ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS: INQUIRY INTO HARMONISATION OF LEGAL SYSTEMS RELATING TO TRADE AND COMMERCE

1 INTRODUCTION

The world that Australia faces today is vastly different to the one at the time of Federation. Technological advances have resulted in greater and speedier access to information and ease of communication and travel. With these advances have come increased expectations from businesses and individuals that they be able to travel across State and Territory borders with ease and with little impact on their own circumstances. Yet, the very nature of Australia's federal system, with powers split between the Commonwealth and the States and Territories, has meant that over time each jurisdiction has developed its own law and its own approach on certain legal issues. This has resulted in a patchwork of, at times, confusing and contradictory laws with costly duplication of regulation and administration.

At Federation, there were valid arguments that justified a local approach on many legal issues. However, many of the arguments, in a society where business transactions—intrastate, interstate and international—are conducted nearly instantaneously, are no longer tenable. Businesses need to be able to operate in each State and Territory on an equal footing. Growth both domestically and internationally will be impeded while regulatory differences remain. Further, for the individual, it is no longer acceptable that an action in one State or Territory will lead to different impact on that individual than if that action had occurred in another jurisdiction.

It is appropriate that the Commonwealth, States and Territories work together to harmonise laws in particular areas of legal concern. This is not to say that all laws need to be uniform for uniformity's sake. However, in many cases, especially where there are impediments to interstate or international trade, these should be removed. Also, consideration needs to be given to increased trans-Tasman cooperation and the possibility of harmonising some of our laws with New Zealand to benefit trade.

This submission is divided into nine parts. Part 2 examines the constitutional mechanisms for achieving harmonised laws. Part 3 looks at the forums in the Attorney-General's portfolio for developing harmonised laws with Australian jurisdictions and New Zealand. Part 4 examines areas of civil procedure and whether they can or should be harmonised. Part 5 looks at personal property securities law reform, while Part 6 explains current aspects of information law. Part 7 argues for more uniform regulation of the legal profession. Part 8 examines current defamation law reform proposals. Part 9 looks at some other areas of the law that affect individuals.

2 MECHANISMS FOR ACHIEVING HARMONISATION

The notion of 'harmonisation' is quite broad, but at its core it is about minimising differences and eliminating obstacles where that is desirable to achieve a national, or at least multi-jurisdictional, objective. Any form of harmonisation requires inter-governmental cooperation. This means that the fundamental limit on achieving harmonisation is the capacity of governments to agree about the need for inter-jurisdictional regulation and the desirability of a particular form of regulation.

Harmonisation of laws or approaches to cooperative regulation may take many forms. The history of corporate regulation in Australia provides a graphic illustration. In 1961, States and Territories passed mirror legislation and maintained separate administrations. In 1981, this progressed to a scheme involving a single federal administrator, until the commencement of the 'applied laws'

scheme in 1990. Finally, in 2001, the States provided constitutional references and now Commonwealth legislation operates on a truly national basis.

As each of these arrangements involved a combination of Commonwealth, State or Territory legislation to deal with matters of national importance, each can accurately be described as a 'cooperative scheme'. The expression of 'cooperative scheme' is often used, however, including in the Committee's background brief, to describe particular forms of legislative cooperation. This submission will address the four kinds of legislative arrangements identified by the Committee in its background brief. It will also canvass other arrangements where relevant to the discussion.

2.1 Co-operative schemes

The legislative mechanism for cooperation can vary greatly. However, two forms that deserve particular attention are those sometimes described as 'applied laws' and 'complementary laws'.

2.1.1 Applied laws approach

The 'applied laws' approach was the basis for the Corporations Law which operated between 1 January 1991 and 14 July 2001. Under the scheme, the 'Corporations Law' was contained in a Commonwealth Act enacted for the Australian Capital Territory. Each State and the Northern Territory then passed legislation 'applying' the Australian Capital Territory law in its own jurisdiction. The effect of this was that the Corporations Law operated as a national law even though it was applied separately in each State and Territory as a law of that jurisdiction.

The Corporations Law was administered by the Australian Securities and Investments Commission which was itself established by separate Commonwealth Act. Each State and the Northern Territory, once again, applied that Act in its own jurisdiction and, in addition, conferred related functions on the Commonwealth Director of Public Prosecutions and the Australian Federal Police. The scheme was supported by an intergovernmental agreement—the Corporations Agreement—that required consultation and, in some cases, voting on any proposed amendments to the Corporations Law and related scheme legislation. Accordingly, amendments of the Commonwealth law made by the Commonwealth Parliament were automatically effective in the States and Territories by virtue of the applied laws regime.

2.1.2 Complementary laws approach

Examples of the 'complementary laws approach' are the current gene technology[1] and human embryo[2] schemes. In these schemes, the Commonwealth legislation creates a national regulator with Commonwealth powers. The States, and sometimes the Territories, then pass complementary laws topping-up the regulator's powers with respect to State matters. By having the States confer State functions and powers, the federal regulator is not impeded by Commonwealth constitutional limitations which might otherwise prevent, or put at risk, national (or inter-jurisdictional) administration. There have been an increasing number of these schemes over the last few decades.

[1] See the *Gene Technology Act 2000* and associated State and Territory provisions.
[2] See the *Research Involving Human Embryos Act 2003* and associated State and Territory provisions.

2.1.3 The Constitutional limitations

In recent years, the High Court has identified two basic constitutional limitations which must be taken into account in the operation of all cooperative schemes involving the Commonwealth. The first limitation, identified in *Re Wakim; ex parte McNally* (1999) 198 CLR 511, affects the capacity of federal courts to participate in some co-operative arrangements. The second, identified in *R v Hughes* (2000) 202 CLR 535, affects the capacity of Commonwealth officers and authorities to participate in some arrangements. These limitations are technical and, in many cases, need not present a permanent impediment to cooperation, harmonisation or uniformity. They may, however, significantly contribute to the complexity of a scheme.

2.1.3.1 *Re Wakim*

The decision in *Re Wakim* examined the 'cross-vesting' scheme established in 1987 by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* and by reciprocal legislation in the States and Territories. The purpose of the legislation was to establish a system of cross-vesting of jurisdiction between federal, State and Territory superior courts to overcome uncertainties that exist as to the jurisdictional limits of those courts. Broadly, the system was intended to allow litigants to institute proceedings in a superior court anywhere in Australia without regard to jurisdictional limits, subject only to the possibility that the proceedings would be transferred to a more appropriate court.

The system was welcomed as the answer to arid and inconvenient jurisdictional debates which had plagued litigants, practitioners and courts. A separate cross-vesting scheme was subsequently established for matters arising under the Corporations Law scheme.

In *Re Wakim*, however, the High Court decided that the conferral of State jurisdiction on federal courts under the general and corporations law cross-vesting arrangements is not permitted by the Constitution. The Court decided that, as section 76 of the Constitution is the exclusive source of the power to confer original jurisdiction on the High Court, the jurisdiction that can be conferred on the federal courts under section 77 is similarly limited to the heads identified in sections 75 and 76. On that basis, no other polity can confer jurisdiction on a federal court.

The practical effect of the decision is that disputes under co-operative schemes comprised by State laws or involving State officers generally cannot be determined by a federal court. That is so even though the State laws in question may be identical. The role of federal courts under such schemes is constitutionally limited to review of decisions of Commonwealth officers and authorities.

In response to *Re Wakim*, the Commonwealth passed legislation – the *Jurisdiction of Courts Legislation Act 2000* – to restore jurisdiction in the limited area of review of decisions of Commonwealth officers under co-operative schemes. The States also enacted legislation to validate past decisions of federal courts made in reliance on cross-vested State jurisdiction. However, the special cross-vesting arrangements under the Corporations Law scheme were regarded as a fundamental element of the fully integrated system of State, Territory and federal adjudication.

2.1.3.2 *Hughes*

In *Hughes*, the case focused on the conferral of State functions and powers on Commonwealth officers and agencies under the Corporations Law scheme. While the Court appeared to confirm that there is scope for co-operative arrangements, it held that the exercise by Commonwealth authorities of duties given by State laws will not be valid unless they are also within the scope of Commonwealth legislative power.

In other words, the High Court held that it may not always be open under all kinds of co-operative schemes to rely on State power to fill gaps in Commonwealth constitutional power. As the limits of Commonwealth power are uncertain, the decision raised questions about co-operative schemes generally and had particularly deleterious consequences for confidence in the Corporations Law scheme.

Remedial action to address *Hughes* problems had to be taken and several options were examined. For the Corporations Law scheme, the States referred power to the Commonwealth so that it could pass a single act with national application. This is discussed below.

For other schemes, remedial action has involved the passage of legislation designed to reduce the *Hughes* risk to an acceptable level in each case. Generally, the legislative action involves prospective and retrospective (or 'validation') elements. The prospective aspect involves legislation (either State or Commonwealth) to put the scheme on a secure foundation for the future. Prospective action in relation to co-operative schemes other than the Corporations Law scheme has varied from scheme to scheme, depending on the nature and operation of those schemes. Even though the *Hughes* decision may have implications for a particular scheme, responsible agencies and Ministers may conclude that it has no practical ramifications, and that remedial action is not warranted.

