for  
that amount; and

(c) the Court may make such orders for costs as the Court considers  
just.

### **40 Liability joint and several**

"75AL. If 2 or more corporations are liable under section 75AD for  
the same loss they are jointly and severally liable.

**Contributory acts or omissions to reduce compensation**

“75AM. If the loss suffered by the plaintiff in a liability action was caused by both:

- (a) an act or omission of the plaintiff or of another person for whom the plaintiff is responsible; and
- (b) a defect of the action goods;

the amount of the loss is to be reduced to such extent as the court thinks fit having regard to the plaintiff’s or other person’s share in causing the loss.

**Time for commencing actions**

“75AN.(1) Subject to subsection (2), a person may commence a liability action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of the alleged loss and of the identity of the person who manufactured the action goods.

“(2) A liability action must:

- (a) if it is an action for loss resulting from an individual’s death or injuries—be commenced within 20 years of the supply by the manufacturer of the action goods; and
- (b) if it is an action for loss caused by the destruction of, or damage to, goods—be commenced within 10 years of that supply.

**Application of provisions not to be excluded or modified**

“75AP.(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Part; or
- (b) the exercise of a right conferred by any of those provisions; or
- (c) any liability under any of those provisions;

is void.

“(2) A term of a contract is not taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

**Representative actions by the Trade Practices Commission**

“75AQ.(1) The Commission may, by application, commence a liability action on behalf of one or more persons identified in the application who has suffered the loss for whose amount the action is commenced.

“(2) The Commission may only make an application under this section if it has obtained the written consent of the person, or each of the persons, on whose behalf the application is being made.

**Saving of other laws and remedies**

“75AR.(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, in force in a State or Territory.

- 5 “(2) This Part is not to be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.

**Jurisdiction of courts**

10 “75AS. Subsection 75B(2) and sections 86, 86A and 86B operate in relation to an action under this Part as if:

- (a) references in them to Part VI included references to this Part;  
and  
(b) references in them to Division 1 or 1A of Part V included references to this Part; and  
15 (c) references in them to the Minister were omitted.”.

**Other amendments**

5. The Principal Act is further amended as set out in the Schedule.

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**SCHEDULE**

Section 5

**OTHER AMENDMENTS****Subsection 5(1):**

Omit "and V", substitute ", V and VA".

**Paragraph 6(2)(c):**

After "that Part" insert "or in Part VA".

**Paragraph 170(1)(a):**

After "under" insert "Part VA,".

**Paragraph 170(1)(c):**

After "under" insert "Part VA,".

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**NOTE**

1. No. 51, 1974, as amended. For previous amendments, see Nos. 56 and 63, 1975; Nos. 88 and 157, 1976; Nos. 81, 111 and 151, 1977; Nos. 206 and 207, 1978; No. 73, 1980; Nos. 61 and 176, 1981; No. 80, 1982; No. 39, 1983; Nos. 63, 73 and 165, 1984; No. 65, 1985; Nos. 8, 17 and 168, 1986; Nos. 23 and 141, 1987; Nos. 8, 20 and 87, 1988; Nos. 28 and 34, 1989; Nos. 11 and 70, 1990; and Nos. 49 and 122, 1991.

