

PREFACE

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This is the third edition of *Product Liability in the Asia-Pacific*. It has been expanded and now includes chapters from Macau, Myanmar, Papua New Guinea, Sri Lanka, and the US Affiliated Jurisdictions in the Pacific. These jurisdictions offer additional insights, interesting from a comparative law perspective, showing the various influences and distinct legal cultures which pervade the law of the region. A chapter on insurance in the region is also included.

The first edition was published in 1995. Since then, widespread reform of product liability laws has taken place in the Asia-Pacific region. The reliance on the provisions of the EC Product Liability Directive 1985 as a model for reform has provided some measure of uniformity in the region. Australia, Korea, Japan, Taiwan, Indonesia, Malaysia, the Philippines and most recently Thailand have introduced laws similar to the EC Directive. Other countries, however, have introduced reforms enhancing consumer rights which are not based on the EC Directive. During the last ten years since the second edition was published in 1999, Asia has come under increased scrutiny in relation to product safety issues.

Part of satisfying a foreign client's needs, is understanding the legal environment in which they operate. With the globalisation of the commercial and legal marketplaces, a knowledge of other legal systems is important for all legal practitioners. The reach of products liability has become worldwide in the 21st century. A company's manufacturing facilities are now likely to be located in several different nations, and its products distributed to all corners of the globe.

Comparative law

A comparative law exercise is important both in its ability to tell us where we are but equally to identify where we are not. The various chapters show that even in the most mature jurisdictions, for example, Australia and the United States, developments in the law are an ongoing process. While national laws based on the EC Product Liability Directive are a start, we are also far from having uniform product liability and product safety law in the region which would facilitate international trade.

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The study of comparative law enables lawyers to gain a better understanding of their own and other legal systems, highlighting the various ways in which different societies approach the same legal problems. Ultimately this encourages lawyers to see the broader social, economic and political contexts in which their own and other legal systems are situated. Ferdinand Saussure, in his landmark text 'Course in General Linguistics' (1915) postulated that meaning was created by difference, a notion which underpins much modern critical theory. Such a hypothesis is certainly supported by studies in comparative law which demonstrate that the meaning of one's own legal system is only fully appreciated when one compares it to another. By having the chapters prepared by lawyers in each country an inherent difficulty in most comparative law exercises, that is, that comparative lawyers usually have a better understanding of their own legal system than others, is avoided.

It is acknowledged that there is a danger in extracting legal concepts relating to one part of the law out of the context of the whole. For this reason, the countries are presented as self contained chapters. As a common law study, the contributions together establish that between the laws of the different jurisdictions there is more than sufficient congruence for mutual intelligibility. The structure of the law in the various countries is directly comparable. Many of the problems faced by countries in the region are also common. Indeed, it is striking how similar the jurisdictions are in terms of causes of action and remedies. Both the content of sales law, the implied warranties and remedies and the solutions to product safety are broadly similar.

The product liability laws of the Asia-Pacific region, however, are characterised by diversity. A mosaic of legal rights exists under contract, tort and statute in most countries. In many of these jurisdictions, product liability is only just beginning to emerge as a significant body of law. With many countries going through a period of economic development, some legislatures are only now beginning to recognise the need to address consumer protection and the legal liability of manufacturers in the region. The diversity of approaches to product liability is a reflection of the diversity of legal systems in the region.

This text is also a study of contrasts. In Papua New Guinea, the courts take note of the custom of traditional communities, and the *Customs Recognition Act 1963* specifies the circumstances in which customary law will apply to particular contractual disputes. In India, importance is still attached to the decisions of *Langridge v Levy* (1837) 2 M&W 519 and *Dixon v Bell* (1816) 4 M&S 198, as a result of which liability is considered under in three heads – things dangerous per se; things not dangerous per se but actually dangerous and known to be so by the transferor; and things neither dangerous per se nor known to be so by the transferor but dangerous in fact.