The validation aspect involves State legislation giving actions or decisions of Commonwealth authorities or officers already taken under the scheme (and at risk following *Hughes*) the same force and effect under State law that they would have had if they had been made or done by an authorised State body or officer under State law. 'Generic' validation legislation has been enacted in all States. The legislation is intended to cover past actions of a Commonwealth officer or authority taken pursuant to a co-operative arrangement once it has been identified as vulnerable.

2.2 Model legislation—the 'template model' or 'mirror' legislation

The template model is another form of cooperative scheme. However, unlike the complementary laws or the applied laws mechanisms discussed above, it does not involve the conferral of State powers on Commonwealth bodies or vice-versa. It therefore does not raise the constitutional limitations identified in *Hughes* and *Re Wakim*. Instead, the States and Territories implement identical legislation in their own jurisdictions. This results in eight separate, but identical, regulatory structures. The legislation can include clauses that recognise the authority of another jurisdiction's regulation. This type of scheme can also be underpinned by an intergovernmental agreement that requires agreement from other jurisdictions before amendments can be made to the scheme.

An example of this type of scheme is the current National Legal Profession project discussed below. The States and Territories have committed to implementing model provisions that, once passed, will ensure nationally consistent regulation of the legal profession.

However, one of the limits on this type of scheme is the risk of the scheme unravelling with the lapse of time. Even if underpinned by an intergovernmental agreement and with Ministers committed to introducing a model bill in their own State, by the time the provisions have been through State and Territory Cabinets and Parliaments differences are likely to emerge and the legislation is likely to diverge.

2.3 Reference of powers

Another legislative arrangement to achieve harmonised laws is for the States and Territories to 'refer power' on a particular issue to the Commonwealth. Subsection 51(xxxvii) of the Constitution provides for State parliaments to 'refer' matters to the Commonwealth Parliament so that the Commonwealth may make laws with respect to those matters which 'extend' to the referring States. In essence, if all States and Territories refer power, this allows the Commonwealth to pass a single law with national application. This mechanism can also be regarded as a cooperative scheme as it still requires State legislation (to refer the power) and Commonwealth legislation. It is a much simpler mechanism for harmonising laws. It does not rely on a complex patchwork of complementary Commonwealth, State and Territory laws and has significant advantages of administrative efficiency. It is also easier for those to whom the law applies.

The current corporations scheme is an example of this type of mechanism. The scheme depends on two-fold references by each State. The first reference ensured that the Commonwealth had the power to enact the text of the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. The second reference—known as the amendment reference—ensures that those Acts may be amended from time to time by the Commonwealth Parliament, so long as those amendments are laws with respect to the formation of corporations, corporate regulation, or the regulation of financial products or services.

The State legislation referring power contains a sunset provision which terminates the reference after five years unless there is an extension. Commonwealth and State Ministers agreed last July that the references should be extended for a further five years. The scheme is also underpinned by an intergovernmental agreement, the Corporations Agreement, which requires the agreement of the States before some amendments can be made to the Commonwealth legislation and consultation in other cases.

The benefit of this type of scheme is that it is not affected by the *Hughes* and *Re Wakim* constitutional limitations. The references given by the States to support Commonwealth laws involve additions—for specific purposes—to Commonwealth legislative power. This means that disputes under Commonwealth laws relying to some extent on State references remain matters within federal jurisdiction and can be determined by federal courts. As cross vesting arrangements continue to vest federal jurisdiction in State and Territory courts, disputes may also be determined in those courts. Further, the administration of the laws does not involve any direct reliance on State legislation.

2.4 Constitutional amendments

It is in theory possible to amend the Constitution to give the Commonwealth additional powers that would make some forms of legislative co-operation unnecessary. It is also, in theory, possible to amend the Constitution to address the implications of *Hughes* and *Re Wakim* for co-operative schemes. However, any proposal to amend the Constitution to address the constitutional limits of the Commonwealth's capacity to achieve harmonisation of laws is bound to be relatively technical in nature. It is therefore unlikely to attract widespread support without extensive intergovernmental, and bipartisan, technical consultation. Even given such consultation, there is no guarantee that a technical proposal with broad support could be developed.

There is also the very significant expense and uncertainty of constitutional referenda to consider. Amendments to address the constitutional limits of Commonwealth constitutional power would be

technical and therefore unlikely to engage public attention. Bipartisan support is no guarantee of success. Further, a proposal to confirm the Commonwealth's constitutional power to participate in co-operative legislative schemes (the 'interchange of powers' proposal) was defeated at referendum in 1984. More generally, proposals to expand Commonwealth constitutional powers have a very poor record at referendum.

Finally, it should be noted that constitutional amendments to address the constitutional limitations identified in *Hughes* and *Re Wakim* would not assist in overcoming the need for a proliferation of complex arrangements involving Commonwealth, State and Territory legislation to achieve co-operative objectives – objectives which may be achieved more simply under the mechanism already provided by subsection 51(xxxvii) of the Constitution.

2.5 Harmonisation mechanisms with New Zealand

Any process to harmonise laws with New Zealand may begin with some formal agreement between Australia and New Zealand. This agreement could take the form of a treaty.

The Australian Government consults with the States and Territories during any treaty making process. This consultation process is detailed in the *Principles and Procedures for Commonwealth-State Consultation on Treaties* adopted in 1996 by the Council of Australian Governments and available at <www.coag.gov.au>.

The consultation mechanisms include the Treaties Council, the Standing Committee on Treaties (SCOT) and Ministerial Councils. The Treaties Council consists of the Prime Minister, Premiers and Chief Ministers. It considers treaties and other international instruments of particular sensitivity to the States and Territories. SCOT consists of senior Commonwealth and State and Territory Officials who consider the international treaties that Australia is currently negotiating or which are under review. During SCOT, State and Territory representatives have the opportunity to seek further details, offer views and comments and flag those matters on which they wish to be consulted or to improve the consultative mechanism. Commonwealth/State and Territory Ministerial Councils are another fora where detailed discussions of particular treaties and other international instruments take place.

In addition, where available, information on treaty negotiations will be provided to the States and Territories and, in appropriate cases, that the State and Territory Governments may be represented in treaty negotiations. Further, many international treaties need State and Territory cooperation for their domestic implementation and, accordingly, the Commonwealth and State and Territories will consult in an effort to secure agreement on the manner in which the obligations incurred should be implemented.

3 FORUMS FOR PURSUING HARMONISATION

3.1 The Standing Committee of Attorneys-General

The main forums for pursuing harmonisation of laws are ministerial councils. There are over 40 ministerial councils which facilitate consultation and cooperation between the Australian Government and State and Territory Governments in specific policy areas. The councils initiate,

develop and monitor policy reform in their areas of portfolio responsibility. Information about individual ministerial councils and their portfolio responsibility can be found in the Ministerial Council Compendium which is available on the Council of Australian Governments website <http://www.coag.gov.au>.

The main ministerial council in the Attorney-General's portfolio is the Standing Committee of Attorneys-General (SCAG). Its members are the Australian Attorney-General, the Minister for Justice and Customs (for items that fall within his portfolio responsibilities), the State and Territory Attorneys-General and the New Zealand Attorney-General. Norfolk Island has observer status at SCAG meetings.

SCAG provides a forum for Attorneys-General to discuss and progress matters of mutual interest. It seeks to achieve uniform or harmonised action within the portfolio responsibilities of its members. The types of issues that SCAG considers can be quite varied. In the past they have included references of power, model provisions for a national legal profession, tort law reform, privacy, vexatious litigants and Indigenous justice issues.

SCAG receives assistance on specific matters from the Special Committee of Solicitors-General (particularly in relation to constitutional matters) and the Parliamentary Counsels' Committee which arranges for the drafting of proposed model legislation.

However, even if model legislation is agreed to by all Attorneys-General at SCAG, this does not guarantee that model legislation will be passed by all jurisdictions. Attorneys need to have models approved by their cabinets and passed through parliament. Over the years, this has led to several projects for uniform laws failing after they have been approved by SCAG, including previous attempts at defamation law reform, powers of attorney, evidence law and a model criminal code.

3.2 Trans-Tasman Working Group

While New Zealand is a full member of SCAG, the nature of the forum, with nine (at times competing) Australian views and with most issues only having a limited interest to New Zealand, means it is not effective for developing trans-Tasman uniform legislation. It is often more efficient for the Australian Government to liaise directly with New Zealand. The Australian Government can then consult with the States and Territories to ensure a consistent Australian view is put forward. An example of this type of process is the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement.

The Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement was established as a result of correspondence in 2003 between the Prime Ministers of Australia and New Zealand, the Hon John Howard MP and the Rt Hon Helen Clark MP. They agreed to review existing trans-Tasman co-operation in the field of court proceedings and regulatory enforcement and to investigate the possibilities for improving existing mechanisms in such areas as service of process, the taking of evidence, recognition of judgments in civil and regulatory matters and regulatory enforcement. The Working Group is jointly chaired by a Deputy Secretary of the Attorney-General's Department and a Deputy Secretary of the New Zealand Ministry of Justice.

