

Marina Farnan's paper -- comments by Glen Gibbs

Firstly, thanks are due from all of us to Don, Robyn and Michelle and all others involved in the smooth running of this conference.

Picking up Eamonn's point about New Zealanders walking away with 2 of the major prizes in the drafting competition I recall a famous comment of Mr Muldoon that "Every time a New Zealander migrates to Australia the IQ level goes up in each place". Maybe he was right?

I have only one minor comment on Marina Farnan's paper on Commonwealth/State legislative schemes. On the question of the application of laws of the Commonwealth as State laws, Marina gives sections 6AAA to 6AAD of the *Therapeutic Goods Act 1989* of the Commonwealth as her preferred approach. Section 6AAD, with my suggested amendment, would read as follows:

6AAD Conferral of jurisdiction on federal courts

If:

(a) a provision of a corresponding State law, **whether made before or after the commencement of this Act,** purports to apply a provision of a law of the Commonwealth (the applied provision) as a law of the State; and

(b) the applied provision purports to confer jurisdiction in relation to a matter on a federal court;

the jurisdiction in relation to that matter is taken to be conferred on the court by this section.

This suggestion, obviously minor, is inspired by the principle that we must draft in a way that a provision cannot possibly be misunderstood. Other comment on Marina's excellent paper is hard to find.

Uniform legislation is usually mooted with great fanfare of trumpets and with much exultation throughout the land. However, before it becomes law, there are often inroads on uniformity to be found. As an example I mention the *Trade Measurement Act 1999* of Tasmania. Section 2A, an objects clause "to facilitate a scheme of uniform trade measurement legislation throughout Australia", is to be found only in Tasmania. However it merely states the obvious. In South Australia this pious sentiment is conveyed by the long title.

There are a few other differences, not of great moment. Section 6 of that Act provides for exemptions from the operation of the Act. Under the corresponding South Australian provision their Act does not apply to bread; this is a rather more interesting deviation from uniformity.

Section 7A, relating to the use of class 4 measuring instruments, is as follows (showing differences in some States):

- A person must not use a class 4 measuring instrument **for trade** other than -
- (a) as airport baggage scales; or
 - (b) for freight scales with a capacity of up to 2 000 kg;
- or
- (b) for the determination of freight or haulage charges; or**
 - (c) for weighing garbage; or
 - (d) for weighing earth, sand, gravel or another similar material; or
 - (e) as a crane weigher; or

- (f) for weighing timber in log form; or
- (g) for another purpose prescribed under a regulation.

Penalty:

- (a) if the class 4 measuring instrument is a weighbridge, fine not exceeding 100 penalty units; or
- (b) in any other case, fine not exceeding 50 penalty units

The amendment in the first line has been made in 3 States, but not in Tasmania, and the alternative paragraph (b) appears in New South Wales. Maybe this is merely an oversight and shows the desirability of continued exchange of information after the uniform scheme gets off the ground. Section 7A does not appear in the Queensland Act.

Section 7B is also absent from the Queensland Act and is as follows, showing an amendment made in 3 States:

7B. Use of measuring instruments for pre-packed articles

A person must not use a measuring instrument for measuring pre-packed articles on premises in which articles are pre-packed unless at least one suitable measuring instrument on the premises is approved for trade use under the National Measurement Act and complies with this Act **and is suitable for measuring the articles to be pre-packed.**

Penalty:

Fine not exceeding 50 penalty units.

The numbering of these sections looks odd in an original Act but shows the drafter's desire to preserve consistency in numbering throughout Australia.

Section 80(4) conferring a differential regulation-making power is missing in Queensland, the reason being that their interpretation Act does the trick. Drafters should therefore be aware of the differences between the various Acts Interpretation Acts.

Section 81, which provides for the operation of the *Fair Trading Act 1990* to be paramount, is missing in the Northern Territory. Drafters must therefore take the trouble to examine and compare other related Acts in the various jurisdictions.

The *Consumer Credit (Tasmania) Act 1996*, which provides for the Queensland Consumer Credit Code to apply as a law of Tasmania, is another example of uniform legislation. The schedules to this Act contains 2 "mini-dictionaries" but I understand that, after experiments in the Commonwealth OPC, this practice has fallen out of favour.

Schedule 2 deals with the problem of differences between interpretation Acts. It contains "Miscellaneous Provisions Relating to Interpretation". Clause 10 of this Schedule provides that examples (of which none are to be found in this Act) to a provision may, in the case of inconsistency with the provision, extend its meaning. The approach of the Commonwealth and certain other States is that the provision is to be paramount. Drafters must therefore be aware of the 2 different philosophies.

In one case (unfortunately I do not have the citation) where the uniform consumer credit scheme came before a Victorian court, the judge called for the text of an amendment to the Code. On being told that the detail of the amendment was contained in a proclamation adopting a law made in Queensland, his riposte was to compare the scheme with the actions of a Roman emperor who placed his edicts high on the walls of a gate to Rome out of sight to his subjects. This is surely food for thought for drafters.