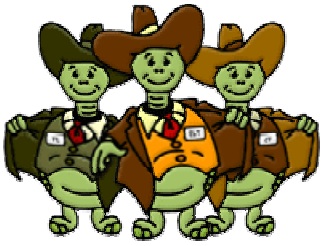

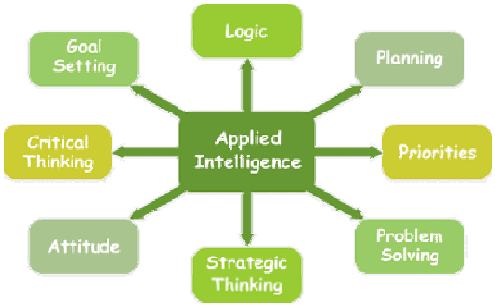

Tortoise Technologies Pty .Ltd. (ABN 76 110 613 226)

"Where there is no vision , the people perish "

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23rd March, 2005

The Secretary,
Inquiry into harmonisation of legal systems,
Standing Committee on Legal and Constitutional Affairs,
House of Representatives ,
Parliament of Australia ,
CANBERRA .

Please accept the following as a submission to your Inquiry.

Yours faithfully,
David H. Price,
DIRECTOR

EXECUTIVE SUMMARY OF SUBMISSION

Given that Australia, whilst physically an island, is part of the global economic community, it is increasingly difficult for both resident and non-resident business owners, to undertake their commercial activities with any degree of certainty as to what the law requires of them, both at a national level and at a state or territory level .

Any commercial undertaking in Australia is subject to a number of regulators, who are not unreasonably focused on their particular role, but who often fail to appreciate that their one – dimensional world is just one of a multitude of dimensions that even a small organisation needs to integrate together to deliver their commercial activities.

One example of this is in the area of Occupational Health and Safety ; consider the following scenario :-

XYZ Corporation is an overseas owned business, in the area of widgets design, manufacture and installation ; it has a variety of ISO accreditations and conforms to a number of Australian Standards. It has multiple OH&S systems, that conform to :-

- "global" policies
- ISO management systems
- Australian Standards (e .g . AS / NZS 4804 and AS/NZS 4801)
- State based laws

There is an accident in the manufacturing plant ; this must be addressed in relation to each of the four above requirements and if negligence is proved, then their insurers will most likely desert them . However, this "negligence" may be as the result of the application of a provision in state based law, which bore no relation to anything in the other three areas, all of which may have been completely complied with .

If this accident was in a plant run under a " partnership" between two corporations and the person injured was an independent contractor, then it may end up with the High Court having to untangle all the legal complexities, the injured person becoming an irrelevance very early in the proceedings.

RECOMMENDATION

It is recommended that a stakeholder audit be carried out, to identify all the regulators, all the standard setting bodies (including professional bodies) and
to develop a framework , under which business operators can identify who is
who in the zoo and require regulators to adopt a "lead" regulator approach
to monitoring and enforcing legal systems and processes.

INDEX TO REST OF SUBMISSION

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In this section, the following questions are addressed :

(a) civil vs criminal actions ; should there be different time limits ?
(b) what is purpose of this statute ?
(c) is that purpose being met ?

Legal Procedures

In this section, the following questions are addressed :

(a) why can government departments escape any liability for advice or information provided, whether payment is involved or not ?
(b) why can banks, insurance companies and utilities change the terms and conditions of contracts whenever they like ?
(c) who is being served by the current framework of legal procedures ?

Partnership Laws

In this section, the following questions are addressed :

(a) are various types of partnerships allowed incompatible ?
(b) when is a partnership a syndicate ?
(c) practical problems in administering partnerships ?

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In this section, the following questions are addressed :

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In this section, the following questions are addressed :

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In this section, the following questions are addressed :

(a) what should the role, in law, be of Australian / International Standards ?
(b) what regulatory role is appropriate here, for the ACCC, various state based Offices of Fair Trading ?
(c) where do product insurers fit in to all this ?

