The Parliament of the Commonwealth of Australia

Harmonisation of legal systems

Within Australia and between Australia and New Zealand

House of Representatives
Standing Committee on Legal and Constitutional Affairs

November 2006
Canberra

ISBN 0 642 78875 8 (printed version)

ISBN 0 642 78876 6 (HTML version)

Contents

APPENDICES

Foreword

While the basic concept of harmonising legal systems – reducing or eliminating inconsistencies, duplication, or complexity between those systems – is straightforward enough, some of the attendant issues are more involved. When is legal harmonisation justified, and what are its benefits? Are there any disadvantages to harmonisation? What forms can it take? What are the areas within Australia and between Australia and New Zealand that might require legal harmonisation? These are the sorts of questions that the Committee seeks to examine in this report. The Committee is also mindful that the harmonisation of laws is very much the art of the possible, particularly in the context of international relations and Australia's complex federal system. Thus the merger of Australia and New Zealand or the progression to a unitary system of government in Australia, however desirable, might not be easy to achieve.

During the course of the inquiry some examples of quite absurd situations resulting from a lack of legal harmonisation were reported to the Committee. These include:

- A power of attorney granted by an individual in New South Wales (and possibly in other States) will not be valid in the Australian Capital Territory. Thus an individual who grants an enduring power of attorney in NSW, relocates to the ACT, and suffers a loss of capacity to make a new grant will be disadvantaged as he or she will not be covered by the NSW power of attorney in the ACT.
- Each of the Australian jurisdictions has legislation requiring employers to provide first-aid kits in workplaces. However, the jurisdictions stipulate different requirements for the contents of first-aid kits, including bandage width. Employers operating in more than one jurisdiction must therefore purchase different types of kits according to the requirements of each

jurisdiction rather than purchasing one type in bulk and distributing to workplaces.

- An importer of diagnostic kits for testosterone analysis in young children must comply, at considerable cost, with the registration requirements of five separate agencies, four of which come within one Australian Government department.

While these situations are not earth-shaking in themselves, they exemplify the senselessness that can result from a lack of legal harmonisation, and they are valuable too in that they illustrate the practical, day-to-day impacts and frustrations that can occur when laws are not as harmonised as they might be.

I would like to thank all Members of the Committee who gave of their time and expertise in examining the issues raised during this inquiry. The range of matters covered was quite broad, and Members made every effort to give each area its proper consideration. I would also like to thank all of the individuals and organisations who took the trouble to make their views known to the Committee during the course of the inquiry. Finally, I would like to convey my thanks to the staff of the Committee Secretariat, particularly the Inquiry Secretary Dr Nicholas Horne.

Hon Peter Slipper MP
Chairman

Membership of the Committee

Chairman	The Hon Peter Slipper MP
Deputy Chairman	Mr John Murphy MP
Members	Mr Michael Ferguson MP (from 09/02/2006)
	Mrs Kay Hull MP
	The Hon Duncan Kerr SC MP
	Mr Daryl Melham MP
	Mrs Sophie Mirabella MP
	Ms Nicola Roxon MP
	Mr Patrick Secker MP
	Mr David Tollner MP
	Mr Malcolm Turnbull MP (to 07/02/2006)
	The Hon Malcolm Turnbull MP (from 07/02/2006 to 09/02/2006)

Committee Secretariat

Secretary	Ms Joanne Towner (to 11/08/2006)
	Ms Cheryl Scarlett (A/g) (from 11/08/2006)
Inquiry Secretary	Dr Nicholas Horne
Research Officers	Ms Emily Howie
	Mr Thomas Wood
Administrative Officers	Ms Kate Tremble
	Ms Jazmine De Roza

Terms of reference

To inquire and report on lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand, with particular reference to those differences that have an impact on trade and commerce. In conducting the inquiry, the Committee will focus on ways of reducing costs and duplication.

Particular areas the Committee may examine to determine if more efficient uniform approaches can be developed include, but are not limited to:

- Statute of limitations
- Legal procedures
- Partnership laws
- Service of legal proceedings
- Evidence law
- Standards of products
- Legal obstacles to greater federal/state and Australia/New Zealand cooperation.

(Referred by the Attorney-General 7 February 2005)

List of abbreviations

AANZFTA	Australia-ASEAN-New Zealand Free Trade Agreement
ACCC	Australian Competition and Consumer Commission
AFC	Australian Finance Conference
AGD	Attorney-General's Department
AIJA	Australian Institute of Judicial Administration Inc
ALRC	Australian Law Reform Commission
ANZTPA	Australia-New Zealand Therapeutic Products Authority
ASMI	Australian Self-Medication Industry
AUSFTA	Australia-United States Free Trade Agreement
BCA	Business Council of Australia
CER	Australia-New Zealand Closer Economic Relations Trade Agreement
CGA	New Zealand *Consumer Guarantees Act* 1993
COAG	Council of Australian Governments
DFAT	Department of Foreign Affairs and Trade
DSE	Victorian Department of Sustainability and Environment

FIA	Fundraising Institute – Australia Ltd
FSANZ	Food Standards Australia New Zealand
JASANZ	Joint Accreditation System of Australia and New Zealand
LSNSW	Litigation Law & Practice Committee, Law Society of New South Wales
MCCA	Ministerial Council on Consumer Affairs
MCCOC	Model Criminal Code Officers Committee of SCAG
MoU	Memorandum of Understanding
NTLRC	Northern Territory Law Reform Committee
NZCC	New Zealand Commerce Commission
NZG	New Zealand Government
OPC	Office of the Privacy Commissioner
PLRA	Property Law Reform Alliance
QLRC	Queensland Law Reform Commission
SAFTA	Singapore-Australia Free Trade Agreement
SCAG	Standing Committee of Attorneys-General
SIAA	Science Industry Action Agenda
SME	Small-to-medium-sized enterprise
TGA	Therapeutic Goods Administration
TPA	Commonwealth *Trade Practices Act* 1974
TTASAG	Trans-Tasman Accounting Standards Advisory Group
TTMRA	Trans-Tasman Mutual Recognition Arrangement
TTWG	Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement
VAIC	Australian Institute of Conveyancers Vic Division Inc

VLRC	Victorian Law Reform Commission
WCT	World Intellectual Property Organisation Copyright Treaty
WPPT	World Intellectual Property Organisation Performances and Phonograms Treaty

List of recommendations

Chapter 2 - Basis and mechanisms for the harmonisation of legal systems

Recommendation 1 (paragraph 2.60)

The Committee recommends that:

- The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;

- The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;

- A dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that

- Any referendum on the constitutional amendment should be held at the same time as a federal election.

Chapter 3 - Harmonisation between Australia and New Zealand

Recommendation 2 (paragraph 3.9)

The Committee recommends that the Senate and the House of Representatives of the Australian Parliament invite the New Zealand Parliament to establish a trans-Tasman standing committee to monitor and report annually to each Parliament on appropriate measures to ensure ongoing harmonisation of the respective legal systems.

The Committee further recommends that the trans-Tasman standing committee be required to explore and report on options that are of mutual benefit, including the possibility of closer association between Australia and New Zealand or full union.

Recommendation 3 (paragraph 3.11)

The Committee recommends that the Australian Government actively pursue with the New Zealand Government the institution of a common currency for Australia and New Zealand.

The Committee further recommends that appropriately equitable arrangements would need to be put in place with respect to the composition of a resulting joint Reserve Bank Board.

Recommendation 4 (paragraph 3.13)

The Committee recommends that the participating Australian governments move to offer New Zealand Government ministers full membership of Australasian (currently Australian) ministerial councils.

Recommendation 5 (paragraph 3.47)

The Committee recommends that the Australian Government propose to the New Zealand Government the legal harmonisation of the Australian and New Zealand banking regulation frameworks in order to foster a joint banking market.

Recommendation 6 (paragraph 3.73)

The Committee recommends that, wherever possible, the Australian Government should seek to utilise the joint regulator model for legal harmonisation between Australia and New Zealand.

Recommendation 7 (paragraph 3.82)

The Committee recommends that the Australian Government investigate with the New Zealand Government the feasibility of instituting a referred legislative responsibility mechanism between the two countries whereby:

- One Parliament can voluntarily cede legislative competency on a specific matter to the other Parliament for an agreed period; and
- The resulting regulatory framework could apply in each country.

Recommendation 8 (paragraph 3.103)

The Committee recommends that, consistently with work towards national harmonisation in this area within Australia, the Australian Government discuss with the New Zealand Government the legal harmonisation of Australian and New Zealand legislation governing non-exludable implied warranties in consumer contracts.

Recommendation 9 (paragraph 3.116)

The Committee recommends that the Australian Government propose to the New Zealand Government the legal harmonisation of the Australian and New Zealand telecommunications regulation frameworks with a view to fostering a joint telecommunications market.

Recommendation 10 (paragraph 3.119)

The Committee recommends that the Australian Government propose to the New Zealand Government that a formal and regular ministerial-level dialogue on telecommunications regulation issues be established between the two countries with a particular focus on consultation prior to regulatory change in either country.

Chapter 4 - Harmonisation within Australia

Recommendation 11 (paragraph 4.36)

The Committee recommends that the Australian Government again raise mutual recognition of power of attorney instruments at the Standing Committee of Attorneys-General with a view to expediting uniform and adequate formal mutual recognition among the jurisdictions, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by the Standing Committee in 2000.

Recommendation 12 (paragraph 4.40)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General investigate an expansion of the class of permitted overseas witnesses for statutory declarations along with the national legislative harmonisation of offence provisions relating to statutory declarations.

Recommendation 13 (paragraph 4.46)

The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to examine the Queensland Law Reform Commission succession law recommendations and to implement those on which agreement can be reached.

Recommendation 14 (paragraph 4.71)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General or other appropriate forum undertake an investigation into the national legislative harmonisation of the existing regulatory frameworks for:

- Debt collection;
- Civil debt recovery; and
- Stamp duty.

Recommendation 15 (paragraph 4.77)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation into the national legislative harmonisation of partnership laws.

Recommendation 16 (paragraph 4.97)

The Committee recommends that the Australian Government propose that the Ministerial Council on Consumer Affairs undertake an exploration of the national harmonisation of consumer protection legislation governing the following areas:

- Consumer contracts including non-excludable implied warranties;
- Unsolicited marketing and telephone marketing;
- Door-to-door sales;
- Trade promotions; and
- Vouchers provided in relation to sales and promotions.

Recommendation 17 (paragraph 4.110)

The Committee recommends that, if it is not already on the Council agenda by the time of this report, national harmonisation of electrical product safety legislation should be incorporated into the work of the Ministerial Council on Consumer Affairs towards a national consumer product safety regulatory system.

Recommendation 18 (paragraph 4.120)

The Committee recommends that the Australian Government, in consultation with the not-for-profit sector and the States and Territories:

- Investigate the establishment of a single national regulator for the not-for-profit sector;
- Investigate the development of a simple but adequate legal structure for not-for-profit organisations;
- Initiate work towards the national legislative harmonisation of simple but adequate reporting and disclosure requirements for not-for-profit organisations; and
- Undertake a review of current licensing and registration requirements for not-for-profit organisations across the jurisdictions with a view to legislative harmonisation of these requirements.

Recommendation 19 (paragraph 4.144)

The Committee recommends that the Australian Government should formulate a harmonised national legislative framework for the development of hazardous substance reporting and monitoring requirements in consultation with the science industry and the States and Territories.

Recommendation 20 (paragraph 4.166)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General or other appropriate forum undertake an investigation into the feasibility of establishing a trans-Tasman judicial commission to provide a comprehensive informational resource for the Australian and New Zealand judiciary in relation to Australian and New Zealand judicial decisions.

Recommendation 21 (paragraph 4.181)

The Committee recommends that the Australian Government seek to expedite national legislative harmonisation of limitation statutes at the Standing Committee of Attorneys-General.

Recommendation 22 (paragraph 4.204)

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation into the development and implementation of a national model contract code.

Recommendation 23 (paragraph 4.219)

The Committee recommends that the Australian Government, at the Standing Committee of Attorneys-General or other appropriate forum, should highlight the strong need to finally achieve a national uniform evidence law system and seek to give fresh impetus to this goal.

The Committee also recommends that the Australian Government should seek to maintain this impetus until the uniform evidence law system is achieved.

Recommendation 24 (paragraph 4.222)

The Committee recommends that the Australian Government, at the Standing Committee of Attorneys-General or other appropriate forum, should highlight the strong need to move ahead with the national implementation of the MCCOC Model Criminal Code and seek to give fresh impetus to this goal.

The Committee also recommends that the Australian Government should seek to maintain this impetus until the Code is implemented nationally.

Recommendation 25 (paragraph 4.236)

The Committee recommends that the Australian Government should highlight the issue of regulatory inconsistency in privacy regulation, including in the area of workplace privacy regulation, in its submissions to the current Australian Law Reform Commission inquiry into the Commonwealth *Privacy Act* 1988 and related laws.

Recommendation 26 (paragraph 4.253)

The Committee recommends that the Australian Government raise, at the Council of Australian Governments or other appropriate forum:

- The circulation of draft intergovernmental agreements for public scrutiny and comment;
- The parliamentary scrutiny of draft intergovernmental agreements; and
- The augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation

With a view to the implementation of these reforms throughout the jurisdictions.

Recommendation 27 (paragraph 4.255)

The Committee recommends that the Australian governments discuss with the New Zealand Government the trans-Tasman harmonisation of legal systems in respect of all matters relating to Australian harmonisation where there can be mutual benefit. A special focus of this discussion should be the goal of achieving a single trans-Tasman legal market.

1

Introduction

1.1 It is important to note at the outset that the Committee draws a distinction between legal harmonisation and coordination or cooperation. Legal harmonisation involves utilising legislative or other formal instrument-based mechanisms to achieve parity between legal systems, whereas coordination or cooperation can involve a wide range of mechanisms and activities that do not necessarily seek to resolve a lack of harmonisation among legal systems. The different emphasis on methods was noted by the New Zealand Government in its submission to the inquiry:

> …discussions of "harmonisation" tend to focus on substantive laws, rather than on the full range of forms of cooperation in making and administering business laws. Coordination more clearly embraces cooperation at the institutional level (between Governments and regulators), and in participation in regional and multilateral fora.[1]

1.2 While formal legal harmonisation was the focus of the inquiry of the Committee, and is, accordingly, the focus of this report, coordination and cooperation are also taken into account where relevant.

---

1 New Zealand Government, *Submission No. 23*, p. 4. See also Department of the Treasury, *Submission No. 21.2*, p. 1.

The inquiry and report

Referral of the inquiry

1.3 On 7 February 2005, the Attorney-General, the Hon Philip Ruddock MP, asked the Committee to inquire and report on lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand, with particular reference to those differences that have an impact on trade and commerce. The full terms of reference for the inquiry are set out above.

Conduct of the inquiry

1.4 The inquiry was advertised in *The Australian* newspaper on 28 February 2005 and 9 March 2005, the *Australian Financial Review* newspaper on 28 February 2005, and *Business Review Weekly* magazine on 10 March 2005.

1.5 Work on the inquiry was suspended from late June 2005 to early March 2006 due to the conduct by the Committee of two other urgent inquiries during this period.[2]

1.6 The Committee received 33 submissions, 13 supplementary submissions, and 34 exhibits. Details of submissions and exhibits are at Appendices A and C to this report respectively.

1.7 Public hearings were held in Melbourne (7 March 2006), Canberra (21 March 2006), and Sydney (6 April 2006). Details of witnesses who appeared at the public hearings are at Appendix B to this report.

The report

1.8 Chapter 2 considers the basis for the harmonisation of legal systems and provides an overview of the main mechanisms and fora for harmonisation.

1.9 Chapter 3 examines the current level of legal harmonisation between Australia and New Zealand in particular areas as raised in the evidence and identifies some possible initiatives for further harmonisation between the two countries.

---

2 The inquiry into the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (report tabled 18 August 2005) and the inquiry into technological protection measures exceptions (report tabled 1 March 2006).

1.10 Chapter 4 considers current levels of legal harmonisation within Australia in particular areas as raised in the evidence and identifies some possible initiatives for further harmonisation. A further aspect of legal harmonisation between Australia and New Zealand is also considered in this Chapter.

2

Basis and mechanisms for the harmonisation of legal systems

2.1 This Chapter considers the basis for the harmonisation of legal systems and provides an overview of the main mechanisms and fora for harmonisation.

Basis for the harmonisation of legal systems

Justifications for harmonisation

2.2 A number of broad justifications for pursuing legal harmonisation within Australia and between Australia and New Zealand were advanced in evidence to the inquiry. Major justifications include:

- Uncertainty, increased operational costs (e.g. compliance costs), or difficulties for business due to different requirements imposed by multiple regulatory regimes;[1]

---

1 See for example the Business Council of Australia (BCA), *Submission No. 16*, section 2; Mr Steven Münchenberg, BCA, *Transcript of Evidence*, 6 April 2006, p. 67; Screenrights, *Submission No. 17,* paras. 8-12, 15; Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 2; Australian Finance Conference, *Submission No. 5*, pp. 1-2; Telstra Corporation Ltd (Telstra), *Submission No. 7*, pp. 5-6; Fundraising Institute – Australia Ltd, *Submission No. 9*, pp. 8-10; Science Industry Action Agenda (SIAA), *Submission No. 14*, p. 4; Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23; Property Law Reform Alliance, *Submission No. 15*, p. 2; Australian Self-Medication Industry, *Submission No. 20*, p. 11; Department of the Treasury, *Submission No. 21.2*, p. 6; Mr Ray Steinwall, *Submission No. 22*, p. 7; New Zealand Government, *Submission No. 23*, pp. 4-5; Department of Foreign

- Impediments to economic growth both, domestically and internationally, resulting from regulatory inconsistencies among jurisdictions;[2]
- Difficulties or uncertainties for individuals arising from regulatory inconsistencies among jurisdictions,[3] and unacceptable differences in impacts for individuals due to inconsistent treatment of the same action across jurisdictions;[4]
- Reduced competitiveness, comparative disadvantage, or lack of opportunity due to regulatory inconsistencies among jurisdictions;[5]
- Reduced effectiveness and integrity of laws due to regulatory inconsistencies among jurisdictions, for example law enforcement difficulties across international borders.[6]

2.3 A number of examples of actual costs resulting from a lack of regulatory harmonisation were provided to the Committee. In its submission the Business Council of Australia (BCA) cited three broad cost estimates relating to multiple and overlapping laws:[7]

- A total of $20 billion as the annual cost of '…duplication and coordination across Australia's multiple jurisdictions';[8]

Affairs and Trade, *Submission No. 28*, p. 4; Mrs June McPhie, Law Society of NSW (LSNSW), *Transcript of Evidence*, 6 April 2006, p. 36.

2 Attorney-General's Department, *Submission No. 26*, p. 3.

3 For example in the area of power of attorney (Ms Susan Cochrane, *Submission No. 12*, pp. 2-3; Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, pp. 32-33), and real estate transactions (Property Law Reform Alliance, *Submission No. 15*, p. 2; Victorian Department of Sustainability and Environment, *Submission No. 29*, p. 3). See also Attorney-General's Department, *Submission No. 26*, pp. 29-31.

4 Attorney-General's Department, *Submission No. 26*, p. 3.

5 For example in the areas of copyright (Viscopy, *Submission No. 1*, pp. 3-7; Screenrights, *Submission No. 17*, paras. 12-23), real estate transactions (Realty Conveyancing Services, *Submission No. 8*, p. 1; Australian Institute of Conveyancers Vic Division Inc, *Submission No. 24*, pp. 1-2), and the science industry (Science Industry Action Agenda, *Submission No. 14*, pp. 4).

6 New Zealand Government, *Submission No. 23*, p. 5.

7 BCA, *Submission No. 16*, section 2.

8 BCA citing Drummond M L, 'Costing Constitutional Change: estimating the Costs of Five Variations on Australia's Federal System', *Australian Journal of Public Administration* 61(4), December 2002, pp.43-56. This figure was also cited by the House of Representatives Standing Committee on Economics, Finance and Public Administration in its 2003 report *Rates and Taxes: A Fair Share for Responsible Local Government*, p. 140. This report can be accessed at: http://www.aph.gov.au/house/committee/efpa/localgovt/report.htm.

- An estimate by Optus that compliance with multiple workers' compensation and occupational health and safety regimes adds between five and ten per cent to the cost of its workers' compensation premiums; and
- An estimate by the Building Products Innovation Council and the Housing Industry Association that the annual cost of compliance with multiple State and Territory building laws is between one and five per cent of company turnover ($600 million annually at two percent of turnover).

2.4 The BCA also referred the Committee to Attachment A of its 2005 submission to the Taskforce on Reducing the Regulatory Burden on Business, which provides four other examples of actual costs incurred by businesses as a result of regulatory overlap.[9]

2.5 The Science Industry Action Agenda (SIAA), a collaboration between the science industry and the Australian Government with the aim of assisting the growth of the industry,[10] provided some examples of aggregate cost imposts for small-to-medium-sized enterprises (SMEs) in the science industry resulting from regulatory duplication or overlap. These are as follows:

- Over $1 million in compliance costs for 100 SMEs involved in the importation of ozone-depleting substances due to requirements under two separate ozone protection and product stewardship regimes;
- Over $71 million in compliance costs for at least 100 SMEs due to statutory requirements to provide Material Safety Data Sheets for chemicals, combined with $1.5 million in compliance costs due to reporting requirements under the Commonwealth National Industrial Chemicals Notification and Assessment Scheme for certain classes and volumes of chemicals supplied to laboratories; and
- An annual compliance cost of $50 000 for one importer of diagnostic kits due to the registration requirements of five separate government agencies.[11]

---

9 'Submission to the Taskforce on Reducing the Regulatory Burden on Business: Attachment A – Specific Regulatory Issues', pp. 9, 17-18, 48 and 67. This document can be accessed at: www.bca.com.au/content.asp?newsID=97547.

10 SIAA, *Submission No. 14*, p. 2.

11 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23. The first two examples were originally set out in the SIAA's December 2005 'Supplementary

2.6 The SIAA informed the Committee that these cost imposts were measured by applying an hourly rate to time spent on compliance and that registration fees were also taken into account.[12]

2.7 The Fundraising Institute – Australia Ltd (FIA), the peak national body for the not-for-profit fundraising sector in Australia, indicated that its member fundraising organisations can incur compliance costs of up to a full-time staff member salary or more due to regulatory duplication.[13]

2.8 The Department of the Treasury (Treasury) informed the Committee that regulatory differentiation between Australia and New Zealand results in Australian companies incurring average costs of between $10 000 and $30 000 in providing securities prospectuses to potential investors in New Zealand. Treasury also indicated that estimated future compliance costs for Australian banks of developing stand-alone systems (particularly information technology platforms) in New Zealand may range between NZ$15 million and NZ$30 million per bank, with estimated ongoing annual costs of between NZ$15 million and NZ$20 million.[14]

2.9 The potential benefits of harmonisation entail the amelioration or removal of the adverse effects noted at paragraph 2.2 above, for example greater certainty for business along with reduced costs and difficulties; greater certainty and consistency for individuals across jurisdictions; fewer comparative disadvantages; and more effective, streamlined regulation. The Committee notes with interest some recent broad estimates of governance costs that could be saved if duplication between the Commonwealth and the States/Territories was reduced or eliminated:

Submission to the Regulation Taskforce' (accessible at: http://www.scienceindustry.com.au/pages/suppl_sub.asp). The SIAA also indicated that science industry SMEs employ in the range of 10-30 people and that the industry is '…primarily composed of SMEs': see Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 22, and *Submission No. 14.1*, p. 4 of 7.

12 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 23-24.

13 Mr Andrew Markwell, FIA, *Transcript of Evidence*, 6 April 2006, p. 47.

14 Treasury, *Submission No. 21.2*, p. 6. Treasury indicated however that recently announced legislative measures to bring about mutual support between the Australian Prudential Regulation Authority and the Reserve Bank of New Zealand will 'ameliorate costs to banks': p. 6.

- One recent academic study into reform of Australia's federal system estimated that up to $30 billion could be saved annually if the state level of government in Australia was abolished.[15]
- In evidence to another parliamentary inquiry, the Chief Executive Officer of the St Luke's Hospital Complex in Sydney estimated that Commonwealth assumption of full responsibility for the administration of the health sector in Australia would save between $5 and $8 billion per annum.[16]

2.10 The Committee was also informed that harmonisation can increase the potential for growth and opportunity in industry, trade and business. The Committee was informed by the SIAA, for example, that the current annual growth rate of 10 per cent of the Australian science industry:

> …can be increased by, among other things, harmonisation of regulation in Australia (and internationally), thus freeing the innovation inherently present in the industry.[17]

2.11 The Department of Foreign Affairs and Trade (DFAT) stated that '…greater harmonisation [between Australia and New Zealand] has the potential to further increase the annual growth rate in trade' between the two countries.[18]

Costs and potential disadvantages of harmonisation

2.12 It is important to note that there are also costs and potential disadvantages of legal harmonisation. To begin with, the institution of measures to achieve legal harmonisation involves considerable costs for governments. Developing and introducing legislation, particularly national legislation covering a range of matters, is a significant undertaking requiring substantial resources, potentially over a period of years. Added to this are the ongoing costs of administration once a

---

15 Griffith University Federalism Project, *Reform of Australia's Federal System*, p. 23 citing Drummond M L, "Costing constitutional change: Estimating the cost of five variations on Australia's federal system." *Australian Journal of Public Administration* 61(4), December 2002, pp. 43-56. This document is available at: http://www.griffith.edu.au/centre/slrc/federalism/.

16 Oral evidence by Mr George Toemoe to the inquiry into Health Funding by the House of Representatives Standing Committee on Health and Ageing, *Transcript of Evidence*, 24 August 2005, p. 23. This document can be accessed at: http://www.aph.gov.au/house/committee/haa/healthfunding/hearings.htm.

17 SIAA, *Submission No. 14.1*, p. 3 of 7.

18 DFAT, *Submission No. 28.1*, p. 2.

new legislative regime is established, particularly if the creation of new regulatory agencies is required.[19] Further, new legislative regimes designed to reduce duplication and costs can impose new compliance costs on industry and business, at least in the short term.

2.13 Some of the potential disadvantages to legal harmonisation identified in the evidence include:

- Difficulty of process and achieving desired outcomes depending upon the mechanism utilised;[20]
- Broad adoption of lowest common denominator laws, which may not be generally desirable, due to compromise;[21]
- Broad adoption of the exacting '…high-water mark' laws of one jurisdiction, which may not be desirable elsewhere due to that jurisdiction resisting modification of its existing regime;[22]
- Erosion of harmonisation over time due to legislative divergence among jurisdictions;[23]
- Discouragement of regulatory innovation among jurisdictions and reduced competitive pressure among jurisdictions to produce better laws;[24] and
- Negative impacts on regional or local areas resulting from harmonisation measures that may be broadly desirable.[25]

2.14 One other possible disadvantage of harmonisation, identified by the Litigation Law & Practice Committee of the Law Society of New South Wales (LSNSW), was the potential for Commonwealth-led harmonisation to be perceived as an attempt to extend the Commonwealth's regulatory reach by stealth:

> The pursuit of harmonisation of laws could meet with opposition based on constitutional grounds. …It could be

19 The New Zealand Government also noted that similar development and administration costs exist in relation to coordination mechanisms: see *Submission No. 23*, p. 5.

20 For example constitutional amendment (see Attorney-General's Department, *Submission No. 26*, pp. 7-8; Professor George Williams, *Submission No. 2*, p. 2).

21 BCA, *Submission No. 16*, section 4; Justice Kevin Lindgren, *Exhibit 33*, p. 4.

22 BCA, *Submission No. 16*, section 4.

23 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 27; New Zealand Government, *Submission No. 23*, p. 14.

24 BCA, *Submission No. 16*, section 4.

25 Mr Michael Ferguson MP and the Hon Duncan Kerr SC MP, *Transcript of Evidence*, 21 March 2006, p. 19. See also New Zealand Government, *Submission No. 23*, p. 5.

