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7 December 2015

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Submission on Contract and Commercial Law Bill Exposure Draft: Process issues, using the Carriage of Goods Act 1979 as an example.

1. This submission is made on a personal basis. It:

   - points out that knowledgeable submissions on the Draft Bill (or indeed a complete bill) are highly unlikely because of the size of the Draft Bill;
   - Addresses the accessibility of the existing statutes to those who regularly use them;
   - points out the consequence of changes to key commercial statutes that underpin business efficiency within New Zealand;
   - questions the need for the review of the Carriage of Goods Act 1979 and also the Sale of Goods Act 1908 (and by extrapolation, other commercial statutes);
   - points out the unintended consequences of the proposed changes; indicates a more appropriate method for checking changes.

   An analysis of sections 1 to 8 of the Carriage of Goods Act 1979 is included in this submission to demonstrate the concerns arising from this revision, and also highlight the unlikelihood that there will be knowledgeable feedback from interested parties because of the huge time commitment required of any reviewer.

2. **Where I am coming from – business plus legal perspectives**

2.1 I commenced my legal career in 1990 after a career in librarianship, then sales, marketing and general management in the retail goods and services supply chain. I have a long history of involvement in law reform, beginning in 1984 when tax reform significantly affected the industry my company was involved in. My academic specialty is consumer law. This is because nothing happens in the economy until a consumer puts his or her hand in their pocket, pulls out some money (or a credit card) and pays a trader. Because of my commercial background I am sorely conscious that increased costs whether in money or time) to traders mean increased costs to consumers.

2.2 During my business career I became familiar with a number of statutes, including those dealing with sale of goods, carriage of goods, hire purchase

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(now credit contracts), what was known as “workmen’s liens”, secondhand dealing, minors’ contracts, aspects of the Mercantile Law Act, health and safety statutes, employment law statutes and later the Fair Trading Act 1986 and the Commerce Act1986.

2.3 I was admitted as a Barrister and Solicitor of the High Court of New Zealand in 1993, and have been working as a sole practitioner, advising businesses who operate in the retail supply chain for goods and services. I have also worked on numerous law reform submissions (best estimate is between 30 and 40) for clients, on my own account, for the Auckland District Law Society, and for the New Zealand Law Society for many years.

2.4 This submission is complementary to that of the New Zealand Law Society, (which I worked on) in that it sets out the process that I used to assess the appropriateness of the suggested revisions to the Carriage of Goods Act 1979.

3. Accessibility

3.1 First, the proposed single Act. There are several aspects of concern in bundling the proposed statutes together in a single “Contract and Commercial Law” statute. First, many important commercial law statutes have been left out, such as consumer law (for every consumer transaction there is a commercial party on one side), the Secondhand Dealers and Pawnbrokers Act, employment law and health and safety statutes. But there are overriding concerns arising from the “single Act” structure, which I suggest will cause an increase in accessibility to users and thus have a negative economic impact.

3.2 A single Act structure does not take into account the audience that makes use of any particular Act. As examples:

- The Contracts (Privity) Act 1982, Contractual Remedies Act 1979, Contractual Mistakes Act 1977, Frustrated Contracts Act 1944 and the Illegal Contracts Act 1970 all operate ex post: that is, their key use is in resolving contractual disputes. In the main, they are used by lawyers to advise clients as to the outcome or potential outcome of a contractual dispute.
- The Minors’ Contracts Act 1969 and the Electronic Transactions Act 2002 are mainly used ex ante by both lawyers and businesses in assessing the consequences of contracting with minors in the first case and designing and carrying out electronic transactions in the second case.
- The Sale of Goods Act 1908 is a critical act which underlies commercial sales transactions of all kinds. Unlike the Acts referred to above, the Sale of Goods Act implies terms into a contract for the sale of goods where no comparable express term exists in the contract of sale. It is an operational statute rather than a dispute resolution statute.
- The Mercantile Law Act 1908 is similarly operational (although in my view it deserves substantive revision, as is indicated out by the comments in the draft Bill).

- The Minors Contracts Act and the Sale of Goods Act in particular are frequently taught to business and commerce students because of their significance to ongoing business.