Legal obstacles to greater Federal /State and Australia & New Zealand Co-operation ?

In this section, the following questions are addressed :

(a) how to address the Constitutional abuse by governments ?
(b) the problem of Lex Situs vs Lex Domicilli : one system for two lands ?
(c) economic vs legal co-operation ?

STATUTE OF LIMITATIONS

(a) civil vs criminal actions ; should there be different time limits ?

Despite some denials from various judicial officers and crown law officers, it seems as if time limits are flexible if it is politically expedient,

but if some ignorant member of the public seeks that obscure thing , justice, then suddenly, time limits become inflexible .

Some time ago, there was a strange concept known as equity, which allowed for flexibility in time limits, on a case by case basis, for ALL , not just those cases that were politically expedient .

Further, sometimes it happens that a civil action can transmogrify into a criminal action, when "new evidence" comes to light , but no account is taken of this in determining the application of the statute of limitations to a particular situation.

This may come across as meaningless ramblings . Once, when challenged, I spent time and money documenting many examples of the above . The response ?? ; " these are all isolated incidents, in the past – things are done differently now !!."

(b) What is the purpose of this statute ??

I have been told this is to stop "old" matters being brought before the courts, where those involved may be dead, or otherwise not available, or where vital evidence may be lost .

If I were a cynic, I would say it was there to give an indication to those who break the law or commit crimes, as to how long they have to "play the system" , before they can have an action struck out , or how long certain evidence has to be "lost" for .

(c) Is that purpose being met ?

It works well for those seeking to escape responsibility for their actions .

LEGAL PROCEDURES

(a) Why can government departments escape any liability for advice or information provided, whether payment is involved or not ?

There is a recent High Court case that is evidence for this proposition ; set out below is a disclaimer used by the NSW Department of State and Regional Development :-

" Due diligence should be taken in any business dealings and the Department of State and Regional Development accepts no liability for

any claim, which may arise from any person acting on the information herein ."

(b) Why can banks, insurance companies and utilities change the terms and conditions of contracts whenever they like ?

Once I have entered into a contract with one of these entities, I am unable to change anything, but they can change anything, as and when they like . In any commercial dealings I have been engaged in over the years, the understanding has been that the terms agreed upon are it , unless they are changed by **MUTUAL CONSENT.**

(c) Who is being served by the current framework of legal procedures ?

It would seem that there is a need for an "intermediate" body, between litigants and the courts, to determine whether the interests of all parties are best served by existing procedures, or whether one –off procedures are required. One example of this would be in those instances where a court is satisfied that there are issues of substantial damage being done to one party, by another party, leaving the potential plaintiff financially weak, but still agreeing to a request by the potential defendant, that a bond
of $250,000 be posted, as a security for costs, by the potential plaintiff, before a case can even be listed, let alone tried .

PARTNERSHIP LAWS

(a) are various types of partnerships allowed incompatible ?

Different states have different laws governing partnerships, which raises practical and operational difficulties for those doing business outside their "home state or territory".

Initially, the concept of a partnership was of individuals coming together to pool talents and resources to better conduct a business.

From that original concept, we have moved on to "limited partnerships" and to companies working together as a partnership.

The two above examples make it difficult to apply the “rules” of joint and several liability and of a partnership not being a separate legal entity .

(b) when is a partnership a syndicate ?

There is no clear answer to this ; however, it is important that these two be capable of clearly distinguished.

(c) practical problems in administering partnerships ?

Given the range of partnerships allowed, these can be legion and need to be classified and dealt with.

SERVICE OF LEGAL PROCEEDINGS

(a) What is the conceptual framework behind this ?

It would seem that the framework for this arose out of a perceived need to ensure that individuals were made aware of the quality and nature of any legal proceedings to be carried out against that individual .

This requires a potential plaintiff to identify the issues to be tried and to give the potential defendant the opportunity to prepare their defence, if any, in a timely fashion.