> seen as a process to "federalise" laws across Australia where those laws affect trade and commerce matters. This would be seen as a subtle mechanism to obviate the resort to section 51(xxxvii) of the Commonwealth Constitution. …It could be argued that harmonising laws would deny the opportunity of citizens to the security presented by the two levels of government…[26]

The Committee's view

2.15 It is clear that, as a general proposition, regulatory inconsistency, multiple layers of regulation, regulatory duplication, or regulatory complexity can add to the operational costs of businesses and other organisations. This impact was routinely cited in evidence to the inquiry, and the Committee is aware that cost imposts cannot always be precisely quantified (or necessarily expressed in dollar terms). It was also clear to the Committee from the evidence – particularly from the examples of absurd situations noted at the beginning of this report[27] – that the range of other adverse effects set out at paragraph 2.2 above can also result from a lack of harmonisation.

2.16 The Committee also accepts the general proposition that legal harmonisation can result in significant benefits such as the easing of compliance cost imposts and more effective regulation. The Committee is conscious too that, just as the costs resulting from a lack of harmonisation cannot always be precisely quantified, the benefits may not always be exactly measurable or immediate.[28]

2.17 These propositions aside, however, the Committee acknowledges that legal harmonisation measures involve significant costs, and that there are a number of potential drawbacks to going down the harmonisation path. It is also worthwhile to make what is perhaps an obvious point: the mere existence of differences between laws will not

---

26 LSNSW, *Submission No. 10*, p. 4. The Western Australian and Queensland Attorneys-General raised the issue of the Commonwealth overriding State laws: see Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 2; Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 1 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2.

27 See pp. vii-viii above.

28 Treasury, for example, indicated that 'Initiatives which extend harmonisation may not always translate directly into increased flows of trade in goods between Australia and NZ', but also that '…reducing costs through harmonisation can increase cross-border investment flows – which have the potential to enhance capital deepening and domestic growth': *Submission No. 21.2*, p. 7.

always mean that harmonisation of those laws is necessary or even desirable. In its submission, the New Zealand Government (NZG) noted that:

> Differences between the legal systems of Australia and New Zealand are not a problem in themselves. The existence of such differences is the inevitable product of well-functioning democratic decision-making processes in each country, which reflect the preferences of stakeholders, and their effective voice in the law-making process.
>
> …identical or unified laws are not a goal in themselves. But where differences cause significant costs, and in particular where they hinder trade and commerce or impair the effectiveness of regulatory regimes, options for coordination to address those concerns need to be considered, and the benefits weighed against the associated costs.[29]

2.18 The Committee agrees with this, not only in the context of the Australia-New Zealand relationship, but also in the context of the relationships among the governments of the Australian federation. Ultimately, the question of whether to harmonise or not to harmonise should be approached on a case-by-case basis and will always require a careful evaluation of the need, potential benefits, costs, and potential disadvantages. No single formula seeking to prescribe the appropriate conditions for legal harmonisation will be adequate for all situations, and the mechanism of harmonisation to be employed will also depend upon the particular circumstances at hand.

Mechanisms for achieving harmonisation of legal systems

Harmonisation within Australia

2.19 The main mechanisms by which legal harmonisation can be facilitated or achieved within Australia include:

- High Court judicial interpretation;
- High Court declaration of a single Australian common law;

29 NZG, *Submission No. 23*, pp. 2, 6.

- Model legislation;
- Referral of powers to the Commonwealth by the States;
- Cooperative legislative schemes; and
- Constitutional amendment.

High Court judicial interpretation

2.20 The Committee notes that harmonisation or standardisation of laws has been facilitated in Australia by High Court interpretation of the Constitution. In a number of landmark decisions since Federation, the High Court has affirmed and/or augmented the scope of Commonwealth legislative competence, thus legitimising Commonwealth establishment of national legislative regimes. While of course there have also been High Court cases tending in the other direction, it has been suggested that '…the High Court is more or less consistently pro-Commonwealth'.[30]

2.21 One of the most significant cases in this context is *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (the Engineers case). The Engineers case concerned industrial proceedings brought by a union against a collection of employers (including the Western Australian Government). In its decision the High Court indicated that the Commonwealth's legislative competence as set out in the Constitution was binding on the States and subject only to limitations also expressed in the Constitution:

> …the nature of dominion self-government and the decisions just cited entirely preclude, in our opinion, an *à priori* contention that the grant of legislative power to the Commonwealth Parliament as representing the will of the whole of the people of all the States of Australia should not bind within the geographical area of the Commonwealth and within the limits of the enumerated powers, ascertained by the ordinary process of construction, the States and their agencies as representing separate sections of the territory.
>
> …It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the

30 Craven G, 'The States–Decline, Fall or What?' in Gregory Craven (ed), *Australian Federation: Towards the Second Century*, 1992, p. 56.

> affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution.[31]

2.22 In applying these principles to the section of the Constitution in issue (s. 51(xxxv)), the Court held that:

> Sec. 51 (XXXV.) is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned: but subject to any special provision to the contrary elsewhere in the Constitution.[32]

2.23 The Engineers case affirmed the ability of the Commonwealth to bind the States and impose national laws where the Constitution so provided, subject to constitutional limitations. Other landmark High Court cases that have affirmed and/or augmented the scope of Commonwealth legislative competence include:

- *South Australia and Another v The Commonwealth and Another* (1942) 65 CLR 373 (the First Uniform Tax case) – the Court upheld Commonwealth legislation giving the Commonwealth exclusive control over the collection of income tax.
- *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468 (the Concrete Pipes case) – the Court was reluctant to define the limits of the Commonwealth corporations power in s. 51(xx) of the Constitution. Barwick CJ stated that:

> No doubt, laws which may be validly made under s. 51 (xx.) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities. I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner.[33]

---

31 Per Isaacs J. The text of the Engineers case can be accessed at: http://www.austlii.edu.au/au/cases/cth/HCA/1920/54.html.

32 Per Isaacs J.

33 Per Barwick CJ. The text of the Concrete Pipes case can be accessed at: http://www.austlii.edu.au/au/cases/cth/HCA/1971/40.html.

- *The Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams case) – the Court upheld Commonwealth legislation enacted under the external affairs power in s. 51(xxix) of the Constitution that sought to prevent the construction of a dam on the Franklin River in Tasmania.
- *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 – in this recent case the Court upheld Commonwealth legislation enacted under the corporations power in s. 51(xx) of the Constitution to regulate the relationship between corporations and their employees.

High Court declaration of a single Australian common law

2.24 The Committee also notes that the High Court has clearly indicated that the common law in Australia is harmonised, in the sense that there is a single Australian common law as opposed to separate systems of common law according to jurisdictional boundaries. In *David Russell Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the Court stated that:

> There is but one common law in Australia which is declared by this Court as the final court of appeal. …the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.[34]

2.25 The Court has affirmed this position in subsequent judgments, for example in *Lipohar v The Queen; Winfield v The Queen* (1999) 200 CLR 485 where the Court stated that '…there is but one common law, not as many as there are bodies politic',[35] and in *Roberts v Bass* (2002) 212 CLR 1 where Kirby J stated that '…there is but one common law in Australia'.[36]

34 The text of the case can be accessed at: http://www.austlii.edu.au/au/cases/cth/HCA/1997/25.html.

35 Per Gaudron, Gummow and Hayne JJ. The text of the case can be accessed at: http://www.austlii.edu.au/au/cases/cth/HCA/1999/65.html.

36 The text of *Roberts v Bass* can be accessed at: http://www.austlii.edu.au/au/cases/cth/HCA/2002/57.html.

Model legislation

2.26 The model – or template – legislation mechanism of harmonisation involves the enactment of identical legislation on a given matter by each of the various jurisdictions, resulting in separate but consistent regimes. The model legislation can be developed by one jurisdiction or cooperatively by a number of jurisdictions. One example of the mechanism is the current National Legal Profession project, developed by the Standing Committee of Attorneys-General (SCAG) and expected to be fully implemented in all States and Territories in 2006.[37] The Attorney-General's Department (AGD) indicated that the National Legal Profession project involves a set of model laws supported by a Memorandum of Understanding (MoU) agreed to by every Australian jurisdiction:

> 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.[38]

2.27 Another example of the model legislation mechanism is the final version of the uniform defamation laws project. In late 2004 the States and Territories advanced a proposal for uniform defamation laws involving the introduction of model legislation throughout Australia. The model laws are underpinned by an intergovernmental agreement and full implementation of the project is expected in 2006.[39]

Advantages and disadvantages

2.28 One advantage of the model legislation mechanism of legal harmonisation is that it avoids certain limitations of cooperative legislative schemes (noted at paragraphs 2.41 – 2.45 below). It can also theoretically achieve a high level of consistency due to the adoption of identical legislation across the board. The main weakness of the mechanism, however, is the potential for divergence due to amendment of the model legislation by individual jurisdictions, both at the initial enactment stage and over time.[40] The AGD stated that:

---

37 See Attorney-General's Department, *Submission No. 26*, pp. 6, 27-28 and *Submission No. 26.1*, p. 7.

38 AGD, *Submission No. 26*, p. 27. The National Legal Profession project is considered further in Chapter 4.

39 AGD, *Submission No. 26*, pp. 28-29 and *Submission No. 26.1*, p. 7. The uniform defamation laws project is considered further in Chapter 4.

40 Professor George Williams, *Submission No. 2*, p. 2; Dr Simon Evans, *Submission No. 31*, p. 2.

> …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.[41]

2.29 One other disadvantage of the model legislation mechanism that was noted in the evidence is '…costly duplication of administering bodies'[42] due to the processes associated with multiple regimes.

Referral of powers to the Commonwealth by the States

2.30 The referral of powers mechanism of harmonisation involves a State or States referring a matter to the Commonwealth for Commonwealth legislation according to subsection 51(xxxvii) of the Constitution. Subsection 51(xxxvii) provides as follows:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

2.31 Once referral of a matter has taken place, the Commonwealth can proceed to enact legislation on that matter which then applies to the referring jurisdictions and to those which subsequently adopt it. One example of the referral of powers mechanism is the current corporations law scheme as embodied by the Commonwealth *Corporations Act* 2001 and *Australian Securities and Investments Commission Act* 2001. This scheme involved an initial referral from the States providing the Commonwealth with the power to enact the legislation, and a second referral enabling Commonwealth amendment of the legislation in certain areas.[43] The referral was

41 AGD, *Submission No. 26*, p. 6.

42 Dr Simon Evans, *Submission No. 31*, p. 2.

43 The formation of corporations, corporate regulation, and the regulation of financial products and services. The referral is supported by an intergovernmental agreement (the Corporations Agreement) which requires the agreement of the States for certain types of

self-limited, being specified to end after five years unless extended; in 2005 an extension of the referral for a further five years was agreed by the Commonwealth and the States.[44]

Advantages and disadvantages

2.32 Perhaps the main advantage of the referral of powers mechanism of legal harmonisation is its simplicity. Once a referral has been made by the jurisdictions, the Commonwealth is able to enact legislation on the referred matter with wide application, thus eliminating the need for multiple regulatory regimes. The AGD noted that:

> [Referral of powers] 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.[45]

2.33 Another advantage of the referral of powers mechanism is that, as with model legislation, it avoids certain limitations of cooperative legislative schemes (noted at paragraphs 2.41 – 2.45 below).[46] The main drawback of the mechanism, however, is that the validity of the Commonwealth legislation on a referred matter will always depend upon the continuation of the underpinning referral from the States.[47] Maintaining an ongoing referral may become particularly important once the Commonwealth legislation has been in place for some time and is well-understood by those to whom it applies.

2.34 In his submission, Dr Simon Evans identified a number of other disadvantages that can reduce the effectiveness of the referral of powers mechanism:

- Potential reluctance on the part of the States to refer broad matters to the Commonwealth due to the possibility that the Commonwealth may legislate in an unforeseen or unapproved manner;
- The referral of a '…specific legislative text' may undesirably constrain the Commonwealth legislative scope;

---

amendments by the Commonwealth and consultation for others: see AGD, *Submission No. 26*, p. 7.

44 AGD, *Submission No. 26*, p. 7.

45 AGD, *Submission No. 26*, p. 7.

46 See AGD, *Submission No. 26*, p. 7.

47 Professor George Williams, *Submission No. 2*, p. 2.

- The revocability of referrals; and
- For self-limited referrals, the potential for the referring States to seek advantageous arrangements with the Commonwealth when the referral is due to expire and an extension is sought.[48]

Cooperative legislative schemes

2.35 The two main cooperative legislative schemes are applied legislation and complementary legislation.

Applied legislation

2.36 The applied legislation mechanism of harmonisation involves one jurisdiction enacting legislation on a given matter (for example the Commonwealth enacting legislation for one of the Territories) which is then applied by other jurisdictions. This mechanism was used to implement the national corporations law scheme between 1991 and 2001. The Commonwealth enacted corporations legislation for the Australian Capital Territory which was then applied independently in each of the other jurisdictions by virtue of their own legislation. Amendments made to the Commonwealth corporations legislation were automatically operative in the other jurisdictions.[49]

Complementary legislation

2.37 The complementary legislation mechanism of harmonisation involves the Commonwealth establishing a national regulator with respect to a given matter together with complementary legislation enacted by the other jurisdictions to furnish the regulator with the necessary '…powers with respect to State matters'.[50] The result is a national regulation scheme on the matter in question. Examples of the complementary legislation mechanism include the current gene technology regulation scheme (established by the Commonwealth *Gene Technology Act* 2000 and associated State/Territory laws) and the human embryo research regulation scheme (established by the *Research Involving Human Embryos Act* 2003 and associated State/Territory laws).[51]

48 See Dr Simon Evans, *Submission No. 31*, p. 2.

49 See Attorney-General's Department, *Submission No. 26*, p. 4.

50 Attorney-General's Department, *Submission No. 26*, p. 4.

51 See Attorney-General's Department, *Submission No. 26*, p. 4.

Advantages and disadvantages

2.38 Professor George Williams submitted that the applied legislation mechanism of legal harmonisation is:

> …arguably the best model because it does not depend upon a transfer of power, allows for change over time and is built upon Commonwealth-State cooperation.[52]

2.39 The Committee was informed by the AGD that the complementary legislation mechanism is also advantageous because the national regulator can operate effectively:

> 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.[53]

2.40 Dr Simon Evans suggested in his submission to the inquiry that the complementary legislation mechanism '…provides a much higher level of uniformity across Australia's legal systems'.[54]

2.41 The main disadvantages of cooperative legislative schemes are certain constitutional limitations that have been identified by the High Court in two cases: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, and *R v Hughes* (2000) 202 CLR 535. In the *Re Wakim* decision, the 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 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.[55]

2.42 After *Re Wakim* the Commonwealth enacted 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',[56] and the States also enacted legislation to '…validate past

52 Professor George Williams, *Submission No. 2*, p. 2.
53 AGD, *Submission No. 26*, p. 4.
54 Dr Simon Evans, *Submission No. 31*, p. 2.
55 AGD, *Submission No. 26*, p. 5.
56 AGD, *Submission No. 26*, p. 5.

decisions of federal courts made in reliance on cross-vested State jurisdiction'.[57]

2.43 In the *R v Hughes* decision, the High Court:

> …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.[58]

2.44 After *R v Hughes*, a new corporations law scheme was established by virtue of a referral of powers to the Commonwealth by the States (see paragraph 2.31 above). Legislative measures were also taken to '…reduce the *Hughes* risk'[59] for various other cooperative schemes and to validate, under State law, Commonwealth actions and decisions taken under schemes.

2.45 Despite the remedial action taken in the wake of the *Re Wakim* and *R v Hughes* decisions, the constitutional limitations to cooperative legislative schemes identified by the High Court still remain. The AGD stated in its submission that the limitations '…are technical and, in many cases, need not present a permanent impediment to cooperation, harmonisation or uniformity'.[60] The Department also noted, however, that the limitations may '…significantly contribute to the complexity of a scheme'.[61] Professor George Williams submitted that:

> These High Court decisions can cause problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology.[62]

2.46 In order to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions comprehensively an amendment to the Constitution would be necessary.

---

57 AGD, *Submission No. 26*, p. 5.
58 AGD, *Submission No. 26*, pp. 5-6.
59 AGD, *Submission No. 26*, p. 6.
60 AGD, *Submission No. 26*, p. 5.
61 AGD, *Submission No. 26*, p. 5.
62 Professor George Williams, *Submission No. 2*, p. 2.

Constitutional amendment

2.47 A constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions was advocated by Professor George Williams in his evidence to the inquiry. Professor Williams submitted that:

> There are now significant legal obstacles to effective harmonisation in Australia, even where there is bi-partisan support for co-operation across federal and State governments. Other than a change of approach by the High Court, the only complete solution is to amend the Constitution. Amendment of the Constitution by referendum is costly and difficult. On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes in other fields because co-operative schemes based on a referral of power are not politically achievable.[63]

2.48 Professor Williams stated that the '…actual amendment to the Constitution could be straightforward', '…need not transfer any power from the States to the Commonwealth',[64] and should contain the following provisions:

1. the States may consent to federal courts determining matters arising under their law; and
2. the States may consent to federal agencies administering their law.[65]

2.49 The AGD, while acknowledging the possibility of a constitutional amendment to resolve the limitations identified in *Re Wakim* and *R v Hughes*,[66] also sounded a note of caution in relation to the prospects for success of a proposal to amend the Constitution in this way:

---

63 Professor George Williams, *Submission No. 2*, p. 2.

64 Professor George Williams, *Submission No. 2*, p. 3.

65 Professor George Williams, *Submission No. 2*, p. 3. Professor Williams noted that the first of these provisions '…matches that recommended by the Constitutional Commission in 1988': *Submission No. 2*, p. 3.

66 AGD, *Submission No. 26*, p. 7.

> …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.[67]

2.50 The Department also noted that the 1984 referendum proposing an amendment to '…confirm the Commonwealth's constitutional power to participate in co-operative legislative schemes'[68] did not succeed, and that a successful constitutional amendment:

> …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.[69]

2.51 The Committee notes however that the referral of powers mechanism under subsection 51(xxxvii) of the Constitution has its own drawbacks (set out at paragraphs 2.33 – 2.34 above).

2.52 The possibility of a constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions also attracted comment elsewhere in the evidence to the inquiry. The Queensland Attorney-General, for example, expressed strong support for such an amendment,[70] whereas the LSNSW suggested that an

---

67 AGD, *Submission No. 26*, pp. 7-8. Dr Simon Evans agreed that the amendment contemplated by Professor Williams '…would remove many of the constitutional impediments to effective cooperative federalism' but also submitted that '…constitutional reform in this area is not likely even in the medium term': *Submission No. 31*, p. 3.

68 AGD, *Submission No. 26*, p. 8.

69 AGD, *Submission No. 26*, p. 8.

70 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, pp. 5, 6 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2. In-principle support was also

amendment would be little more than a 'bandaid' and that a thorough re-examination of the whole Constitution is required.[71]

2.53 The Committee supports the idea of a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court in the *Re Wakim* and *R v Hughes* decisions. Given the importance of intergovernmental cooperation in Australia's federal system, there should not be a constitutional obstacle to legislative harmonisation at such a crucial and fundamental level as between the Commonwealth and the States and Territories, either now or in the future. The avenues for cooperation between the jurisdictions should be preserved rather than impeded, particularly in the case of matters requiring a national approach. As Professor Williams stated:

> …the costs of not acting are very high. Do we really want to go through the next century of the Australian federation without an effective means of fostering cooperation between the federal and state governments in some of the most important areas of public policy today facing the nation?
>
> …the change is necessary. We should do it now rather than waiting for another century and simply limping along with our current problems.[72]

2.54 A constitutional amendment to remove the *Re Wakim* and *R v Hughes* limitations would enable the full use of cooperative schemes which are workable and can achieve a high level of legal harmonisation among the jurisdictions.

2.55 At the same time, the Committee is mindful of the very real issues that confront referenda proposing constitutional amendment. They are most expensive to mount and have a poor success rate (only 8 of the 44 referenda for constitutional amendment since Federation have been successful). It is also quite possible, as the AGD noted, that a proposal to amend the constitution to facilitate cooperative legislative schemes may not attract the requisite support due to the technical nature of the matter. Professor Williams, however, suggested that this factor would actually work in favour of obtaining support for such a proposal:

---

expressed by the BCA; see Mr Steven Münchenberg, BCA, *Transcript of Evidence* 6 April 2006, p. 69.

71 Mr Ian Tunstall, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 34.

72 Professor George Williams, *Transcript of Evidence*, 6 April 2006, pp. 77, 78.

> The Attorney-General's Department has also said that this would be a very technical amendment and that it might be difficult to convince Australians of its worth. But my view is that, in fact, this is exactly the type of amendment which is more likely to succeed at a referendum. That is because it is very different to some of the big ticket items that sometimes polarise people in the Australian community. This is an item like some of the successful changes by referendum to the New South Wales constitution that have been effective in getting very high levels of public support because they are seen as technically necessary and as commonsense to remedy a defect in the constitutional system.[73]

2.56 The Committee was interested to learn from the Queensland Attorney-General and the Treasury that the issue of a constitutional amendment to facilitate cooperative legislative schemes is currently being considered by SCAG.[74] Treasury indicated that:

> As part of this process, a range of issues have been under consideration by officials from the Australian Government and the States and Territories. The Special Committee of Solicitors-General has also been consulted for its views. There are still many issues to be considered by SCAG before deciding whether a constitutional referendum might be desirable.[75]

2.57 The Committee was also informed that, as far back as March 2002, SCAG agreed that Commonwealth and State officials would develop text for a constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions.[76]

2.58 It is clear, then, that a constitutional amendment has been identified by the Australian Government as a possible measure. The Committee considers that four years has been ample time for preparatory work

---

73 Professor George Williams, *Transcript of Evidence*, 6 April 2006, pp. 77-78. Professor Williams also drew a parallel between the possible amendment and the uncontroversial proposals that succeeded in the referenda of 1967 and 1977: p. 78.

74 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 5 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2; Treasury, *Submission No. 21.1*, p. 5 and *Submission No. 21.2*, p. 9.

75 Treasury, *Submission No. 21.2*, p. 9.

76 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 5. Professor Williams stated that the constitutional amendment as been '…on the agenda as an item at SCAG since 2002; it just has not moved anywhere': *Transcript of Evidence*, 6 April 2006, p. 81.

on this amendment, and that the time has come for the matter to be accorded a higher priority and taken forward. The Committee is also of the view that it would be advantageous for the Australian Government to draft the amendment sufficiently generally so as to encompass the broadest possible range of cooperative legislative schemes. This would provide some degree of protection against unforeseen constitutional obstacles for future cooperative arrangements, and would also be prudent given the expense and effort involved in mounting referenda.

2.59 The Committee is also of the view that a dedicated and wide-ranging consultation and education process will need to precede any referendum that is eventually held on this matter in order to maximise its chances of success, and that any referendum on the matter should be held at the same time as a federal election.

Recommendation 1

2.60 **The Committee recommends that:**

- **The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;**
- **The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;**
- **A dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that**
- **Any referendum on the constitutional amendment should be held at the same time as a federal election.**

Harmonisation between Australia and New Zealand

2.61 The AGD noted that:

> 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.[77]

2.62 The NZG identified four main mechanisms for achieving legal harmonisation between Australia and New Zealand:

- Treaties/agreements implemented by domestic legislation in each country;
- Mirror legislation adopted in each country without a treaty or arrangement;
- Each country giving legal effect to rules formulated by a joint body via domestic legislation;[78] and
- One country adopting, by way of domestic legislation, a regulatory scheme or body established in the other country.[79]

2.63 The central overarching trade agreement between Australia and New Zealand is the Australia New Zealand Closer Economic Relations Trade Agreement (CER) of 1983, under which a number of other agreements and arrangements exist.[80]

2.64 The Committee was informed that there are a number of harmonisation arrangements already in place or in development between Australia and New Zealand. Some examples include:

---

77 AGD, *Submission No. 26*, p. 8. The AGD noted that the States and Territories are involved in the treaty-making process: *Submission No. 26*, p. 8.

78 DFAT also noted that the creation of a '…regulatory body which regulates both jurisdictions and which has essentially the same rules and regulations applying in both Australia and New Zealand' can be a mechanism of legal harmonisation: *Submission No. 28*, p. 4.

79 NZG, *Submission No. 23*, pp. 13-15.

80 Telstra registered a concern with the Committee that the CER '…does not appear to have kept pace with other international agreements. Telcos are a clear example here': Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2. The Committee notes that, as at November 2006, the CER is under review by the Joint Standing Committee on Foreign Affairs, Defence and Trade. Further information is available at: http://www.aph.gov.au/house/committee/jfadt/nz_cer/index.htm.

- The Australia-New Zealand Therapeutic Products Authority (in development), the joint therapeutic goods regulator that will be established by legislation in both Australia and New Zealand;[81]
- Food Standards Australia New Zealand, the joint statutory authority established by the *Food Standards Australia New Zealand Act* 1991 that develops and implements a single set of food standards for both countries;[82] and
- The Joint Accreditation System of Australia and New Zealand established by the 1990 Agreement on Standards, Accreditation and Quality, which '…is the joint accreditation body for certification of management systems, products and personnel'.[83]

2.65 The Committee was also informed that there are a number of coordination and cooperation arrangements in place between Australia and New Zealand such as the following:

- *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law*, which, under the CER, sets out a number of areas for greater coordination and harmonisation of business law between Australia and New Zealand;[84]
- The trans-Tasman Mutual Recognition Arrangement (1998), which, under the CER, '…extends Australia's Mutual Recognition scheme operating between the Commonwealth, State and Territory jurisdictions to include New Zealand';[85] and
- The Single Economic Market initiative (2004), which will seek to '…create a more favourable climate for trans-Tasman business through regulatory harmonisation'.[86]

2.66 As some of these examples indicate, coordination and cooperation arrangements between Australia and New Zealand can involve or lead to formal legal harmonisation, for example the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* and the Trans-

81 HE Mrs Kate Lackey, NZG, *Transcript of Evidence* 21 March 2006, p. 44. See also NZG, *Submission No. 23*, pp. 18-19.

82 See NZG, *Submission No.* 23, p. 7.

83 DFAT, *Submission No. 28*, p. 5 (Attachment A). See also NZG, *Submission No. 23*, p. 7.

84 See Treasury, *Submission No. 21.1*, pp. 6-13 and NZG, *Submission No. 23*, pp. 7, 10.

85 Treasury, *Submission No. 21.1*, p. 12; see also NZG, *Submission No. 23*, pp. 7, 8-9.

86 DFAT, *Submission No. 28*, p. 2.

Tasman Mutual Recognition Arrangement.[87] The NZG also noted a number of cooperative techniques for achieving greater coordination, for example cooperation between regulators (information sharing, assistance in evidence-gathering, cross-appointment of members), joint research, analysis, and policy development, and cooperation in regional and multilateral fora.[88]

Fora for pursuing harmonisation of legal systems

Harmonisation within Australia

2.67 The main fora for pursuing legal harmonisation within Australia are the Council of Australian Governments (COAG) and the various ministerial councils. COAG is the senior intergovernmental forum within Australia and comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association. COAG deals with policy issues of national import including National Competition Policy arrangements.[89]

2.68 The ministerial councils comprise relevant ministers from each government, including ministers from the NZG when matters affecting New Zealand are considered. The AGD informed the Committee that:

> 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.[90]

2.69 The ministerial councils also supervise the implementation of policy decisions agreed by COAG. Examples of ministerial councils dealing with matters relevant to the inquiry include:

- Ministerial Council on Consumer Affairs;
- Ministerial Council for Corporations;

87 DFAT noted that '…mutual recognition of each jurisdiction's processes and standards… is often linked to the harmonisation of laws, standards, and regulations to the greatest extent possible': *Submission No. 28*, p. 4.