The Terms of Reference agreed between Australia and New Zealand require the working group to:

> examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings (where those proceedings relate to regulatory matters).
>
> Those arrangements include:
>
> - investigatory and regulatory powers
> - service of initiating and other process
> - taking of evidence, and
> - recognition and enforcement of court orders and judgments (including civil penalties and criminal fines).
>
> The working group will:
>
> - identify any problems that exist with the current arrangements
> - consider a more general scheme for trans-Tasman service of process, taking of evidence and recognition and enforcement of court orders and judgments
> - consider a more general scheme for trans-Tasman co-operation between regulators
> - undertake appropriate domestic consultation, and
> - propose options that may be pursued.

The working group has met twice—in Canberra in June 2004 and in Wellington in November 2004. It has identified a number of issues and is currently developing a draft discussion paper. The working group has received positive comments and cooperation from key government departments and agencies, federal courts, States and Territories and the legal profession. Some of the issues identified as benefiting from harmonised trans-Tasman arrangements by the working group are discussed in greater detail below.

4 CIVIL PROCEDURE

The law of 'civil procedure' across Australia is currently piecemeal. There are eight separate State and Territory systems, with the federal system adding a ninth. This means that industry sectors and businesses that operate nationally have to seek legal advice that covers applicable jurisdictional variations. This is not only costly but can lead to uncertainty in results depending on a particular jurisdiction's approach. It can also encourage forum shopping.

This part examines the main areas of civil procedure that could benefit from a harmonised approach in Australia. Some of the areas would also benefit from trans-Tasman harmonisation and are currently being considered by the trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement.

4.1 Service of proceedings

4.1.1 Australia

Certain procedures relating to service of proceedings have already been successfully harmonised.

An originating process identifies the legal claim that is asserted against a defendant and provides details of the parties to the action. The principal basis of a court's jurisdiction in civil matters is valid service of originating process on the defendant. The Commonwealth *Service and Execution of Process Act 1992* (SEPA) provides for the service and execution, throughout Australia, of process of courts and tribunals, and related procedures. SEPA overrides State law for the interstate service and execution of process and judgments covered by the Act. Amendments are only made to the SEPA where State and Territory agreement has been secured.

Under SEPA, the service of originating process from any State or Territory court is allowed on a defendant across all Australian jurisdictions. Section 15 enables initiating process issued out of any State/Territory court in civil proceedings to be served (without leave) throughout Australia. For interstate service to be effective it must simply meet the requirements for service of initiating process found in the State of issue. In effect, this means that interstate service has the same effect as service in the place of issue. Similar principles apply to criminal proceedings under section 24.

Separate provision is made in SEPA for the service of subpoenas, to allow a subpoena issued in any State or Territory to be served in any part of Australia.

4.1.2 Harmonisation with New Zealand

4.1.2.1 Service of Australian proceedings in New Zealand.

Service of process outside Australia must be authorised under the Rules of Court in which the process is issued. Most of the jurisdictions (High Court, Federal Court and Supreme Courts of each State/Territory except Tasmania) have enacted Rules of Court which allow service in a foreign country. These jurisdictions have similar but not uniform requirements. In some cases, prior leave is required. Service may be authorised for any claim for relief that could be granted by the court had the defendant been served within the jurisdiction.

The jurisdictions also specify the circumstances which create a sufficient jurisdictional nexus to allow service outside Australia. The court can grant leave for service outside Australia for an action that is based on:

- a tort committed within the jurisdiction
- land which is within the jurisdiction
- a defendant who is domiciled or ordinarily resident in the jurisdiction
- a person who is a necessary and proper party to an action begun against a person who was served within the jurisdiction, or
- an injunction that is sought to compel or restrain the performance of any act within the jurisdiction.

There is no Convention in force between Australia and New Zealand relating to the service of documents in civil proceedings. Neither Australia nor New Zealand is party to the Hague

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

At present, a party in Australia who wishes to serve a party in New Zealand with documents issued by an Australian court needs to employ a private agent in New Zealand to serve the documents. Service through an agent does not breach New Zealand law and is not considered by the New Zealand Government to be a breach of its sovereignty. However, the New Zealand Government will not accept requests through the diplomatic channel seeking the assistance of its authorities in serving documents.

4.1.2.2 Service of New Zealand proceedings in Australia.

Australia does not raise objection to the service of process within its territorial jurisdiction by a foreign plaintiff (or an agent acting on behalf of the plaintiff). Foreign process can be served by mail, by a private process server or by other means chosen by a foreign litigant. Requests are also frequently sent through the diplomatic channel to the Australian Department of Foreign Affairs and Trade seeking the assistance of Australian authorities in serving documents pursuant to treaty or as a matter of comity.

4.2 Forum non conveniens rules

4.2.1 Australia

Sections 20 and 21 of SEPA allow a defendant to apply for a stay of proceedings if the court of another State or Territory with jurisdiction is the appropriate court to decide the matters in issue. A list of factors is taken into account including where the parties and witnesses live and the law to be applied. This operates as a disincentive to initiating proceedings in an inappropriate court. This statutory test replaces the *forum non conveniens* rules between Australian States and Territories.

However, section 20 does not apply to a proceeding in which the Supreme Court of a State is the court of issue. At domestic level within Australia, section 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) provides for the transfer of proceedings in federal jurisdiction between a State or Territory Supreme Court, State Family Court, the Federal Court or Family Court if it appears to the court in which the proceeding is pending that 'it is more appropriate that the relevant proceeding be determined by that [other] Court'.

Equivalent State and Territory cross-vesting legislation contains transfer provisions in similar form. However, since the High Court decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, it is clear that the legislation cannot operate to transfer proceedings in State, as opposed to federal, jurisdiction to the Federal Court or the Family Court.

4.2.2 New Zealand

Different transfer and *forum non conveniens* principles apply in the context of international litigation. In recent years, differences between the *forum* rules applied in New Zealand and Australia have led to difficulties in the conduct of trans-Tasman civil litigation.

New Zealand applies the tests stated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (*Spiliada*). Essentially, *Spiliada* requires a court to decline

jurisdiction where it is not the appropriate court to determine the dispute. On the other hand, Australia applies the test adopted by the High Court in *Voth v Manildra Flour Mills Pty Ltd* (1990) 97 ALR 124 (*Voth*). *Voth* requires the court to decline jurisdiction only where it is clearly an inappropriate court to determine the dispute.

These difficulties were highlighted in *Gilmore v Gilmore* (1993) 110 FLR 311. In that case the New Zealand High Court decided (under the *Spiliada* approach) that it was the (more) appropriate court to hear the matter. The Full Court of the Family Court of Australia applied the principle in *Voth* and decided that it was not clearly an inappropriate court.

It should be noted that *Spiliada* lays down more than one test, depending on where the defendant is served.

4.2.3 Comment

The Trans-Tasman Working Group recognises that these differences can lead to inconvenience, expense and uncertainty in trans-Tasman litigation and is developing proposals to address the issue.

4.3 Statute of Limitations

The idea of standardising statutes of limitations has been around for many years. It has been intermittently considered by SCAG and has been the subject of an Australian Law Reform Commission (ALRC) report[3] and a Law Reform Commission of Western Australian Report.[4] There is no doubt that the current state of limitation laws is complex and potentially confusing. However, there is a lack of evidence as to whether reform in this area would warrant the resources that would need to be invested.

4.3.1 Commonwealth limitation periods

The Commonwealth has enacted specific limitation periods for causes of action arising under some of its legislation.[5] While the time limits in these pieces of legislation differ, these differences may be justified on policy grounds. Further, the Department is not aware of problems having arisen from different limitation periods applying in different areas of activity regulated by Commonwealth law.

Where there is no limitation period for a particular cause of action under Commonwealth law, sections 79 and 80 of the *Judiciary Act 1903* provide for State and Territory laws to be picked up and applied as federal law in federal jurisdiction. The effect of section 79 and the decision in *Pfeiffer v Rogerson*[6] (discussed below) is that any court exercising federal jurisdiction in a State or Territory will apply the limitation law of the State or Territory as federal law if that State or Territory law is the law of the cause of action. This may make it more difficult to determine the relevant limitation period in cases which have factual connections with several jurisdictions and where there are different limitation periods for the particular cause of action in those jurisdictions.

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[3] *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation,* Australian Law Reform Commission, 2001.
[4] *Report on Limitations and Notice of Actions,* Law Reform Commission of Western Australia, 1997.
[5] For example, the *Trade Practices Act 1974* and the *Copyright Act 1968.*
[6] (2000) 172 ALR 625.

Greater harmonisation of State and Territory limitation laws would ensure section 79 operated more consistently.

It has previously been suggested that a single federal limitation statute dealing with limitation periods in federal jurisdiction and federal courts would simplify litigation. However, there does not appear to be an urgent need for this. Also, there may be an issue about the Commonwealth's power to enact a limitation law regulating proceedings in federal jurisdiction.

