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The Law Society
of New South Wales

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Direct Line: 9926 0209

11 April 2005

Ms. Joanne Towner
Secretary
Standing Committee on Legal & Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms. Towner,

Re: Harmonisation of Legal Systems

Thank you for your letter of the 28th February 2005 seeking the views of the Law Society of NSW on the Terms of Reference to the Legal and Constitutional Affairs Committee on the harmonisation of legal systems.

I **enclose** for your information the comments of the Litigation Law & Practice Committee of the Law Society of NSW on the Terms of Reference. I note that submissions are required by the 8th April 2005 and I apologise for the delay in providing these submissions.

Yours sincerely,


John McIntyre
President

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Litigation Law & Practice Committee

Harmonisation of Legal Systems Relating to Trade and Commerce

Submission to the House of
Representatives Standing Committee on
Legal and Constitutional Affairs

April 2005

Harmonisation of Legal Systems Relating to Trade and Commerce

**Submission by
the Litigation Law & Practice Committee
to
the House of Representatives Standing Committee
on Legal and Constitutional Affairs**

The Litigation Law and Practice Committee of the Law Society of New South Wales submits that the task for the Legal and Constitutional Affairs Committee, to inquire and report on the harmonisation of legal systems relating to trade and commerce, should be to focus on trade and commerce rather than on just identifying the differences between legal systems. Laws and systems that hinder trade and commerce could then be identified from that perspective rather than trying to identify problems initially from a legal perspective. It may be better to remove laws rather than retain them in their current form with minor changes to harmonise them.

If this focus is not accepted, it is submitted that the Committee should also inquire into the institutions established to administer the laws in each jurisdiction. The administration of laws is an important factor where there are differences despite apparent uniformity of the laws they administer. Also, the process of interpreting laws across jurisdictions needs to be enhanced by better drafting of laws for consistency of terms, expressions and constructions to allow for their easier application in trade and commerce.

The concept of trade and commerce needs definition as it has a wide meaning and can apply to many circumstances including illegal or improper activities.

Harmonisation of laws and legal systems

The notion of harmonisation can be misleading as it does not express the intent of the proposed process to provide consistency in laws and their administration by the different jurisdictions and legal systems. Persons involved in trade and commerce require certainty in laws and legal processes so they can expend their resources in the operation of their businesses. They need fewer burdens to be imposed by administrative processes in applying the law for compliance. They need better assistance from government agencies rather than be threatened with penalties and sanctions. Also, processes for dealing with conflicts need to be efficient and timely to avoid unnecessary costs. Better resources need to be given to these processes to achieve improved outcomes for trade and commerce.

The *Background Brief* (Legal and Constitutional Affairs Committee, February 2005) recognises the different processes needed for examining the differences in laws to identify a path for making legal processes that do not adversely hinder trade and commerce across Australia and New Zealand. The approach stated in *Closer Economic Relations: Background Guide to the Australia New Zealand Relationship* (Department of Foreign Affairs and Trade, February 1997) for dealing with the harmonisation of laws between Australia and New Zealand is a sensible one. The concentration of resources to deal with the differences

increasing transaction and compliance costs in trade and commerce is more economic than attempting to make the relevant laws identical.

Uniform approaches to specific laws

The list of particular areas of laws identified in the referral to the Legal and Constitutional Affairs Committee can be misleading for the inquiry. The focus on these areas of law would not necessarily produce more efficient processes and procedures for trade and commerce. Differences between laws of the jurisdictions in Australia and New Zealand may sometimes assist trade and commerce rather than hinder it. The impact of different legal approaches may not adversely affect trade and commerce. In some instances they may assist it in order to give confidence to other parties such as consumers and even promote integrity in dealings under trade and commerce.

The task of identifying differences in laws and legal systems could be expensive and possibly unproductive.

Uniform approaches to legal systems

The legal systems of jurisdictions within Australia have been undergoing change, with approaches to uniform court rules and procedures. The Uniform Court Procedures of Queensland and the recent Civil Procedure Bill 2004 (NSW) are making changes to streamline court procedures. This change will benefit trade and commerce along with other persons using the court system.

Harmonisation between jurisdictions requires different approaches

Harmonisation of Australia's laws across jurisdictions and internationally with New Zealand's laws involves different processes. The cross-jurisdictional harmonisation of Australia's laws is fundamentally constitutional whereas the harmonisation of laws between Australia and New Zealand involves international law considerations including international law processes.

The lack of harmonisation within Australia's legal system is constitutionally based in history. The inability of Australia's federal system of government to harmonise laws across all jurisdictions is not new. The recent experience resulting in the conferral of the corporations' power to the Commonwealth demonstrates the complexity of achieving harmonised laws for corporations. The arrival at the *Corporations Act 2001* (Cth) took many years and processes including the former uniform companies' code and national scheme law. The fundamental constitutional arrangements between the Commonwealth and the States need to be dealt with before a common consensus can be achieved to rationalise all laws regulating corporations, commerce and trade. The referral of powers by the States can be conditional as shown by the conferral of the corporations' power. The 5 year period (now extended for a further period to 2011 by the Ministerial Council for Corporations) can affect the legal basis for corporations and create risks for them due to the conditional arrangements.

