

Supplementary Submissions by Prof Luke Nottage, Sydney Law School,  
For Senate Economics Committee hearing, Weds 28 April 2010

1. Re my para 11 on the lack of a GSP in the Bill:
  - a. even if the Act does not add a generic obligation on suppliers to provide only safe products (as in the EU and HK), or even
  - b. specific provisions such as I suggest, eg
    - i. ongoing duty to monitor and report on products that they have already notified to regulators if relevant new info comes to light;
    - ii. re record-keeping (including a register of consumer complaints, as in the EU or Japan) or traceability (as proposed in Canada)
  - c. then at least add a provision such as that recommended for further consideration by the PC as far back as its 2006 Report, to “target specific problems identified with the current system” (p132 – see attached extracts): “providing regulators with the power to impose financial penalties, *once the threshold trigger for a mandatory product ban has been satisfied* and it has been implemented” (original emphasis)
2. Section 131 requires disclosures for “consumer goods”, which s2 defines as including goods that have become fixtures since supplied but only if subject to mandatory or voluntary recall. Disclosure should be required for all goods that have become fixtures, so eg regulators can decide whether a recall is needed.
3. The penalties for not reporting serious product related injuries and deaths under s131 seem very low (s202): a maximum of \$3,330 (or \$16,650 for incorporated bodies)
  - a. especially given the Defences proposed (eg s207 “reasonable mistake of fact”)
  - b. anyway, shouldn’t this be expressed as Penalty Units so the amounts can be raised more easily?
4. There appears to be a major drafting error in the Product Liability provisions in ss 140-1, which the legislative history (including April 2009 “Guide to Provisions just published) intend to be a restatement of TPA Part VA:
  - a. These private compensation provisions apply if a product’s “safety defect” (now defined in s9 of the Bill – cf present TPA s75AC) causes harm to other goods (i) “of a kind ordinarily acquired for personal, domestic or household use or consumption” AND (ii) the person harmed (actually or planned to have) “used or consumed” such damaged goods for such use or consumption. In other words, liability only follows if both an objective AND subjective test are satisfied.
  - b. By contrast, current TPA ss 75AF and 75AG allow claims for loss to other goods if they fulfil only (i) the objective test (as eg in the EU, which was the template for this Part VA of the TPA).
  - c. And TPA Part V Div 2A (see s74A(2)(a) and s74D(1)) requires the unsafe goods to be “consumer goods” satisfying such an objective test, but then claims can be made for consequential damage to all other goods (even not ordinarily for personal use).

To maintain consumer protection we should retain our alignment with the EU (and other Asia-Pacific jurisdictions that have also followed it) by redrafting as in (b). Or, if the legislative intention is really to narrow the scope for product liability claims (already very few in Australia, especially after 2002 tort reforms), then this provides further justification to expand the scope for product safety duties as suggested here and in my original Submission.
5. Product safety regulatory requirements, especially information disclosure duties, dovetail well with incentives provided by the product liability system for

manufacturers and others to supply safe products. But they also underpin a more functional regime for consumer warranties. Even under the new scheme proposed in this Bill, because warranties (eg of “acceptable quality”, including safety) mostly have to be enforced through private action, there is a high likelihood that suppliers will gradually begin to ignore consumer claims – as now under TPA Part V Divs 2 and 2A. But if there Australia adds effective information disclosure obligations, at least where safety problems become apparent, suppliers should begin to take consumer warranty complaints more seriously as well.