4.3.2 State and Territory statutes of limitations

For actions under contract law, there is already a high degree of harmonisation of State and Territory limitation periods. The limitation period for contract claims in every State and Territory, with the exception of the Northern Territory, is six years and limitation periods are calculated from the date on which the cause of action first accrues.[7] There is more diversity in relation to specialty contracts, which include bonds, contracts under seal, deeds and covenants.

4.3.3 Comment

Greater harmonisation of limitation periods and exceptions providing for extensions of time would seem desirable.

4.3.4 Issues surrounding reform of limitation periods

4.3.4.1 Forum shopping

Historically, the main problem with different limitation periods arose when a case had a factual connection with more than one jurisdiction (with different limitation periods) and there were questions as to when the action could be brought. This also resulted in a certain amount of forum shopping. However, these problems have largely been resolved by the passage of uniform *Choice of Law (Limitation Periods) Act 1993*, which classifies limitation laws as substantive law, and the High Court's decision in *Pfeiffer* which held that the law of the place where a wrong was committed should be applied to all questions of substance.

In some situations opportunities for forum shopping will still arise. The situation arose in *Blunden v Commonwealth* (2003) 203 ALR 189 where a tort was alleged to have been committed in international waters. The High Court held that the limitation law of the forum applied. Greater harmonisation of State limitation periods makes forum shopping less attractive in those cases. Another way to address this problem would be for the Commonwealth to enact a limitation regime of comprehensive application to civil actions pursued in federal jurisdiction. However, where actions are brought in State and federal jurisdiction relying on the same sets of facts, a comprehensive Commonwealth limitation law would not necessarily preclude concern about different limitation periods being relevant to the proceedings.

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[7] See *Limitation Act 1985* (ACT) s11, *Limitation Act 1969* (NSW) s14, *Limitation of Actions Act 1974* (QLD), s10, *Limitation of Actions Act* 1936 (SA) s35, *Limitations Act 1974* (Tas) s4, *Limitation of Actions Act 1958* (Vic) s5, *Limitations Act 1935* (WA) s38, *Limitation Act 1981* (NT) s12.

4.3.4.2 Elimination of injustices

More consistent limitation periods would prevent inequality created by reliance on State and Territory laws where parties in the same situation may be treated differently by virtue of the different operation of state limitation statutes. While it is uncertain how many cases fall into this category, this could be an issue, for example, in class actions for product liability claims where the relevant failure to warn occurred (and hence the tort was committed) where each plaintiff purchased or consumed a product.

4.3.4.3 Benefit to trade and commerce and the consumer

While it is difficult to assess businesses would be better able to assess risks of potentially successful civil actions against them. Also, they may be able to reduce costs for enforcing their legal (mainly contractual) rights. Consumers may also benefit from greater certainty of limitation periods under consumer protection and other laws.

4.3.4.4 The complexity of a review

In its report, the ALRC considered that uniform federal, State and Territory legislation on the limitation of actions would be a desirable means of providing certainty and equality in this area of the law. It recommended that 'the Attorney-General order a comprehensive review of this area for the purpose of determining the details [of a new federal limitation statute].'[8] The Government is considering the recommendations made by the ALRC.

Any review of federal and State and Territory limitation laws would also need to consider laws which provide criteria and procedures for extending time limits and the interaction of federal, State and Territory procedures. Given the range of different causes of actions which would have to be examined, achieving greater harmonisation of limitation periods would involve considerable work.

4.3.5 New Zealand

Consideration is being given by the Trans-Tasman Working Group to whether limitation periods in Australia and New Zealand might be candidates for uniformity. However, as there is as yet no Commonwealth legislation standardising limitation periods in civil or any other claims, it would seem too early to tackle the task of standardisation of limitation periods in trans-Tasman court proceedings.

4.4 Evidence Law

4.4.1 Australia

4.4.1.1 Existing legislation

Uniform evidence legislation is an important and achievable aim and has been an aspiration for many years. In the early 1990s, SCAG developed a proposal for a model Evidence Act. In 1995, the Commonwealth and New South Wales passed nearly identical legislation. The Commonwealth *Evidence Act 1995* applies in federal courts and the Australian Capital Territory. Since then,

[8] *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation,* Australian Law Reform Commission, 2001 at 537

Tasmania and Norfolk Island have also passed parallel, but not identical, legislation. These Acts are collectively known as 'the uniform Evidence Acts'. The other jurisdictions continue to rely on a combination of existing statute, common law and applicable rules of court. However, the Victorian Government has now announced its intention to develop a similar Act.

The successful conclusion of the Commonwealth and NSW Evidence Acts may be attributed in part to their limited scope. At present, the uniform Evidence Acts are largely (but not entirely) concerned only with court (and similar) proceedings.

Nevertheless, the differing needs of the partners to the uniform legislation have resulted in departures by individual jurisdictions. In the case of the uniform Evidence Acts, a key concern has been to maintain the central numbering system so that relevant provisions are identified by the same section numbers in all participating jurisdictions. This is a way of helping users understand the common scheme. A comparison of the various Acts shows there are a number of additional provisions which appear in various jurisdictions. A number of participants in the uniform Evidence Acts have incorporated variations in their legislation even from commencement.

The process for amendment of the uniform Evidence Acts is also complicated by the need for wider consultation on the part of the Commonwealth than States. This usually means that NSW can achieve an amendment to the NSW Evidence Act much faster than the Commonwealth. The Commonwealth has so far taken the view that any amendment to the Commonwealth Act requires consultation with all participating jurisdictions and action may be delayed where a participating jurisdiction does not favour the amendment. Furthermore, the Commonwealth Act still applies to the ACT—pending the ACT enacting its own law—so the Commonwealth has a particular responsibility for consultation with the ACT in relation to all amendments.

Both the Commonwealth and NSW have a range of special evidence provisions which are not in their Evidence Acts. Under the *Judiciary Act 1903* matters of federal jurisdiction heard in State and Territory courts normally attract State and Territory evidence law respectively. Most criminal matters use the evidence law of the jurisdiction in which the matter is tried and not the *Evidence Act 1995* (Cth). In addition, if there are special evidence provisions in other legislation, these will apply. For example there are some special provisions in the *Crimes Act 1914* and in the *Family Law Act 1975* and Family Law Rules.

4.4.1.2 Law Reform Commission Reviews

The uniform Evidence Acts are currently the subject of several Law Reform Commission inquiries.

On 12 July 2004, the Australian Attorney-General referred the operation of the *Evidence Act 1995* (Cth) to the ALRC. The NSW Law Reform Commission has been given nearly identical terms of reference. The two Commissions are required to work together with a view to making agreed recommendations and focus on possible improvements to the operation of the Commonwealth and NSW Evidence Acts. They are also to identify and address 'any defects in the current law…with a view to maintaining and furthering the harmonisation of the laws of evidence throughout Australia.' The Commissions are required to consult with Tasmania and the ACT. In December 2004 the ALRC released Issues Paper 28, *Review of the Evidence Act 1995*, inviting public comment. The report is due by 5 December 2005.

On 22 November 2004, the Victorian Attorney-General asked the Victorian Law Reform Commission to review the *Evidence Act* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the uniform Evidence Act into Victoria.

On 31 March 2005, the Queensland Attorney-General issued terms of reference to the Queensland Law Reform Commission asking it to become involved in the ALRC-led review of the uniform Evidence Acts, with an eye to promoting greater harmonisation of the law in the area.

4.4.2 New Zealand

Existing international cooperation on evidence law focuses on the obtaining of evidence, rather than on the issue of harmonisation of the evidence laws. Much of it is not specific to cooperation with New Zealand.

4.4.2.1 Existing legislative framework

Australia's scheme for mutual assistance in criminal matters is about providing and requesting assistance in criminal investigations and prosecutions, and the restraint and confiscation of the proceeds of crime. Under the *Mutual Assistance in Criminal Matters Act 1987* (Cth), Australia can request assistance from and give assistance to any other countries, including New Zealand, subject to the provisions of the Act. The types of assistance covered by the scheme include arranging for:

- evidence to be taken from witnesses
- production of documents
- execution of search warrants to seize documents and items, and
- registration and enforcement of foreign proceeds of crime orders.

Use of coercive powers under this Act must be authorised by the Attorney-General or the Minister for Justice and Customs.

The *Mutual Assistance in Business Regulation Act 1992* (Cth) was established to enable prescribed Commonwealth regulators to assist foreign counterpart agencies in business regulatory investigations. The first tier requires the relevant Commonwealth regulator to conduct an initial assessment of a request received from a foreign regulator and to decide if the request should be declined or referred to the Attorney-General. The second tier requires the Attorney-General to decide if the request should be granted or refused. If the request is granted, the Attorney-General authorises the Commonwealth's regulator to arrange for information to be obtained, documents to be produced, or evidence to be taken.