Harmonisation of the drafting of laws across Australia

To achieve a more consistent approach to harmonisation of laws across Australia it is suggested that the Commonwealth, State and Territory Attorneys-General participate in a forum to make the drafting of laws more consistent. While parliamentary draftspersons meet

to discuss legislative drafting techniques, there is a need to formalise a consistent approach to drafting. The consistency needs to not only deal with legislation in the parliament, but also with subordinate legislation and other legal instruments promulgated by the legislature and the executive government.

Harmonisation through coordination of laws

The process of harmonisation would be better aided by coordinating laws across Australia and with New Zealand. This would involve bringing together in one place the range of laws applying in each jurisdiction. Each government in Australia maintains a directory of laws for their jurisdiction which are easily accessible using the internet.

A better approach would be linking all websites and databases in a single website or a website that connects all relevant laws across Australia and New Zealand. The linkage would be accessible by subject-matter, particular word search or other preferred mechanism to allow for immediate comparisons across all jurisdictions. This approach would not only identify the differences in laws across all jurisdictions but also regulatory gaps, over-regulatory provisions, legal structures, differences in expressions and legal drafting. Methods of electronic database interrogation would make this type of comparison easier and the system would become a mini-internet on Australian and New Zealand laws. Each jurisdiction would maintain the database of laws but make this available for the coordinated website where laws of all jurisdictions can be viewed simultaneously. It may be the case that this task could be privatised, corporatised or managed by a particular government agency assigned the task.

The coordinated website could also contain judgements of courts, tribunals and other legal opinions such as advisings and rulings on matters, second reading speeches, explanatory memoranda that can be linked to specific statutory provisions to assist in the processes of interpretation and application.

Harmonisation and globalisation

Trade and commerce implies cross-border activities and, in Australia's context, trade between the States and Territories. While the latter is intended by the drafters of the Commonwealth Constitution to be free, experience has shown that legal structures have impeded this intention. Through freeing of Australia's economy by reducing import restrictions and exposing financial and other markets to world trade and commerce, the impact of globalisation is being realised. Unimpeded trade and commerce requires transparency to operate effectively for Australia's national interests. This includes any process where decisions are made about the Australian economy such as determining the level of interest rates. Also, rigidities in the structure of industries such as the financial industry (including banking and insurance) can retard effective trade and commerce. These processes and structures are supported by laws and legal systems that need to be reviewed. The laws and policies propping up inefficient mechanisms and measures in some areas of the Australian economy need to be reviewed to not only harmonise them but to prevent them from making differences in laws in other areas.

As the impact of globalisation gathers momentum, issues for harmonisation of laws with foreign laws will become more apparent. This is already occurring in relation to laws regulating corporations and financial markets including insolvency laws.

Arguments against harmonisation

The pursuit of harmonisation of laws could meet with opposition based on constitutional grounds. This could be a factor in determining the extent to which greater harmonisation is desirable or achievable. It could be seen as a process to "federalise" laws across Australia where those laws affect trade and commerce matters. This would be seen as a subtle mechanism to obviate the resort to section 51(xxxvii) of the Commonwealth Constitution.

The debate is over the separation of powers under Australia's federal system of government. It could be argued that harmonising laws would deny the opportunity of citizens to the security presented by the two levels of government, as the two levels of government under Australia's federal system would enact laws that are relevant to the circumstances of the citizens in the respective jurisdictions.

For harmonisation of Australia's laws to be effective as envisaged, it is necessary that uniformity of laws does not ignore the local requirements that each State law regulates. While a more consistent approach may assist trade and commerce it should not ignore peculiar circumstances that apply in the States due to essential differences of time, climate, weather, terrain or other feature.

Further inquiry of legal systems

In addition to inquiring into laws and legal systems, administrative arrangements and the application of laws to factual situations need to be examined as they can hinder trade and commerce. The administrative arrangements can be functions of public organisations, private entities charged with powers to administer particular laws, administrative appeals processes including reviews of administrative decisions.

A further aspect that should be considered by the inquiry is the process by which laws are interpreted. As only a small number of matters are determined by the courts the majority of matters involving legal interpretation are made by corporate officers and their advisers, government officials and those involved in dispute resolution processes. This task would be made more uniform if laws were drafted better to convey the subject-matter in a clearer manner and avoid confusion that often arises from the rapid drafting of legislation and the lack of Parliamentary debate on issues. Also, lack of broader community consultation and short deadlines for comment often contribute to poorly drafted legislation that causes confusion.

Laws such as tax laws that have a very significant, direct impact on trade and commerce need to be rationalised. The apparent concentration on prescriptive measures in legislation rather than resorting to principle based expression, has contributed to the confusion in the business community as to how to apply tax law to their business arrangements and activities. The recent initiatives of the Australian Taxation Office, as shown by *Strategic Statement 2003-05* and *Compliance Program 2004-05*, to separate responsibilities for making laws and their administration and improving operational systems to make it easier for people to meet their tax obligations, should be extended to other areas of lawmaking and administration. These initiatives make the administration of tax laws more transparent and taxpayer corporations and persons involved in trade and commerce are better able to plan their business operations while understanding their responsibilities for the administration of tax laws.

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