

# Chapter 8

## Minor drafting issues

8.1 The chapter identifies some places where Treasury could clarify some of the definitions and address matters raised about drafting. In the interests of clarity this should be done using existing legal meanings.

### *Consumer guarantees*

8.2 Dr Stephen Corones asked whether 'due care' in section 60 of the bill means 'reasonable care', or imposes a new, more 'stringent standard'.<sup>1</sup>

8.3 Mr Lynden Griggs argues that the drafting of the provisions covering auction sales does not reflect the intent:

A further matter to be raised is the drafting associated with auction sales. These are excluded from the operation of ss 54-59. Sale by auction is defined as follows (s 2): 'sale by auction, in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person, (whether that person acts in person or by electronic means).' It is clear from the explanatory memorandum that the intent is that the guarantees do not apply where an auctioneer acts as an agent for a person to sell goods. 'They do apply to sales made by businesses on the internet by way of an online 'auction' websites when the website operate does not act as an agent for the seller.' Today, there is no doubt that guarantees should apply to online auctions...<sup>2</sup>

### *"Grown in" Australia provisions*

8.4 Section 255 provides that where "country of origin" claims are made consistent with the rules in the provision, they do not amount to misleading or deceptive conduct under section 218 of the bill. CHOICE submitted that they support the approach of requiring "grown in..." claims to also satisfy other tests in the table to ACL s. 255(1) ("made in..." or "product of...") and to avoid the protection for the

"grown in..." claim where the supplier makes multiple origin claims. However, the drafting in ACL s. 255 is almost incomprehensibly complex, involving a circular (and negative) crossreference between sub-sections (1) and (2). We would encourage the Committee to request alternative drafting.<sup>3</sup>

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1 Dr Stephen Corones, *Submission 44*, p. 1.

2 Mr Lynden Griggs, *Submission 7*, p. 3; refers to *Explanatory memorandum*, p. 184.

3 CHOICE, *Submission 20*, p. 6.

## **Product Safety**

8.5 The Law Council of Australia highlighted the ambiguity of the term 'reasonable foreseeable use (including misuse)' that has been incorporated into the threshold tests in relation to product safety. This definition allows the Minister to, for example, impose an interim or permanent ban for consumer goods; but it also relates to product related services. The Law Council is concerned that:

...it is not clear on the face of the legislation what is meant by "reasonably foreseeable use" and, in particular, "misuse". The Explanatory Memorandum to the Bill states that "reasonably foreseeable use" may include use of the good for its primary, normal or intended purpose, *for its unintended purpose*, or misuse of the good. This implies that the legislature intends for the concept of "reasonably foreseeable use" to capture not only unintended misuse by a user (for example, due to some design defect), but also any deliberate use of a good in an unintended manner...The [Trade Practices] Committee [of the Law Council] believes that the concept of "reasonably foreseeable use" should be clarified to exclude instances where harm will likely occur only due to deliberate use of a product, and where that use is not the intended purpose of the good.<sup>4</sup>

8.6 Associate Professor Luke Nottage drew the Committee's attention to an apparent drafting error in sections 140 and 141:

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:

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) (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.

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).

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).

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4 Law Council of Australia, *Submission 18*, p. 12.

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.<sup>5</sup>

8.7 Mr David Howarth from CHOICE agreed with Associate Professor Nottage's recommendation in a statement to the Committee.<sup>6</sup>

### *Other drafting corrections*

8.8 The Scrutiny of Bills Committee has examined the legislation. It noted the following three errors in the explanatory memorandum:

- (i) chapter 16: reference in the chapter to Part 5-2 should be to Part 5-3
- (ii) Schedule 2, item 133E: this section about self incrimination is discussed in the EM at paragraph 19.47, but there is no cross reference to the item number; and
- (iii) Schedule 2, item 137F: the EM at pages 389 and 390 mistakenly refer to section 137K instead of 137F.

### **Recommendation 9**

**8.9 The Committee notes the claim of drafting errors. The Committee does not believe that these issues are of sufficient magnitude to delay passage of the bill. Notwithstanding this, the Committee recommends that the Minister seek further advice and rectifies any drafting errors where warranted.**

**Senator Annette Hurley**  
**Chair**

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5 Associate Professor Luke Nottage, *Submission 26 (Supplementary Submission)*, pp. 1-2; see also *Proof Committee Hansard*, 28 April 2010, pp. 3 and 7.

6 CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 11.