3.3 Although most of the contract law statutes could bundled together, this is because they are used post-transaction – that is, they are used by the Courts and by lawyers to assist with the clarification of contract disputes. There is a key exception: the Minors' Contracts Act. This Act is also referred to by businesses who contract with consumers who could be minors: they need to know when it applies and at what age, what a minor can do to unwind a contract, and other matters to assess their risks, should they contract with minors (bearing in mind the Human Rights Act 1993 may require them to contract with minors). To bundle the Minors' Contracts provisions into a "Contract and Commercial Law Act" raises significant accessibility issues. For example, using the legislation.govt.nz website, a complex search would be required to locate the relevant provisions if that Act were to be even renamed.

3.4 Further, there are real concerns that the revised wording will have unintended consequences in that they appear to change the statutes. **It is not sufficient to hide changes behind an interpretation clause which states that previous case law/interpretation prevails.** That *could* not be the case if the new express wording were clearly different (eg see comments in the attached table relating to proposed s 248 of the "revised" Carriage of Goods Act 1979). In addition, the development of future case law would be frustrated by a clause of that kind, which would effectively freeze existing interpretations regardless of innovations in the commercial environment.

3.5 The Carriage of Goods Act 1979 is a statute central to day to day commercial activity. Aspects of it are well understood by carriers, consignors and consignees: it is an everyday statute to businesses. It is addressed in detail in paragraph 4. Similarly the Sale of Goods Act is the foundation stone of trading in New Zealand. Concerns are set out below in paragraph 5.

3.6 In my view the Mercantile Law Act requires a complete overhaul, not just a change in wording. It should not be included in this review.

4. My exercise: analysing the proposed revisions to the Carriage of Goods Act 1979 sections 1-8

4.1 My comments below on the Carriage of Goods Act 1979 (CoGA) show not only the level of detail required to check this Bill, but also the nature of the exercise if it is to be carried out clearly. **It is important to extrapolate the 4 hours I took carrying out the exercise to assess the time required to get competent feedback on a bill of the kind under consideration: it amounts to weeks or possibly months for every submitter.** Frankly, it is not going to happen: no commercial or legal business can afford the time to carry out this exercise pro bono. Yet the small sample study I carried out has highlighted several serious flaws.

4.2 I spent 4 hours analysing the revisions to only the first 8 sections of the CoGA (see attached chart). In doing so, I needed to refer to all of these documents contemporaneously:

- The draft Bill
- The explanatory material
- The Draft Bill Explanatory Note
- The Carriage of Goods Act 1979
- Commercial law texts
- Case law on the Carriage of Goods Act 1979 (this was necessary to assess how critical the existing language was to the interpretation of the provision, and whether changing that language might lead to either a change in meaning or the potential for litigation challenge).

4.3 While the cross-reference table supplied with the explanatory material was helpful, it was confusing to find the former sections split up and scattered throughout the proposed revisions. I am not referring to those revisions where concepts which were bundled together in the CoGA are split into separate sections (eg the proposed sections 248-250) but to the widespread positioning of concepts which in real life belong together, because they address aspects of the same kind of transaction or transactions between the same kinds of parties.

4.4 I have attached below my unadorned analysis of the proposed changes to those sections. As you will see, while it contains some accolades, there are some substantial criticisms of changes which would have the potential to significantly affect the rights of carriers, businesses and consumers, and which could on no account be considered to merely reflect the updating of language. Much more work needs to be done on this Bill should the proposed revision proceed.

4.5 In particular, there appears to be a lack of understanding of the commercial realities of carriage: eg see my comment below on proposed s 248. The revision of the CoGA, should it continue, has such a significant ability to change the law that no matter how pure the motives, it should at least be separated out and sent to Select Committee for public submissions. The risk profile is high. I strongly doubt whether in such a large Bill all changes of this kind would be identified.

4.6 Please note an important point: the CoGA currently works. It has a somewhat ancient history, being derived from common law principles that have underpinned carriage risks for centuries, if not millennia. The relative lack of case law indicates that it is efficient.

4.7 It is fair to say that like most of the other statutes, the CoGA is not in need of reform for practical purposes**.** But if no-one took the trouble to carry out the exercise I carried out (limited in scope to just 8 sections) these changes would have happily progressed into New Zealand statute law. It would appear that if indeed the language of the CoGA were considered worth updating, it would be necessary to carry out a very careful and complete review of the

implications. This indicates that it should at least go to Select Committee. And if there is to be no substantive change, what is purpose of such an exercise?

4.8 I point out that if the changes were to be made, it is likely that this will prove costly for the carriage industry, the legal profession (although for litigators there might well be counterbalancing benefits), and therefore consumers. These costs should be taken into account.