88 See NZG, *Submission No. 23*, pp. 12-13.

89 More information on COAG can be found at: http://www.coag.gov.au/about.htm.

90 AGD, *Submission No. 26*, pp. 8-9.

- Workplace Relations Ministers' Council; and
- SCAG.[91]

Harmonisation between Australia and New Zealand

2.70 The main fora that can be utilised for pursuing legal harmonisation between Australia and New Zealand are:

- Australian ministerial councils involving NZG ministers (see paragraph 2.68 above);
- Official bilateral working groups such as the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (2003),[92] the Trans-Tasman Accounting Standards Advisory Group (2004),[93] and the Trans-Tasman Council on Banking Supervision (2005);[94] and
- 'Formalised arrangements for discussion of policy proposals and implementation issues, for example the MoU on Business Law Coordination'.[95]

2.71 The NZG further noted that 'informal discussions between Ministers and officials in the context of unilateral reforms' and 'cooperation in regional and multilateral fora' also take place.[96]

91 A full list of the ministerial councils can be found at: http://www.coag.gov.au/ministerial_councils.htm.

92 AGD, *Submission No. 26*, pp. 9-10; see also NZG, *Submission No. 23*, pp. 17-18.

93 Treasury, *Submission No. 21.1*, p. 8; see also NZG, *Submission No. 23*, p. 16.

94 Treasury, *Submission No. 21.1*, p. 11; NZG, *Submission No. 23*, p. 16.

95 NZG, *Submission No. 23*, p. 15.

96 NZG, *Submission No. 23*, p. 15.

3

Harmonisation between Australia and New Zealand

3.1 This Chapter examines the current level of legal harmonisation between Australia and New Zealand in particular areas as raised in the evidence and identifies some possible initiatives for further harmonisation between the two countries. A further aspect of legal harmonisation between Australia and New Zealand is also considered in Chapter 4.

The Australia-New Zealand relationship

3.2 Australia and New Zealand have a uniquely close and abiding relationship borne of shared history and longstanding connections – and it is a relationship that continues to grow closer over time. Both the Australian and New Zealand Governments affirmed this relationship in their evidence to the inquiry. DFAT stated that:

> Australia's relationship with New Zealand is the closest and most comprehensive relationship we have with any country.[1]
>
> …Migration, trade and defence ties, and strong people-to-people links have helped shape a close and co-operative relationship. …At the government-to-government level, Australia's relationship with New Zealand is more extensive than with any other country.[2]

---

1 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 1.

2 DFAT, *Submission No. 28*, p. 1.

> …On the economic and commercial fronts, both governments are strongly committed to the closer integration of our two markets, including the closer alignment of our respective legal and regulatory regimes to streamline business activities and create a more favourable climate for trans-Tasman business.[3]

3.3 The NZG stated that:

> New Zealand's closest international relationship is with Australia, as reflected in our trade, investment and people flows, depth of regulatory coordination and an array of inter-governmental trans-Tasman agreements and arrangements. The two governments have expressed a desire to deepen and broaden the economic relationship by advancing the concept of a single economic market, or seamless business environment.[4]

3.4 The Committee was pleased to hear that much progress has been made, and continues to be made, to advance regulatory harmonisation, coordination and cooperation between Australia and New Zealand, particularly in the area of trade and commerce. DFAT indicated that:

> There is a high level of integration of the two economies… both governments are now focusing on third generation trade facilitation activities which are aimed at creating closer integration of the two economies through regulatory harmonisation and the creation of a more favourable climate for trans-Tasman business collaboration.[5]

3.5 The NZG stated in its initial submission that '…substantial work has been done to address legal and regulatory impediments to trans-Tasman commercial activity' over the last ten years,[6] and the terms of reference for a 2005 review of the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* state that 'There has been a significant alignment of Australian and New Zealand business laws over the past five years'.[7] The NZG also observed elsewhere that:

---

3 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 2.

4 NZG, *Submission No. 23*, p. 1.

5 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 2.

6 NZG, *Submission No. 23*, p. 7; see also pp. 7-8.

7 Terms of Reference for the Review of the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of

> Trans-Tasman cooperation has been remarkably successful. Occasionally… deadlines have been missed and processes have taken longer than had initially been anticipated. But what has been established has been a continuing process for identifying and exploring opportunities between the two countries. This has been conspicuously successful and long may it continue.[8]

3.6 The Committee commends the Australian and New Zealand Governments for this excellent work. The Committee would also like to take the opportunity to thank the New Zealand Government for its considered, constructive and highly professional input into the inquiry. The Committee found the evidence of the New Zealand High Commissioner to Australia, HE Mrs Kate Lackey, particularly valuable, and greatly appreciated the fact that the High Commissioner took time out of her busy schedule to appear in person before the Committee.

Closer association

3.7 The Committee notes that, prior to Australian Federation in 1901, New Zealand was one of the seven colonies of Australasia together with the Australian colonies, and was involved in the processes that led up to Federation. New Zealand participated in intercolonial conferences on various matters as well as in the Australasian Federation Conference of 1890 and the Federation Convention of 1891. While New Zealand ultimately chose not to join the Federation, it is still included in the definition of the States in s. 6 of the Australian Constitution. This historical context forms a backdrop to the closeness and breadth of the relationship between Australia and New Zealand today. While Australia and New Zealand are of course two sovereign nations, it seems to the Committee that the strong ties between the two countries – the economic, cultural, migration, defence, governmental, and people-to-people linkages – suggest that an even closer relationship, including the possibility of union, is both desirable and realistic. A more closely integrated relationship is also suggested by the ever-shrinking globalised environment that now exists and the sense that the concept of national sovereignty is not perhaps what it once was.

Business Law, New Zealand Ministry of Economic Development website: http://www.med.govt.nz/templates/Page____13456.aspx (accessed 7 August 2006).

8 NZG, *Submission No. 23.1*, p. 5.

3.8 The Committee is of the view therefore that Australia and New Zealand would benefit from collaboration at the parliamentary level to ensure ongoing harmonisation of their respective legal systems and to investigate future options for mutually beneficial activity, including the possibility of union.

Recommendation 2

3.9 **The Committee recommends that the Senate and the House of Representatives of the Australian Parliament invite the New Zealand Parliament to establish a trans-Tasman standing committee to monitor and report annually to each Parliament on appropriate measures to ensure ongoing harmonisation of the respective legal systems.**

The Committee further recommends that the trans-Tasman standing committee be required to explore and report on options that are of mutual benefit, including the possibility of closer association between Australia and New Zealand or full union.

3.10 The Committee has also identified other initiatives at a broad overarching level which are most assuredly possible and which would function constructively to bring Australia and New Zealand closer together. Firstly, the Committee is of the view that both Governments should be actively pursuing a common currency. While the Committee is aware that both Governments have indicated that a common currency is not being considered at present,[9] it seems to the Committee that a common currency between Australia and New Zealand would go a long way towards cementing closer economic relations between the two countries. The European experience shows that a common currency between sovereign nations is quite within the realms of possibility.

9 See for example joint press conference of the Australian Treasurer, the Hon Peter Costello MP, and the New Zealand Minister for Finance, the Hon Dr Michael Cullen, 17 February 2005. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/transcripts/2005/013.asp. See also HE Mrs Kate Lackey, NZG, *Transcript of Evidence*, 21 March 2006, p. 41.

Recommendation 3

3.11 **The Committee recommends that the Australian Government actively pursue with the New Zealand Government the institution of a common currency for Australia and New Zealand.**

The Committee further recommends that appropriately equitable arrangements would need to be put in place with respect to the composition of a resulting joint Reserve Bank Board.

3.12 Secondly, while the Committee is aware that NZG ministers participate in Australian ministerial councils when matters affecting New Zealand are considered,[10] it seems desirable to the Committee that NZG ministers should have full membership of Australian ministerial councils, which would therefore become Australasian ministerial councils. This would strengthen Government-to-Government links, provide an additional perspective in the consideration of policy issues, and would ensure that New Zealand ministers are kept abreast firsthand of significant developments in Australia which may have ramifications for New Zealand and the trans-Tasman relationship.

Recommendation 4

3.13 **The Committee recommends that the participating Australian governments move to offer New Zealand Government ministers full membership of Australasian (currently Australian) ministerial councils.**

Specific areas covered in this Chapter

3.14 In this Chapter the Committee also considers a number of specific areas that were raised in the evidence. These are:

- Partnership law;
- Competition and consumer protection law;
- Telecommunications regulation;
- Copyright regulation;
- Legal procedures;

10 See Chapter 2 paragraph 2.68 above.

- Statute of limitations;
- Service of legal proceedings; and
- Evidence law.

3.15 Each of these areas is considered in turn. Before this, however, an overview of a number of relevant formal arrangements and instruments between Australia and New Zealand, encompassing a range of measures and activities including legal coordination and harmonisation, is provided below. The possibility of a new legislative mechanism for legal harmonisation between Australia and New Zealand is also raised.

Overview of relevant formal arrangements between Australia and New Zealand

3.16 The Committee notes that there are currently more than 80 '…government-to-government bilateral treaties, protocols and other arrangements of less-than-treaty status'[11] between Australia and New Zealand, dealing with a wide range of matters including:

> …bilateral trade, business law coordination, food and product standards, trans-Tasman travel and aviation links, taxation, social security, health care and government procurement.[12]

Australia-New Zealand Closer Economic Relations Trade Agreement (CER)

3.17 Upon its entry into force in 1983 the CER provided for the incremental removal of tariffs, import licensing and quantitative restrictions. Both Governments also agreed to stop providing subsidies as inducements to export. In its submission to the inquiry, the NZG noted that '…the CER agreement took a comprehensive, "everything is included unless expressly excluded" approach to trade issues'.[13]

---

11 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 3.

12 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 3.

13 NZG, *Submission No. 23*, p. 6. The CER can be accessed at: http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/dfat/treaties/1983/2.html?query=CER.

3.18 In 1988 the CER was extended to the trans-Tasman trade in services, with the same inclusive, overarching approach as had been employed earlier.[14] The CER has meant a liberalisation of services trade between Australia and New Zealand; indeed, DFAT indicated that '…almost all trans-Tasman trade in services is now open'.[15] The CER was further augmented in 1990 when anti-dumping rules were replaced with complementary 'abuse of market power' provisions in both countries' respective trade practices legislation.[16]

3.19 In its submission DFAT noted the success of the CER in fostering trade:

> In the twenty years following the [CER's] entry into force, two way trade in goods has expanded at an average annual growth rate of 10 per cent. In 2004, trans-Tasman merchandise trade was valued at $13.2 billion… New Zealand is now Australia's fifth biggest market.[17]

3.20 DFAT also indicated that the CER has been successful in fostering investment between Australia and New Zealand:

> It is estimated that between 1983 and 2003, two way investment increase at an annual rate close to 18 per cent. In 2003, total two way investment was valued at $56.7 billion… Since 1991 total two-way investment has increased by 167.9 per cent.[18]

3.21 In oral evidence DFAT stated that the CER:

> …is one of the earliest and most comprehensive trade agreements. It is recognised by the World Trade Organisation as a model agreement covering substantially all trade in goods, including agricultural products and services.[19]

3.22 As noted in Chapter 2, however, Telstra suggested in its evidence that the CER '…does not appear to have kept pace with other international agreements',[20] notably in the area of telecommunications. As was also

---

14 The Trade in Services Protocol to the CER: see DFAT, *Submission No. 28*, p. 5 (Attachment A).

15 DFAT, *Submission No. 28*, p. 5 (Attachment A).

16 NZG, *Submission No. 23*, p. 6.

17 DFAT, *Submission No. 28*, p. 2.

18 DFAT, *Submission No. 28*, p. 2.

19 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 2.

20 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2.

noted in Chapter 2, the CER is currently under review by the Joint Standing Committee on Foreign Affairs, Defence and Trade.[21]

Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law

3.23 The current *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* was signed by Australia and New Zealand in February 2006[22] following a review of the previous incarnation (signed in 2000). Treasury informed the Committee that the MoU '…sits under the umbrella' of the CER and '…reflects the desire of both countries to deepen the trans-Tasman relationship within the global market'.[23] In terms of objectives, Treasury indicated that the MoU:

> …specifies a number of areas to consider for suitability for coordination, including cross recognition of companies, financial product disclosure regimes, cross border insolvency, stock market recognition, consumer issues, electronic transactions and competition law.[24]

3.24 The Committee notes that the current MoU contains the following statement regarding the reduction of business law regulatory impediments:

> Both Governments are aware that some existing laws and regulatory practices relating to business within each economy may impede the development of trans-Tasman business activity. Through the development of increased coordination and dialogue, both Governments will endeavour to minimise such impediments.[25]

3.25 Further, the current MoU also affirms a commitment on the part of both Australia and New Zealand to work towards a single economic market:

---

21 See Chapter 2 footnote 80 above.

22 Ms Ruth Smith, Treasury, *Transcript of Evidence*, 21 March 2006, p. 16.

23 Treasury, *Submission No. 21.1*, p. 6.

24 Treasury, *Submission No. 21*, p. 6.

25 *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2006), para. 4. This document can be accessed at: http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1073.

> Both Governments have committed to the objective of a single economic market. The Australian Productivity Commission… has defined this as a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations of both countries.[26]

3.26 In reference to this commitment, the NZG stated that:

> …the SEM [Single Economic Market] process represents a political commitment to systematically identify and move forward on initiatives that seek to reduce barriers to trans-Tasman trade in goods, services, labour and capital.[27]

3.27 In his evidence to the Committee, Professor Gordon Walker stated that the single economic market initiative:

> …is a big shift. That is the first time both governments have come out and said this, and to my mind it is absolutely welcome; because that is the key step.[28]

3.28 The current MoU also notes that Australia and New Zealand have achieved a '…significant degree of coordination and cooperation in a number of areas of business law' including the following:

> a. competition laws enforced by the Commerce Commission in New Zealand and Australian Competition and Consumer Commission;
>
> b. consumer protection laws, including fair trading laws;
>
> c. cross investment activity including the offer of securities between Australia and New Zealand, in particular, equities and interests in managed funds; cross border listings on ASX and NZSX;
>
> d. mutual recognition of registered occupations, as provided for under the Trans-Tasman Mutual Recognition Arrangement; and
>
> e. New Zealand reforms regarding takeovers and securities law, and the adoption by both countries of International Financial Reporting Standards.[29]

---

26 *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2006), para. 3.

27 HE Mrs Kate Lackey, NZG, *Transcript of Evidence*, 21 March 2006, p. 40.

28 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, p. 2.

3.29 In its submission, Treasury informed the Committee of the following current business law coordination projects between Australia and New Zealand that were put in train under the previous version of the MoU:

- Accounting standards (the Trans-Tasman Accounting Standards Advisory Group, discussed further below);
- Mutual recognition of companies;
- Cross-border insolvency;
- Mutual recognition of offer documents (discussed further below);
- Competition law and consumer protection;
- The Trans-Tasman Council on Banking Supervision (discussed further below); and
- Trans-Tasman Mutual Recognition Arrangement (discussed further below).[30]

3.30 The current MoU retains and refines a number of the areas for possible business law coordination that were identified in the previous version, as well as specifying new areas for possible coordination work such as insurance regulation and anti-money laundering supervisory frameworks. In relation to the areas identified for possible coordination, the current MoU further states that:

> In order to determine the suitability of each of these issues for coordination, regard will be given to:
>
> a. The desirability of ensuring for each particular situation, that a firm, ideally, will only have to comply with one set of rules, and have certainty as to the application of those rules in the other jurisdiction, and with which regulator (ie Australian or New Zealand) it needs to deal;
>
> b. Whether the situation should be regulated solely through domestic rules or whether a bilateral, or multilateral solution would be more appropriate; and
>
> c. Whether a good reason exists for the law in this area to be different between Australia and New Zealand.[31]

29 *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2006), para. 8.

30 Treasury, *Submission No. 21.1*, pp. 7-12.

3.31 While the MoU does not focus on legal harmonisation of laws, the Committee is encouraged to see that this important document recognises the desirability of reducing regulatory overlap and inconsistency where warranted.

Trans-Tasman Mutual Recognition Arrangement (TTMRA)

3.32 The TTMRA, which commenced in 1998, extends the mutual recognition scheme which operates within the Australian jurisdictions to include New Zealand. Treasury informed the Committee that:

> The TTMRA seeks to assist the integration of the Australian and New Zealand economies and promote competitiveness and forms part of the Australia-New Zealand Closer Economic Relations Trade Agreement (CER).
>
> The principle of TTMRA is that any good that may legally be sold in one participating jurisdiction can also be sold in another; and any person registered to practise an occupation in one jurisdiction can practise an equivalent occupation in another.[32]

3.33 The NZG also informed the Committee that the TTMRA is '…of particular importance' in the context of product standards between Australia and New Zealand:

> [TTMRA] is intended to ensure that differences in standards between the two countries do not prevent the trans-Tasman supply of goods: goods that meet the requirements for sale in one country can lawfully be sold in the other without needing to comply with any different local requirements.[33]

3.34 The NZG noted that while there are outstanding differences between Australia and New Zealand in relation to product standards which can present problems (for example non-enforceable standards set by industry or major purchasers), it '…supports continuing the momentum of the current work programme on these issues'.[34]

---

31 *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2006), para. 13.

32 Treasury, *Submission No. 21.1*, p. 12. See also AGD, *Submission No. 26.3*, pp. 9-10.

33 NZG, *Submission No. 23*, p. 22.

34 NZG, *Submission No. 23*, p. 22.

3.35 The AGD indicated that the TTMRA is given effect in Australia by the Commonwealth *Trans-Tasman Mutual Recognition Act* 1997.[35]

3.36 The Committee notes that the Productivity Commission conducted a review of the TTMRA in 2003. The Commission noted that its data were limited given the TTMRA's commencement in 1998, but nevertheless was able to conclude that:

> [The] TTMRA [has] been effective overall in achieving [its] objectives of assisting the integration of the Australian and New Zealand Economies and promoting competitiveness. [It] should continue.[36]

3.37 The NZG informed the Committee that the Productivity Commission made a number of recommendations in its review report to further improve the operation of the TTMRA, which the Australian and New Zealand Governments are working to implement. These recommendations include:

- the development of an information/education campaign to remind regulators and the respective policy machineries of the strategic objectives and obligations of the TTMRA;
- the development of explicit mechanisms to ensure TTMRA integration objectives are factored in at an early stage of policy and regulatory design on both sides of the Tasman;
- the establishment of the CJR [Cross-Jurisdictional Review] Forum, under new terms of reference, to implement the review recommendations as well as to act as a "ginger group" to consider and promote discussion around the next set of regulatory integration issues; and
- a streamlined approach to the annual rollover of the Special Exemptions, whereby the reporting requirements associated with Co-operation Reports would be simplified.[37]

3.38 The Committee notes that exemptions to the TTMRA apply to medical practitioners. However, DFAT indicated that mutual recognition arrangements apply to doctors trained in either Australia or New Zealand.[38] The NZG indicated similarly:

> Medical schools in Australia and New Zealand and Australasian medical colleges are… mutually accredited by

35 AGD, *Submission No. 26.3*, p. 10.

36 Productivity Commission, *Evaluation of Mutual Recognition Schemes*, p. xiv. This report can be accessed at: http://www.pc.gov.au/study/mra/finalreport/.

37 NZG, *Submission No. 23.1*, p. 3; see also NZG, *Submission No. 23*, p. 9.

38 DFAT, *Submission No. 28*, p. 5 (Attachment A).

> both the Australian and the New Zealand Medical Councils. This means that graduates from these schools can work in both Australia and New Zealand.[39]

Trans-Tasman Accounting Standards Advisory Group (TTASAG)

3.39 The TTASAG, which was announced by Australia and New Zealand in January 2004, is intended to coordinate work towards common accounting standards in Australia and New Zealand. Treasury informed the Committee that membership of the TTASAG includes:

> …representatives from the Australian Financial Reporting Council (FRC), Australian Accounting Standards Board (AASB), New Zealand's Financial Reporting Standards Board (FRSB) and Accounting Standards Review Board (ASRB), the professional accounting bodies and officials from the Australian Treasury and the New Zealand Ministry of Economic Development.[40]

3.40 Treasury also indicated that the TTASAG has focused on the following areas thus far:

- the alignment of Australian and New Zealand financial reporting standards and how this can be progressed in light of the adoption of international accounting standards;
- the extent to which Australia and New Zealand can influence the development of international accounting standards through their involvement with the International Accounting Standards Board and related forums;
- the broader legal framework governing financial reporting requirements in Australia and New Zealand and how those requirements could be more closely aligned; and
- whether, in the longer term, there would be a move to joint institutions to ensure the maintenance of common standards in the two countries.[41]

Trans-Tasman Council on Banking Supervision

3.41 The Trans-Tasman Council on Banking Supervision was announced in February 2005 as part of the single economic market agenda.[42] Treasury informed the Committee that:

---

39 NZG, *Submission No. 23.1*, p. 5.

40 Treasury, *Submission No. 21.1*, p. 8.

41 Treasury, *Submission No. 21.1*, p. 8.

> The Council is chaired by jointly by the Secretaries to the Treasuries of Australia and New Zealand, and also includes senior officials from APRA, RBNZ and the RBA.[43]

3.42 The NZG indicated that the purpose of the Council is to '…promote a joint approach to trans-Tasman banking supervision'.[44] The Committee notes the terms of reference for the Council as follows:

> In particular, the Council will:
>
> - enhance cooperation on the supervision of trans-Tasman banks and information sharing between respective supervisors;
> - promote and review regularly trans-Tasman crisis response preparedness relating to events that involve banks that are common to both countries;
> - guide the development of policy advice to both governments, underpinned by the principles of policy harmonisation, mutual recognition and trans-Tasman coordination;
> - in the first instance, the Council will report to Ministers by 31 May 2005 on legislative changes that may be required to ensure APRA and the RBNZ can support each other in the performance of their current regulatory responsibilities at least regulatory cost.[45]

3.43 The Committee notes that in February 2006 Australia and New Zealand announced the legislative implementation in both countries of the Council's first set of recommendations. These are:

- General provisions that require each regulator to support the other in fulfilling the other's statutory objectives and, where ever reasonably possible, to avoid actions that could have a detrimental effect on financial system stability in the other country.
- A specific reference to the definition of 'detrimental actions' to actions that interfere with or prevent the provision of outsourced services to a related party in the other country.

---

42 Joint media statement of the Australian Treasurer, the Hon Peter Costello MP, and the New Zealand Minister for Finance, the Hon Dr Michael Cullen, 17 February 2005. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/pressreleases/2005/007.asp.

43 Treasury, *Submission No. 21.1*, p. 11.

44 NZG, *Submission No. 23*, p. 8.

45 Joint media statement of the Australian Treasurer, the Hon Peter Costello MP, and the New Zealand Minister for Finance, the Hon Dr Michael Cullen, 17 February 2005. See also Treasury, *Submission No. 21.1*, p. 11.

- A requirement that, where reasonably practical, the regulators consult each other before exercising a power that is likely to be detrimental to financial stability in the other's country.
- A requirement that an administrator or statutory manager advise the regulator if they have reasonable cause to believe that the proposed exercise of a function or power by them is likely to have a detrimental effect on financial stability in the other country.[46]

3.44 The ANZ Bank stated that these legislative changes will '…materially… we believe, decrease the risk of a problem occurring in Australia impacting on our New Zealand operations in an adverse way'.[47]

3.45 While the Committee is encouraged by the progress that has been made towards joint trans-Tasman banking supervision between the prudential regulators, the Committee notes evidence from the ANZ that there are still material differences between the Australian and New Zealand banking regulation environments. In oral evidence the ANZ stated that:

> Given that banking is a global activity, that really means that you would have to duplicate your operations, so it is a lot more expensive and you cannot take advantage of the sorts of economies of scale that you would otherwise be able to do. …we spent $50 million in setting up separate facilities in New Zealand.[48]

3.46 The ANZ further stated that '…there are very few products that we offer in Australia that are mirrored in New Zealand'.[49] Given the importance of the banking sector to both the Australian and New Zealand economies, the Committee considers that more should be done to progress a genuinely seamless banking environment between the two countries, particularly in the context of the trans-Tasman commitment to a single economic market.

---

46 Joint media statement of the Australian Treasurer, the Hon Peter Costello MP, the New Zealand Minister for Finance, the Hon Dr Michael Cullen, and the New Zealand Minister of Commerce, the Hon Lianne Dalziel, 22 February 2006. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/pressreleases/2006/006.asp.

47 Ms Jane Nash, ANZ Bank, *Transcript of Evidence*, 7 March 2006, p. 24.

48 Ms Jane Nash, ANZ Bank, *Transcript of Evidence*, 7 March 2006, p. 22.

49 Mr Sean Hughes, ANZ Bank, *Transcript of Evidence*, 7 March 2006, p. 25.

Recommendation 5

3.47 **The Committee recommends that the Australian Government propose to the New Zealand Government the legal harmonisation of the Australian and New Zealand banking regulation frameworks in order to foster a joint banking market.**

Joint Accreditation System of Australia and New Zealand (JASANZ)

3.48 The NZG informed the Committee that the JASANZ, which was established in 1991,

> …provides accreditation of bodies that certify quality and environment management systems, inspection services and product certification.[50]

3.49 The NZG also indicated that the JASANZ '…plays an important role in facilitating New Zealand's and Australia's bilateral and international trade'.[51]

Australia-New Zealand Therapeutic Products Authority (ANZTPA)

3.50 In December 2003 the Australian and New Zealand Governments signed a treaty to establish the ANZTPA. Once it is established, the ANZTPA will replace the current Australian TGA and the New Zealand Medicines and Medical Devices Safety Authority and will be the joint therapeutic goods regulator for both countries. The NZG informed the Committee that the ANZTPA, which will be '…accountable to both Governments',[52] will be established via legislation enacted both in Australia and New Zealand:

> That legislation is expected to be similar, but not identical. Both Acts will include the same core provisions, for example prohibiting the supply of a therapeutic without an approval from the agency, if an approval is required by Rules made by the Ministerial Council…[53]

3.51 The NZG also indicated that the regulatory framework of the ANZTPA will include '…a single set of Rules made by the Ministerial

50 NZG, *Submission No. 23*, p. 7.
51 NZG, *Submission No. 23*, p.7.
52 NZG, *Submission No. 23*, p. 19.
53 NZG, *Submission No. 23*, p. 19.

Council, and technical Orders made by the Managing Director',[54] and that the agency will be overseen by:

> …a two-member Ministerial Council comprising the New Zealand Minister of Health and the Australian Health Minister. The Agency will also have a five member Board. The Treaty establishes the Ministerial Council and the Board… the Board will be responsible for the strategic direction and financial management of the Agency. One of the Board members, the Managing Director, will be responsible for regulatory decisions about therapeutic products and for the day to day management of the Agency. The Board and the Managing Director will be appointed by the Ministerial Council.[55]

3.52 As noted in Chapter 2, arrangements for the Australia-New Zealand Therapeutic Products Authority are currently in development.[56] The Committee understands that public consultations regarding the details of the ANZTPA regulatory scheme commenced in May 2006.[57]

3.53 The Committee welcomes this historic development in the Australia – New Zealand relationship. As the NZG stated, the ANZTPA '…will in a sense be the first genuinely binational Australian and New Zealand body'.[58] The Committee envisages that a single approval process for both countries will result in reduced compliance costs for therapeutic product companies operating across the Tasman.