As far as cooperation in civil matters is concerned, Australia and New Zealand are both parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970. This is confined only to civil matters and allows letters of request to be sent, in the case of Australia, via the Attorney-General's Department in the case of Federal courts, and through the registrars of State and Territory Supreme Courts in the case of courts within their jurisdictions, to the corresponding central authority of another contracting State. The letter of request must (with limited exceptions) be executed in the requested State by a judicial authority competent to execute it under its own law. Australia's obligations under the Convention are implemented through State and Territory evidence legislation and court rules.

The *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994* (NZ) offer a limited regime for taking evidence for use in civil cases, other than family proceedings. The regime applies to subpoenas issued by the Federal Court, a court of an Australian State or

Territory and any New Zealand court. It provides a framework for allowing subpoenas issued in one country to be served in the other.

The *Foreign Evidence Act 1994* (Cth) is not specific to New Zealand but allows for the taking of evidence overseas for Australian proceedings. For example, Part 2 of the *Foreign Evidence Act 1994* (Cth) provides for the examination of witnesses abroad, if in the interests of justice to do so, and Part 3 establishes a framework for the use of foreign testimony, in criminal and related civil proceedings, obtained as a result of a request made by the Attorney-General to the foreign country.

Section 32T of the *Federal Court Australia Act 1976* provides for the taking of evidence by the Federal Court for the High Court of New Zealand in specified trade practices proceedings. In addition, Sections 32C and 32M allow the Federal Court to sit in New Zealand and the New Zealand court to sit in Australia, if it is more convenient to do so. This will usually be to support the taking of evidence in the other country.

4.4.2.2 Trans-Tasman Working Group

The Working Group has identified a number of issues relating to the taking of evidence (and is developing solutions) that could further enhance trans-Tasman cooperation.

These issues include the following.

- *Court appearance by video link or telephone.* Telephone and video link technology is used under the *Evidence and Procedure (New Zealand) Act 1994* (Cth) (and the *Evidence Amendment Act 1994* (NZ), the corresponding New Zealand legislation) by witnesses and counsel. The Working Group is examining how that technology could facilitate more remote appearances by parties and counsel to alleviate the cost and inconvenience of physical attendance at court in trans-Tasman litigation.
- *Leave requirement for trans-Tasman service of lower court subpoena.* The *Evidence and Procedure (New Zealand) Act 1994* (and the *Evidence Amendment Act 1994* (NZ)) implement a cooperative scheme between Australia and New Zealand for the service of subpoenas between the two jurisdictions. Under the scheme a subpoena issued in one country can be served on a witness in the other only with the leave of a higher court judge. Where a subpoena is issued by a lower court, a separate application must be made to a higher court before service can occur. This adds a layer of cost and complexity and can cause delay. The Working Group is examining ways in which this may be addressed.
- *Extending trans-Tasman subpoenas to criminal proceedings.* A subpoena under the *Evidence and Procedure (New Zealand) Act 1994* (Cth) (and the *Evidence Amendment Act 1994* (NZ)) cannot be issued in criminal proceedings. If a witness is unwilling, evidence can only be obtained under the Mutual Assistance in Criminal Matters legislation. The Working Group is examining whether the trans-Tasman subpoenas regime may be extended to criminal proceedings.

4.5 Recognition and enforcement of judgments

4.5.1 Australia

Within Australia, there is a simple process for enforcing civil judgments between the States and Territories under section 105 of SEPA. The term 'judgment' is defined in section 3 to include a

judgment or order in a civil proceeding for payment of a sum of money or requiring someone to do or not do an act or thing. It includes an award in the course of criminal proceedings for the compensation of victims of crime.

For a judgment to be enforced inter-state, a sealed copy of it must first be lodged and registered in the 'appropriate court' (defined in section 105(6)) of the State in which it is to be enforced). A registered judgment has the same force and effect, and can give rise to the same enforcement proceedings, as a judgment of the court in which it is registered. The only requirement for enforcement is that the judgment must, at the time that enforcement proceedings are taken, be able to be enforced by a court in the State of origin.

The court in which a judgment is registered does not have a wider role beyond enforcement. Applications to set aside, vary or discharge the judgment must be made to the original court, not the court where it is registered.

This system appears to be effective and the Departments is unaware of any need for further harmonisation.

4.5.2 New Zealand

The recognition and enforcement of judgments between Australia and New Zealand gives rise to some complexities. Under Australian law, two separate avenues for recognition and enforcement of foreign judgments, one at common law and the other under statute. Different eligibility criteria apply under each. The statutory mechanism offers a streamlined procedure for enforcement.

4.5.2.1 The common law position

Five requirements must be met for enforcement of foreign judgments as a matter of Australian common law:

- the foreign court must have had jurisdiction, as recognised by Australian private international law rules (jurisdiction is established by the defendant's presence or residence in the country of the original court at the time the original proceedings were issued, or the defendant's submission to the original court's jurisdiction, by voluntarily appearing in the proceedings (other than to contest jurisdiction) or by agreement between the parties before the proceedings began)
- the foreign judgment must be final and conclusive
- the parties to the foreign judgment and to the domestic enforcement proceedings must be the same
- for *in personam* judgments (ie those which bind only the particular parties to the proceedings), the judgment must be for a fixed sum, and
- the judgment must not be open to challenge on public policy grounds.

4.5.2.2 The statutory position—*Foreign Judgments Act 1991* (Cth)

Under the *Foreign Judgments Act 1991* (Cth) provision is made for the registration of the qualifying foreign judgments of courts specified in the *Foreign Judgments Regulations 1992* (Cth). The specified New Zealand courts are the Court of Appeal and High Court, and each District Court of New Zealand. The Act applies primarily to 'enforceable money judgments', a term which excludes

any amount payable in respect of taxes, a fine or other penalty. The Act may be extended by Regulation to prescribed non-money judgments where supported by substantial reciprocity. However, there has been no such extension. The equivalent New Zealand legislation is the *Reciprocal Enforcement of Judgments Act 1934* (NZ).

The effect of registration (provided this is done within six years of the judgment) is the same as if the judgment had originally been given in the court in which it is registered. The Act only applies to a foreign judgment which satisfies all of the following criteria:

- it is a judgment of a foreign court specified in the *Foreign Judgments Regulations 1992* (Cth)
- the judgment is final and conclusive between the parties (section 5(4)), though it does not matter that an appeal against a judgment is pending or that the judgment is subject to appeal (section 5(5))
- it must be for a sum of money (ie a judgment under which an amount of money is payable, other than in respect of taxes or other charges of a similar nature, or a fine or other penalty) - see the definition of 'enforceable money judgment', and
- it must be wholly or partly unsatisfied.

4.5.2.3 Other statutory mechanisms

Part IIIA of the *Federal Court of Australia Act 1976* applies to trade practices proceedings and makes provision for the registration and enforcement of judgments of the High Court of New Zealand (section 32W). Also, an injunction may be made in relation to New Zealand conduct (section 32E). Order 69, Rule 19 of the Federal Court Rules makes special provision for the recognition in Australia of judgments, injunctions (and other orders) of the High Court of New Zealand in New Zealand trade practices proceedings.

4.5.2.4 The trans-Tasman Working Group

The working group has identified the following issues relating to the recognition and enforcement of orders.

- *Jurisdiction.* Australian and New Zealand courts have broad jurisdiction to allow service of proceedings on a defendant overseas. However, if a defendant served overseas does not submit to the court's jurisdiction, the resulting judgment may not be enforceable in the other country. This seems undesirable, given the increasing movement of people, assets and services across the Tasman.
- *Final non-money judgments.* Currently only final money judgments can be registered and enforced between Australia and New Zealand. Orders for specific performance or final injunctions are not enforceable in the other country. This makes the effective resolution of disputes more difficult, slower and more expensive.
- *Interim relief in support of foreign proceedings.* Currently an Australian or New Zealand court will only grant interim relief, such as a *Mareva* injunction, pending final judgment in proceedings before that court. Interim relief cannot be obtained in one country in support of proceedings in the other. Instead, proceedings seeking resolution of the main dispute need to be commenced in the court where interim relief is sought, even if it is not the appropriate court to decide the matter.

- *Enforcing tribunal orders*. Decisions of tribunals in one country cannot currently be enforced in the other. However, many tribunals decide disputes in essentially the same way as a court and are widely used. The current situation therefore limits efficient and cost-effective dispute resolution.
- *Enforcing civil pecuniary penalty orders*. Civil pecuniary penalty orders imposed by a court in one country are not currently enforceable in the other. This undermines the strong mutual interest each country has in the integrity of trans-Tasman markets and the effective enforcement of each other's regulatory regimes.
- *Enforcing fines for certain regulatory offences*. Currently a criminal fine imposed in one country is not enforceable in the other. This is a problem where the fine is imposed under a regulatory regime that impacts on the integrity of markets and in which each country has a strong mutual interest.

4.6 Miscellaneous

The trans-Tasman Working Group is also examining the following matters.

4.6.1.1 Regulator cooperation

The Working Group proposes to invite comment on whether certain regulatory contexts would benefit from further trans-Tasman co-operation and what form it should take.