The complexity of the law of the United States, Canada and Australia with a sophisticated class action mechanism, for example, can be contrasted

with the elegant simplicity of Myanmar, where reference is made to a suit to recover damages by a plaintiff on account of the death of his elephant which died allegedly as a result of wounds negligently inflicted by the defendant. Product liability in New Zealand is governed by a combination of its unique accident compensation scheme and a common law system based on the English model.

The external influences on the law of the region is marked in some jurisdictions. The People's Republic of China (PRC) resumed sovereignty over Hong Kong on 1 July 1997 and over Macau on 20 December 1999. In both countries, China's socialist economic system will not be practiced for 50 years.

In the meantime, the influence of the English and Portuguese legal heritage will continue to be felt. Australia, Canada, India, Myanmar, New Zealand, Singapore, Fiji, Malaysia, and the United States are all common law jurisdictions. Indonesia, Japan, Macau, Philippines are influenced by the tradition of civil law countries. Sri Lanka has been influenced by both the common law and Roman Dutch law.

Other countries, however, have not been so influenced. The laws of other Asian countries such as China, Thailand, Korea, Taiwan and Vietnam, appear indigenous.

A status report as at 2009

One of the regions of the world that has enjoyed a boom in product manufacture and distribution in recent years is the Asia-Pacific. The region remains of great economic importance to the world in terms of both manufacturing and consumption, evidenced by the status of the economic giants, Japan and South Korea, and the emergence of China since it joined the World Trade Organization and more recently the economic growth of India. In affluent economies, spending patterns parallel those of the United States.

How the Global Financial Crisis will impact upon the region is as yet unknown. This is, however, a region that has shown an ability to survive economic downturn – as shown by the Asian Financial Crisis in 1997.

Throughout the region, there is an increased awareness of product liability and safety issues. A number of recent incidents has focused attention on these issues in relation to products manufactured in the region. Particular attention has been given to China, perhaps because of the 2008 Beijing Olympics. There have also been two high-profile international incidents involving Chinese products. In Panama in 2006, there were reports of a number of deaths caused by a medicine imported from China which was contaminated. In July 2007, the sale of Chinese-made toothpaste was banned by governments in North and South America, Europe and Asia.

Since December 2006, the Chinese General Administration of Quality Supervision, Inspection and Quarantine agency (AQSIQ) has reportedly closed 180 food factories after inspectors had found illegal dyes, industrial wax and formaldehyde being used to make candy, pickles, crackers and

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seafood. AQSIQ has also proposed a version of the US motor vehicle 'lemon laws'. These laws seek to provide regulations as to the responsibility for the repair, replacement and return of domestic use vehicle products. In May 2007, a former top drug regulated in Beijing was also sentenced to death for taking bribes to approve substandard medicines, which included an antibiotic blamed for at least ten deaths.

Concerns throughout the region generally culminated in the leaders of the 21 member countries of APEC (the Asia Pacific Economic Cooperation) making it a priority in its 2007 Declaration 'to develop a more robust approach to strengthening food and consumer product safety standards and practices in the region, using scientific risk-based approaches and without creating unnecessary impediments to trade.' The topic of consumer product safety standards and practices in the Asia-Pacific region was again considered at a conference in Kuala Lumpur on 10-12 November 2008. In China, a new Food Safety Law was issued by the National People's Congress on 28 February 2009 and comes into effect from 1 June 2009.

The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) was signed on 27 February 2009 in Hua Hin, Thailand. The ten ASEAN members are Burma, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

It is the most comprehensive free trade agreement that ASEAN has negotiated. It is also the largest free trade agreement Australia has negotiated. AANZFTA covers all sectors including trade in goods, services, investment, intellectual property, electronic commerce, competition policy and movement of natural persons.

A chronology

The following timeline illustrates the steady and on-going pace of the reform process.