Double Taxation Agreement

3.54 DFAT informed the Committee that the Double Taxation Agreement, which commenced in 1995:

> …contains provisions for the avoidance of double taxation and the prevention of fiscal evasion in relation to income flowing between Australia and New Zealand.[59]

3.55 DFAT also informed the Committee that Australia and New Zealand agreed in 2003 to '…extend Australia's and New Zealand's

54 NZG, *Submission No. 23*, p. 19.

55 NZG, *Submission No. 23*, pp.18-19.

56 See Chapter 2 paragraph 2.64 above.

57 Further details can be accessed at the ANZTPA website: http://www.anztpa.org/index.htm (accessed 8 August 2006).

58 HE Mrs Kate Lackey, NZG, *Transcript of Evidence*, 21 March 2006, p. 44.

59 DFAT, *Submission No. 28*, p. 6 (Attachment A).

imputation regimes to include certain companies resident in the other country [*sic*]' in order to resolve shareholder inability to receive imputation credits relating to taxes paid on investment income from companies resident the other country.[60]

3.56 In its submission the ANZ Bank indicated that this is '…an improvement on the previous situation'[61] but still does '…not go far enough' to resolve some outstanding issues relating to double taxation.[62]

Mutual recognition of offer documents

3.57 Stemming from an October 2001 Australian proposal for the mutual trans-Tasman recognition of offer documents in financial services regulation, Australia and New Zealand agreed in 2005 on a treaty for the implementation of a mutual securities offer recognition scheme.[63] Treasury indicated that the purpose of the scheme is to:

> …provide that an offer of securities that can lawfully be made in one country can lawfully be made in the other country in the same manner and with the same offer documents, provided that:
>
> - the entry criteria for the recognition regime are satisfied; and
> - the offeror complies with the ongoing requirements of the recognition regime.[64]

3.58 Treasury also indicated that the potential benefits of a trans-Tasman mutual recognition regime include:

- facilitating cross-border fundraising activity;
- reducing the compliance costs associated with multiple market participation;
- enhancing competition in domestic markets by facilitating market entry;
- the potential to reduce the cost of capital to issuers by enabling them to access wider capital markets at lower cost than is currently available; and

60 DFAT, *Submission No. 28*, p. 6 (Attachment A).
61 ANZ Bank, *Submission No. 27*, p. 6.
62 ANZ Bank, *Submission No. 27*, p. 6.
63 Treasury, *Submission No. 21.1*, pp. 9-10.
64 Treasury, *Submission No. 21.1*, p. 10.

- providing investors with more opportunities to manage risk through geographical diversification of their investments.[65]

3.59 The Committee understands that the treaty was signed by Australia and New Zealand in February 2006,[66] and that provisions to implement the mutual recognition regime under the *Corporations Act* 2001 are currently being drafted.[67] The NZG indicated that the '…enabling framework is already in primary regulation in New Zealand so only the passing of regulations is required'.[68]

3.60 While welcoming the treaty, Professor Gordon Walker raised one concern in oral evidence regarding the potential for unlisted securities issuers to sell assets in Australia.[69] Professor Walker suggested that, in order to prevent this, '…Australia would be very smart to confine [the treaty] to mutual recognition in respect of listed issuers or issuers seeking listing':[70]

> …it seems to me the way to deal with this particular problem is to say, 'We'll confine the operation of this treaty to listed issuers'—those who are already listed on the ASX or indeed any other Australian exchange or, in the case of New Zealand, the NZX, or those seeking listing because they would have to be party to a listing agreement and the NZX would have gone through this issue of vendor securities.[71]

3.61 In its oral evidence Treasury stated that New Zealand has brought areas of its securities regulation closer to Australian securities regulation in recent years.[72] Treasury also indicated that it was not aware of the capacity for regulatory arbitrage being raised as an issue.[73]

---

65 Treasury, *Submission No. 21.1*, p. 9.

66 Joint media statement of the Australian Treasurer, the Hon Peter Costello MP, the New Zealand Minister for Finance, the Hon Dr Michael Cullen, and the New Zealand Minister of Commerce, the Hon Lianne Dalziel, 22 February 2006.

67 Ms Ruth Smith, Treasury, *Transcript of Evidence*, 21 March 2006, p. 17.

68 NZG, *Submission No. 23*, p. 18.

69 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, pp. 3-5.

70 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, p. 3.

71 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, p. 4.

72 Ms Ruth Smith, Treasury, *Transcript of Evidence*, 21 March 2006, p. 17.

73 Ms Ruth Smith, Treasury, *Transcript of Evidence*, 21 March 2006, p. 17.

Food Standards Australia New Zealand (FSANZ)

3.62 DFAT informed the Committee that FSANZ is:

> …a bi-national statutory authority that develops common food standards to cover the whole of the food chain "from paddock to plate". FSANZ operates under the *Food Standards Australia and New Zealand Act* 1991. ***The Joint Australia New Zealand Food Standards Code*** [*sic*] became the sole food standards code in operation in Australia and New Zealand on 20 December 2002.[74]

3.63 The NZG elaborated on the operation of FSANZ and the implementation of food standards:

> …each participating jurisdiction adopts food standards made by FSANZ by incorporating those food standards in subordinate legislation made in that jurisdiction, and is required to do so by the arrangements entered into by those jurisdictions, with some limited exceptions.[75]

3.64 In its evidence to the Committee DFAT identified FSANZ as a significant example of regulatory harmonisation between Australia and New Zealand,[76] and the SIAA cited the implementation process for food standards under the Australia-New Zealand arrangement as an example of best practice with regard to achieving regulatory harmonisation.[77]

Protocol on Harmonisation of Quarantine Administrative Procedures

3.65 The Protocol on Harmonisation of Quarantine Administrative Procedures entered into force in 1988 and comes under the aegis of the CER (quarantine was not dealt with in the original CER other than in an exception allowing for '…reasonable, scientifically justified quarantine measures to protect human, animal or plant life or health'[78]). The NZG noted that the purpose of the Protocol is to:

> …improve the efficiency and speed of the flow of goods between the two countries by harmonising quarantine

74 DFAT, *Submission No. 28*, pp. 5-6 (Attachment A).

75 NZG, *Submission No. 23*, p. 13.

76 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, pp. 2, 4.

77 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 22.

78 NZG, *Submission No. 23.1*, p. 8.

> administrative procedures. Under the Protocol, New Zealand and Australia reaffirmed their commitment to the principle that quarantine requirements should not be deliberately used as a means of creating a technical barrier to trade where this is not scientifically justified.[79]

3.66 In evidence to another parliamentary inquiry, the Australian Department of Agriculture, Fisheries and Forestry described the role of the Protocol as follows:

> In practice the protocol provides a basis for improved understanding of Australia and New Zealand's respective quarantine measures and practices and facilitates closer cooperation on a range of issues of common concern; while respecting the different pest and disease status of each country, and ensuring that the integrity of our respective quarantine regimes and the scientific basis of our import risk assessments are not compromised.[80]

3.67 In its evidence to the harmonisation inquiry the NZG also informed the Committee that the Protocol provides for the harmonisation of quarantine standards in the international context and specifically between Australia and New Zealand:

> The Protocol also placed some rules or disciplines around harmonising technical measures with international standards where they exist, and promoted bilateral harmonisation of quarantine and inspection standards and procedures, notwithstanding the fact that the exception in the original agreement continues to apply. The Protocol also provided for the establishment of a bilateral consultative group to drive quarantine harmonisation, coordinate technical committees and help resolve technical differences…[81]

3.68 Both the NZG and DFAT noted that each country regulates its own quarantine regime.[82] The Committee was pleased to hear from the

---

79 NZG, *Submission No. 23.1*, p. 8.

80 Submission by the Australian Government Department of Agriculture, Fisheries and Forestry to the inquiry into Australia and New Zealand Closer Economic Relations (CER) by the Joint Standing Committee on Foreign Affairs, Defence and Trade Trade Sub-Committee, p. 30. This document can be accessed at: http://www.aph.gov.au/house/committee/jfadt/nz_cer/subs.htm.

81 NZG, *Submission No. 23.1*, p. 8.

82 Mr Hans Saxinger, DFAT, *Transcript of Evidence*, 21 March 2006, p. 6; Ms Paula Wilson, NZG, *Transcript of Evidence*, 21 March 2006, p. 47.

NZG that '…the overwhelming majority of [quarantine] issues' acting as an impediment to trans-Tasman trade in goods '…have now been resolved, with only one or two remaining'.[83] In oral evidence the NZG also indicated that Australia and New Zealand are endeavouring to reach commonality regarding quarantine requirements for third countries:

> There is cooperation going on at the lower level to try and align, for example, the quarantine requirements we have for third countries. So if the US are exporting something to New Zealand which they also want to export to Australia we are trying to talk to each other at the broad level to get those kinds of things aligned and facilitate trade across the border as far as we can.[84]

Observations of the Committee

3.69 The array of arrangements and instruments summarised above demonstrates that, since the advent of the CER in 1983, cooperation between Australia and New Zealand and integration of the two economies has continued apace. These examples also demonstrate the merit of utilising a range of approaches and mechanisms, and that it is necessary to fit the method to the matter.

3.70 The Committee notes that there are a number of other agreements relating to the CER that are in place between Australia and New Zealand, for example the Open Skies Agreement, the Trans-Tasman Travel Arrangement, and the Government Procurement Agreement.[85]

3.71 The Committee was interested to hear views on whether additional arrangements or instruments were required to further pursue harmonisation between Australia and New Zealand. Treasury commented that, while further arrangements '…may be required to implement coordination in particular areas', Treasury was '…not aware of the need for further overarching arrangements'.[86] DFAT did not identify the need for additional arrangements at this stage, noting that the 'CER is a dynamic and living instrument which… continues to evolve', and that the '…extensive work program to enhance

83 NZG, *Submission No. 23.1*, p. 9.

84 Ms Paula Wilson, NZG, *Transcript of Evidence*, 21 March 2006, p. 47.

85 See DFAT, *Submission No. 28*, pp. 5-6 (Attachment A).

86 Treasury, *Submission No. 21.2*, p. 8.

coordination between Australia and New Zealand' is a '…significant and evolving agenda'.[87] DFAT also stated that it:

> …will continue to work with other government agencies, Australian businesses and New Zealand to identify and progress further areas where additional regulatory harmonisation will benefit both countries and make progress towards the goal of establishing a singe economic market.[88]

3.72 Over the course of the inquiry the Committee was particularly impressed by the joint regulator model of legal harmonisation between Australia and New Zealand, as exemplified by the ANZTPA. For the Committee, the functionality and simplicity that this model can achieve suggests that, as a general principle, it should be utilised wherever possible.

Recommendation 6

3.73 **The Committee recommends that, wherever possible, the Australian Government should seek to utilise the joint regulator model for legal harmonisation between Australia and New Zealand.**

3.74 During the course of the inquiry also the Committee was struck by the possibility of a new legislative mechanism for legal harmonisation between the two countries – the referral of legislative responsibility.

Possible new mechanism for legal harmonisation: referred legislative responsibility

3.75 The Committee envisages a referred legislative responsibility mechanism between Australia and New Zealand involving one Parliament voluntarily ceding legislative competency on a specific matter to the other Parliament for an agreed period. The single regulatory framework resulting from this arrangement could then apply in each country. Such an arrangement would have the advantage of facilitating and streamlining mutual regulation of an area where there is considerable common ground. Specific benefits would include:

87 DFAT, *Submission No. 28.1*, p. 2.

88 DFAT, *Submission No. 28.1*, p. 2.

- No legislative duplication or overlap between the two countries on the matter to be regulated, meaning minimal compliance costs for stakeholders;
- Regulatory cohesion with no potential for legislative divergence either at the initial enactment stage or subsequently;
- A high level of regulatory certainty for stakeholders in both countries; and
- Greater responsiveness to developments requiring amendments.

3.76 A limited analogy may be drawn with the referral of powers mechanism within Australia under subsection 51(xxxvii) of the Australian Constitution.

3.77 The Committee notes that arrangements involving the ceding of legislative responsibility exist abroad. In the United Kingdom, for example, the Parliament has ceded some legislative responsibility to European Community legislation:

> The accession of the United Kingdom to the three European Communities (the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community) on 1 January 1973 had great implications for the traditional concept of parliamentary sovereignty. The *European Communities Act* 1972 gave the force of law in the United Kingdom to existing Community legislation, and obliged the UK Government to incorporate into domestic law future legislative acts of the Communities. The Single European Act (ratified 1986), Maastricht Treaty (ratified 1992), Amsterdam Treaty (in force 1999) and Nice Treaty (in force 2003) extended these obligations.[89]

3.78 The Committee notes that the ability for the Australian Parliament to participate in a referred legislative responsibility mechanism would be conferred by the external affairs power under subsection 51(xxix) of the Australian Constitution. The NZG indicated that there would seem to be no apparent constitutional bar to New Zealand participating in a referred legislative responsibility mechanism:

> The doctrine of parliamentary sovereignty means that there are no legal constraints which control the content of

89 House of Commons Information Office Factsheet L11: European Communities Legislation, p. 3. This document can be accessed at: http://www.parliament.uk/parliamentary_publications_and_archives/factsheets.cfm.

> legislation. …As Parliament has legislative supremacy, constitutionally there would be no apparent legal impediment to Parliament taking a legislative step to cede sovereignty to another body.[90]

3.79 Despite this, the NZG expressed doubt regarding the possibility of a referred legislative responsibility mechanism being established between Australia and New Zealand:

> It would seem unlikely that the New Zealand Parliament would take such a step, just as it would seem unlikely that the Australian Parliament would cede legislative competence to the New Zealand Parliament.[91]

3.80 In its initial submission the NZG also indicated that arrangements involving one country agreeing to be regulated by the laws of another country are '…the least satisfactory mechanism for making joint rules or establishing joint bodies',[92] as they can raise significant concerns regarding the ceding Parliament's participation in the law-making process and the level of accountability of the legislating Parliament to the ceding Parliament.[93] The NZG did note however that these concerns can be alleviated to some extent when a formal treaty is concluded on the matter.[94]

3.81 The Committee acknowledges that, upon closer investigation, the possibility of a referred legislative responsibility mechanism between Australia and New Zealand may well prove to be unfeasible. The Committee believes however that the potential benefits of such a mechanism warrant further exploration of the concept by the two Governments.

---

90 NZG, *Submission No. 23.1*, p. 6. The NZG noted however that Parliamentary sovereignty also means that '…one Parliament cannot fetter the legislative competence of a subsequent Parliament… a subsequent Parliament could reassert its sovereignty at any time': *Submission No. 23.1*, p. 6.

91 NZG, *Submission No. 23.1*, p. 7.

92 NZG, *Submission No. 23*, p. 15.

93 NZG, *Submission No. 23*, p. 15.

94 NZG, *Submission No. 23*, p. 15.

Recommendation 7

3.82 **The Committee recommends that the Australian Government investigate with the New Zealand Government the feasibility of instituting a referred legislative responsibility mechanism between the two countries whereby:**

- **One Parliament can voluntarily cede legislative competency on a specific matter to the other Parliament for an agreed period; and**
- **The resulting regulatory framework could apply in each country.**

3.83 The balance of the Chapter examines specific areas that were raised in the evidence as specified at paragraph 3.14 above.

Partnership law

3.84 In its initial submission the NZG noted the shared history of Australian and New Zealand partnership laws and the fact that discrepancies have arisen between the two countries over time:

> The partnership laws of New Zealand and the Australian states and territories have a common origin in the UK partnership legislation of the late 19th and early 20th century. Reforms in the different jurisdictions have given rises to differences across the Tasman, as well of course as within Australia.[95]

3.85 The NZG submitted however that these differences should not generate compliance costs for businesses operating in Australia and New Zealand:

> Provided it is clear that the law in each jurisdiction recognises the existence of partnerships established in other Australasian jurisdictions, and recognises that the law under which the partnership is established governs core issues such as limits on partners' liability, differences in partnership law should not give rise to material costs in the trans-Tasman context…[96]

95 NZG, *Submission No. 23*, p. 20.

96 NZG, *Submission No. 23*, p. 21.

3.86 The NZG also indicated that intended reforms in New Zealand will have the effect of more closely aligning aspects of New Zealand partnership law with partnership regimes in Victoria, the ACT, and NSW:

> The New Zealand Government has recently announced that it intends to develop a limited partnership regime for the facilitation of venture capital investment in New Zealand. This regime will be similar in many aspects to the recent Victoria, Australian Capital Territory, and New South Wales reforms (incorporated limited partnerships.)[97]

3.87 The Committee did not receive any evidence from the AGD on the harmonisation of partnership laws between Australia and New Zealand.

Competition and consumer protection law

Productivity Commission inquiry and report

3.88 The Committee notes that the Productivity Commission conducted a major inquiry into the Australian and New Zealand competition and consumer protection regimes in 2004. In its final report the Commission found that:

> There has already been significant convergence of Australia's and New Zealand's competition and consumer protection regimes, particularly by international standards.[98]

3.89 The Commission also found that '…the regimes are not significantly impeding businesses operating in Australasian markets', and that '…major changes to the two regimes are not warranted at this stage'.[99] The Commission stated that:

> For the Australian and New Zealand competition and consumer protection regimes:
>
> - the substantive laws

97 NZG, *Submission No. 23*, p. 20.

98 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv. This report can be accessed at: http://www.pc.gov.au/study/transtasman/finalreport/index.html.

99 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv.

> - the application of the laws
> - the approval processes for acquisitions and restrictive trade practices
> - the sanctions and remedies
> - the review and appeals processes
>
> are sufficiently similar that they generally are not an impediment to an integrated trans-Tasman business environment.[100]

3.90 This being the case, the Commission did find that '…there are aspects of the Australian and New Zealand competition and consumer protection regimes that are not consistent with a single economic market', such as a tendency for each country to focus mainly on its internal context and '…differences in guidelines, timelines, and decision making and duplication of processes, for cases where approval is required in both countries'.[101]

3.91 The Commission considered however that both partial and full integration of the two countries' competition and consumer protection regimes would not be desirable:

> Full integration, requiring identical laws and procedures and a single institutional framework, would have high implementation and ongoing costs, change the operation of the existing national regimes and achieve only moderate benefits.
>
> Partial integration, involving retaining the two national regimes, but establishing a single system to handle certain matters having Australasian dimensions, also would be unlikely to achieve net benefits.[102]

3.92 Instead, the Commission indicated that the Australia-New Zealand single economic market agenda '…would be assisted by a package of measures involving a transitional approach to integration of the two regimes'.[103] The Commission identified a number of elements in this package of measures including the following:

---

100 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xxv (finding 4.1).

101 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xxv (finding 4.2).

102 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv.

103 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv.

- 'retaining, but further harmonising, the two sets of laws in relation to competition and consumer protection policy';
- 'providing scope for businesses to have certain approvals considered on a 'single track' (but with separate decisions)';
- 'making more formal the policy dialogue between the two Governments on competition policy'; and
- 'adding consideration of impediments to a single economic market to the scope of the proposed review of Australian consumer protection'.[104]

3.93 The Commission also recommended a number of other elements relating to greater cooperation and collaboration between the two relevant regulatory institutions – the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) – such as enhanced cooperation, information sharing, and use of investigative powers to assist the regulator in the other country.[105]

3.94 The Committee supports the recommendations of the Productivity Commission. In its submission Treasury indicated that the Productivity Commission report and recommendations were endorsed by the Australian and New Zealand Governments in February 2005.[106] The ANZ in its submission stated that:

> ANZ supports the findings and recommendations of the Productivity Commission… In particular, ANZ supports moves towards a more efficient, streamlined regulatory structure for the clearance of trans-Tasman mergers, acquisitions and joint ventures…[107]

Competition law

3.95 In its submission Telstra advocated greater institutional coordination between the ACCC and the NZCC along with greater sharing of expertise and formal consultation requirements.[108] The Committee

104 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv.

105 See Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xiv.

106 Treasury, *Submission No. 21.1*, p. 11.

107 ANZ Bank, *Submission No. 27*, p. 7.

108 Telstra, *Submission No. 7*, pp. 7-8. See also Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 5.

notes that the recommendations of the Productivity Commission encompass a range of enhanced cooperation and collaboration measures between the ACCC and the NZCC.

Exclusionary provisions

3.96 Telstra also raised the issue of exclusionary provisions (agreements between competitors not to deal with particular suppliers) in its submission. Telstra informed the Committee that exclusionary provisions are illegal under the Australian TPA *per se* and are also prohibited under the New Zealand *Commerce Act* 1986 but with a competition defence.[109] Telstra noted a 2002-2003 independent review of the TPA (the Dawson Review) which recommended the harmonisation of the Australian *per se* prohibition of exclusionary provisions with the New Zealand approach:[110]

> The Act [TPA} should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.[111]

3.97 The Committee notes that the Government accepted this recommendation in its response to the Dawson Review report:

> The Government agrees with these recommendations. Although much of the behaviour covered by the present prohibition may damage competition, there is a risk that the prohibition may also be capturing some behaviour that is not detrimental to competition. To ensure the prohibition only ever stops harmful behaviour, the Government will establish a competition defence, as outlined in Recommendation 8.1.[112]

3.98 As Telstra noted in its submission, however, the eventual proposed legislation amending the TPA, the Trade Practices Legislation Amendment Bill (No. 1) 2005, only provides a limited competition defence for exclusionary provisions for the purpose of initiating a

---

109 Telstra, *Submission No. 7*, pp. 6-7.

110 Telstra, *Submission No. 7*, pp. 7.

111 Review of the Trade Practices Act, *Review of the Competition Provisions of the Trade Practices Act*, p. 131 (Recommendation 8.1). This report can be accessed at: http://tpareview.treasury.gov.au/content/report.asp.

112 Australian Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/publications.asp.

joint venture.[113] Telstra submitted that '…the recommendation of the Dawson Committee should be adopted on this issue'.[114]

3.99 The Committee notes the following explanation of the changed stance adopted by the Government in the Explanatory Memorandum to the Bill:

> Recommendation 8.1 of the Dawson Review proposed that the TP Act be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.
>
> The Government now considers that the recommended defence would be too broad as it would prevent unambiguously anti-competitive conduct from being prohibited *per se* in appropriate cases. The defence has therefore been restricted so that it only applies where the exclusionary provision is for the purposes of a joint venture (as defined in section 4J) and does not substantially lessen competition. This change also has the benefit of providing a consistent defence for joint ventures to the *per se* prohibition of exclusionary provisions and price fixing provisions.[115]

Consumer protection law

3.100 In his submission Mr Ray Steinwall compared provisions of the Australian consumer protection regulation framework governing non-excludable implied warranties in consumer contracts with equivalent provisions in the New Zealand *Consumer Guarantees Act* 1993 (CGA). Mr Steinwall noted that there are both similarities and differences between New Zealand and the Australian jurisdictions – a situation which reflects the differences that exist among the various Australian consumer protection regimes. Some examples include:

- Definition of 'consumer' – the CGA '…defines a consumer using the "personal, domestic or household use or consumption" formulation used by the Commonwealth, Victoria and Western

113 Telstra, *Submission No. 7*, pp. 7.

114 Telstra, *Submission No. 7*, pp. 7.

115 *Explanatory Memorandum to the Trade Practices Legislation Amendment Bill (No. 1) 2005*, p. 72. This document can be accessed at: http://parlinfoweb.parl.net/parlinfo/view_document.aspx?ID=1958&TABLE=EMS.

Australia'.[116] The Committee notes also that the New Zealand definition does not specify a threshold for the monetary value of goods as do the definitions in these Australian jurisdictions.

- Merchantable quality – the CGA implies a guarantee of acceptable quality for goods; as with Victoria, the CGA specifies '…factors to be considered in determining whether goods are of acceptable quality', although '…the factors are different to and more extensive than its South Australian equivalent'.[117] The CGA also provides that '…goods will not breach the guarantee because the goods have been used in a manner inconsistent with the use by a reasonable customer.'[118]
- Sample – the CGA contains certain conditions also prescribed by the TPA, but not all.[119]

3.101 As is discussed in the next Chapter, Mr Steinwall submitted that a national harmonised regulatory framework for implied warranties should be established in Australia.[120] In his submission Mr Steinwall further suggested that such a framework:

> …could readily be adopted in New Zealand. Issues of sovereignty however, would favour mirror laws in New Zealand (supported by an inter-governmental agreement), rather than direct application of the Australian law.[121]

3.102 The Committee agrees, and is of the view that legal harmonisation between Australia and New Zealand in the area of non-excludable implied warranties could be usefully pursued consistently with work to advance a national harmonised framework in Australia (recommended in the following Chapter).

116 Mr Ray Steinwall, *Submission No. 22*, pp. 3-4.
117 Mr Ray Steinwall, *Submission No. 22*, p. 5.
118 Mr Ray Steinwall, *Submission No. 22*, p. 5.
119 Mr Ray Steinwall, *Submission No. 22*, p. 6.
120 See Chapter 4 paragraphs 4.81 – 4.86 below.
121 Mr Ray Steinwall, *Submission No. 22*, p. 8.

Recommendation 8

3.103 **The Committee recommends that, consistently with work towards national harmonisation in this area within Australia, the Australian Government discuss with the New Zealand Government the legal harmonisation of Australian and New Zealand legislation governing non-exludable implied warranties in consumer contracts.**

Telecommunications regulation

3.104 The main issue raised in the evidence in relation to telecommunications regulation was regulatory inconsistency.

Regulatory inconsistency

3.105 Telstra informed the Committee that there are considerable differences between the Australian and New Zealand telecommunications regulatory environments:

> There are currently significant divergences in regulatory approaches. New Zealand has a very different regulatory model from Australia. We believe there is considerable scope for greater coordination, which would create much more of a single market.[122]
>
> …Generally, Telstra Corporation Limited is subjected to significantly greater regulation in Australia than Telecom New Zealand Limited is subjected to in New Zealand. A number of critical New Zealand regulatory decisions have been at odds with similar decisions made in Australia, including New Zealand's decision to date not to unbundle the local loop.[123]

3.106 Telstra cited differences in a number of specific areas:

122 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2.

123 Telstra, *Submission No. 7.1*, p. 7. The Committee notes that Telstra currently operates a wholly-owned subsidiary telecommunications company in New Zealand, TelstraClear Ltd. Telstra informed the Committee that TelstraClear '…is New Zealand's second largest full service telecommunications company and provides a suite of telecommunications and information services including: voice, data, Internet, mobile, managed services and cable television to approximately 12% of the New Zealand market. TelstraClear also provides a seamless service to Telstra's trans-Tasman customers': *Submission No. 7*, p. 5.

- Access regulation – 'Differences in the type of telecoms services and products subject to access regulation to ensure any-to-any connectivity and to promote competition in downstream markets' and 'Differences in the ability of the regulator in each jurisdiction to ensure reasonable and timely access to non-contestable services and products';
- Enforcement – 'Differences in the availability of enforcement mechanisms and powers necessary for the regulator to ensure effective compliance with regulatory instruments', and 'Differences in the availability of private rights of enforcement action where a third party suffers damages';
- Conduct regulation – 'Differences in the ability of parties subject to investigatory action to be subjected to binding undertakings in the context of a negotiated resolution; and
- Industry self-regulation – 'Differences in each nation's reliance on industry self-regulatory codes', and 'Differences in the number of industry self-regulatory codes in each jurisdiction'.[124]

3.107 Telstra stated that these differences:

> …act as a significant impediment to the realisation of a trans-Tasman market. Differences in regulation may impose material transactions and compliance costs on firms operating in both nations. Over-regulation by one nation or under-regulation by the other may distort efficient trade and investment and lead to real economic and welfare costs.
>
> ...divergent regulation in New Zealand and Australia makes it particularly difficult for telecommunications operators to provide equivalently priced telecommunications products and services with equivalent functionality in a seamless "trans-Tasman" manner…[125]

3.108 Importantly, Telstra indicated that it does not perceive Australia's telecommunications regulation framework to be inherently superior to that of New Zealand or indeed that either country's regulatory system is perfect:

> …we do not believe that New Zealand has got it fundamentally wrong and Australia has got it fundamentally

124 Telstra, *Submission No. 7.1*, pp. 11-12. See also *Transcript of Evidence*, 6 April 2006, pp. 3-4.

125 Telstra, *Submission No. 7.1*, pp. 6, 7.

> right. We do not think there is a monopoly of wisdom on either side of the Tasman.[126]

3.109 Telstra did note however that the current telecommunications regulation framework in New Zealand is disadvantageous for the New Zealand consumer in certain respects:

> If you look at the uptake of, for example, broadband services in New Zealand, it is in the bottom quarter of the OECD. It is very far behind Australia. If you look at mobile phone call usage in New Zealand, it is way behind Australia because of the exorbitantly high prices that are charged in New Zealand, including because of the lack of regulated prices for terminating calls on to mobile networks. And now the New Zealand government agrees with this: there is no question that the productivity and quality of life of New Zealanders is being impeded by the telecommunications regime they have at the moment in New Zealand. It is too light and therefore consumers are not getting the benefit and the economy is not getting the benefit.[127]

3.110 The Committee was informed by Telstra that harmonisation and/or integration of telecommunications regulation between Australia and New Zealand was expressly identified as a key element of the single market initiative at the inaugural meeting of the Australia-New Zealand Leadership Forum in May 2004.[128]

3.111 In oral evidence Telstra advocated the concept of harmonised telecommunications regulation between Australia and New Zealand:

> There is absolutely no reason we could not have a harmonised regulatory regime, where both sides come to a common agreement. …They do some things very well and we do some things very well. If you can bring those two together, there is absolutely no reason a common telco market could not develop very quickly, because you would have quite large cross-shareholdings. Telecom currently owns the third largest telco in Australia, AAPT, and we own the second largest; their Vodafone is a major mobile player in both countries. We have a lot of cross-company ownership already. So there is absolutely no reason, if you got the

126 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 4.

