



## Product Liability in Australia for Manufacturers

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### Introduction

The *Trade Practices Act (TPA)* implies certain rights and warranties into commercial contracts. These rights and warranties apply to a company even though it is based and operates overseas.

This paper deals with three critical questions:

1. who is considered a manufacturer – be aware, the scope of the regime is broader than you think;
2. the bases for manufacturer liability; and
3. the scope a manufacturer has to limit its liability.

### A manufacturer does not need to manufacture the goods

This law applies to “manufacturers”. This is not as simple as it first appears. Companies are deemed to be manufacturers that would not otherwise be considered manufacturers. This regime applies to each of these companies. Most surprisingly, the law applies to importers and licensors.

You should consider yourself a manufacturer and, therefore, exposed to liability on the goods you supply if your company:

- (a) holds itself out or allows its resellers to hold it out as the manufacturer of those goods<sup>1</sup>;
- (b) trade marks those goods and applies that mark to the goods itself or its packaging<sup>2</sup>; or
- (c) imports those goods, provided that the true manufacturer does not have a place of business in this country.<sup>3</sup>

An overseas manufacturer will certainly be considered the manufacturer for the purposes of the TPA, even if it has no place of business in Australia. There may be jurisdictional issues. For the sake of clarity, though, the importer will also be considered the manufacturer for the purposes of the TPA. That gives a distributor or consumer two targets at which to aim.

### Bases of manufacturer liability

#### 1. Introduction

As a manufacturer, a company is exposed to liability for the goods it supplies on various bases. That liability could arise as a result of:

- (a) any contractual rights or rights in tort (such as negligence) the manufacturer owes to its distributor, subject to any limitation of liability provision in its contract;

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<sup>1</sup> Section 74A(3)

<sup>2</sup> Section 74A(3)

<sup>3</sup> Section 74A(4)



- (b) rights to compensation for misleading and deceptive conduct, where representations are made (either expressly or by implication) to the distributor and/or the enduser that the products are of a certain standard or fit for certain purposes (ss52/53)<sup>4</sup>;
- (c) a statutory indemnity in favour of its distributor, covering the distributor's liability under any warranties it owes to its customers implied under the TPA (s74H); and
- (d) the statutory right consumers have to seek compensation directly from the manufacturer for certain sub-standard goods.

It is beyond the scope of this paper to examine the exposure of manufacturers under contract, in tort or for misleading and deceptive conduct. Please contact Martin Algie if you have any questions on these issues. This paper focuses exclusively on a manufacturer's liability under the implied warranty scheme in the TPA.

## 2. The statutory indemnity manufacturers owe their distributors

A manufacturer's liability under this head is predicated on the liability of its distributor.

A distributor will be liable to its customer for breaching one or more of the implied warranties under the TPA if it supplies defective product. The warranties that may be implied are as follows:

- (a) the warranty that goods are of merchantable quality;
- (b) the warranty that goods are fit for their purpose;
- (c) the warranty that goods match any sample against which they are sold; and
- (d) the warranty that goods match any description against which they are sold.

There is a corresponding warranty for services. These warranties are implied into the distributor–customer relationship where the goods the distributor supplies to its customer are worth A\$40,000 or less or, if worth more than A\$40,000, are of a kind ordinarily acquired for personal, domestic or household use or consumption (otherwise referred to as being inherently domestic). That has an important implication. Inherently domestic goods will be covered, but so will inherently commercial goods worth A\$40,000 or less. More is said of this in the context of the manufacturer's ability to limit its liability.

Inherently domestic goods are the sort of goods you would have at home. A good example is carpet. Even though it is sold in commercial quantities, the carpet is still inherently domestic and warranties will apply to its sale<sup>5</sup>. By comparison, a reduction photocopier is not inherently domestic, even if the sale involves a single unit.<sup>6</sup> Indeed, a recent case suggests that versions of products that target the commercial market and are used exclusively in commercial applications may nevertheless be inherently domestic.<sup>7</sup> Understanding the distinction is important because you would not necessarily appreciate that warranties will be implied in such a supply arrangement and be oblivious to the exposure.

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<sup>4</sup> *Gharibian v Propix Pty Ltd, trading as Jamberoo Recreational Park* [2007] NSWCA 151 was a recent case where the applicant was unable to demonstrate the independent making of any representations. It failed under section 52 of the TPA, but won its case on appeal for compensation for breach of implied warranty. See also *Zuvela & Anor v Geiger* [2007] WASCA 138.

<sup>5</sup> *Carpet Call Pty Limited v Chan* (1987) ATPR (Digest) 46-025

<sup>6</sup> *Four Square Stores (Qld) Limited v ABE Copiers Pty Limited* (1981) ATPR 40-232

<sup>7</sup> *Bunnings Group Limited (formerly Bunnings Pty Ltd) v Laminex Group Limited* [2006] FCA 682, [111-114]



In all these cases, warranties will apply and the distributor will be liable to its customer if the goods fail to satisfy any of the implied warranties.