5. Another high risk "revision": the Sale of Goods Act 1908

5.1 Finally, I would point out that the other high-risk statute in the revision set is the Sale of Goods Act 1908. It is an "oldie but goodie" which implies terms into the contract of sale (not surprisingly, as it was carefully drafted to follow good sales practice). Its language is by no means archaic. The Sale of Goods Act implies terms into the sale contract in the absence of specific terms addressing the same points.

5.2 The Sale of Goods Act's provisions are central to commercial and private life in New Zealand: it is the Sale of Goods Act which sets the rights of the parties in the sales contract **at all times** where there is no written contract, including where goods are purchased over the counter at a supermarket. Its post-supply provisions address the parties' rights a range of circumstances which happen intermittently, which are certainly not obvious in an oral contract of sales, but which are called into play in dispute resolution.

5.3 The Sale of Goods Act is central to the New Zealand economy. It has a lengthy history: like the Carriage of Goods Act 1979, it is based upon a careful study of what actually happens in real life trading. Any revision to this Act which changes the wording of key sections has the potential to significantly disrupt settled case law and to require new case law (see note in paragraph 3.4 above). And of course new case law is required from time to time in any case, as trading mechanisms change.

5.4 The fact that the conditions and warranties of the Sale of Goods Act have been replaced by the statutory guarantees of the Consumer Guarantees Act in sales of consumer goods should not distract us from the point that it is still the Sale of Goods Act which sets out other rights. For example, it implies into the contract of sale the consumer's obligation to pay, and the retailer's obligation to hand over possession of the goods once paid. Changes to the Sale of Goods Act would have a severe impact the New Zealand economy.

6. Conclusion

6.1 This submission addresses the potentially serious consequences of carrying out revisions on those statutes which are key to the New Zealand economy. It is difficult to assess whether rewording will generate a change in the interpretation of the statutes, but on the tiny sample checked, this would appear to be likely.

7. Please consider this submission carefully. Feel free to contact me if you have any questions.

Yours sincerely

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CARRIAGE OF GOODS ACT AMENDMENTS: REVISION Check		
Section	**Comments**	**Suggestion**
240	*Check that this does happen*	
240 (e)		Insert “to” between “payable and” and “exercise”
241/2	These would be better combined into a single section to improve clarity of analysis	
242(1)(c), (4)	“any other State” unclear without analysis and referral to definitions in (f).	Revert to previous wording: s 4(2)(a). This gives a complete picture.
243	Agree with change	
244	“actual carrier” definition is difficult wording. Former wording distinguished clearly between the whole carriage or any part of the carriage	Suggest adding “whole” or “entire” eg “for the purpose of performing the entire carriage, any stage..”.
	“carriage”: refer to “carry”	
	“carrier”	
	“Checked baggage”	Delete the word “check” which has no current usage: “form of receipt” or just “receipt” is better
	“goods” – in Sale of Goods Act and other statutes includes software.	Either exclude software or refer to tangible goods.
245	Agree with “unit of measurement” change in 245(1).	
245(2)	This amendment changes the scope of “unit of goods” significantly. Eg see *Wolters Cartage* case [1993] BCL 403 (CA) which would have had a different outcome under this definition.	S 245(2) should refer to subs (1)(a) only: bulk freight.
246	All of these are subject to the inherent vice etc provisions: see s 14 CoGA	Please amend to include
247	Re note: s 8(3) applies only where there is not a label? No. S 8(2) is very specific. It gives the safe harbour. Eg see use of “deemed” in s 8(2) and “purport” in s 8(4). S 8(2) is subject to s 8(3) inter alia.	It’s limited carrier’s risk if it isn’t one of the others. That is the default provision.

CARRIAGE OF GOODS ACT AMENDMENTS: REVISION Check		
Section	**Comments**	**Suggestion**
247(2)	This makes sense. Maybe should be a separate section after 251 or at end of s 246.	
248	Agree with "prominent" which covers online contracting as well. But you have "additional cost": actually, it is a reduction in cost for "owner's risk": see CoGA s 8(9)	Replace "additional cost" with "difference in cost".
249	Do you want to update "adduce"?	
250(b)	See s 248 comment	Replace "under" with "as set out in", also as for s 248.
251	See 248, 250(b)	Replace "additional cost" with "difference in cost" in each case.
	The former s 7 (now s 288) should be here. It applies to contracts of carriage between consignor and contracting carrier as well as contracts between carriers.	
253	Disagree with exclusion of reference to former s 7. CoGA s 8(4) applies to contracts which don't have specific wording. They then become "limited carrier's risk".	