Product Liability in Australia

Licensor may find itself treated as manufacturer, and therefore liable to user for loss or damage

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Before examining the extent to which Australian law attaches to a licensor a liability to persons who suffer loss or damage as a consequence of some defect in or failure of goods or services produced by a licensee within the scope of the license granted, some background is necessary.

The English common law of sale of goods and statutes codifing such law along the lines of the English Sale of Goods Act of 1893 have long been the law in each state of Australia and litigation arising out of contracts for the sale of goods falls within the jurisdiction of the courts of each state, not the federal courts.

The law of the sale of goods did, until recently, provide that implied conditions and warranties as to the quality of the goods; their fitness for their purpose; their correspondence with any samples and any description given to them were incorporated in all contracts of sale unless the buyer and seller agreed otherwise. This proviso for many years enabled sellers to exclude such implied terms and further to impose upon buyers conditions which would exclude or limit the liability of the seller to the buyer if something went wrong. Thus, the principle "Caveat Emptor" (let the buyer beware), has been an accepted part of Australian law for many decades.

All this has now changed, however, with the introduction by several states and, in particular, by the Federal Parliament of legislation which reverses the onus and forces sellers to accept liability which they cannot exclude. Thus, under the Trade Practices Act, originally enacted in 1974 and subsequently amended on several occasions, a trading company or an individual trading across state borders or with the Commonwealth Government or its instrumentalities is liable to pay damages to a consumer for breach of any of the implied conditions previously capable of being excluded under the Sale of Goods Legislation. A consumer is any acquirer of goods valued up to $15,000 or, if the goods are worth more, an acquirer of goods ordinarily acquired for personal domestic or household use or consumption. This definition enables a buyer of an expensive car to claim the benefit of the legislation but it also enables a business which buys even a moderately priced typewriter to claim the benefits afforded to consumers.

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Limitation

This legislation, of course, extends the implied warranties and conditions only to the buyer himself and

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attaches a liability only to the seller himself. The seller cannot exclude his liability and may limit it only when goods in question are not ordinarily acquired for personal domestic or household use or consumption in which case he may limit his liability to the replacement or repair of goods or to the payment of the cost of doing so.

This then was the background against which product liability laws were introduced at Federal level into the Trade Practices Act in December 1978.

The particular part of the act which did this is entitled "Actions against manufacturers and importers of goods" and this somewhat lengthy title is probably more apposite than "product liability".

The act now provides a statutory liability of manufacturers in circumstances similar to those in which warranties and conditions are implied between sellers and buyers. The person injured need not be the person who bought the goods from the retailer.

All of this may seem to be somewhat removed from the concept of licensing. However, a corporation that permits somebody else to hold out the corporation's name or trademark to the public as the manufacturer of goods is deemed to be itself the manufacturer of the goods(e.g. house brand names applied on behalf of chain stores etc.). Further, a corporation which causes or permits its name or any business name, brand or trademark that it uses to be applied to goods which it supplies is also deemed to be a manufacturer. (Dr. von Hulsen: Inclusion of reference to the actual manufacturer doesn't save him). It is this provision which brings trademark licensing within the scope of manufacturers' liability.

Of course, not all trademark licenses will result in the licensor being treated as if he were a manufacturer of goods for the purposes of imposing upon him a liability to any person who may suffer loss or damage should the goods to which the mark is applied turn out to be defective. It is necessary that the licensor (who may be a permitted or registered user) permit the licensee to hold out to the public that the licensor is the manufacturer, or it is necessary that the licensor itself supply goods to the licensee. This provision raises a difficulty, since a licensor of a trademark may supply to the licen-

see goods which form only part of the licensed product, such as a concentrate for a softdrink or a particular component required for production of the final product, and it will be to the final product that the brand or mark of the corporation is applied by the licensee.

As presently worded, it appears that the law will treat as a manufacturer of the final product a trademark licensor who supplies ingredients or components to a licensee where those ingredients or components are part of the final product to which the trademark is applied. (Supply and resupply: Resupply includes supply of goods in which other goods have been incorporated).

Quality Control

Clearly the responsibility is upon licensors to exercise a high degree of quality control over licensees and to stamp out unauthorized use of trademarks, not merely to protect the goodwill in the mark but to avoid potential product liability. The act places the onus upon the trademark owner to disprove the presumption that when his name or mark is applied to goods by anybody, such application was caused or permitted by the trademark owner. Compare this with trademark law where no such presumption arises.

Equally, when a company subcontracts the manufacture of goods which it wishes itself to sell under its trademark it is deemed to be the manufacturer. Thus, if goods marked in such way are supplied by the trademark owner to a dealer and they eventually find their way into the hands of a consumer, (otherwise than by way of sale by auction) and the goods are not of merchantable quality, leading to loss or damage suffered by the consumer, the trademark owner is liable to compensate the person suffering loss or damage, except where the lack of merchantable quality is attributable to an act or default of somebody other than the trademark owner or to a cause independent of human control, occurring after the goods have left the trademark owner's control.

Again, liability does not attach as regards defects specifically drawn to the consumer's attention before he obtained the goods or if he examined them before doing so, in so far as such examination should have revealed the defect.

A similar provision imposes a liability upon the trademark owner who has permitted his mark to be applied to goods which he himself has eventually supplied in trade, in relation to goods unfit for their purpose, goods falsely described by the dealer and goods which do not correspond with a sample.

A novel provision imposes upon the manufacturer of goods, including the licensor of a trademark who himself supplies goods for trade, a liability to ensure that all statements which it makes and all statements made by dealers handling the goods should be absolutely correct, in so far as they relate to the quality, performance or characteristics of goods, and in so far as the natural tendency is to induce persons to acquire them, since the manufacturer, as defined, is liable to a consumer suffering loss or damage if any such statements turn out to be incorrect, even where those statements may have been made by the retailer. Under these circumstances the manufacturer is presumed to have authorized the retailer to make the statement unless he proves that he did not.

Obligations

Accordingly, not only is there an obligation upon the trademark owner to insure that its quality control requirements are adhered to in the course of manufacture, but that false statements as to quality and characteristics are not made by anybody down the distribution chain to consumers. In practice this clearly requires accurate information to be distributed to dealers stating the performance characteristics of the goods and forbidding statements going outside such specifications to be made in connection with their promotion or sale. Unless it can be shown that any false statements made were outside the scope of this directive, the trademark owner will be obliged to meet the claim of the consumer for loss or damage.

When a consumer can claim against the retailer who breaches any implied conditions as to merchantable quality or fitness for purpose, and when the consumer could have sued the manufacturer in relation to the same defect, then the retailer has a good claim to be indemnified by the manufacturer. However, unless the goods are of a kind ordinarily acquired for personal domestic or household use or consumption, there is a statutory limitation upon the liability to indemnify confined to the cost of replacement or repair of the goods.

From the foregoing, you will see that product liability in licensing is new in Australia, the law having come into force only 16 months ago. No one I know has heard of any case which has been brought under the new law, and the Trade Practices Commission, which monitors all such litigation, has no record of any such cases. The law applies only to trademark licensing and only to certain kinds of trademark licensing. At this stage it is too soon to say whether the lack of litigation shows the law has had little impact or whether this is just the lull before the storm.