127 Mrs Rosemary Howard, Telstra, *Transcript of Evidence*, 6 April 2006, pp. 7-8.

128 Telstra, *Submission No. 7.1*, p. 6.

> regulatory harmony right, it would not act as if you were just switching states, from a telco perspective.[129]

3.112 Telstra submitted that such harmonisation would result in considerable benefits to consumers and to the Australian and New Zealand economies:

> …there are very obvious benefits to consumers. For example, you would no longer have to have roaming between New Zealand and Australia on your mobile handset.[130]
>
> You would definitely see improved productivity in the New Zealand economy. You would see improved productivity and performance in New Zealand and Australian businesses, because you would have a bigger domestic marketplace, all being done the same way and done once, and that would improve the efficiency not only of the telecommunications industry but also, therefore, of every business sector and consumer grouping that depended on telecommunications for part of their productivity.[131]

3.113 In evidence to another parliamentary inquiry, Telstra elaborated on the benefits of having a single trans-Tasman network:

> …roll-out of one network across both countries would bring scale benefits – New Zealand consumers would enjoy services that might not otherwise have been supplied to them due to the small size of the New Zealand market; while Australian consumers would enjoy lower cost service options…[132]

3.114 In this other evidence Telstra also estimated that the elimination of mobile phone roaming charges between Australia and New Zealand would save Australian consumers some A$31 million per year.[133] In its oral evidence to the harmonisation inquiry, Telstra made the additional point that harmonisation would likely result in greater

---

129 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 10.

130 Mr Danny Kotlowitz, Telstra, *Transcript of Evidence*, 6 April 2006, p. 9.

131 Mrs Rosemary Howard, Telstra, *Transcript of Evidence*, 6 April 2006, p. 9.

132 A Review of the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement: Submission by Telstra Corporation Limited and TelstraClear Limited to the Joint Standing Committee on Foreign Affairs, Defence and Trade, p. 10. This document can be accessed at: http://www.aph.gov.au/house/committee/jfadt/nz_cer/subs.htm.

133 A Review of the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement: Submission by Telstra Corporation Limited and TelstraClear Limited to the Joint Standing Committee on Foreign Affairs, Defence and Trade, p. 2.

competition in the Australian market: 'In Australia you would have another large player in Telecom New Zealand'.[134]

3.115 The Committee is attracted to the concept of a harmonised regulatory telecommunications framework between Australia and New Zealand with a view to fostering a joint telecommunications market. Common regulation, however constituted, would eliminate the impediments that result from regulatory divergence and would benefit the consumers and economies of both countries. Further, it would seem to the Committee that greater harmonisation between Australia and New Zealand in this crucial sector will be highly important if the objective of a single economic market between the two countries is ever to be achieved. This is borne out by the fact that harmonisation/integration of telecommunications regulation between Australia and New Zealand was identified as a key element of the single market initiative by the Australia-New Zealand Leadership Forum in 2004. The Committee considers that the two Governments should explore the legal harmonisation of their telecommunications regulation frameworks.

Recommendation 9

3.116 **The Committee recommends that the Australian Government propose to the New Zealand Government the legal harmonisation of the Australian and New Zealand telecommunications regulation frameworks with a view to fostering a joint telecommunications market.**

Measures for greater coordination

3.117 In its evidence Telstra also advocated the following measures for greater coordination of telecommunications regulation between Australia and New Zealand:

- Inclusion of telecommunications regulation coordination in the work programme of the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law*. The Committee learned that neither the CER nor the MoU identify telecommunications as an area for further harmonisation or coordination work between Australia and New Zealand.[135] Telstra registered its concern here that:

134 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 8.

135 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2; Telstra, *Submission No. 7.1*, p. 4.

> …the CER agreement does not appear to have kept pace with other international agreements. Telcos are a clear example here. The free trade agreements we negotiated with the US and with Singapore both had telecom chapters but the CER contains no such telecoms chapter.[136]

Telstra submitted that:

> Telstra has been making submissions to government requesting that the development of a much more detailed treatment of telecoms be incorporated in the CER work program for a number of years.[137]
>
> ...the MOU already includes work programmes relating to electronic transactions, and consumer protection in electronic commerce. The MOU also relevantly contemplates a work programme in relation to the application and enforcement of competition law. In this manner, three of the eight work programmes in the Annex to the MOU are already directly relevant to telecommunications regulation. The incorporation of a work programme relating to telecommunications regulation into the MOU would be entirely consistent with, and could build upon, these existing work programmes.[138]

The Committee notes that the 2003 Singapore-Australia Free Trade Agreement (SAFTA) has a specific chapter dealing with telecommunications.[139]

- A formalised, regular ministerial-level dialogue between the Australian and New Zealand Governments on telecommunications regulation issues. In oral evidence Telstra indicated that:

> …there is a dialogue between the [Australian] department of communications and its counterpart in New Zealand. That is quite an interesting and informed dialogue… but there is not the formal standing.[140]

Telstra stated that a formal ministerial-level dialogue on telecommunications regulation would enable Australia and New Zealand to engage with each other regarding possible legislative

136 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2.

137 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 3.

138 Telstra, *Submission No. 7.1*, p. 5.

139 Singapore-Australia Free Trade Agreement, Chapter 10. This document can be accessed at: http://www.dfat.gov.au/trade/negotiations/safta/.

140 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 6.

changes in their respective regulatory regimes and thus assist the cause of regulatory harmonisation:

> We believe that a dialogue between the two countries, to try and seek convergence of that regulation over time – we accept that it is not going to happen overnight – makes much more sense than the current situation, where we have a divergence of regulation.[141]

> The best way would be, whenever there is a change in the Australian legislation, to give the New Zealand government standing, not in the legislative process but in the inquiry process. In other words, involve them from the beginning, and vice versa. So you would have the parties constantly involved in that dialogue, and we would see if we could get some kind of convergence of view.[142]

The Committee notes here that, in its 2004 report on the Australian and New Zealand competition and consumer regimes, the Productivity Commission recommended that Australia and New Zealand should hold regular, formalised ministerial-level dialogue on competition policy issues with a focus on harmonisation:

> The Australian and New Zealand Governments should agree to hold regular formal discussions, at both the Ministerial and officials levels, on competition policy matters, with a particular focus on greater harmonisation in the context of the long-term objective of a single economic market for Australia and New Zealand.[143]

3.118 The Committee sees merit in the suggestion that a regular formal ministerial level dialogue be established between Australia and New Zealand on telecommunications regulation. Such a dialogue, particularly as regards regulatory change, would be a useful means of promoting harmonisation between the two countries in the area of telecommunications, and would constitute a valuable parallel support structure for the pursuit of legal harmonisation between Australia and New Zealand regarding telecommunications regulation (see Recommendation 9 above). The Committee also sees merit in the suggestion that telecommunications regulation coordination could be

141 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 5.

142 Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 6. See also Telstra, *Submission No. 7.1*, pp. 9-10.

143 Productivity Commission, *Australian and New Zealand Competition and Consumer Regimes*, p. xxvii (Recommendation 6.1).

added to the work programme of the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law*, but considers that such an addition would more properly be pursued subsequent to the establishment of the ministerial dialogue.

Recommendation 10

3.119 **The Committee recommends that the Australian Government propose to the New Zealand Government that a formal and regular ministerial-level dialogue on telecommunications regulation issues be established between the two countries with a particular focus on consultation prior to regulatory change in either country.**

3.120 Telstra also advocated greater institutional coordination between the ACCC and the NZCC along with greater sharing of expertise and formal consultation requirements.[144] As noted at paragraph 3.93 above, the recommendations of the Productivity Commission in its 2004 report on the Australian and New Zealand competition and consumer regimes encompass a range of enhanced cooperation and collaboration measures between the ACCC and the NZCC.

Copyright regulation

3.121 In its submissions the AGD provided the Committee with an overview of a number of aspects of the Australian and New Zealand copyright regulation frameworks. To begin with, the AGD informed the Committee of a number of areas of divergence between the Australian Commonwealth *Copyright Act* 1968 and the New Zealand *Copyright Act* 1994. These include:

- Term of protection – recent amendments to the Australian *Copyright Act* 1968 in relation to the Australia-United States Free Trade Agreement (AUSFTA) have extended the term of protection to the life of the author plus 70 years (or 70 years from publication for certain categories of works); under the New Zealand *Copyright Act* 1994 the term of protection is generally life of the author plus 50 years.[145]

144 Telstra, *Submission No. 7*, pp. 7-8 and *Submission No. 7.1*, p 8. See also Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 5.

145 AGD, *Submission No. 26*, p. 25.

- International treaties – due to the AUSFTA Australia is preparing to accede to the World Intellectual Property Organisation Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT). Although it is unclear whether New Zealand will formally accede to the WCT and WPPT, it is understood that New Zealand is currently reviewing its copyright law with a view to reaching consistency with the WCT. Until such time as this take place differences between Australian and New Zealand copyright law will exist, particularly in relation to digital technology and performers' rights.[146]
- Statutory licences – under the Australian *Copyright Act* 1968 statutory licences permit educational institutions and governments to reproduce copyright material '…providing they pay equitable remuneration to a declared collecting society'. Under the New Zealand *Copyright Act* 1994, however, there are broad exceptions allowing educational institutions to reproduce copyright material for educational purposes that '…are only limited to the extent that a licensing scheme is available to cover the copying'. Further, the Australian *Copyright Act* 1968 requires the declaration of collecting societies which administer statutory licences, whereas the New Zealand regime '…does not have this process in place for educational and government use of copyright material'.[147]
- Enforcement – under the Australian *Copyright Act* 1968 commercial-scale conduct which '…significantly prejudices a copyright owner, even where there is no profit motive', is a criminal offence. This offence is not present in the New Zealand copyright law.[148]
- Other differences – there are '…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 larger range of secondary copyright infringements than the Australian regime and a moral right of privacy. However, '…moral rights are more comprehensive in Australia and subsist without the need for assertion by the author', and '…the breadth of provisions within New Zealand's Copyright Act [*sic*] about first ownership of

146 AGD, *Submission No. 26*, p. 26; *Submission No. 26.1*, pp. 5, 6.

147 AGD, *Submission No. 26.1*, pp. 6-7.

148 AGD, *Submission No. 26.1*, p. 5.

commissioned works are slightly different' to provisions in the Australian *Copyright Act* 1968.[149]

3.122 The AGD also noted that a number of aspects of the Australian and New Zealand copyright regulation frameworks are under review, which may result in either further divergence between or harmonisation of the two systems:

- Copyright exceptions – New Zealand is considering the scope of exceptions in the *Copyright Act* 1994; '…it is unclear how the scope of exceptions in each country will develop and whether it will result in greater harmonisation'.[150] The Committee notes that in May 2006 the Australian Government announced amendments to the *Copyright Act* 1968 that will add new copyright use exceptions for format shifting, time shifting, for cultural institutions, and for those with disabilities.[151] In respect of time shifting at least, this should mean greater harmonisation with the New Zealand *Copyright Act* 1994, which currently provides a copyright infringement exception for time shifting of broadcasts.
- Pay television – Australia is in the process of drafting amendments to criminalise the unauthorised and unpaid access of subscription broadcasts. While '…elements of the [new] offence under Australian law may differ to that in the New Zealand law', the amendments should still '…result in greater harmonisation of the law on this issue' with New Zealand.[152]
- Enforcement – a '…technical review of the criminal provisions' in the Australian *Copyright Act* 1968 is currently being conducted by the Australian Government, which '…may result in further differences between Australian and New Zealand copyright law and enforcement policy'. The Committee was also informed that in 2005 representatives of the AGD conducted discussions on '…copyright enforcement policy and strategy' with representatives of the NZG.[153]

---

149 AGD, *Submission No. 26*, p. 26.

150 AGD, *Submission No. 26.1*, p. 4.

151 Media release of the Attorney-General, the Hon Philip Ruddock MP, 14 May 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006. See also AGD, *Submission No. 26*, p. 26.

152 AGD, *Submission No. 26.1*, pp. 4-5.

153 AGD, *Submission No. 26.1*, p. 5.

- Crown copyright – the Commonwealth and State Governments are currently considering the possibility of repealing the specific Crown subsistence and ownership provisions in the Australian *Copyright Act* 1968 so that '…Governments would then rely on the general provisions to claim copyright ownership'. The possibility of '…abolishing copyright in certain materials produced by the judicial, legislative and executive arms of the government, duration of Crown and management of Crown copyright' are also being considered. Depending on the outcome of this process, Australian law could further harmonise with the New Zealand *Copyright Act* 1994, which provides that '…copyright does not subsist in various legal and parliamentary material'.[154]

3.123 In terms of adverse impacts resulting from differences between the Australian and New Zealand copyright regulation frameworks, the AGD indicated that there have been suggestions that the difference in the term of protection between the two countries '…may create greater transaction and system costs for copyright collecting societies who represent copyright owners and licence users in both countries'.[155] The AGD also indicated that, in reference to the absence of declaration requirements in New Zealand, 'Collecting societies have highlighted that this creates greater administrative hurdles in gaining remuneration for educational and government copying in New Zealand.' The AGD stated that it '…does not have a view on whether harmonisation is required between Australia and New Zealand copyright law'.[156]

3.124 Other evidence to the Committee focused on specific elements of regulatory inconsistency between the Australian and New Zealand copyright frameworks and associated impacts.

Regulatory inconsistency and impacts

3.125 In its evidence to the inquiry, Screenrights, an Australian collecting society for copyright holders in audio and audio-visual works also operating in New Zealand, drew the attention of the Committee to a number of elements of the New Zealand *Copyright Act* 1994 which differ from the Australian *Copyright Act* 1968:

154 AGD, *Submission No. 26.1*, p. 6.

155 AGD, *Submission No. 26*, p. 25.

156 AGD, *Submission No. 26*, p. 26; *Submission No. 26.1*, p. 7.

- There is no provision in the New Zealand *Copyright Act* 1994 for the declaration of collecting societies (see paragraph 3.121 above);
- There is no provision in the New Zealand *Copyright Act* 1994 for a right of communication of broadcast material for educational institutions;
- There is no equitable remuneration requirement in the New Zealand *Copyright Act* 1994 for educational institutions for the recording and copying of broadcast material; and
- There is no licensing mechanism for the retransmission of satellite-based pay television services in the New Zealand *Copyright Act* 1994.[157]

3.126 Screenrights submitted that these discrepancies:

> …have meant that Screenrights has experienced significant additional costs in establishing and maintaining licensing schemes to cover the NZ educational sector.[158]

3.127 Screenrights also cited uncertainty for the educational sector in New Zealand and economic disadvantage to both copyright owners and users as further adverse impacts resulting from the inconsistencies between the Australian and New Zealand copyright regimes:

> Australian teachers are able to copy a television program with absolute certainty for their educational purpose. They can then send an excerpt of this program to their students by e-mail, they can put this program on a central cache and they are able to reticulate it into multiple classrooms – again, with absolute certainty. The situation in New Zealand is less certain.[159]

> …when creators license a broadcast, they expect in part subsequent royalties from the copying and communication of these broadcasts in various markets, including educational markets. By the New Zealand act not recognising this right and not facilitating licensing of these cases, copyright owners are economically disadvantaged and copyright users have restricted ability to access this material.[160]

---

157 Screenrights, *Submission No. 17*, paras. 12-23; Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, pp. 12-13.

158 Screenrights, *Submission No. 17*, para. 12.

159 Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, pp. 12-13.

160 Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, p. 13.

3.128 Screenrights further indicated that the greater certainty in Australia also translates to a higher level of licence fees collected in Australia as opposed to the level of fees collected in New Zealand.[161] Screenrights also informed the Committee that the lack of provision in the New Zealand legislation for the declaration of collecting societies led to costly litigation in New Zealand (including in the New Zealand High Court) regarding a challenge to a licensing scheme that Screenrights sought to establish. Screenrights stated that:

> The whole process was very expensive and time consuming… Ultimately, the process achieved little more in practice than is achieved in Australia by the declaration process for the collecting society which is a straightforward administrative matter.[162]

3.129 Another trans-Tasman collecting society, Viscopy Ltd, also raised regulatory inconsistency between the Australian and New Zealand copyright regimes. Viscopy indicated that, unlike the Australian *Copyright Act* 1968, the New Zealand *Copyright Act* 1994 explicitly provides that those who commission works such as photographs, computer programs, paintings, drawings, maps, charts, plans, engravings, models, sculptures, films or sound recordings are the first owners of copyright in those works.[163]

3.130 In oral evidence Viscopy indicated that this inconsistency between Australia and New Zealand regarding the commissioning rule negatively impacts on copyright creators in New Zealand:

> …the commissioning rule… in practice favours copyright owners and licencees over copyright creators. This rule means that if a work is commissioned the copyright has always belonged to the commissioner instead of the creator, whereas in most common law countries, the creator owns the right initially and then negotiates a contract with the commissioner, which gives them more bargaining power because they then have something to sell. In the case of visual artists, most of them do not actually ever sell their copyright; they just keep it and they license it for income for works.[164]

---

161 Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, p. 15.

162 Screenrights, *Submission No. 17*, para. 12.

163 Viscopy, *Submission No. 1*, p. 4; Ms Chryssy Tintner, Viscopy, *Transcript of Evidence*, 6 April 2006, pp. 56-57. Viscopy indicated that the relevant provision is s. 21(4) of the New Zealand *Copyright Act* 1994.

164 Ms Chryssy Tintner, Viscopy, *Transcript of Evidence*, 6 April 2006, p. 56.

3.131 In its submission Viscopy elaborated on the disadvantages suffered by visual artists in New Zealand as a result of the presence of the commissioning rule in the New Zealand *Copyright Act* 1994:

> [Visual artists] cannot collect royalties on works created under commission;
>
> They cannot protect the works created under commission from infringement or piracy either at law in New Zealand or internationally, when infringements occur beyond domestic boarders [*sic*];
>
> They cannot effectively enforce moral rights over commissioned creative works;
>
> They are in a position of dependence upon the commissioners of their works, including rights owners such as publishers, manufacturers, business, government (and finally the tax payer as the Crown copyright is in the public domain);
>
> They have a weaker market position with respect to the collection of royalties on non commissioned works to which they are currently entitled…[165]

3.132 Both Screenrights and Viscopy advocated harmonisation of New Zealand copyright law with Australian copyright law in relation to their areas of concern. Screenrights stated that:

> …it is critical to our submission that New Zealand needs to introduce a right of communication into their Copyright Act – as they say they intend to do – and this right should extend to the educational provisions of the Copyright Act. This will create greater clarity for new media and will put New Zealand educators in the same position as Australian educators.

3.133 Viscopy stated that:

> Viscopy urges the Inquiry into the Harmonisation of Legal Systems to recommend that the commissioning rule, as contained in section 21(4) of the *New Zealand Copyright Act 1994*, [*sic*] be urgently updated…[166]

---

165 Viscopy, *Submission No. 1*, p. 4

166 Viscopy, *Submission No. 1*, p. 7. See also Ms Chryssy Tintner, Viscopy, *Transcript of Evidence*, 6 April 2006, p. 58.

3.134 While the Committee is sympathetic to the issues raised by Screenrights and Viscopy, it is unable to recommend that the sovereign parliament of another country amend its legislation. Screenrights indicated that the New Zealand Government has legislation in train which may address one of its areas of concern by instituting a right of communication of broadcast material for educational institutions:

> We understand that the New Zealand government is seeking to address this as part of the digital copyright review… our understanding is that a copyright amendment bill is ready for introduction.[167]

3.135 Both Screenrights and Viscopy indicated that they have raised their concerns with the NZG.[168] The Committee notes evidence from the AGD indicating that intellectual property may be included in the forthcoming Australia-ASEAN-New Zealand Free Trade Agreement (AANZFTA):

> Currently the parties to the negotiation are discussing the benefits of including substantive IP [intellectual property] provisions in the AANZFTA.[169]

3.136 The Committee would encourage Screenrights and Viscopy to raise their concerns with the Australian and New Zealand Governments in the context of the AANZFTA negotiations.

Legal procedures

The Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (TTWG)

3.137 The AGD informed the Committee that the TTWG was established in 2003 to:

> …review existing trans-Tasman co-operation in the field of court proceedings and regulatory enforcement and to investigate the possibilities for improving existing

167 Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, p. 13.

168 Mr Simon Lake, Screenrights, *Transcript of Evidence*, 6 April 2006, p. 13; Ms Chryssy Tintner, Viscopy, *Transcript of Evidence*, 6 April 2006, pp. 57, 58.

169 AGD, *Submission No. 26.2*, p. 1.

> mechanisms in such areas as service of process, the taking of evidence, recognition of judgments in civil and regulatory matters and regulatory enforcement.[170]

3.138 The terms of reference for the TTWG require the 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).[171]

3.139 The Committee was interested to learn that in August 2005 the TTWG released a discussion paper that:

- identified problems that exist with the current arrangements
- considered a more general scheme for trans-Tasman service of process, taking of evidence and recognition and enforcement of court orders and judgments
- considered a more general scheme for trans-Tasman co-operation between regulators
- undertook appropriate domestic consultation; and
- proposed options that may be pursued.[172]

3.140 The AGD stated that the TTWG '…expects to report, with recommendations, to both governments in 2006' and that additional '…consultation with the States and Territories, and other stakeholders, will be undertaken prior to the Working Group's recommendations being finalised'.[173]

3.141 The Committee notes that, in the August 2005 discussion paper, the TTWG identified reforms to the civil justice systems of Australia and New Zealand which were implemented in the early 1990s:

- the trans-Tasman evidence regime that allows subpoenas issued by a court in one country to be served on witnesses in the other, and evidence to be taken from the other country by video link or telephone conference
- recognition and enforcement of each other's tax judgments, and

---

170 AGD, *Submission No. 26*, p. 9. See also NZG, *Submission No. 23*, p. 17.

171 AGD, *Submission No. 26*, p. 10.

172 AGD, *Submission No. 26.1*, p. 1.

173 AGD, *Submission No. 26.1*, p. 2.

- the recognition and enforcement of judgments from each other's lower courts.[174]

3.142 The TTWG stated that further reform of the two countries' legal frameworks:

> …would have many benefits, including reduced costs, increased efficiency and reduced forum shopping (where a litigant tries to find the most advantageous jurisdiction in which to bring proceedings).[175]

3.143 The TTWG identified a number of areas for further reform as follows.

Recognition and enforcement of judgments

3.144 The TTWG stated in the discussion paper that:

> 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 is undesirable, given the increasing movement of people, assets and services across the Tasman.[176]

3.145 In order to resolve this issue, the TTWG has proposed a new regime modelled on the Commonwealth *Service and Execution of Process Act* 1992 which would:

> …allow initiating process in civil proceedings begun in any Australian State, Territory or Federal Court, or any New Zealand court to be served in the other country without leave. Service would have the same effect as if it had occurred in the place where the proceedings were filed.[177]

3.146 TTWG indicated that this new harmonised civil procedure regime would contain the following elements:

---

174 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 2. This document can be accessed at: http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Trans-Tasman_Court_Proceedings_and_Regulatory_Enforcement_-_August_2005.

175 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 2.

176 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 4. See also AGD, *Submission No. 26.3*, p. 6.

177 *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 4.

- The plaintiff would not have to establish any particular connection between the proceedings and the forum to be allowed to serve the proceedings in the other country.
- The defendant could apply for a stay of proceedings on the basis that a court in the other country is the appropriate court to decide the dispute.
- A judgment from one country could be registered in the other. It would have the same force and effect, and could be enforced, as a judgment of the court where it is registered.
- A judgment could only be varied, set aside or appealed in the court of origin. The court of registration would be able to stay enforcement to let this happen.
- A judgment debtor would be notified if a judgment was registered in the other country.
- A judgment could only be refused enforcement in the other country on public policy grounds. Other grounds such as breach of natural justice would have to be raised with the original court.
- The defendant's address for service could be in Australia or New Zealand.
- Judgments could be registered in the Federal Court of Australia, the Family Court of Australia, any Australian Supreme Court, or the New Zealand High Court, or in any inferior court in either country that could have granted relief.[178]

Final non-money judgments

3.147 The TTWG indicated that, currently, '…only final money judgments can be registered and enforced between Australia and New Zealand', and that orders for final injunctions or specific performance are not enforceable across the Tasman, which renders '…the effective resolution of disputes more difficult, slower and more expensive'.[179] The TTWG has suggested that, under the proposed new harmonised civil procedure regime outlined at paragraphs 3.145 – 3.146 above, '…judgments that require someone to do, or not do, something (such as injunctions and orders for specific performance) should also be enforceable'. The TTWG did state however that:

178 Australian Attorney-General's Department and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, pp. 4-5.

179 Australian Attorney-General's Department and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

> …some judgments would not be included, such as orders about the administration of estates and the care or welfare of children. Nor would the regime affect other bilateral and multi-lateral arrangements.[180]

Interim relief in support of foreign proceedings

3.148 The discussion paper noted that:

> 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.[181]

3.149 The TTWG has proposed that '…appropriate Australian and New Zealand courts be given statutory authority to grant interim relief in support of proceedings in the other country'.[182]

Enforcing tribunal orders

3.150 The TTWG indicated that tribunal decisions cannot currently be enforced across the Tasman, despite the fact that '…many tribunals decide disputes in essentially the same way as a court and are widely used'.[183] The TTWG stated that this '…limits efficient and cost-effective dispute resolution' and has accordingly proposed that certain tribunal decisions should be enforceable in the other country and that, under the proposed new harmonised civil procedure regime outlined at paragraphs 3.145 – 3.146 above, the proceedings of certain tribunals could be served across the Tasman.[184]

---

180 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

181 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

182 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

183 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

184 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 5.

Forum non conveniens

3.151 The TTWG discussion paper noted that the Australian and New Zealand *forum non conveniens* rules are '…potentially inconsistent' in that Australian courts require a court to refuse jurisdiction '…only where it is *clearly inappropriate* for it to determine the dispute', whereas New Zealand courts are required to refuse jurisdiction '…where another court is *more appropriate*'.[185] The TTWG stated that this potential inconsistency could '…lead to inconvenience, expense and uncertainty' and proposed a single statutory test for both Australia and New Zealand which would specify that proceedings '…in one country could be stayed if a court in the other country is appropriate to decide the dispute'.[186]

Enforcing civil pecuniary penalty orders

3.152 The TTWG stated that:

> 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.[187]

3.153 In order to resolve this issue the TTWG has suggested that '…all civil pecuniary penalty orders from one country should be enforceable in the other' under the proposed new harmonised civil procedure regime.[188]

Enforcing fines for certain regulatory offences

3.154 The TTWG discussion paper noted that, currently, '…a criminal fine imposed in one country is not enforceable in the other', and that this creates difficulties where such a fine is given '…under a regulatory regime that impacts on the integrity of markets and in which each

185 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

186 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

187 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 7.