4.6.1.2 The Moçambique rule

The *Moçambique* rule (derived from the case of *British South Africa Co v Companhia de Moçambique* [1893] AC 602) means that a court has no jurisdiction over questions about title to, or possession of, immovable property (mainly land and, in Australia, also intellectual property) situated outside the jurisdiction. There are several exceptions to the rule. One exception is that a court can deal with claims about enforcing contractual or personal obligations, or those that are otherwise binding in equity. The *Moçambique* rule has been acknowledged to be difficult to justify except on historical grounds, and neither logical nor satisfactory in the result it produces.

The *Moçambique* rule has already been abolished in NSW and partly removed in the ACT. However, it still applies in federal jurisdiction and is applied in other Australian States/Territories and also in New Zealand. The rule will be of lessening importance, however, as domestic reforms progressively abolish it.

5 PERSONAL PROPERTY SECURITIES LAW

5.1 Current system and its difficulties

Personal property securities (PPS) can be broadly defined as interests in personal property that a creditor has the right to take or keep possession of, or otherwise deal with, on default by a debtor. These include mortgages, liens, charges and pledges as well as financing leases, hire purchases, bailments, sales by instalment and reservation of titles agreements. In recent decades, PPS have been of increasing importance for business finance.

The responsibility for regulation of PPS is shared between the States and Territories and the Commonwealth. This has led to the development of competing and sometimes contradictory forms of regulation. The current system of regulation is inconsistent, costly and lacks certainty around the priority of competing secured creditors. A list of Commonwealth, State and Territory legislation that in some way regulate PPS is **Attachment A** to this submission.

Some jurisdictions require certain PPS interests to be registered. For example, in New South Wales, cars and boats that have been financed by a third party are required to be registered in the Register of Encumbered Vehicles (REVS). However, existing registration requirements are patchy and vary considerably between all jurisdictions. Whether a PPS can, needs to be or could be registered depends on the jurisdiction, the type of interest, the class of debtor, the type of property, the location of the property and the kind of transaction.

Also, there is overlap between existing registration statutes. Some PPS transactions are subject to more than one registration requirement in the same jurisdiction or are required to be registered in more than one jurisdiction. The registration process is cumbersome, being both complex and costly, particularly if the PPS is required to be entered on more than one register.

Further, the priority rules for competing interests are drawn from statute, common law and equity. This has led to inconsistency across jurisdictions, complexity and a great deal of uncertainty. Some statutory priority rules detract from the paramountcy of a register and the rights of parties are based on rules or variables that are not necessarily commercially sound or convenient. The complexity of the PPS scheme leads to uncertainty over consumers' rights and interests.

These cumbersome and at times conflicting processes impede the freedom and pace of transactions and add unnecessary costs. It also makes it difficult for potential lenders to check whether a personal property is already subject to a security as it could be registered in one of several different registers or not at all. This leads to high costs for borrowers and lenders as they are required to either comply with multiple registrations or undertake multiple searches. The system also duplicates administrative costs through the maintenance of more than one register.

5.2 Extent to which greater harmonisation is desirable

Harmonisation in this area is highly desirable as it will provide efficiencies improve consistency and certainty for borrowers, lenders and consumers. Harmonisation would

- simplify which PPS nationally are to be subject to registration
- provide clear straightforward registration requirements
- ensure that the information is easily accessible and there is no need to provide for multiple registrations
- simplify administrative process for registration, and
- ensure clear priority rules.

5.3 Reform Process

At the March 2005 SCAG meeting, Ministers agreed to form an officers' working group to examine the possible options for PPS reform and develop proposals for consideration by Ministers.

The working group, chaired by the Australian Government Attorney-General's Department, is preparing an issues paper that will form the basis for future consultations. Consultations will be targeted and stakeholders will include the banking industry groups, the financial services industry, consumers, corporate borrowers and legal practitioners.

The policy goal of any reform would be to establish a single legal regime for all Australian jurisdictions for the regulation of priorities between the holders of competing PPS interests and for the determination of interests between security holders and purchasers.

Over the years there several reports and papers have canvasses options for PPS law reform. These include the ALRC's Interim Report No 64 *Personal Property Securities*, an Attorney-General's Department Discussion Paper issued in 1995 and a special issue of the *Bond Law Review*, Vol 14, No 1, December 2002.

These reports and papers all identified the main policy issues that need to be addressed and noted concerns that could be had by various stakeholders. Consideration will need to be given to:

- the best model to achieve a 'cheaper, faster, easier, simpler, safer' system
- the scope of the reform—whether all PPS will be included or whether there are to be any exceptions and the impact on 'floating charges'
- the priority rules between security holders both registered and non-registered
- the impact on purchasers
- the establishment of a national registry and its administrative arrangements
- the requirements for registration
- privacy considerations relating to the register, and
- enforcement issues, remedies and choice of law.

5.4 International Reform

The reform of PPS laws has been of significant interest internationally. A working group of the United Nations Commission on International Trade Law (UNCITRAL) is developing a legislative guide for a legal regime for security rights in goods. This guide will draw on the models used in the United States and Canada. The UNCITRAL guide on security rights in goods, when released, would usefully inform the development of PPS reforms in Australia.

Further, New Zealand is currently experiencing the benefits of their recent reform. The *Properties Securities Act 1999 (NZ)* came into effect in 2002 and established a single procedure for the creation and registration of security interests in personal property as well as a centralised electronic register. New Zealand government officials have reported that its reforms have resulted in increased certainty and confidence to the parties in commercial transactions where personal property is used as a security interest and clarity where competing security interest is an issue. Any steps to harmonise Australian laws with New Zealand would seem likely to benefit trans-Tasman business opportunities.

6 INFORMATION LAW

6.1 Privacy

Greater harmonisation of privacy laws between Australian jurisdictions would be desirable as it would minimise confusion and uncertainty for businesses and consumers who need to comply with the regulation.

6.1.1 Commonwealth legislation

The *Privacy Act 1988* (Cth) is the principal piece of legislation providing protection of personal information in the federal public sector and in the private sector. The *Privacy Act* provides 11 Information Privacy Principles (IPPs) for the federal public sector. The Act was amended in 2000 to insert a cooperative private sector privacy regime by providing the National Privacy Principles (NPPs) for private sector organisations. The privacy principles deal with all stages of the processing of personal information, setting out standards for the collection, use, disclosure, quality and security of personal information. They also create requirements of access to, and correction of, such information by the individuals concerned.

The Privacy Act contains a number of exemptions from the NPPs, including for small businesses (those with an annual turnover of less than $3 million), employee records, media organisations, organisations acting under a State contract, and political acts and practices. The term organisation is defined to exclude Commonwealth and State and Territory agencies or authorities. However, section 6F permits regulations to be made to treat State instrumentalities or authorities as organisations at the request of the relevant State or Territory.

The Report of the Review of the private sector provisions of the Privacy Act, released on 18 May 2005, has found that overall the National Privacy Principles have worked well and protected the privacy of Australians' personal information in those private sector areas covered by the Act. The main recommendations of the report include improving national consistency in privacy regulation, ensuring that privacy is adequately protected in the face of rapidly developing new technologies and raising consumer and business awareness of a range of privacy issues. The report is available on the Office of the Privacy Commissioner's website at <www.privacy.gov.au>. The Government will carefully consider the recommendations in the report.

6.1.2 Existing State and Territory legislation

New South Wales, Victoria and the Northern Territory have enacted privacy legislation for the public sector in their jurisdiction. The Commonwealth *Privacy Act* applies to the ACT's public sector agencies. In Tasmania, South Australia and Queensland administrative arrangements apply to protect the privacy of personal information in public sector agencies.

6.1.3 Health Privacy

A significant area where the Commonwealth Privacy Act will not generally apply is to health privacy where health services are delivered by State or Territory authorities. Health services

delivered by the private sector will fall within the operation of the NPPs. New South Wales, Victoria and the ACT have health information legislation that applies to health information held by public and private sector agencies in those jurisdictions.

This has already been identified as an area that would benefit from harmonisation. A draft National Health Privacy Code, containing health privacy principles, has been developed by Commonwealth, State and Territory Health Ministers to achieve nationally consistent privacy arrangements for health information across public and private sectors. The Commonwealth will consider options for endorsing and implementing the Code in consultation with State and Territory Governments. The code is to be considered by Health Ministers in 2005 after a pathway has been agreed for achieving implementation of the Code.

6.1.4 Consistency with New Zealand

There is already a high level of consistency between the Australian and New Zealand legislative approaches to privacy. Australia and New Zealand both have privacy legislation at the national level. The legislation is similar in approach and coverage and is based upon the OECD privacy principles developed in 1980. Australia and New Zealand worked closely together in the APEC Information Privacy Sub-Group to develop the APEC Privacy Principles which were adopted by Ministers in 2004. The Attorney-General's Department is not aware of any adverse impact on trade and commerce due to the privacy laws in Australia and New Zealand.

6.2 Copyright

Copyright law in Australia is contained in the *Copyright Act 1968* and in New Zealand in the *Copyright Act 1994 (NZ)*. The Australian and New Zealand copyright law was originally based on the United Kingdom's. However, the laws have diverged. For example, in recent years, there have been several amendments to the Australian Act, some required by the Australian-United States Free Trade Agreement (AUSFTA). The main areas of difference are discussed below.