- 1986: India passed the *Consumer Protection Act 1986* imposing strict liability upon manufacturers of defective goods and the suppliers of substandard services.
- 1992: Australia added product liability provisions based on the EC Directive as Part VA of the *Trade Practices Act 1974* (Cth), as well as a class action procedure in the Federal Court of Australia. Concurrently, the Philippines introduced the *Consumer Act*, the product liability provisions of which were also based upon the EC Directive. In Macau, Decree-Law no 50/92/M was introduced regulating the labelling of food products that are ready to be supplied to the final consumer, whether local or imported. In Myanmar, the *National Drug Law* was also enacted in 1992 with the purpose of giving the public access to genuine, high quality, safe and effective drugs.

- 1993: Against the background of its national compensation scheme and despite suggestions that the EC Directive was the emerging international standard in the region, New Zealand rejected any need for product liability legislation based on the EU model. However, the *Consumer Guarantees Act* was enacted to give consumers additional rights based on implied product warranties. During 1993, the PRC also enacted two laws enhancing consumers' rights: the *Product Quality Law* and the *Consumer Rights Protection Law*. The former introduced strict liability for defective products into the law of the PRC, although the definition of 'defect' differs from that in the EC Directive.
- 1994: The PRC's reform example was swiftly followed the following year by Taiwan, when it promulgated its *Consumer Protection Law* based on the EC Directive.
- 1995: Following vigorous debate, during which Japanese consumer organisations advocated the introduction of product liability laws similar to those existing in the US, the Japanese *Product Liability Law of 1994* based upon provisions of the EC Directive came into effect.
- 1997: The *National Food Law* was enacted in 1997 in Myanmar with the purpose of ensuring safe food of genuine quality and to control as well as systematically regulate the manufacture, import, export, storage, distribution and sale of food.
- 1998: The Hong Kong Law Reform Commission in its Report on Civil Liability for Unsafe Products recommended the introduction of laws based on the EC Directive. However, this recommendation has not been implemented.
- 1999: After legislative debate lasting over a decade, both the Indonesian and the Malaysian parliaments passed *Consumer Protection Acts* based on the EC Directive. Macau also introduced provisions into its *Commercial Code* based largely on the Portuguese Decree no 383/89 implementing the EC Directive.
- 2000: Korea passed its *Product Liability Act*, again based on the EC Directive, which came into effect on 1 July 2002. Cambodia passed its *Law on the Quality and Safety of Products and Services*.
- 2003: Australia debated a possible tort law crisis resulting in civil liability law reform first at state, then federal, levels. Implementation of these reforms has significantly restricted consumers' entitlements to recover compensation in personal injury claims, and has introduced considerable confusion into Australian law. In contrast, facilitating product liability litigation, Taiwan added class action provisions in article 50(1) of the *Consumer Protection Act*.
- 2004: A *Legal Aid Act* is passed in Taiwan.
- 2007: The *Commodity Inspection Act* was promulgated in Taiwan placing a general legal obligation on manufacturers, importers, exporters and in some cases sellers to notify the Bureau of Standards, Metrology and Inspection should any 'commodities mandatory for inspection'

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(eg, electric blankets, lighters and sunglasses) cause or be likely to cause personal injury or damage to the property of consumers.

The Cambodian parliament adopted a new *Civil Code*. Thailand passed product liability legislation based on the EC Directive. In China, *Special Rules of the State Council on Strengthening the Supervision and Management of the Safety of Food and Other Products* were promulgated in July 2007, imposing a general notification obligation on manufacturers and sellers regarding safety risks. In Taiwan, the Department of Health issued a ruling requiring food manufacturers, food importers and food suppliers generally and those that outsource manufacturing of food to co-manufacturers to purchase product liability insurance in respect to the food and certain packaging. Similar requirements were also imposed upon elevating equipment and mechanical parking facilities.

2008: The *Administrative Regulation* no 17/2008, of 29 May 2008, established the Product Safety regime in Macau in regard to certain products (namely machines, appliances and electrical/electronic equipments) that affect a consumer's health or safety.