188 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 7.

country has a strong mutual interest.'[189] The TTWG has proposed therefore that criminal fines imposed under the following regimes should be enforceable in the other country:

- Australian TPA;
- Australian *Corporations Act* 2001;
- Australian 'Consumer protection and product safety legislation at State and Territory level';
- Australian 'Occupational regulation legislation at State and Territory level';
- New Zealand *Commerce Act* 1986;
- New Zealand *Companies Act* 1993;
- New Zealand *Fair Trading Act* 1986;
- New Zealand *Securities Act* 1978;
- New Zealand *Securities Markets Act* 1988;
- New Zealand *Takeovers Act* 1993;
- New Zealand *Financial Reporting Act* 1993;
- New Zealand *Credit Contracts and Consumer Finance Act* 2003; and
- New Zealand 'Occupational regulation legislation'.[190]

3.155 The TTWG indicated that a number of safeguards would be in place:

> Such fines would be enforceable in the other country in the same way as a civil judgment debt. This should address potential concerns about one country using its fine collection powers to enforce the other's criminal sanctions. A public policy exception to enforcement would apply. Also, criminal fines could only be registered for enforcement in a higher court.
>
> To address concerns that the proposal would result in activities in one country being regulated in the other, there would need to be a real and substantial connection between the country imposing the fine and the conduct amounting to

189 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 7.

190 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 7.

> the offence. This could be done by specifying the circumstances under which a fine under a particular regime would be enforceable in the other country.[191]

The Committee's view

3.156 The Committee endorses the work of the TTWG. The reform measures identified above should, *mutatis mutandis*, streamline the interaction between the Australian and New Zealand legal systems and reduce the costs and inconvenience that can be associated with trans-Tasman proceedings. In its submission to the inquiry Treasury stated that these reforms will also have wider benefits for trans-Tasman trade and commerce:

> Progress on this project will bring general benefits to trade and commerce across the Tasman through providing greater certainty to the enforcement of legal rights.[192]

Statute of limitations

3.157 The NZG stated that there are differences between Australian and New Zealand statutes of limitations, but that the NZG:

> …is not aware of these differences giving rise to material costs in the trans-Tasman context, and it is not easy to identify circumstances in which significant costs are likely to result from such differences.[193]

3.158 The NZG also indicated that there were historically concerns relating to the application of limitation rules in trans-Tasman proceedings, but that these were largely addressed in the early 1990s by the harmonisation of New Zealand law with that of relevant New South Wales legislation.[194]

3.159 In its initial submission the AGD indicated that the TTWG was considering the possible harmonisation of Australian and New

---

191 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, pp. 7-8.

192 Treasury, *Submission No. 21.1*, p. 13.

193 NZG, *Submission No. 23*, pp. 19-20.

194 NZG, *Submission No. 23*, p. 20.

Zealand statute of limitations legislation.[195] The AGD however also stated that:

> …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.[196]

3.160 The Committee notes that, in the subsequent TTWG discussion paper of August 2005, the issue of statute of limitations legislation was not raised.

Service of legal proceedings

3.161 In terms of service of Australian proceedings in New Zealand, the AGD stated that, currently:

> 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.[197]

3.162 The AGD also stated that these jurisdictions '…specify the circumstances which create a sufficient jurisdictional nexus to allow service outside of Australia',[198] and that leave for service outside Australia can be granted for actions 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.[199]

---

195 AGD, *Submission No. 26*, p. 15.
196 AGD, *Submission No. 26*, p. 15.
197 AGD, *Submission No. 26*, p. 11.
198 AGD, *Submission No. 26*, p. 11.
199 AGD, *Submission No. 26*, p. 11.

3.163 The AGD indicated that service in New Zealand of documents issued in an Australian court must be performed by an agent in New Zealand – a mechanism which does not breach New Zealand law and '…is not considered by the New Zealand Government to be a breach of its sovereignty'.[200]

3.164 In terms of service of New Zealand proceedings in Australia, the AGD stated that '…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)' and that such process '…can be served by mail, by a private process server or by other means chosen by a foreign litigant'.[201]

3.165 The AGD informed the Committee that, currently, there is no convention '…in force between Australia and New Zealand relating to the service of documents in civil proceedings'.[202] The Committee notes that, under the TTWG's proposed new harmonised civil procedure regime outlined at paragraphs 3.145 – 3.146 above, initiating process in civil proceedings begun in any Australian Federal, State or Territory court, or in any New Zealand court, will be able to be served in the other country without leave. The Committee also notes that the TTWG has proposed further reforms to current arrangements for trans-Tasman service of subpoenas (discussed at paragraphs 3.173 – 3.174 below).

Evidence law

3.166 In its submission the NZG noted that there are '…some differences, mainly on issues of detail, between the evidence laws of New Zealand and the evidence laws of the Australian jurisdictions'.[203] The NZG also stated however that:

> Such differences as do exist in this field seem unlikely to give rise to material costs in the trans-Tasman context, provided there are appropriate arrangements for obtaining evidence across the Tasman.[204]

200 AGD, *Submission No. 26*, p. 12.
201 AGD, *Submission No. 26*, p. 12.
202 AGD, *Submission No. 26*, p. 11.
203 NZG, *Submission No, 23*, p. 21.
204 NZG, *Submission No, 23*, p. 21.

3.167 The AGD informed the Committee that Australia has legislative schemes in place to facilitate mutual evidentiary assistance with other countries, including New Zealand, in criminal matters (Commonwealth *Mutual Assistance in Criminal Matters Act* 1987) and business regulatory investigations (Commonwealth *Mutual Assistance in Business Regulation Act* 1992).[205] In terms of civil matters, the AGD stated that both Australia and New Zealand are parties to the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* (1970), which:

> …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 of within their jurisdictions, to the corresponding central authority of another contracting State. …Australia's obligations under the Convention are implemented through State and Territory evidence legislation and court rules.[206]

3.168 Also in relation to civil matters, the Committee was informed that the Commonwealth *Evidence and Procedure (New Zealand) Act* 1994 and the New Zealand *Evidence Amendment Act* 1994 provide:

> …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 another.[207]

3.169 The AGD also noted the Commonwealth *Foreign Evidence Act* 1994, which allows for the taking of evidence overseas for Australian proceedings (for example the examination of witnesses overseas), and the Commonwealth *Federal Court of Australia Act* 1976, which enables the Federal Court to take evidence for the New Zealand High Court in particular trade practices proceedings and which allows the Federal Court and New Zealand High Court to sit in the other country if convenient.[208]

---

205 AGD, *Submission No. 26*, p. 17.

206 AGD, *Submission No. 26*, p. 17.

207 AGD, *Submission No. 26*, pp. 17-18.

208 AGD, *Submission No. 26*, p. 18.

TTWG reform

3.170 The Committee notes that in its August 2005 discussion paper the TTWG identified areas for reform in relation to evidence law as follows.

Court appearance by video link or telephone

3.171 The Committee notes that, currently, video link and telephone technology are utilised in court proceedings between Australia and New Zealand under the Commonwealth *Evidence and Procedure (New Zealand) Act* 1994 and the New Zealand *Evidence Amendment Act* 1994.[209] The TTWG has proposed that this technology also be available for remote appearances and stay of proceedings appearances:

> Remote appearances by parties and counsel using electronic technology could also reduce the cost and inconvenience of physically attending court in trans-Tasman litigation.
>
> …parties seeking a stay of proceedings under the proposed trans-Tasman regime, and their counsel, should be able to appear from the other country as of right. The court would decide the technology to be used. Parties wishing to appear remotely in other situations could do so with the court's leave. Their counsel could also appear with leave, provided they have the right to appear before the court.[210]

3.172 The TWWG stated that the '…appropriate privileges, immunities and protections' would need to be in place for those utilising the technology from remote locations.[211]

Leave requirement for trans-Tasman service of subpoenas

3.173 In its discussion paper the TTWG noted the limited trans-Tasman civil evidence regime that is currently in place between Australia and New Zealand (see paragraph 3.168 above). The TTWG stated that, under this regime:

---

209 See AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6 (see also p. 2). See also AGD, *Submission No. 26*, p. 18.

210 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

211 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

> 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.[212]

3.174 In order to address this situation the TTWG has proposed that '…lower court judges should be able to grant leave to serve a subpoena in proceedings before that lower court or a tribunal'.[213]

Extending trans-Tasman subpoenas to criminal proceedings

3.175 The Committee was informed that, currently, subpoenas cannot be issued in criminal proceedings under the regime established by the Commonwealth *Evidence and Procedure (New Zealand) Act* 1994 and the New Zealand *Evidence Amendment Act* 1994.[214] The TTWG indicated that, in the situation where a witness is unwilling, '…evidence can only be obtained under less convenient procedures, such as the Mutual Assistance in Criminal Matters legislation'.[215] The TTWG has proposed extending the current trans-Tasman civil subpoenas regime to criminal proceedings. The TTWG stated that 'Various safeguards (such as the leave requirement) would prevent misuse'.[216]

The Committee's view

3.176 Again, the Committee endorses the work of the TTWG. The reform measures suggested by the TTWG in relation to evidence law should streamline the interaction between the Australian and New Zealand legal systems and reduce costs and inconvenience to parties.

---

212 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

213 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 6.

214 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 8; AGD, *Submission No. 26*, p. 18.

215 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 8.

216 AGD and New Zealand Ministry of Justice, *Trans-Tasman Court Proceedings and Regulatory Enforcement*, p. 8.

4

Harmonisation within Australia

4.1 This Chapter considers current levels of legal harmonisation within Australia in particular sectors and areas of law as raised in the evidence and identifies some possible initiatives for further harmonisation. The main areas that were raised in the evidence are:

- Real estate regulation;
- Legal issues relating to individuals;
- Personal property securities law and financial services regulation;
- Partnership law;
- Consumer protection law;
- Standards of products regulation;
- Not-for-profit sector regulation;
- Therapeutic goods and poisons regulation;
- Science industry regulation;
- Regulation of the legal profession;
- Legal procedures;
- Statute of limitations;
- Service of legal proceedings;
- Contract law and equity;
- Evidence law;

- Privacy law;
- Defamation law;
- Workers compensation regulation; and
- Intergovernmental agreements.

4.2 On a purely conceptual level, the Committee recognises that there is a continuum of possibilities with regard to harmonisation within Australia, ranging from highly diverse regulatory systems with no harmonisation whatsoever to a single central legislative regime covering the field. It is at least arguable that, to avoid the duplication that can currently occur, a more unified system of governance would be desirable in Australia – for example a centralised government with competency on national policy issues accompanied by a level of regional government. However, as the Committee noted in Chapter 2, the question of harmonisation does require a case-by-case approach. Each of the areas listed above is therefore considered in turn. A further aspect of legal harmonisation between Australia and New Zealand is also considered at the conclusion of the Chapter.

Recent national developments

4.3 Since the Committee commenced its inquiry in early 2005 there have been significant overarching national developments regarding regulatory harmonisation in Australia. In February 2006, as part of its National Reform Agenda, COAG agreed that all jurisdictions would take steps to reduce the burden of regulation. COAG stated that:

> The regulatory reform stream of the COAG National Reform Agenda focuses on reducing the regulatory burden imposed by the three levels of government. …COAG agreed to a range of measures to ensure best-practice regulation making and review, and to make a "downpayment" on regulatory reduction by taking action now to reduce specific regulation "hotspots". It is expected that further action to address burdensome regulation and red tape will be taken as the Commonwealth considers and responds to the report of the Taskforce on Reducing the Regulatory Burden on Business,

and as State, Territory and local governments undertake their own regulation review processes.[1]

4.4 Specifically, the jurisdictions agreed to:

- establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition;
- undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community;
- identify further reforms that enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies; and
- in-principle, aim to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden.[2]

4.5 The 'hotspot' areas for cross-jurisdictional reform that COAG agreed to address as a matter of priority are:

- Rail safety regulation;
- Occupational health and safety;[3]
- National trade measurement;
- Chemicals and plastics;
- Development assessment arrangements; and
- Building regulation.[4]

---

1 COAG Communiqué, 10 February 2006, p. 8. This document can be accessed at: http://www.coag.gov.au/meetings/100206/.

2 COAG Communiqué, 10 February 2006, p. 8. See also Attachment B to the COAG Communiqué, pp. 4-7. Attachment B can be accessed at: http://www.coag.gov.au/meetings/100206/. The AGD informed the Committee that in April 2006 SCAG agreed to '…coordinate efforts, monitor the progress and assist in the prioritisation of harmonisation initiatives': *Submission No. 26.3*, p. 4.

3 The ANZ Bank raised the issue of occupational health and safety regulation and stated that 'The variance of legislation' between the jurisdictions '…presents obvious difficulties to an Australia-wide employer such as ANZ': *Submission No. 27.1*, p. 1, and Mr Sean Hughes, ANZ Bank, *Transcript of Evidence,* 7 March 2006, p. 25.

4 COAG Communiqué, 10 February 2006, p. 9. See also Attachment B to the COAG Communiqué, pp. 4-7.

4.6 At its most recent meeting in July 2006, COAG reaffirmed its commitment to the National Reform Agenda regulatory reform programme and added four further priority 'hotspot' areas to those listed above:

- Environmental assessment and approvals processes;
- Business name, Australian Business Number and related business registration processes;
- Personal property securities; and
- Product safety.[5]

4.7 At the July 2006 meeting COAG agreed that '…officials would develop specific reform proposals reflecting the commitments made today and in February which COAG will consider in early 2007'.[6]

4.8 In addition to the work of COAG, the Taskforce on Reducing the Regulatory Burden on Business (appointed in October 2005) released its final report, *Rethinking Regulation*, in April 2006. In this report the Taskforce identified 'Overlapping and inconsistent regulatory requirements' as one of the prominent regulatory issues that '…stand out in terms of the likely significance of the burdens for individual businesses and the number of businesses potentially affected'.[7] The Taskforce further stated that:

> While the Taskforce identified some overlapping and inconsistent requirements between different areas of Australian Government regulation, the more vexed instances occur across jurisdictions. Naturally, reforms to address these matters will generally involve state and territory governments, as well as the Australian Government. In many cases, reviews are required to work out the best way forward.[8]

---

5 COAG Communiqué, 14 July 2006, pp. 5, 7-8. This document can be accessed at: http://www.coag.gov.au/meetings/140706/. See also Attachment E to the COAG Communiqué, pp. 1-2. Attachment E can be accessed at: http://www.coag.gov.au/meetings/140706/.

6 COAG Communiqué, 14 July 2006, p. 8.

7 Taskforce on Reducing the Regulatory Burden on Business, *Rethinking Regulation*, p. iii. This document can be accessed at: http://www.regulationtaskforce.gov.au/finalreport/index.html.

8 Taskforce on Reducing the Regulatory Burden on Business, *Rethinking Regulation*, p. 178. See pp. 178-79 for some specific reform areas identified by the Taskforce in this regard.

4.9 In August 2006 the Government responded to the Taskforce's *Rethinking Regulation* report, accepting 158 of its 178 recommendations in whole or in part.[9] In particular, the Committee notes that the Government agreed to the recommendation that there be targeted reviews of areas of regulatory overlap and inconsistency between the Commonwealth and the States/Territories, and also to the recommendation that a framework be developed for national regulatory harmonisation. The Government indicated that the current COAG regulatory reform agenda would implement these recommendations.[10]

4.10 At its July 2006 meeting COAG indicated that national harmonisation work is proceeding in regard to jurisdictional payroll tax regimes and occupational health and safety standards as identified in the Taskforce report.[11]

4.11 In the context of COAG's considerable regulatory reform agenda – particularly the agreement to work towards regulatory consistency and reduced duplication throughout the jurisdictions – and the Taskforce report, the Committee envisages that its recommendations in this report will complement and support the work of the Commonwealth, States and Territories by highlighting specific areas of concern that require harmonisation.

Real estate regulation

4.12 The two main issues raised in the evidence in relation to real estate regulation were regulatory inconsistencies and complexity and conveyancing.

---

9 Media release of the Treasurer, the Hon Peter Costello MP, 15 August 2006. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/pressreleases/2006/088.asp.

10 *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business: Australian Government's Response*, pp. 86-87. This document can be accessed at: http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1141.

11 COAG Communiqué, 14 July 2006, p. 8. The ANZ Bank submitted that there are '…significant differences in the application and operation of payroll tax between States and Territories': *Submission No. 27*, p. 14, and Mr Sean Hughes, ANZ Bank, *Transcript of Evidence,* 7 March 2006, p. 25.

Regulatory inconsistencies and complexity

4.13 The AGD noted that each State and Territory has its own land register and systems of real property and conveyancing regulation.[12] In its submission the Property Law Reform Alliance (PLRA), which is a '…coalition of legal and industry associations',[13] listed over 70 separate pieces of key legislation from across the States and Territories regulating real estate transactions.[14]

4.14 A number of submissions pointed to inconsistencies and complexity in the regulation of real estate transactions across the different jurisdictions. The AGD, for example, indicated that:

> 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.[15]

4.15 The ANZ Bank informed the Committee that the '…patchwork of State and Territory laws' causes compliance difficulties for the Bank as a '…national financier of real estate transactions', particularly where interstate real estate transactions are involved.[16] The Bank noted that regulatory inconsistencies add '…significant complexity to bank staff compliance training as well as a substantial risk of non-compliance with largely technical requirements'.[17]

4.16 The PLRA stated that:

> …the disparate laws and procedures relating to property transactions across state and territory borders mean that any companies investing in property still face significant barriers to efficient business practices. This discourages international

12 AGD, *Submission No. 26*, p. 30.

13 PLRA, *Submission No. 15*, p. 1. Members include a range of property associations and a number of the Law Societies: PLRA, *Exhibit 32*, p. 1.

14 PLRA, *Submission No. 15*, pp. 4-7.

15 AGD, *Submission No. 26*, p. 30.

16 ANZ Bank, *Submission No. 27*, p. 14.

17 ANZ Bank, *Submission No. 27*, p. 14.

> investment and makes property a less attractive investment vehicle for Australian companies… Any individual who moves or invests interstate also faces a completely different set of legal requirements when purchasing (or selling) a property.[18]

4.17 The PLRA submitted that a '…comprehensive reform of Australia's property laws'[19] is required and contended that moving towards uniform real estate laws across the jurisdictions in Australia would:

- Enable the adoption of the most '…efficient, rigorous, and fair system' for real estate transactions in the States and Territories;
- Facilitate interstate real estate transactions for individuals and businesses; and
- Place real estate investment on a '…level playing field with other asset classes'.[20]

4.18 The PLRA informed the Committee that it is currently reviewing inconsistencies in real estate regulation throughout Australia and developing a model Real Property Act.[21]

4.19 While not proposing a comprehensive review of the real estate legislation throughout the States and Territories, the AGD suggested that a reform of title registration on a national basis would be desirable:

> …the operation and interpretation of Torrens title differs between each jurisdiction… 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.[22]

4.20 The Victorian Department of Sustainability and Environment (DSE) informed the Committee of current projects to develop electronic conveyancing systems in the different jurisdictions and a harmonised

---

18 PLRA, *Submission No. 15*, p. 2.

19 PLRA, *Submission No. 15*, p. 2.

20 PLRA, *Submission No. 15*, p. 3.

21 PLRA, *Submission No. 15*, pp. 1, 3; see also Mr Murray McCutcheon, PLRA, *Transcript of Evidence*, 6 April 2006, pp. 54-55.

22 AGD, *Submission No. 26*, p. 30.

national Torrens title registration system. With regard to electronic conveyancing, the DSE stated that the Victorian system is due to commence in 2006 and will:

> …eliminate the need for settlement parties to arrange and attend a physical venue to complete a property transaction. Electronic conveyancing will offer financial settlement with multilateral electronic funds transfer into nominated bank accounts, self-assessment and payment of duty, and lodgement of electronic instruments with Land Registry for registration, electronically and remotely in one consecutive process. The settlement process… from end to end, will be completed in approximately one hour.[23]

4.21 The DSE stated that the electronic conveyancing project is a '…completely new concept not attempted anywhere else in the world' and could result in cost reductions nationwide of at least $150 million per annum.[24] The DSE indicated that similar initiatives are being progressed in New South Wales, Queensland and South Australia, and that Victoria and New South Wales have prepared an agreement to advance a national electronic conveyancing system that has received in-principle support from all of the other jurisdictions.[25] The Committee also understands that SCAG agreed in November 2006 to monitor the project.[26]

4.22 In its submission the ANZ Bank endorsed the Victorian electronic conveyancing project and stated that 'ANZ hopes this project will act as a driver for more national uniformity in conveyancing laws'.[27]

4.23 With regard to the national Torrens title registration harmonisation project, the DSE informed the Committee that the project, which was commenced in 2004 by the Australian Registrars of Titles,[28] involves simplifying conveyancing instruments and documentation, reviewing land title legislation in each jurisdiction, and formulating model

---

23 DSE, *Submission No. 29*, p. 3.

24 DSE, *Submission No. 29*, pp. 3-4.

25 DSE, *Submission No. 29*, pp. 3-4.

26 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0.

27 ANZ Bank, *Submission No. 27*, p. 14.

28 DSE, *Submission No. 29,* p. 1.

national legislation on Torrens title registration.[29] The model legislation will make full use of technology '…to assist in managing differences which would be hard to reconcile with paper documents'.[30] The DSE also stated that the project:

> …should allow Australians and their legal and conveyancing advisers the opportunity to undertake conveyancing across Australia in one common form with simple common instruments. For the increasingly centralised lending business of major banks and financial institutions and national legal firms, this will eliminate the need to train staff in the conveyancing and legal systems of eight different jurisdictions. It also opens interstate borders to a far greater extent by allowing the trans-jurisdictional trading of land and interests in land.[31]

4.24 The Committee commends the electronic conveyancing and harmonised national Torrens title registration projects outlined above. These are innovative and significant developments which, once adopted widely, will substantially reduce the current regulatory inconsistencies and complexities surrounding real estate transactions in Australia and the associated cost burdens. The Committee also supports the PLRA's development of a model Real Property Act, which could be implemented on a cooperative basis by means of the applied or complementary legislation mechanisms. The Committee is hopeful that all of these developments will go a considerable way towards achieving a truly national real estate regulatory framework.

Conveyancing

4.25 The Victorian Division of the Australian Institute of Conveyancers (VAIC), a representative association for conveyancers in Victoria, raised the issue of licensing and registration for Victorian conveyancers. In its submission the VAIC indicated that, unlike New South Wales, Victoria had no licensing or registration system for conveyancers.[32] The VAIC submitted that the lack of such a system

29 DSE, *Submission No. 29,* pp. 1, 4-5. The DSE indicated that the project is supported by the PLRA: p. 4.

30 DSE, *Submission No. 29*, p. 4.

31 DSE, *Submission No. 29*, p. 5.

32 VAIC, *Submission No. 24*, p. 1. The VAIC indicated in oral evidence that the only other jurisdictions without licensing systems for conveyancers are Queensland and the ACT: Mrs Jillean Ludwell, VAIC, *Transcript of Evidence*, 7 March 2006, p. 28.

meant that Victorian conveyancers were limited to performing non-legal work, that there was no officially regulated entry into the conveyancing occupation in Victoria, and that there was no scope for mutual recognition in other jurisdictions.[33]

4.26 Subsequent to making its submission, however, the VAIC informed the Committee that a licensing system is to be established in Victoria for conveyancers:

> …the Victorian government have finally announced that they are introducing a licensing system for conveyancers in Victoria. …It will recognise experience and education and require professional indemnity insurance… It will put Victorian conveyancers on a par with their licensed counterparts in other states.[34]

4.27 The VAIC indicated that the legislation to establish the licensing system may be introduced in the 2006 spring session of the Victorian Parliament.[35]

Legal issues relating to individuals

4.28 The main legal issues raised in the evidence relating to individuals were power of attorney, statutory declarations, and succession law. Each of these areas is regulated by the States and Territories.

Power of attorney

4.29 The AGD informed the Committee that:

> 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.[36]

4.30 The Department also noted that:

33 VAIC, *Submission No. 24*, pp. 1-2.

34 Mrs Jillean Ludwell,VAIC, *Transcript of Evidence*, 7 March 2006, p. 28.

35 Mrs Jillean Ludwell, VAIC, *Transcript of Evidence*, 7 March 2006, p. 28

36 AGD, *Submission No. 26*, p. 31.

> …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.[37]

4.31 As noted at the beginning of this report, one example of senselessness resulting from regulatory inconsistency that emerged during the course of the inquiry is the lack of recognition in the Australian Capital Territory of a power of attorney granted in New South Wales.[38] The LSNSW indicated that:

> Power of attorney executed in New South Wales is not effective when a person moves into a nursing home in the ACT. They are in another jurisdiction, regardless of where the assets are. If they have lost the capacity at the time they enter the ACT, they cannot enter into and grant another power of attorney.[39]

4.32 The LSNSW stated that this is an issue of '…great concern' relating to '…lack of equality of laws'.[40] Other evidence to the inquiry suggested that power of attorney granted in Queensland will not be recognised in the ACT either. In her submission, Ms Susan Cochrane, who has a parent living in Queensland with executed power of attorney, stated that:

> I have been advised by the Office of the Community Advocate that, under relevant legislation in the ACT, I would not be entitled to rely on the Queensland instrument to make decisions… for my father were he to move to the ACT. Instead, the OCA advises me that I will need to go through the process of seeking a guardianship order.[41]

4.33 Ms Cochrane indicated that the ACT Government has acknowledged the lack of recognition in the ACT for interstate power of attorney instruments.[42] Ms Cochrane did also note that '…there is legal

---

37 AGD, *Submission No. 26*, p. 31.

38 See p. vii above.

39 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 32.

40 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 32.

41 Ms Susan Cochrane, *Submission No. 12*, p. 2.

42 Ms Susan Cochrane, *Submission No. 12*, p. 2. See the 2004 ACT Government issues paper *Substituted Decision-Making: Review of the Powers of Attorney Act 1956*, p. 31. This document can be accessed at: http://www.jcs.act.gov.au/eLibrary/discuss_papers.html.

opinion to the contrary effect about the ACT legislation, so the matter is not free from doubt for donors, donees or third parties'.[43]

4.34 The Committee believes that there should be consistency among the jurisdictions with regard to the mutual recognition of power of attorney instruments. Individuals should not be disadvantaged or placed in a difficult position with regard to power of attorney merely because they have moved interstate, particularly given that the decision to grant power of attorney can be stressful enough in itself without added complications. Nor should there be any uncertainty regarding interstate recognition for any party involved with a power of attorney. The Committee agrees with the following statement of the AGD:

> With an increasing mobile population, both donors and donees of powers of attorney should be confident of the validity of these instruments interstate.[44]

4.35 Accordingly, the Committee is of the view that the Australian Government should raise mutual recognition of power of attorney instruments again at SCAG with a view to expediting uniform and adequate formal mutual recognition, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by SCAG in 2000. The Committee can see little in the way of potential drawbacks to legal harmonisation in this area.

Recommendation 11

4.36 **The Committee recommends that the Australian Government again raise mutual recognition of power of attorney instruments at the Standing Committee of Attorneys-General with a view to expediting uniform and adequate formal mutual recognition among the jurisdictions, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by the Standing Committee in 2000.**

Statutory declarations

4.37 In its submission the AGD indicated that:

> Currently, each jurisdiction regulates the making of statutory declarations for the purposes of a law of that jurisdiction.

43 Ms Susan Cochrane, *Submission No. 12*, p. 2.

44 AGD, *Submission No. 26*, p. 31.

> However, the classes of persons who may witness statutory declarations and the forms that are to be used differ across jurisdictions.[45]

4.38 The range of permitted witnesses for Commonwealth and ACT statutory declarations, for example, is wider than the range of permitted witnesses for a NSW statutory declaration, and the forms that must be used differ also.[46] The AGD submitted that harmonisation across Australia of the forms, rules, and offence provisions relating to statutory declarations would '…assist people engaged in business and ordinary citizens', and that making statutory declarations outside Australia (e.g. in New Zealand) easier by broadening the range of permitted overseas witnesses would also be desirable.[47]

4.39 The Committee considers that harmonised forms, rules and offence provisions relating to statutory declarations could certainly be beneficial for users in terms of increasing ease of use and reducing uncertainty. The Committee was pleased to learn that the Attorney-General promoted harmonisation of statutory declaration laws, including the introduction of a single form and an agreed list of potential witnesses, at SCAG in November 2006.[48] The Committee believes however that this move towards harmonisation should also encompass offence provisions and an exploration of the possibility of expanding the class of permitted overseas witnesses.

Recommendation 12

4.40 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General investigate an expansion of the class of permitted overseas witnesses for statutory declarations along with the national legislative harmonisation of offence provisions relating to statutory declarations.**

---

45 AGD, *Submission No. 26*, p. 31.

46 AGD, *Submission No. 26*, p. 31.

47 AGD, *Submission No. 26*, p. 31.

48 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0.