6.2.1 The term of protection

The term of protection for most copyright material in Australia has been extended by 20 years by amendments to the Copyright Act in 2004. This has resulted in Australia's term of protection for many works being more harmonised with the term of protection under US law.[9] This means that works that were in copyright on 1 January 2005 will generally be in copyright for life of the author plus 70 years (or 70 years from 'publication' in the case of films, sound recordings and broadcasts). This is in comparison to New Zealand where the duration of copyright for works is generally life of the author plus 50 years.

It has been suggested that this difference may create greater transaction and system costs for copyright collecting societies who represent copyright owners and licence users in both countries.[10]

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[9] See Schedule 9 of the *US Free Trade Agreement Implementation Act 2004* and *Copyright Legislation Amendment Act 2004*.

[10] Submission by APRA and AMCOS to the Asia Trade Task Force "Potential Australia-ASEAN-New Zealand Free Trade Agreement", 24 February 2005.

6.2.2 *International standards*

Australia and New Zealand are both parties to the Berne Convention for the Protection of Literary and Artistic Works and the World Trade Organisation Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement. However, neither are yet signatories to the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) or the WIPO Performances and Phonograms Treaty (WPPT). These two conventions extend copyright protection to the online environment and create obligations in relation to the protection of performers' rights.

In line with the AUSFTA, Australia is making final preparations to accede to the WIPO WCT and WPPT. It is understood that New Zealand is undertaking a comprehensive review of its legislation to ensure its compliance with the two WIPO treaties.[11] Until New Zealand completes this process, there will be differences between Australian and New Zealand copyright law, particularly in relation to the digital technology provisions.

6.2.3 *Time shifting*

Section 84 of the New Zealand Copyright Act provides an exception for time shifting of broadcasts. This ensures that the recording of broadcasts and works included in the broadcast for private and domestic purposes do not infringe copyright. Section 111 of the Australian Copyright Act provides for a narrower time shifting exception by only allowing the actual broadcast itself to be copied for private and domestic purposes.

The Australian Government is reviewing whether Australian copyright law should include an exception based on the principles of 'fair use' which would facilitate the public's access to copyright materials in the digital environment. This review is considering the issue of private copying which could potentially widen the ambit of exceptions to copyright in Australia. On 5 May 2005, an Issues Paper on fair use and other copyright exceptions was released by the Government on the Attorney-General's Department website.

6.2.4 *Other differences*

There are other subtle differences in the breadth of exceptions for copyright within each Act and depth of coverage for certain rights. For example, New Zealand provides a slightly larger ambit of secondary copyright infringements and provides an additional moral right of privacy, compared with the Australian Copyright Act. On the other hand, moral rights are more comprehensive in Australia and subsist without the need for assertion by the author. Also, the breadth of provisions within New Zealand's Copyright Act about first ownership of commissioned works are slightly different to those within the Australian Copyright Act.

The Department does not have a view on whether harmonisation is required between Australia and New Zealand copyright law.

[11] See <http://www.med.govt.nz/buslt/int_prop/digital/index.html>

7 REGULATION OF THE LEGAL PROFESSION

7.1 Australia

Consistent regulation of the legal profession will be a major achievement benefiting legal practitioners and consumers alike. The existing inconsistent regulation of the legal profession means that lawyers practising in more than one jurisdiction are forced to restructure their practice to abide by the rules of each jurisdiction they practice in. This duplication of administration results in higher administrative costs and overheads for practitioners and presents an impediment to interstate practice. Also, inconsistent requirements particularly in the areas of admission, costs and standards of conduct create uncertainty for consumers.

SCAG has recognised the importance of consistent regulation of the legal profession and since 2002 has been working towards a National Legal Profession. The National Legal Profession project is intended to ensure nationally consistent regulation in the main aspects of the legal profession, including admission and practice, the reservation of legal work, trust accounts, costs and costs review, complaints and discipline, professional indemnity insurance, fidelity funds, incorporated legal practices and multi-disciplinary practices, external administration (ie the appointment of receivers and administrators to a practice) and the regulation of foreign lawyers.

To this end, SCAG has developed a set of model laws, in close consultation with stakeholders, covering those areas. All the States and Territories have committed to introducing those model laws which are available on the Law Council of Australia's website <www.lawcouncil.asn.au>. So far, New South Wales and Victoria have passed the model provisions with an intended commencement date of 1 July 2005. Queensland has also implemented some of the model provisions and has indicated that it will introduce the rest in the near future. The other jurisdictions have not yet introduced legislation but it is anticipated they will do so within the next 12 months. It is fundamental to the success of this project that the remaining States and Territories introduce the model provisions as soon as possible.

The model laws are underpinned by a memorandum of understanding (MOU) signed by all jurisdictions including the Commonwealth. The MOU commits jurisdictions to introducing the provisions and maintaining uniformity in certain key provisions and establishes a working group to monitor the implementation of the model provisions and ensure future consistency.

However, while the National Legal Profession project has moved the harmonisation of the legal profession forward enormously, it will not result in a completely consistent set of rules regulating the profession. The model provisions are divided into three different types: core-uniform, core-consistent and non-core. Under the MOU, jurisdictions need to implement the core provisions, but only need to ensure uniformity in the core-uniform provisions. The non-core provisions are optional. The result of this is that there will still be significant areas of divergence in regulation.

This divergence may be problematic if it impacts on the trade of legal services or disadvantages lawyers practising in one jurisdiction over lawyers in another. For example, not all jurisdictions have committed to implementing the model provisions for incorporated legal practices. This means that some jurisdictions will allow corporations with non-lawyer directors who provide a range of legal and non-legal services to practice law while others will not. In those other jurisdictions the

incorporated legal practice will have to modify their business structures to practice. As a result, some legal practices may be competitively disadvantaged in certain jurisdictions by not being able to choose their preferred legal structure.

7.2 New Zealand

Under the *Trans-Tasman Mutual Recognition Act 1997*, a person who is admitted to practice in New Zealand is entitled to be admitted in an Australian jurisdiction providing they notify the relevant authorities. However, that person will still need to obtain a practising certificate before they can practice in Australia. The arrangements are reciprocal for an Australian practitioner wishing to practice in New Zealand.

Consideration could be given to extending these arrangements to allow for trans-Tasman practice. However, the current system appears to be effective and the immediate priority for the States and Territories is the implementation of the National Legal Profession project.

8 DEFAMATION

Defamation law in Australia is constituted by a patchwork of common law and State and Territory statutes. As early as 1979, the ALRC report *Unfair Publication: Defamation and Privacy* concluded that significant changes were needed 'in the substantive law governing rights of action and defence'. Defamation 'laws [were] complex and [conflicted] from one part of the country to another'. The ALRC recommended that there should be a codified, uniform law of defamation in Australia to replace the patchwork of existing statutes and case law.

Since then, the need for uniformity in defamation has generally been accepted. Additionally, the development of a national media as well as the technological revolution of the internet makes differences between jurisdictions' defamation law even harder to justify. However, progress towards uniformity has been minimal despite the issue having been more or less constantly on the SCAG agenda since 1980.

8.1 The Commonwealth proposal

Most recently, the Australian Attorney-General has driven defamation law reform. In March 2004, he released an outline for a Commonwealth Bill. The Bill would form the basis for a national defamation law based on the Commonwealth's existing constitutional powers. A revised outline was released following consultations in July 2004.[12]

The application provisions of the national law would ensure that the Act was limited to matters within Commonwealth constitutional power. Putting to one side the possibility of a reference of power to the Commonwealth, the Bill would be limited primarily to defamatory publications made:

- in a Territory
- in the course of trade and commerce among the States

[12] See <http://www.law.gov.au/agd/WWW/agdhome.nsf/Page/Publications>

- by the use of postal, telegraphic, telephonic and like services (defined to include radio, television and the internet)
- by a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation, or
- in relation to the activities of a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation.

The proposed law would therefore be a code for most defamation proceedings. The only significant areas that would remain within State jurisdiction would involve some defamatory publications made by one individual against another, such as placing something on a notice board or spreading leaflets alleging corruption.

8.2 The State and Territory proposal

Following the release of the Commonwealth proposal, the States and Territories released their own 'Proposal for Uniform Defamation Laws'. The proposal differed in substance from the Commonwealth's but the underlying intention was that the States and Territories would introduce model provisions in each jurisdiction, resulting in uniform defamation laws.

In November 2004, State and Territory Attorneys-General agreed to seek Cabinet approval to amend each State's and Territory's civil law of defamation in accordance with the Model Defamation Provisions and to simultaneously commence legislation in all jurisdictions no later than 1 January 2006.