Notwithstanding a slow start, product liability litigation has become established in a few jurisdictions. In Australia, our research has found over 30 judgments (interlocutory and final decisions) concerning Pt VA of the *Trade Practices Act 1974* (Cth). In Japan, there are at least 35 judgments under the *Product Liability Law*, including quite a high proportion of reported judgments for a court system based on the European civil law tradition.

Clayton Utz Asia-Pacific survey

A separate question is the extent to which these reforms have impacted upon product liability litigation in the Asia Pacific region. From 2003-2006, my firm Clayton Utz conducted a survey of product liability risks in the Asia Pacific,² paralleling similar surveys previously undertaken by the international law firm, Lovells³ in the European Union.

The Clayton Utz survey confirms what has been suspected through anecdotal observation and comment, that is to date, there has been no large or widespread increase in claims throughout the region. Indeed, the increase is modest and is reported to be between 0-20 per cent with the overwhelming majority of respondents reporting that they have no claims. Rather than the Reforms, increased awareness of consumer rights and the media were identified as being more important factors behind the increase in claims.

2 For a fuller report and analysis of the results see J Kellam and L Nottage, 'Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark' (2008) 31 (2) *Journal of Consumer Policy* 217-241.

3 'Product Liability in the European Union, a report for the European Commission', February 2003 available at <<http://ec.europa.eu/enterprise/regulation/goods/docs/liability/studies/lovells-study-en.pdf>>.

However, that does not mean that manufacturers and insurers can be complacent about product liability risks in the region. Most respondents thought that the Reforms had increased or greatly increased product liability risk for manufacturers distributing goods in the region. Notwithstanding a slow start, product liability litigation is well established in Australia and Japan. There are 'hot spots' in the region. Respondents to the Clayton Utz survey also reported other countries of concern including, in particular, China.

In summary, the Clayton Utz Asia-Pacific survey found that:

- Overall, 72 per cent of the respondents thought that there had been a general increase in product liability claims over the past decade and 44 per cent of respondents thought that the Reforms had increased or greatly increased product liability risk for manufacturers distributing goods in the region. However, 61 per cent of manufacturers and 72 per cent of insurers thought implementation of the Reforms had not changed product liability risks.
- Unanimously, 100 per cent of insurers/brokers thought that there had been an increase in the number of product liability claims in the Asia-Pacific region since the Reforms. One hundred percent reported that there had been an increase in settlements. Overall, total respondents thought the increase was between 0-20 per cent. However, 78 per cent of respondents, in explaining why they could not return completed surveys in any detail, reported that they had no claims in the region, and the balance reported that they had experienced no increase in claim numbers. The risk profile of foreign manufacturers and domestic manufacturers appears to be different. Overall, 37 per cent of total respondents thought that claims against foreign manufacturers were prevalent compared to 26 per cent for domestic manufacturers.
- Perhaps unsurprisingly given that manufacturers, members of the insurance industry, in-house counsel and defendants' lawyers were surveyed, 59 per cent of respondents thought that traditional causes of actions adequately protected consumers from unsafe products (yet only 22 per cent of total respondents thought it provided consumers with an efficient means of obtaining compensation).
- The main motivations for consumers to bring actions under the Reforms were reported as a perceived higher success rate and damages, with the factors of less expense and evidentiary hurdles also being identified. An increase in out-of-court settlements was identified as being due to the Reforms and greater access to legal advice.
- Regarding future law reform, while 26 per cent of total respondents thought that consumers would benefit if a common and sole system of liability was introduced, 49 per cent of respondents were indifferent as to whether it would be beneficial for consumers. In contrast, 56 per cent of respondents thought that consumers would benefit if fault-based

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claims in tort/delict such as negligence were abolished (including 70 per cent of lawyers, both external and in-house).

In summary, what the survey also suggests is that the Asian experience is likely to correlate to the European experience. One of the conclusions that emerges from the Clayton Utz survey and the EC study is that it is really the United States which is different and the US experience is not being replicated in either the Asia-Pacific nor Europe. In short, the United States remains the global product liability anomaly.