Succession law

4.41 The AGD informed the Committee that succession law '…varies significantly in each State and Territory',[49] and that:

> …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 be recognised by all jurisdictions.[50]

4.42 The Department indicated that a project has been underway since 1991 to review succession law across Australia and formulate model succession laws for the jurisdictions. The project, coordinated by the Queensland Law Reform Commission (QLRC), has focused on four areas: wills, family provisions, intestacy, and administration of estates.[51] The AGD stated that:

> The QLRC has so far reported on the first two areas [wills and family provisions] 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.[52]

4.43 However, in a subsequent submission, the AGD also indicated that:

> The Queensland Law Reform Commission is expected to finalise its reports on Intestacy and the Administration of Estates early in 2006.[53]

4.44 The Department further indicated that the Northern Territory and Victoria have legislated to implement the QLRC's recommendations in relation to wills and that Queensland has legislation before the Parliament also.[54] The Department noted that while this legislation is '…largely consistent with the QLRC's recommendations', there are some points of '…substantial policy departure'.[55]

4.45 While it is regrettable that this divergence has arisen, the Committee is heartened by the fact that the implementing legislation to date has been consistent with the QLRC recommendations in the main. The

---

49 AGD, *Submission No. 26*, p. 30.
50 AGD, *Submission No. 26*, p. 30.
51 AGD, *Submission No. 26*, p. 30.
52 AGD, *Submission No. 26*, p. 30.
53 AGD, *Submission No. 26.1*, p. 8.
54 AGD, *Submission No. 26.1*, p. 8.
55 AGD, *Submission No. 26.1*, p. 8.

Committee is also mindful of the time that has been taken to reach this point in succession law harmonisation (some 15 years), and considers that a fresh exercise examining harmonisation in this complex area would not be useful or timely. The focus should now be on the completion of the project and the harmonised legislative implementation of the QLRC's recommendations in the remaining jurisdictions.

Recommendation 13

4.46 **The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to examine the Queensland Law Reform Commission succession law recommendations and to implement those on which agreement can be reached.**

Personal property securities law and financial services regulation

Personal property securities law

4.47 The AGD indicated that, currently, regulation of personal property securities law:

> …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.[56]

4.48 In its submission the Department listed over 60 separate pieces of legislation from across the Commonwealth, States and Territories regulating personal property securities.[57] The AGD also detailed a number of specific problems caused by a lack of harmonisation in this area of law such as overlapping, costly and cumbersome registration processes and uncertainty resulting from inconsistent priority rules. Difficulties arising in relation to personal property securities law were

56 AGD, *Submission No. 26*, p. 22.

57 AGD, *Submission No. 26*, pp. 32-33.

also identified by the Queensland Attorney-General[58] and the Australian Finance Conference (AFC).[59]

4.49 The AGD stated that harmonisation in the area of personal property securities law is '…highly desirable as it will provide efficiencies [*sic*] improve consistency and certainty for borrowers, lenders and consumers'[60] and will:

- simplify which PPS [personal property securities] 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 processes for registration, and
- ensure clear priority rules.[61]

4.50 The Department also noted international developments in the reform of personal property securities law, particularly New Zealand's *Personal Property Securities Act* 1999:

> The *Properties Securities Act 1999 (NZ)* [*sic*] 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.[62]

4.51 The Committee learned that considerable progress has been made towards the national legal harmonisation of personal property securities law in Australia. The AGD informed the Committee that SCAG agreed in March 2005 to establish a working group to examine and develop possibilities for personal property securities law reform, with the goal of establishing a:

> …single legal regime for all Australian jurisdictions for the regulation of priorities between the holders of competing PPS

---

58 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3.

59 AFC, *Submission No. 5*, p. 2. The AFC is a '…national finance industry association': *Submission No. 5*, p. 1.

60 AGD, *Submission No. 26*, p. 22.

61 AGD, *Submission No. 26*, p. 22.

62 AGD, *Submission No. 26*, p. 23.

> interests and for the determination of interests between security holders and purchasers.[63]

4.52 In a subsequent submission the Department indicated that SCAG released an options paper in April 2006 on the matter which '…canvasses policy issues and some of the options available to address them'.[64] The options paper states that:

> The benchmarks for any solution are that it would be comprehensive in its coverage, provide legal certainty, and be efficient.[65]

4.53 The options paper further states that different legislative measures have been identified for reform, and that:

> Each option raises a number of practical and constitutional issues that would need to be worked through. Particular issues relate to the relationship between State and Territory legislation and inconsistent Commonwealth legislation, the conferral of jurisdiction on federal courts and officials and the transitional arrangements.[66]

4.54 The Committee was interested to hear that the options paper utilises the New Zealand *Personal Property Securities Act* 1999 and that the Attorney-General has '…commended the New Zealand model to SCAG'.[67] In separate evidence to the inquiry, Professor Gordon Walker stated that the New Zealand regime is '…state of the art and the best in the world', and that:

> …we have this horrific situation in Australia with the states and the territories all having their own version. It is a shambles; it is pre-internet. If we are really talking about coordination or harmonisation, perhaps Australia should be looking at that law in New Zealand. You could virtually lift it

---

63 AGD, *Submission No. 26*, p. 23. The AGD also noted work on personal property securities law reform undertaken in previous years by the Australian Law Reform Commission and the Department: see p. 23. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3; and Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 1.

64 AGD, *Submission No. 26.3*, p. 3. The options paper, *Review of the law on Personal Property Securities*, can be accessed at: http://www.ag.gov.au/pps.

65 AGD, *Review of the law on Personal Property Securities*, p. 10.

66 AGD, *Review of the law on Personal Property Securities*, p. 15.

67 AGD, *Submission No. 26.3*, p. 3.

> up and plonk it down in Australia without too much difficulty.[68]

4.55 The AFC expressed its satisfaction with the progress of the SCAG personal property securities reform process,[69] and the AGD stated that the Attorney-General has consulted a range of key stakeholders who have all '…indicated their support for the project'.[70]

4.56 Most recently, the Committee notes that in July 2006 COAG identified personal properties securities as a 'hotspot' priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.[71] COAG stated that:

> A national system facilitating the registration of all types of personal property as security would have tangible economic benefits in terms of business investment and reduced transaction costs.[72]

4.57 COAG also stated that it:

> …endorsed the development by the Standing Committee of Attorneys-General (SCAG) of an efficient and effective national personal properties registration system for security transactions and has asked SCAG to report to it by the end of 2006 on progress with developing options and timeframes for implementing a national system, including identifying any cost and associated consumer protection data implications.[73]

4.58 The Attorney-General announced in November 2006 that '…significant progress' has been made in a review of the legislation regulating personal property securities law in Australia and that a series of discussion papers on a national personal property securities register would be released in the near future.[74]

---

68 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, p. 3. The AFC also expressed support for the New Zealand regulatory approach: Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 23.

69 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

70 AGD, *Submission No. 26.1*, p. 3.

71 COAG Communiqué, 14 July 2006, p. 8.

72 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

73 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

74 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0.

4.59 The Committee is pleased to see the Australian Government and COAG advancing legal harmonisation of personal property securities law. This is an excellent instance of a regulatory framework that is in strong need of harmonisation, and the Government appears to be committed to this outcome. The Committee will observe the progress of this work with interest.

Financial services regulation

4.60 In its submission the AFC identified regulatory inconsistencies and inefficiencies in the following financial service areas:

- Debt collection – multiple statutes, multiple licensing and registration requirements, educational requirements, and Commonwealth and State debt collection guidelines.
- Finance broking – multiple statutes, licensing and registration requirements, commission structures, and broking contract requirements.
- Civil debt recovery – multiple statutes, process requirements, judgment periods, enforcement mechanisms, remedies, statute of limitations inconsistencies.[75]

4.61 The AFC submitted that inconsistencies and inefficiencies in these areas '…impact adversely on our members' business efficiencies and compliance costs', and that harmonisation would '…result in significant benefits to our members, their customers, government and consumers as a whole'.[76]

4.62 With regard to finance broking, the ANZ Bank elaborated on the regulatory inconsistencies present across the jurisdictions:

> Western Australia, Victoria, New South Wales and the ACT have passed legislation specifically regulating finance brokers. South Australia, Tasmania, the Northern Territory and Queensland are yet to legislate specifically on the topic. The regimes of NSW, Victoria, and the ACT are similar and focus primarily on the disclosure requirements for brokers. They apply only to brokers dealing in consumer credit. The regime in Western Australia goes further by also establishing a licensing regime, code of conduct, and functions for a

75 AFC, *Submission No. 5*, p. 2. The AFC also raised personal property securities law which is dealt with at paragraphs 4.47 – 4.59 above.

76 AFC, *Submission No. 5*, p. 3.

> 'regulator' which has an ongoing industry oversight role. It also has a wider scope, applying to intermediaries who deal in commercial as well as consumer credit.[77]

4.63 The ANZ submitted that this '…patchwork of legislation presents difficulties for a financier like ANZ with a national network of finance brokers':[78]

> While ANZ does not have direct compliance responsibility under the various laws, it provides compliance training and support for many brokers and has an obvious interest in ensuring its brokers are competent, appropriately qualified and law abiding. It is much easier for ANZ to set standards for the good character and conduct of its brokers if those standards can be based on one nationally uniform legislative regime with one set of licensing, conduct and disclosure requirements. The difficulties of inconsistent legislation is [*sic*] compounded for national broking companies, which do have direct responsibility for compliance with this legislation.[79]

4.64 The ANZ also informed the Committee that some progress has been made towards national uniform finance broker laws in Australia.[80] In 2004 the NSW Office of Fair Trading released a discussion paper entitled *National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper*.[81] The discussion paper proposes a national regulatory scheme which, it suggests, would:

> …address the problems between brokers and consumers which result in market inefficiencies and consumer loss. In effect, the proposals combine features of the Western Australia and New South Wales approaches, but these are enhanced to address current practices and problems.[82]

4.65 The ANZ indicated that it '…understands draft provisions will be released by the New South Wales Office of Fair Trading in the near future for wide consultation'.[83]

---

77 ANZ Bank, *Submission No. 27*, p. 12.
78 ANZ Bank, *Submission No. 27*, p. 12.
79 ANZ Bank, *Submission No. 27*, p. 12.
80 ANZ Bank, *Submission No. 27*, p. 12.
81 This document can be accessed at: http://www.fairtrading.nsw.gov.au.
82 *National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper*, p. 60.
83 ANZ Bank, *Submission No. 27*, p. 12.

4.66 The Committee commends the NSW Office of Fair Trading for taking the initiative with this national regulation project. It appears that harmonised finance broker legislation throughout the jurisdictions would reduce the training and compliance burden on business and increase certainty for both practitioners and consumers with regard to practice standards.

4.67 The ANZ also raised the issue of inconsistencies in the regulation of the various forms of stamp duty throughout the jurisdictions. The ANZ submitted that:

> There is a strong case for the harmonisation of stamp duty laws throughout the Australian States and Territories. …significant differences can still be seen, for example, in the way the 'land rich' rules apply in each State… and in the way each State calculates its proportion for the purposes of multi-jurisdictional mortgage stamping (ie with 5 States imposing mortgage duty, 4 different methods are used to calculate the appropriate proportion).[84]

4.68 Other differences cited by the ANZ include inconsistent requirements regarding deed duty, corporate trustee duty and credit business duty, and different time periods among the States regarding the payment of duty.[85] The ANZ stated that inconsistencies between the separate stamp duty regimes '…make it difficult to operate a business on a national basis'.[86]

4.69 The ANZ noted previous efforts to harmonise stamp duty requirements '…through the rewrite of State-based Duties Acts to incorporate the previous uniform provisions',[87] but stated that :

> …only Victoria, Tasmania, New South Wales and the Australian Capital Territory adopted a common rewrite model (although a number of initial differences were retained and there have been subsequent amendments resulting in further differences).
>
> Queensland undertook its own rewrite, which is not entirely consistent with the other rewrite jurisdictions. Additionally,

84 ANZ Bank, *Submission No. 27*, p. 15.
85 ANZ Bank, *Submission No. 27*, pp. 15, 19-23.
86 ANZ Bank, *Submission No. 27*, p. 15.
87 ANZ Bank, *Submission No. 27*, p. 15.

> Western Australia has adopted some aspects of the rewrite… but remains different in many other respects.[88]

4.70 The Committee considers that further investigation into the benefits (and potential disadvantages) of national legal harmonisation of the regulatory frameworks governing debt collection, civil debt recovery, and stamp duty is warranted.

Recommendation 14

4.71 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General or other appropriate forum undertake an investigation into the national legislative harmonisation of the existing regulatory frameworks for:**

- **Debt collection;**
- **Civil debt recovery; and**
- **Stamp duty.**

Partnership law

4.72 The LSNSW indicated that it has identified partnership law as an area where harmonisation between the jurisdictions is required.[89] From a small business perspective, Tortoise Technologies stated that:

> Different states and territories have different laws governing partnerships, which raises practical and operational difficulties for those doing business outside their "home state or territory".[90]

4.73 The AGD stated that it:

> …has not developed a model for harmonising partnership laws. The Department supports harmonisation of existing State and Territory laws where practicable.[91]

4.74 The Department indicated that SCAG '…would be an appropriate forum to pursue such harmonisation' and that partnership law

88 ANZ Bank, *Submission No. 27*, p. 15.

89 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36. See also LSNSW, *Exhibit No. 31*, p. 2.

90 Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 7.

91 AGD, *Submission No. 26.3*, p. 2.

harmonisation '…would also require involvement of the Treasury portfolio'.[92]

4.75 The AFC indicated that, while it did not have a view on the harmonisation of partnership laws, it did advocate the harmonisation of business name requirements and recognition across the jurisdictions.[93] The Committee notes in this connection that, in July 2006, COAG identified business name, Australian Business Number and related business registration process as a 'hotspot' priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.[94] COAG stated that:

> The registration of Australian Business Numbers (ABN) and business names are separate processes that involve registration by various means (that is, on-line, over the counter or by post), at two levels of government. They require a business to provide the same or similar details on a number of occasions. For business, the complexity of the existing processes results in:
>
> - a compliance burden associated with the separate registration for ABN and business names; and
> - confusion surrounding the protection rights afforded to business and company names.
>
> COAG has agreed that the Small Business Ministerial Council is to develop a model that delivers a seamless, single on-line registration system for both ABN and business names, including trademark searching and report back to COAG with its recommendations, cost implications and a proposed timeline for implementation by the end of 2006.[95]

4.76 The Committee is of the view that harmonisation of partnership laws between the jurisdictions warrants further investigation by SCAG.

Recommendation 15

4.77 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation into the national legislative harmonisation of partnership laws.**

---

92 AGD, *Submission No. 26.3*, pp. 2-3.

93 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 25.

94 COAG Communiqué, 14 July 2006, p. 8.

95 Attachment E to COAG Communiqué of 14 July 2006, p. 1.

Consumer protection law

4.78 Consumer protection in Australia is regulated by the Commonwealth *Trade Practices Act* 1974 (TPA) and *Australian Securities and Investments Commission Act* 2001 and by State and Territory consumer protection legislation.[96] Treasury noted that:

> …the consumer protection provisions of the TPA are replicated in the fair trading legislation of each of the Australian states and territories. Additionally, the state and territory fair trading agencies also regulate specific subject areas either through their Fair Trading Acts or through other pieces of legislation. The subject areas regulated by the states and territories vary from state to state.[97]

4.79 Treasury also noted that enforcement of consumer protection regulation:

> …primarily falls to Australia's consumer protection regulators both at the Commonwealth level with the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), and at the state and territory level with their fair trading offices.[98]

4.80 The main issue raised in the evidence in relation to consumer protection law was regulatory inconsistency.

Regulatory inconsistencies in implied warranties in consumer contracts

4.81 In his submission Mr Ray Steinwall informed the Committee of the combined Commonwealth and State/Territory regulatory framework governing implied warranties in consumer contracts:

> In each Australian State and Territory and in New Zealand, sale of goods legislation provides for terms to be implied in contracts for the sale of goods. The provisions generally permit implied warranties to be modified or excluded. Effective exclusion of implied warranties therefore deprives consumers of the benefit of important post sale consumer

96 For example the various State and Territory Fair Trading Acts and Sale of Goods Acts.

97 Treasury, *Submission No. 21.1*, p. 4.

98 Treasury, *Submission No. 21.1*, p. 4.

> protection. To alleviate the impact on consumers, provisions in the Commonwealth *Trade Practices Act 1974*… the New Zealand *Consumer Guarantees Act 1993*… and equivalent legislation in the States and Territories prohibit exclusion or 'contracting out' of the implied terms in consumer transactions, variously described.[99]

4.82 While recognising that, 'From a policy perspective, broadly the laws are consistent',[100] Mr Steinwall identified a number of notable inconsistencies among the jurisdictions in relation to non-excludable implied warranties as follows:

- Lack of express provisions – Queensland, Tasmania and the ACT lack express provisions regarding non-excludable implied terms in consumer contracts;
- Definition of 'consumer' – 'consumer' is variously defined across the jurisdictions according to factors such as the value of the goods/consideration; the nature of the supplier; and the purpose of the goods;[101] and
- Aspects of implied warranties – differences exist among the jurisdictions regarding aspects of implied warranties including compliance of goods with their description; merchantable quality of goods; fitness for purpose of goods; and compliance of samples with goods. Minor differences also exist among the jurisdictions regarding freedom of goods from encumbrances.[102]

4.83 Mr Steinwall stated that, as a result of these inconsistencies:

> Firms operating in multiple Australian jurisdictions and in Trans-Tasman trade face significant costs in complying with different statutory provisions. These include the costs of obtaining legal advice, different trading terms and consumer warranty brochures in different jurisdictions, compliance programs and staff training and education.[103]

4.84 Mr Steinwall also pointed out that consumers '…cannot be expected to know, understand or appreciate the significance of jurisdictional

---

99 Mr Ray Steinwall, *Submission No. 22*, p. 2.

100 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 27.

101 Mr Steinwall stated that the '…considerable differences in the fundamental definition of 'consumer'' is 'Particularly regrettable': *Submission No. 22*, p. 7.

102 Mr Ray Steinwall, *Submission No.22*, pp. 2-6, 11-47.

103 Mr Ray Steinwall, *Submission No. 22*, p. 7.

differences, essential for effective enforcement of their rights'.[104] In order to remedy the inconsistencies among the jurisdictions in the legislation governing non-excludable implied warranties, Mr Steinwall submitted that the applied legislation mechanism used to establish the Competition Codes of the States and Territories should also be utilised to achieve a national harmonised regulatory framework for implied warranties:

> In 1999 the Commonwealth enacted the Schedule version of Part IV of the TPA – the competition provisions of the TPA. …Each State and Territory passed application legislation applying the Schedule version in their jurisdictions – known as the Competition Code. …A similar scheme should be applied to achieve a uniform national consumer law in Australia. It is particularly suitable as a model as the Commonwealth, States and Territories each have concurrent jurisdiction for consumer protection.[105]

4.85 The AGD stated that it '…has not developed a model for harmonising the law governing implied warranties and conditions in consumer contracts' as this is properly a matter for the Treasury portfolio,[106] but also stated that it '…supports harmonisation of existing State and Territory laws where practicable'.[107]

4.86 The Committee considers that national harmonisation of the regulatory framework governing non-excludable implied warranties in consumer contracts could be beneficial for both businesses and consumers alike by assisting to reduce compliance costs and uncertainty. The matter should be raised for further exploration at the Ministerial Council on Consumer Affairs (MCCA) (see Recommendation 16 below).

---

104 Mr Ray Steinwall, *Submission No. 22*, p. 7. See also *Transcript of Evidence*, 6 April 2006, p. 26.

105 Mr Ray Steinwall, *Submission No. 22*, p. 8. Mr Steinwall also noted that inter-governmental agreements which underpin the Competition Code '…provide mechanisms for consultation on legislative amendments and a transparent process for exclusions and exemptions': p. 8.

106 AGD *Submission No. 26.3*, p. 2.

107 AGD *Submission No. 26.3*, p. 2.

Regulatory inconsistencies in other areas

4.87 Regulatory inconsistencies among the jurisdictions were raised in relation to a number of other areas of consumer protection law as well. In its submission the ANZ Bank stated that:

> …there have been several legislative developments in various States and Territories in recent years that have created some inconsistencies in consumer protection laws across the country. It appears State and Territory Governments are increasingly using fair trading legislation as a means to drive consumer protection initiatives which do not necessarily have national support.[108]

4.88 Telstra Corporation Ltd also nominated inconsistency as an issue of concern and stated that '…there is an immediate need for greater harmonisation of some State, Territory and Federal consumer protection laws'.[109] The ANZ and Telstra identified regulatory inconsistencies in the following specific areas:

- Consumer contracts – duplication between a code registered under the Commonwealth *Telecommunications Act* 1997, applying to carriers and carriage service providers and regarding unfair terms in consumer contracts, and current or proposed legislation covering the same/similar subject matter in some States and Territories (e.g. Part 2B of the Victorian *Fair Trading Act* 1999).[110]
- Unsolicited marketing and telephone marketing – multiple regulatory bodies and legislative regimes, particularly inconsistencies between Victorian and New South Wales Fair Trading Acts relating to scope of regulation; permitted call times; consumer disclosure, exclusions; cooling-off periods; contractual consent; and penalties for breach.[111]
- Door-to-door sales – differences among the State and Territory regulatory regimes regarding minimum contract consideration values; prescribed forms for cooling off period and contract

108 ANZ Bank, *Submission No. 27*, p. 9.

109 Telstra, *Submission No. 7*, p. 8.

110 Telstra, *Submission No. 7*, p. 9.

111 ANZ Bank, *Submission No. 27*, pp. 10-11; Telstra, *Submission No. 7*, pp. 10-12. In its report the Taskforce on Reducing the Regulatory Burden on Business noted differences in direct marketing regulation and recommended that SCAG endorse national consistency in privacy-based legislation. See *Rethinking Regulation*, pp. 54-58.

cancellation information; cooling off periods; and permitted call times.[112]

- Trade promotions – inconsistencies among State and Territory regulatory regimes regarding permit, scrutineer, certification, and winner notification requirements; fees; draw location requirements; and terms and conditions disclosure requirements.[113]
- Third party trading stamps – divergence among State and Territory legislation regarding the supply, redemption, and publication of third party trading stamps, which are vouchers provided in relation to sales and promotions.[114]

4.89 The ANZ and Telstra identified a number of adverse effects resulting from these regulatory inconsistencies including:

- Increased compliance costs;
- Increased complexity of compliance arrangements, rules and procedures;
- Difficulties in maintaining clear and consistent compliance rules for staff;
- Reduced flexibility to allocate staff and resources as required;
- Prevention of legitimate business activity; and
- Increased risk of non-compliance due to complexity.[115]

4.90 The Committee is conscious that there have been a number of developments in the area of consumer protection policy and regulation since the Committee commenced its inquiry in early 2005. The Productivity Commission, in its February 2005 report on National Competition Policy reforms, recommended that the Australian Government '…establish a national review into consumer protection policy and administration in Australia', including a focus on '…mechanisms for coordinating policy development and application across jurisdictions and for avoiding regulatory duplication'.[116] Indeed, the Commission nominated consumer protection policy as

112 Telstra, *Submission No. 7*, pp. 12-13.

113 Telstra, *Submission No. 7*, pp. 13-14; ANZ Bank, *Submission No. 27*, p. 17.

114 Telstra, *Submission No. 7*, p. 14.

115 ANZ Bank, *Submission No. 27*, pp. 11, 17-18; Telstra, *Submission No. 7*, pp. 10, 13-15.

116 Productivity Commission, *Review of National Competition Policy Reforms*, p. xlix. This report can be accessed at: http://www.pc.gov.au/inquiry/ncp/finalreport/.

one of the priority areas for national reform on its proposed national reform agenda and stated that:

> …it seems clear that ineffective national coordination mechanisms have led to regulatory inefficiencies and inconsistencies, to the detriment of both consumers and businesses.[117]

4.91 In April 2005 the Australian Government indicated its commitment to national harmonisation of the consumer policy framework through the MCCA.[118] The Government also stated that:

> …all jurisdictions have committed themselves to the objective of harmonisation as part of the overall strategic agenda of the Council.[119]

4.92 At its February 2006 meeting, COAG acknowledged the importance of effective regulation for consumer protection and agreed that the jurisdictions would take steps to reduce the burden of regulation,[120] including the identification of reforms to:

> …enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies.[121]

4.93 In relation to the COAG agreement Treasury noted that:

> Key commitments agreed to by the Australian Government and the States and Territories include: establishing effective gatekeeping arrangements for new regulation; targeted annual reviews of existing regulation; and promoting harmonisation and reducing duplication in regulation across Australia. A new reform agenda will provide benefits for both business and consumers.[122]

4.94 Treasury further informed the Committee that, in April 2006, the Government announced that the Productivity Commission would be

---

117 Productivity Commission, *Review of National Competition Policy Reforms*, p. xl.

118 Media release of the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, 22 April 2005. This document can be accessed at: http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2005/011.asp.

119 Media release of the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, 22 April 2005.

120 COAG Communiqué, 10 February 2006, p. 8.

121 COAG Communiqué, 10 February 2006, p. 8. See also Attachment B to the Communiqué, pp. 4-7, and paragraph 4.4 above.

122 Treasury, *Submission No. 21.2*, p. 5.

requested to conduct an '…inquiry into the consumer policy framework with a view to promoting greater national consistency in this area and reducing unnecessary regulatory burden'.[123]

4.95 In relation to telemarketing, the Committee notes that the Australian Government is in the process of establishing a national Do Not Call Register, which will enable individuals to register their details in order to avoid receiving unsolicited telemarketing calls. The Register, established by the Commonwealth *Do Not Call Register Act* 2006, is expected to be operational in May 2007.[124]

4.96 The Committee supports these initiatives. The COAG agreement and the commitment from all jurisdictions through the MCCA to achieve a national harmonised consumer policy framework are significant developments which should result in a higher level of consistency in consumer protection policy and regulation. In order to assist this work, the Committee considers that the areas of regulatory inconsistency identified above should be further explored by the MCCA.

Recommendation 16

4.97 **The Committee recommends that the Australian Government propose that the Ministerial Council on Consumer Affairs undertake an exploration of the national harmonisation of consumer protection legislation governing the following areas:**

- **Consumer contracts including non-excludable implied warranties;**
- **Unsolicited marketing and telephone marketing;**
- **Door-to-door sales;**
- **Trade promotions; and**
- **Vouchers provided in relation to sales and promotions.**

123 Treasury, *Submission No. 21.2*, p. 3.

124 Further information regarding the Do Not Call Register can be accessed at: http://www.dcita.gov.au/tel/do_not_call.

Standards of products regulation

4.98 The main issue raised in the evidence in relation to standards of products regulation was inconsistency among the jurisdictions in relation to electrical product safety regulation.