That agreement was affirmed at the SCAG meeting in March 2005. State and Territory Attorneys-General also agreed to the preparation of an intergovernmental agreement committing them to achieving and maintaining uniformity in respect of the substantive law of defamation, with SCAG having responsibility for overseeing this commitment. The intergovernmental agreement is expected to be signed at the July 2005 SCAG meeting,

8.3 Next steps

The Australian Government has commended the States and Territories for their progress towards uniform defamation law. However, at the time of this submission, it is difficult to say whether all jurisdictions will be able to pass identical model provisions or whether parliaments will insist on modifying the bill. The Australian Government intends to hold the States to their target of 1 January 2006 to enact mirror legislation. If the target is not met, federal legislation can still be introduced.

9 LAWS IMPACTING ON INDIVIDUALS

This part examines four areas of the law that affect individuals and are traditionally matters for the States and Territories. However, with an increasingly mobile population and with family members often living in more than one State or Territory, these laws are showing an increasing need to be harmonised.

9.1 Conveyancing

Each State and Territory has its own real property and conveyancing system and operates its own land register. Each system is based on the Torrens title system which centres on the notion of title by registration. Once an interest is registered it is considered indefeasible. However, the operation and interpretation of Torrens title differs between each jurisdiction as each State and Territory has a variety of different exceptions to indefeasibility of title.

Further, each State and Territory has its own systems and procedures for conveyancing. There are different processes for exchange of contracts, the terms and conditions of the standard contracts of sale, existence and requirements of statutory 'cooling-off' periods, the time when insurance risk passes and the obligations on vendors including statutory requirements surrounding the disclosure of building documents. There are also different rules for conveyancers, including licence categories, licence qualification and educational requirements as well as different requirements for mortgages, including the execution, forms, methods of serving notices and registration provisions.

The lack of uniformity with existing States and Territory systems and the absence of a national land register can increase the complexity and costs associated with the conveyancing system, especially where transactions have an interstate element. For example, law firms and financial institutions with offices in several States and Territories cannot standardise procedures or develop manuals and staff training to be implemented across the country. Consumers who purchase property interstate will also be affected as different protections exist in different jurisdictions.

The central notion behind a Torrens system of title registration is the need for a more efficient and streamlined system of title. Having a national registration system would allow for increased security and certainty of title, potentially less delay and expense in transferring title, simplification of the processes and increased accuracy in the transactions. Greater harmonisation would be particularly beneficial at a time when most jurisdictions are moving toward electronic conveyancing and registration systems.

9.2 Succession Law

Succession law is complex, highly technical and varies significantly in each State and Territory. For example, a will may be recognised as admissible to probate in some States but not in others. So, when a person leaves assets across various States and Territories, the will may not recognised by all jurisdictions.

SCAG has long recognised the importance of uniform succession law, but efforts to achieve uniformity have been unsuccessful to date. In October 1991, SCAG agreed that the Queensland Law Reform Commission would coordinate and review the existing law and procedure relating to succession and recommend model laws for the States and Territories. The project is divided into four distinct areas of succession law: wills, family provisions, administration of estates and intestacy. The QLRC has so far reported on the first two areas and has prepared a supplementary report on Family Provisions. The delay in preparing the report is demonstrative of the complexity of succession law across Australia.

With the increasingly mobile population in Australia, it is important that succession law be harmonised as soon as possible. Uniformity would minimise confusion surrounding conflicting laws for the transmission of an estate upon death. Uniformity would also allow legal practitioners to practice successfully in succession law without requiring State to State expertise.

9.3 Powers of Attorney

A 'power of attorney' refers to the unilateral grant of authority by a donor for someone else to act on their behalf. A power of attorney can either have a general/ordinary authority, such as instructing someone to sell an asset or operate ones' affairs for a fixed period of time, or an enduring authority, which survives the loss of individual physical or mental capacity.

There is different and sometimes conflicting legislation governing the execution and operation of powers of attorney in each State and Territory. Formal requirements (such as registration) also differ which can result in powers of attorney made in one jurisdiction not being recognised in another. With an increasing mobile population, both donors and donees of powers of attorney should be confident of the validity of these instruments interstate.

SCAG has previously considered the issue of mutual recognition of powers of attorney and in 2000 endorsed draft provisions for the mutual recognition of powers of Attorney. However, only New South Wales, Victoria, Queensland and Tasmania have implemented legislation in accordance with the draft provisions.

9.4 Statutory Declarations

A further area that may benefit from harmonisation is the rules relating to the making of statutory declarations. Currently, each jurisdiction regulates the making of statutory declarations for the purposes of a law of that jurisdiction. However, the classes of persons who may witness statutory declarations and the forms that are to be used differ across jurisdictions.

For example, a person wishing to use a statutory declaration in connection with a law of the Commonwealth or the Australian Capital Territory must make the declaration in accordance with the *Statutory Declarations Act 1959* (Cth). The Act provides that a statutory declaration must be in the prescribed form and made before a prescribed witness. The form for making a statutory declaration and the persons who can witness a statutory declaration are prescribed under the Statutory Declarations Regulations 1993. There are many categories of persons who may witness Commonwealth statutory declarations including members of a range of professions (medical practitioner, vet, physiotherapist, legal practitioner) as well as numerous other persons such as bank officers with five or more years of continuous service, full-time teachers, and public servants with five or more years of continuous service.

However, a person wishing to make a statutory declaration in New South Wales must make the declaration in accordance with the *Oaths Act 1900*. This Act prescribes the form that is to be used for statutory declarations in that State (which is different to the Commonwealth form). The persons who can witness statutory declarations in NSW is more limited than for the Commonwealth, and include Justices of the Peace, notaries public and solicitors holding a current practising certificate.

Other States and the Northern Territory have enacted legislation prescribing the making and witnessing of statutory declarations within their respective jurisdictions.

Harmonised rules, and a single form that would suffice for the purposes of Commonwealth, State and Territory laws, would assist people engaged in business and ordinary citizens. Uniform offence provisions would also be desirable. Whether the making of statutory declarations outside Australia including New Zealand for the purposes of Australian laws should be made easier by widening the classes of persons who may witness such declarations would also need to be considered.

Existing Personal Property Securities Legislation

Commonwealth

- *Bills Of Exchange Act 1909*
- *Cheques Act 1986*
- *Copyright Act 2001*
- *Corporations Act 2001*
- *Designs Act 1906*
- *Patents Act 1990*
- *Plant Breeders' Rights Act 1994*
- *Shipping Registration Act 1981*
- *Trade Marks Act 1995*

New South Wales

- *Bills Of Sale Act 1898*
- *Conversions Of Securities Adjustment Act 1931*
- *Credit Act 1984*
- *Liens On Crops And Wool And Stock Mortgages Act 1898*
- *Pawnbrokers And Second-Hand Dealers Act 1996*
- *Registration Of Interests In Goods Act 1986*
- *Sale Of Goods Act 1923*

Victoria

- *Chattel Securities Act 1987*
- *Credit Act 1984*
- *Goods Act 1958*
- *Hire-Purchase Act 1959*
- *Instruments Act 1958*
- *Second-Hand Dealers And Pawnbrokers Act 1989*

Queensland

- *Bills Of Sale And Other Instruments Act 1955*
- *Cooperatives Act 1997*
- *Credit (Rural Finance) Act 1996*
- *Credit Act 1987*
- *Financial Intermediaries Act 1996*
- *Hire-Purchase Act 1959*
- *Liens On Crops Of Sugar Cane 1931*
- *Motor Vehicles And Boat Securities Act 1986*
- *Property Agents And Motor Dealers Act 2000*
- *Sale Of Goods Act 1896*
- *Second-Hand Dealers And Pawnbrokers Act 2003*
- *Storage Liens Act 1973*

Western Australia

- *Bills Of Sale Act 1899*
- *Chattel Securities Act 1987*
- *Consumer Credit Code*
- *Finance Brokers Control Act 1975*
- *Hire-Purchase Act 1959*
- *Pawnbrokers And Second-Hand Dealers Act 1994*
- *Sale Of Goods Act 1895*

South Australia

- *Bills Of Sale Act 1886*
- *Goods Securities Act 1986*
- *Liens On Fruit Act 1923*
- *Sale Of Goods Act 1895*
- *Second-Hand Dealers And Pawnbrokers Act 1996*

- *Second-Hand Vehicle Dealers Act 1995*
- *Stock Mortgages And Wool Liens Act 1924*
- *Warehouse Liens Act, 1990*

Tasmania

- *Bills Of Sale Act 1900*
- *Motor Vehicle Securities Act 1984*
- *Sale Of Goods Act 1896*
- *Second-Hand Dealers And Pawnbrokers Act 1994*
- *Stock, Wool And Crop Mortgages Act 1930*

ACT

- *Credit Act 1985*
- *Instruments Act 1933*
- *Law Of Property (Miscellanous Provisions) Act 1958 (NSW)*
- *Pawnbrokers Act 1902*
- *Sale Of Goods Act 1954*
- *Second-Hand Dealers Act 1906*

Northern Territory

- *Consumer Affairs And Fair Trading Act*
- *Instruments Act 1935*
- *Registration Of Interests In Motor Vehicles And Other Goods Act 1983*
- *Sale Of Goods Act 1972*
- *Warehousemen's Liens Act*