A manufacturer is made liable for that debt pursuant to the statutory indemnity in section 74H. It is important to note though that this indemnity does not extend to a distributor's liability under any other grounds, such as contract or tort. Accordingly, if the end-user sues the distributor for breach of contract and fails to claim under a TPA warranty, the manufacturer will have no liability for the debt, subject to the contrary being separately provided for in the supply agreement.

### 3. Direct manufacturer liability

A manufacturer's direct liability to customers – under their statutory right of action – arises only in respect of goods that are inherently domestic.<sup>8</sup> These statutory rights apply even if the goods have passed through two, three or more intermediaries before ending up with the end-user. The end-user will still retain the right to sue the manufacturer if it can establish that the product:

- (a) is not of merchantable quality (s74D);
- (b) does not match a description of the goods, where the description was applied to the goods by the manufacturer or with the consent of the manufacturer (s74C); or
- (c) do not correspond with a sample in terms of quality or by reason of a defect, provided that the sample was supplied by the manufacturer or with the manufacturer's consent and the "bulk" of the goods supplied fail to match the sample (s74E).

You should also note that a manufacturer (including an overseas manufacturer) is exposed under Australian law to claims by consumers for defective goods under Part VA of the TPA. A defective good is a good that is not as safe as one would reasonably expect in the circumstances. The company cannot limit its liability in this regard.

### Legitimately limiting liability

As a result of the A\$40,000 deeming provision, warranties apply on the sale of inherently commercial products if the value of the contract is A\$40,000 or less. That means the distributor will be liable for any breach of implied warranty. The distributor is able to limit its liability, but it must do so in its terms and conditions of supply. The TPA allows the distributor to limit its liability on the supply of these goods alone to:

- (a) supplying the goods again;
- (b) providing equivalent goods; or
- (c) repairing the goods.

Corresponding provisions apply in the case of services. It should go without saying that the distributor will be liable to the full extent of the law if it fails to limit its liability appropriately.

In the case of manufacturers, the TPA automatically limits exposure in actions by the distributor claiming compensation under the statutory indemnity to the same extent, that is to

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<sup>8</sup> That is, goods of the kind ordinarily acquired for personal, domestic or household use or consumption



supplying the goods again, providing equivalent goods or repairing the goods. The manufacturer has no exposure to direct consumer action unless goods are inherently domestic and therefore limiting that liability is not an issue.<sup>9</sup>

If the goods are inherently domestic (even if valued over A\$40,000), the distributor's liability is uncapped (and any attempt to cap that liability is not only unenforceable, but illegal) and the manufacturer is obliged to compensate the distributor to the full extent of that liability. In addition, it would be open to consumers to take action directly against the manufacturer, and, in such a case, the manufacturer's liability is entirely uncapped.

As noted above, the distributor can limit its own liability to its customer in the case of inherently commercial products worth A\$40,000 or less. If no provision or insufficient provision is made, the distributor will be left carrying a portion of its liability as the manufacturer is liable only to the extent of the statutory cap – replacing the goods or repairing the goods – whilst the distributor will be liable to the extent of its customer's recoverable losses. For the sake of clarity, it bears noting that there is no issue in the case of inherently domestic goods. The distributor is not able to limit or curtail its liability and the manufacturer is liable for the full extent of it under section 74H.

It is unlawful to attempt to limit or curtail liability beyond the above in the case of inherently commercial goods. It is unlawful to attempt to limit liability at all in the case of inherently domestic goods. Blanket exclusion clauses are common (particularly in agreements initially drafted in the United States). Because they do not discriminate between express warranties and implied warranties, blanket exclusion clauses have the effect of limiting all liability – even liability under the implied warranties, by implication. They therefore breach Australian law. Such clauses must be amended to excise liability under this statutory scheme from the general exclusion.

Finally, if the company deals directly with some of its customers, its terms and conditions of supply should make provision for liability under the implied warranties, excising that exposure from any limitation provision. As noted in the context of the distributor's liability to its customers, if the contract consideration is A\$40,000 or less or the goods supplied to its customer are inherently domestic (irrespective of the value), warranties will be implied in each supply contract. Those warranties include a warranty that goods are of merchantable quality and are fit for their purpose. Again, the manufacturer would be able to limit its liability where the goods are inherently commercial in the manner discussed above; however, it would expressly need to do so in its terms and conditions of supply.

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<sup>9</sup> Section 74A(2)(a) deems all references to “goods” in Division 2A (the Division dealing with direct rights) to be goods that are inherently domestic. That means all direct rights against manufacturers are restricted to inherently domestic goods.