(b) Is this framework relevant to reality ?

This is relevant to the reality of modern day litigation

(c) Should a wider range of types of service be available ?

This is a difficult question to answer ; it is open to a court to decide that service can be deemed to have occurred, if the relevant party has been "keeping house", or has refused to receive service by registered mail or some other appropriate means .

However, there should be no need to seek a court ruling on this, so it would be important to review the current range of types of service and provide for any additional forms seen as appropriate

LAW OF EVIDENCE

(a) Originals vs.certified copies; what if the Court loses the originals ?

Originals of documents, exhibits, all tangible forms of evidence can only be provided once ; if they are lost, they cannot be made again .

Problems arise when originals are filed with a "court", then lost by that body ; certified copies are often not allowed, even if they have been notarised, which can be very convenient in certain cases.

Protocols need to be established, so that once originals have been lodged and accepted by a "court", it should not be open to challenge evidence that is not in original form , due to it being lost by the "court".

(b) Should there be a code that sets out the weight to be given to different types of evidence ?

The civil level of proof is less onerous than the criminal level of proof; different types of evidence , e.g. oral, visual, written are involved in different circumstances and the current maze of laws, precedents, etc., need to be re-drafted into a code .

This re-drafting should be undertaken every five years at the latest, preferably every three years ..

(c) What constitutes evidence anyway ?

Given the advances in some photographic technologies and the failures of certain forensic processes, there should be a review as to what evidence actually is .

STANDARDS FOR PRODUCTS

(a) what should the role, in law, be of Australian / International Standards ?

Standards, such as AS3806, on legal compliance, are being used in judicial proceedings, as benchmarks, for determining whether the actions of individuals / organisations have been reasonable.
Whilst these standards are not part of legislation, they are being used to interpret the application of legislation .

There should be a formal way of recognising the role of standards in applying laws, rules and regulations.

(b) What regulatory role is appropriate here, for the ACCC, various state based Offices of Fair Trading ?

There is an increasing reliance on not only standards, but also codes of practice et.al ; when developing a product, or providing guidelines for the use of products, all those involved, from the provider of the raw materials, through to the end users, are tied up with laws, rules, codes, standards and other fun things .

Product recalls seem to be the main role of regulators of products, but it would seem that greater emphasis should be placed on educating producers as to the practical requirements of quality, safety and applications of products to be produced.

(c) Where do product insurers fit into all this ?

At the moment, insurers seem to stand on the outside and " stay above the fray" ; when an event occurs that could give rise to a claim, their focus is "how can avoid this claim ?". They search for all appropriate standards, rules, etc., that could in any way impact on the event and require the insured to prove compliance with all these.

It would seem more equitable for all parties to work together, however that would require a major shift in culture from all parties and the driver for this shift does not appear to currently exist .

LEGAL OBSTACLES TO GREATER FEDERAL / STATE AND AUSTRALIA & NEW ZEALAND CO-OPERATION

(a) how to address the Constitutional abuse by governments ?

An example of this is superannuation ; in order to gain control of this and to overcome the lack of constitutional power over trusts, the Commonwealth Government used its corporations power.

This problem will need to be addressed, to ensure any closer co –operation has popular, rather than just legislative support .

(b) the problems of Lex Situs and Lex Domicilli : one system for two lands ?

Taxing its citizens is a prime function of any government ; the return of death and estate duties in overt, rather than covert forms, may well be forced upon governments due to the aging of both populations and the decline in the "working" taxpayers.

The location of assets (Lex Situs) and the domicile of individuals (Lex Domicilli) will again become key issues and no government will want to forgo revenue in the name of "co-operation".

(c) economic vs legal co –operation ?

There would appear to a sophisticated economic integration in

many sectors of the economies of Australia and New Zealand ; traditionally, the law of the dominant economic force becomes the law of the “partner” / co –operator .

Should we pursue even closer economic ties with New Zealand and let the natural progression of the integration of Australian law into New Zealand take its own course ??.