Inconsistencies in electrical product safety regulation

4.99 The SIAA registered its concern regarding the regulatory framework for electrical product safety in Australia:

> Electrical safety compliance in Australia is regulated by the individual States and Territories rather than being coordinated at the national level. This situation has lead [*sic*] to some potentially unsafe electrical products entering into the Australian market.[125]
>
> …Individual States/Territories, as is their right, have different approaches to the policing of compliance with their respective regulations. …the approaches are inconsistent across Australia and compliance in this area is not seen as a priority. The outcome is that endogenous manufacturers and importers of brand name electrical goods/equipment are placed at a market disadvantage because they "play the game" and ensure their products comply with all regulations/standards and are therefore deemed to be safe.[126]

4.100 The SIAA provided a number of examples of unsafe electrical products (including domestic products) that were recalled from the Australian market between April 2005 and April 2006.[127]

4.101 The SIAA also informed the Committee that the electrical industry has indicated its desire for a single national regulatory regime for electrical product safety:

> The electrical industry's peak body, Australian Electrical and Electronic Manufacturers Association (AEEMA), has suggested that the State and Territory legislation be superseded by Australian legislation that is complementary to Part 5A of the *Trade Practices Act* (1974). AEEMA has also

125 SIAA, *Submission No. 14*, p. 6.

126 SIAA, *Submission No. 14.1*, p. 1 of 7.

127 SIAA, *Submission No. 14.1*, p. 1 of 2.

> suggested that a National Electricity Safety Regulator be created and overseen by a Ministerial Council.[128]

4.102 The Committee also received evidence on electrical product safety regulation from the Electrical Safety Office Queensland (ESOQ). The ESOQ, which is responsible for '…developing and enforcing standards for electrical safety and promoting strategies for improved electrical safety performance across the community' in Queensland,[129] stated that:

> In the interest of safety the regulatory authority in each Australian state and territory administers a uniform approvals scheme, aimed at preventing the sale of unsafe electrical equipment in Australia. This is achieved through State based legislation.
>
> …National uniformity is supported and progressed through close co-operation and liaison with other jurisdictions in various forums. The most important of these is the Electrical Regulatory Authorities Council (ERAC). ERAC, which includes New Zealand, is the forum that coordinates the harmonisation of electrical product safety and enforcement issues. …approvals issued in one state are recognised across Australia and New Zealand.[130]

4.103 The ESOQ also informed the Committee that:

> Electrical product safety standards have been harmonised across Australia and New Zealand with joint publication of AS/NZS standards for many years. Australian and New Zealand electrical regulators actively participate in Standard Committees.[131]

4.104 The ESOQ further stated that:

> The development of a list of agreed nationally prescribed electrical products has served to enhance national uniformity for safety of electrical equipment. Under this system,

128 SIAA, *Submission No. 14*, p. 6. The SIAA also indicated that '…AEEMA has not at this stage taken the cause of national legislation any further' due to the process being '…"stuck" between two sets of state/territory regulators. These are those represented by membership of the Electrical Regulatory Authorities Council (ERAC) and those represented by the Ministerial Council on Consumer Affairs (MCCA)': *Submission No. 14.1*, p. 1 of 7.

129 ESOQ, *Submission No. 11*, p. 2.

130 ESOQ, *Submission No. 11*, pp. 2-3.

131 ESOQ, *Submission No. 11*, p. 2.

> electrical equipment may be classified as being 'Prescribed Electrical Equipment'. …Prescribed electrical equipment must have a certificate of approval prior to being sold or offered for sale in any State or Territory of Australia. …Also, by agreement between all Australian electrical regulators, there is legislation in each State and Territory that requires non-prescribed electrical equipment to comply with the requirements of *AS/NZS 3820:1998/Amdt 1:2004 – Essential safety requirements for low voltage electrical equipment*.[132]

4.105 Despite the ESOQ's emphasis on congruence among the jurisdictions in respect of electrical product safety regulation, the Committee notes the following statement on this issue by the Productivity Commission in its January 2006 report on the Australian consumer product safety system:

> The relevant electrical safety Acts and/or regulations of each of the jurisdictions aim to prevent the sale of unsafe electrical products. The particular safety obligations imposed on suppliers are worded differently in each jurisdiction. As one example, in Western Australia, the *Electricity Act 1945* requires that all electrical appliances/equipment sold are in a safe condition. 'Safe' means that no significant risk of injury or death to any person, or damage to any property is likely to result from the proper use of the electrical appliances/equipment.[133]

4.106 This would suggest that the SIAA's contention regarding inconsistencies among the jurisdictions has some merit. Treasury informed the Committee that in its report the Productivity Commission:

> …found that a strong case exists for harmonising the consumer product safety system in Australia, particularly in

---

132 ESOQ, *Submission No. 11*, p. 3.

133 Productivity Commission, *Review of the Australia Consumer Product Safety System*, p. 426. This report can be accessed at: http://www.pc.gov.au/study/productsafety/finalreport/. This study was commissioned by the Australian Government to inform an MCCA-led review of the Australian consumer product safety system: see Treasury, *Submission No. 21.1*, p. 4 and *Submission No. 21.2*, p. 3. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, pp. 2-3.

> relation to legislation across States and Territories. The Commission advocates a single national law and regulator.[134]

4.107 Treasury also stated that:

> Treasury is still examining the findings of the report. The findings were considered at the MCCA meeting in May 2006. At that meeting, Ministers broadly supported the recommendations of the Commission. Ministers noted that they are committed to greater harmonisation of Australia's product safety system…[135]

4.108 Most recently, the Committee notes that in July 2006 COAG identified product safety as a 'hotspot' priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.[136] COAG stated that:

> COAG has requested the MCCA to develop options for a national system for product safety regulations without increasing the regulatory burden and report back to it with a recommended approach by the end of 2006.[137]

4.109 The Committee is pleased to see that national harmonisation of Australia's consumer product safety system is firmly on the MCCA and COAG agendas. The Committee considers that harmonisation of the electrical product safety regulatory framework should be part of this work if it is not so already.

Recommendation 17

4.110 **The Committee recommends that, if it is not already on the Council agenda by the time of this report, national harmonisation of electrical product safety legislation should be incorporated into the work of the Ministerial Council on Consumer Affairs towards a national consumer product safety regulatory system.**

---

134 Treasury, *Submission No. 21.2*, p. 3. See also SIAA, *Submission No. 14.1*, pp. 6 of 7 – 7 of 7.Another submission to the inquiry suggested that '…greater emphasis should be placed on educating producers as to the practical requirements of quality, safety and applications of products to be produced': Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 10.

135 Treasury, *Submission No. 21.2*, p. 3.

136 COAG Communiqué, 14 July 2006, p. 8.

137 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

Not-for-profit sector regulation

4.111 The main issue raised in the evidence in relation to not-for-profit sector regulation was regulatory inconsistency and complexity.

Regulatory inconsistency and complexity

4.112 In oral evidence the FIA stated that:

> In surveying our members, what we have found is that over 50 per cent of our members work across state borders. The disparities, the differences, the discrepancies and some of the inconsistencies between [*sic*] state and federal legislation make it very difficult to carry on a national campaign. This has significant importance for Australia in that… it was recently established that Australians give $11 billion to charitable causes per annum.[138]

4.113 The FIA cited recent research on the not-for-profit regulatory environment in its evidence to the inquiry. The Committee was informed of a 2004 survey-based investigation of '…almost 2,000 not-for-profits in Australia that are registered as companies limited by guarantee',[139] which found that the '…regulatory framework that underpins the sector is complex and riddled with inconsistencies'.[140] The FIA indicated that this study also highlighted the following regulatory difficulties for not-for-profit organisations:

- There are '…myriad possible legal structures' for not-for-profit organisations;
- There is a '…confusing mix… between State and Federal regulations and regulators'; and
- There is a '…lack of nationally consistent reporting obligations'.[141]

---

138 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 42. Dr Wallace indicated that the FIA has a membership of some 1,500 individuals, which, combined with up to 3,000 individual subscribers, represent some 2,000 Australian charitable organisations: p. 42.

139 FIA, *Submission No. 9*, p. 9.

140 S. Woodward and S. Marshall (2004), *A Better Framework – reforming not-for-profit regulation*. University of Melbourne: Centre for Corporate Law and Securities Regulation, p. 1, cited in FIA, *Submission No. 9*, p. 9.

141 FIA, *Submission No. 9*, p. 9.

4.114 The FIA also cited a 2003 study which found that the regulatory framework for incorporation of not-for-profit organisations is a '…confusing muddle':[142]

> When for-profit companies wish to raise funds, by issuing shares or debentures, they seek permission from the same regulator that handled their incorporation. When nonprofits wish to raise funds they must seek a licence from yet another regulator. These are state and territory government agencies, operating under different pieces of legislation that differ in some aspects across jurisdictions. These differences make conducting a national fundraising campaign a nightmare.[143]

4.115 The FIA indicated the major consequence of these regulatory inconsistencies and complexities for not-for-profit organisations is increased compliance costs and an associated reduction in the proportion of funds reaching their target:

> …anything that makes that fundraising more complex and more difficult adds to the costs of fundraising and will therefore mean that some of the money that is given does not go directly to the cause, because it is absorbed through the costs in complying with different legislation and regulation in different states and also federally.[144]

4.116 As noted earlier in this report, the FIA estimated that its member fundraising organisations can incur compliance costs of up to a full-time staff member salary or more due to regulatory duplication.[145]

4.117 The FIA submitted that a '…simplified and rational legislative framework'[146] is necessary to simplify the regulatory environment for the not-for-profit sector and reduce compliance costs. In order to achieve this goal, the FIA proposed a wide-ranging reform agenda including the establishment of a single Commonwealth regulatory framework '…covering all corporate bodies including for-profit, not-for-profit and incorporated associations'; the establishment of a new national regulator for the not-for-profit sector; the development of a national mandatory code of conduct for the sector; and the

142 M. Lyons (2003), 'The Legal and regulatory environment of the Third Sector', *The Asian Journal of Public Administration* 25(1), cited in FIA, *Submission No. 9*, p. 9.

143 M. Lyons (2003), 'The Legal and regulatory environment of the Third Sector', *The Asian Journal of Public Administration* 25(1), cited in FIA, *Submission No. 9*, p. 9.

144 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 42.

145 See Chapter 2 paragraph 2.7 above.

146 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 43.

development of specialised national accounting standards for the sector.[147] The FIA also suggested two other specific measures:

- The development of a single specialised legal structure for not-for-profit organisations by '…combining the best aspects of the corporations law and the incorporated associations laws';[148] and
- Harmonisation of the financial reporting and disclosure requirements for not-for-profit organisations across the jurisdictions.[149]

4.118 The Committee was informed that the not-for-profit sector is '…absolutely emphatic about the need for one regulatory system'.[150]

4.119 While a single Commonwealth framework covering all corporate bodies and the development of codes of conduct and accounting standards go beyond the scope of the inquiry of the Committee,[151] the Committee is attracted to the other proposals advanced by the FIA. A single national regulator would greatly simplify fundraising compliance for the not-for-profit sector, while a simple but adequate legal structure for not-for-profit organisations, developed from existing legislation, would provide a stable, purpose-built legal identity and streamline compliance obligations. National harmonisation of current reporting and disclosure requirements for the not-for-profit sector would also assist in reducing compliance costs and in maintaining community confidence in the sector. In addition, the Committee considers that a review of the current licensing and registration requirements for not-for-profit organisations across the jurisdictions should be undertaken with a view to legal harmonisation.

147 FIA, *Submission No.* 9, pp. 3-4, 10.

148 FIA, *Submission No.* 9, p. 3, 10.

149 FIA, *Submission No.* 9, p. 4, 10.

150 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 45.

151 As the FIA recognised: see *Submission No.* 9, p. 10.

Recommendation 18

4.120 **The Committee recommends that the Australian Government, in consultation with the not-for-profit sector and the States and Territories:**

- **Investigate the establishment of a single national regulator for the not-for-profit sector;**
- **Investigate the development of a simple but adequate legal structure for not-for-profit organisations;**
- **Initiate work towards the national legislative harmonisation of simple but adequate reporting and disclosure requirements for not-for-profit organisations; and**
- **Undertake a review of current licensing and registration requirements for not-for-profit organisations across the jurisdictions with a view to legislative harmonisation of these requirements.**

Therapeutic goods and poisons regulation

4.121 The main issue raised in the evidence in relation to therapeutic goods and poisons regulation was regulatory inconsistency.

Regulatory inconsistency

4.122 The Australian Self-Medication Industry (ASMI), an industry association which represents '…the interests of all non-prescription medicine (including complementary medicines) manufacturers in Australia',[152] informed the Committee that:

> Therapeutic goods are regulated at the Commonwealth level under the *Therapeutic Goods Act 1989*… The Act contains an apparently complete statutory scheme which regulates the manufacture, registration (after evaluation), listing, sale and advertising of therapeutic goods. Therapeutic goods are defined in s.3 of the Act to include all products which make a therapeutic claim…[153]

152 ASMI, *Submission No. 20*, p. 1.

153 ASMI, *Submission No. 20*, p. 3.

4.123 ASMI also advised that the '…regulatory environment for therapeutic goods in Australia is partly a Commonwealth and partly a State responsibility'.[154] ASMI indicated that the Commonwealth *Therapeutic Goods Act* 1989 does not extend to corporations trading only within a State or to sole traders and permits the States to regulate these businesses:

> …the actions of other than sole traders or one-State corporations are uniformly regulated by the Commonwealth Act, but the former are governed in various fashions under the same or similar State laws.[155]

4.124 ASMI stated that this has enabled the marketing of non-TGA registered products: '…sole traders are well aware of the "loophole" which they have exploited to offer products which have not been listed or registered by the TGA'.[156] ASMI also advised that s.9 of the Commonwealth Act '…allows arrangements to be made with the States for them to carry out, in effect, some functions the Act assigns to the Commonwealth's Therapeutic Goods Administration (TGA).'[157]

4.125 ASMI's main contention was that there are inconsistencies among the different State poisons regimes (which extend to medications) and the arrangements for poisons regulation:

> The States also retain control of so-called "poisons" legislation and this means subtle but commercially inefficient State-by-State differences.[158]
>
> …The *SUSDP* [Standard for the Uniform Scheduling of Drugs and Poisons] has been developed by the National Drugs and Poisons Scheduling Committee (NDPSC). …The decisions of the NDPSC are subject to ratification by each State and Territory. There is not established uniform procedure for this process. Each State can cherry-pick what it likes or dislikes of the decisions, and/or amend or vary its decision, and/or delay its entry into force.[159]

---

154 ASMI, *Submission No. 20*, p. ii.

155 ASMI, *Submission No. 20*, p. 5. ASMI cited ss. 6 and 4 of the Commonwealth *Therapeutic Goods Act* 1989 in this connexion.

156 ASMI, *Submission No. 20*, p. 5. ASMI stated that this was especially so in Queensland and cited an example of an Ibuprofen medication advertised by a Queensland sole trader: *Submission No. 20*, pp. 5-6.

157 ASMI, *Submission No. 20*, p. 5.

158 ASMI, *Submission No. 20*, p. ii.

159 ASMI, *Submission No. 20*, pp. 7-8.

4.126 ASMI provided examples of inconsistencies such as different display requirements for the same product and uncertainty regarding permitted advertising dates for a product across the jurisdictions.[160] ASMI stated that the consequences of these inconsistencies for the therapeutic medication industry:

> …have been anything but academic or trivial. There is no doubt that existing overlaps and uncertainties add to management and compliance costs to industry. Consumers end up paying more. Our efforts to grow export marketing are hampered to some extent as well.[161]

4.127 The SIAA also raised inconsistency with regard to the regulation of poisons, drug precursors and therapeutic substances across the jurisdictions and submitted that:

> The industry is seeking the introduction of a harmonised national code of practice that Commonwealth, State and Territory Governments use for packaging and labeling [*sic*] of hazardous substances – poisons, precursors for drugs and explosives and therapeutic substances.[162]

4.128 ASMI proposed that the Australian legislation establishing the Australia-New Zealand Therapeutic Products Agency should be utilised to '…improve and simplify the regulatory arrangements'[163] by establishing a '…completely uniform regulatory scheme'[164] for therapeutic products and poisons across the jurisdictions. The Committee put this to the AGD, which, in consultation with the Department of Health and Ageing, advised that '…in relation to poisons, it is not possible to achieve harmonisation' within Australia by means of the treaty between Australia and New Zealand establishing the joint agency.[165]

4.129 ASMI also indicated that the State and Territory poisons regimes were reviewed in 1999 (the Galbally Review) as part of the national competition legislation review process.[166] The Committee notes that this review made a number of recommendations for '…national

---

160 See ASMI, *Submission No. 20*, pp. 8-9.
161 ASMI, *Submission No. 20*, p. 11.
162 SIAA, *Submission No. 14*, pp. 5-6.
163 ASMI, *Submission No. 20*, p. 11.
164 ASMI, *Submission No. 20*, p. ii.
165 AGD, *Submission No. 26.3*, p. 4.
166 ASMI, *Submission No. 20*, pp. 9-10.

uniformity of regulations through legislative reforms',[167] and that the review and the response of the Australian Health Ministers' Advisory Council were considered and endorsed by COAG in June 2005. Significantly, COAG agreed '…to move closer towards a national uniform system of regulation of medicines and poisons' and recognised that such harmonisation would bring '…significant administrative efficiencies and cost-savings'.[168] The Committee also notes that the TGA has separately announced that:

> While the target timeframe for implementation of the Galbally Review recommendations (as accepted in the response) is within twelve months from the time of COAG endorsement, many of the recommendations which involve legislative change are to be implemented for the commencement of the trans-Tasman regulatory agency for therapeutic products on 1 July 2006.[169]

4.130 As noted in Chapters 2 and 3,[170] the Australia-New Zealand Therapeutic Products Agency is currently in development. ASMI stated that it '…has been a strong supporter of the Australian and New Zealand Government's decision to establish a joint agency to regulate therapeutic products'.[171] The Committee applauds COAG's commitment to work towards national uniform regulation of medicines and poisons within Australia and its recognition of the benefits of national harmonisation in this area. Harmonisation should eliminate many of the regulatory inconsistencies currently frustrating the industry and reduce compliance costs.

Science industry regulation

4.131 The main issue raised in the evidence in relation to science industry regulation was regulatory inconsistency, complexity and duplication. The SIAA defined the science industry as:

> …research and development, design, production, sale and distribution of laboratory-related goods, services and

167 TGA website, http://www.tga.gov.au/docs/html/rdpdfr.htm. The Galbally Review document is also accessible at this website.

168 TGA website, http://www.tga.gov.au/docs/html/rdpdfr.htm.

169 TGA website, http://www.tga.gov.au/docs/html/rdpdfr.htm.

170 See Chapter 2 paragraph 2.64 and Chapter 3 paragraph 3.52 above.

171 ASMI, *Submission No. 20*, p. 10.

> intellectual capital used for the measurement, analysis and diagnosis of physical, chemical and biological phenomena.[172]

Regulatory inconsistency, complexity and duplication

4.132 In its submission the SIAA outlined the regulatory context for the science industry in Australia:

> …Australia has a complex regulatory regime. Its nine jurisdictions… each have their own regulations and standards that are administered by many different regulatory bodies. The Commonwealth alone has around 60 Government Departments and agencies, and 40 national standard-setting bodies and Ministerial Councils that have power to prepare or administer regulations.[173]

4.133 The SIAA raised the following specific concerns:

- The inconsistence administration of certain regulations relevant to the industry;
- The lack of consultation by governments in their formulation and implementation of regulations and national codes of practice;
- The alignment of Australian regulations and standards with relevant international ones; and
- Industry awareness of product certification regulations and standards.[174]

4.134 The SIAA acknowledged that progress has already been made towards regulatory harmonisation in Australia in certain areas including building codes, chemicals and plastics regulation, and weights and measures.[175] However, the SIAA stated that further harmonisation is required in relation to poisons, drugs and explosives precursors, in vitro diagnostics, weights and measures, and electrical product safety.[176]

4.135 In terms of the consequences of the lack of harmonisation in these areas, the SIAA stated that:

> It is a costly process for the industry to remain compliant with all the regulations and standards under this

172 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 20.
173 SIAA, *Submission No. 14*, p. 4.
174 SIAA, *Submission No. 14*, p. 5.
175 SIAA, *Submission No. 14*, p. 5.
176 SIAA, *Submission No. 14*, p. 5.

> administrative framework. This reduces the industry's international competitiveness and is a significant impediment to the efficient operation of the market. The costs associated with such compliance are ultimately borne by the community.[177]

4.136 As noted earlier in this report, the SIAA also provided specific examples of compliance costs due to regulatory duplication or overlap as follows:

- Over $1 million in compliance costs for 100 SMEs involved in the importation of ozone-depleting substances due to requirements under two separate ozone protection and product stewardship regimes;
- Over $71 million in compliance costs for at least 100 SMEs due to statutory requirements to provide Material Safety Data Sheets for chemicals, combined with $1.5 million in compliance costs due to reporting requirements under the Commonwealth National Industrial Chemicals Notification and Assessment Scheme for certain classes and volumes of chemicals supplied to laboratories; and
- An annual compliance cost of $50 000 for one importer of diagnostic kits due to the registration requirements of five separate government agencies.[178]

4.137 The SIAA stated in its submission that one of its '…key priorities' is to:

> …progress the harmonisation of regulations and standards relevant to the science industry across Australia's nine jurisdictions and their alignment with relevant international standards.[179]

4.138 Accordingly, the SIAA submitted that '…Australia should be a single, united market rather than one which is fragmented into nine small markets'.[180] In pursuit of this, the SIAA indicated that the science industry is seeking the following harmonisation measures:

---

177 SIAA, *Submission No. 14*, p. 4. The SIAA also indicated that the science industry is '…primarily composed of SMEs' and that '…regulation impacts more on SMEs than non-SMEs': *Submission No. 14.1*, p. 4 of 7.

178 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23 (see also p. viii and Chapter 2 paragraph 2.5 above).

179 SIAA, *Submission No. 14*, p. 3.

180 SIAA, *Submission No. 14*, p. 4.

- A '…harmonised national code of practice' for the packaging and labelling of hazardous substances including poisons, precursors for drugs and explosives, and therapeutic substances;
- A '…fully uniform, national trade measurement system';
- National coordination of electrical product safety regulation;
- A '…common and more inclusive process for the development of the reporting and monitoring requirements on hazardous substances'; and
- The '…alignment of Australian regulations and standards with relevant international ones such as CE Mark, UL Certification, US Food and Drug Administration and the quality standards ISO and American Stand Test Method'.[181] The SIAA stated here that the benefits would include '…improved market access and decreased compliance costs due to mutual recognition' at the international level.[182]

4.139 The SIAA stated in conclusion that:

> …the industry believes that the overall costs of regulation within Australia can only be lowered through a package of initiatives and that this package should reflect current and national initiatives and best practice.[183]

4.140 Electrical product safety regulation and the regulation of poisons and therapeutic substances are considered separately at paragraphs 4.99 – 4.110 and 4.121 – 4.130 respectively above. With regard to the proposals for a code of practice for the packaging and labelling of hazardous substances and the international alignment of Australian regulations and standards proposals, the Committee considers that these issues do not properly come within the scope of its inquiry. Codes of practice are often best developed by industry (at least in the first instance) and do not necessarily require legislative action, and the issue of aligning Australian regulations and standards with those of other countries (apart from New Zealand) ranges beyond the inquiry terms of reference.

---

181 SIAA, *Submission No. 14*, pp. 5-7.

182 SIAA, *Submission No. 14.1*, p. 3 of 7.

183 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 22. Dr Spencer also stated that '…the industry believes that COAG could justify the greater use of a variant of the template model, namely, that operating in the area of food standards': *Transcript of Evidence*, 21 March 2006, p. 22.

4.141 With regard to trade measurement, the Committee notes that national trade measurement was identified by COAG in February 2006 as a 'hotspot' priority area for cross-jurisdictional reform as part of its National Reform Agenda.[184] COAG agreed to request that the MCCA:

> …develop a recommendation for introducing a national system of trade measurement that would rationalise the different regulatory regimes of the Commonwealth, States and Territories and streamline the present arrangements for cost recovery and the certification of trade measuring instruments; and
>
> …report back to COAG with its recommendations and a proposed timeline for implementation for COAG consideration before the end of 2006.[185]

4.142 The Committee also notes that chemicals and plastics regulation was identified by COAG in February 2006 as another 'hotspot' priority area for cross-jurisdictional reform.[186] COAG agreed to:

> …establish a ministerial taskforce, with each jurisdiction nominating one responsible Minister, to develop measures to achieve a streamlined and harmonised system of national chemicals and plastics regulation, and reporting progress to COAG by mid 2006.[187]

4.143 The Committee supports the SIAA's proposal for a common and inclusive process for developing monitoring and reporting requirements for hazardous substances. A national framework establishing such a process would assist in reducing compliance costs and uncertainty for the industry and help to ensure the adoption of best practice requirements.

Recommendation 19

4.144 **The Committee recommends that the Australian Government should formulate a harmonised national legislative framework for the development of hazardous substance reporting and monitoring requirements in consultation with the science industry and the States and Territories.**

---

184 See paragraph 4.5 above. This was also noted by the SIAA: *Submission No. 14.1*, p. 2 of 7.

185 Attachment B to COAG Communiqué of 10 February 2006, p. 6.

186 See paragraph 4.5 above. This was also noted by the SIAA: *Submission No. 14.1*, p. 2 of 7.

187 Attachment B to COAG Communiqué of 10 February 2006, p. 6.

Regulation of the legal profession

4.145 The main issue raised in relation to regulation of the legal profession was the National Legal Profession project.

The National Legal Profession project

4.146 The AGD informed the Committee that reform to achieve national harmonised regulation of the legal profession in Australia – the National Legal Profession project – has been in progress since 2002.[188] The Department indicated that existing regulation of the profession across the jurisdictions is inconsistent:

> …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.[189]

4.147 The AGD stated that the object of the National Legal Profession project is 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.[190]

4.148 The Department advised that model legislation implementing the project, developed by SCAG and supported by a Memorandum of Understanding agreed to by all jurisdictions,[191] has been enacted by NSW and Victoria and partially enacted by Queensland, and that all

188 AGD, *Submission No. 26*, p. 27.

189 AGD, *Submission No. 26*, p. 27.

190 AGD, *Submission No. 26*, p. 27.

191 See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 4, and Chapter 2 paragraph 2.26 above.

jurisdictions are expected to enact implementing legislation in 2006.[192] The Department stated that comprehensive implementation of the model legislation across Australia is '…fundamental to the success of the project' and that, if this is not realised, '…the regulation of the legal profession will remain a mix of contradictory laws.'[193]

4.149 The Department further indicated that, while the project has '…moved the harmonisation of the legal profession forward enormously',[194] there will still be differences among the jurisdictions once the model legislation is fully in place:

> 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.[195]

4.150 The AGD advised that:

> …this divergence may be problematic if it impacts on the trade of legal services or disadvantages lawyers practicing [*sic*] 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. …As a result, some legal practices may be competitively disadvantaged in certain jurisdictions by not being able to choose their preferred structure.[196]

4.151 The LSNSW indicated that differences among the jurisdictions regarding trust account and cost agreement elements of the model legislation have already had '…a tremendous impact on the practical delivery of legal services':

> One… large law firm has set up a complete independent department to work out the trust account provisions in each

192 AGD, *Submission No. 26*, p. 27; *Submission No. 26.1*, p. 7.
193 AGD, *Submission No. 26.1*, p. 7.
194 AGD, *Submission No. 26*, p. 27.
195 AGD, *Submission No. 26.1*, p. 7.
196 AGD, *Submission No. 26*, pp. 27-28.

> of its jurisdictions and has applied millions of dollars to getting it right in each state.[197]

4.152 The LSNSW further stated that:

> These little hiccups, where the states have not complied exactly with the momentum and the direction of the legislation, have added tremendous costs and practical problems, and not just for large law firms – though they are a good example – but for the little dweller on the coast as well and on the borders.[198]

4.153 The Committee considers it unfortunate that a project intended to achieve consistent regulation and reduced costs for the legal profession has already led to increased compliance costs and difficulties for legal practitioners. The AGD advised that:

> The Australian Government continues to press for uniformity to the greatest possible extent, so as to minimise contrary or conflicting regulation between [*sic*] the jurisdictions. However, there is an increasing concern that the divergence in regulation may undermine the ultimate goals of the national legal project to facilitate the inter-jurisdictional trade of legal services.[199]

4.154 While the Committee welcomes the real progress that has been made by the National Legal Profession towards harmonised regulation of the legal profession in Australia, it is most regrettable that material differences are already apparent. The Committee supports the Government's continued efforts to achieve uniformity.

Legal procedures

4.155 The main issues raised in relation to legal procedures were harmonisation of court rules and judicial decision-making.[200]

---

197 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36.

198 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36.

199 AGD, *Submission No. 26.1*, p. 7.

200 The AGD also noted current *forum non conveniens* regulation under the Commonwealth *Service and Execution of Proceedings Act* 1992, the *Jurisdiction of Courts (Cross-vesting) Act* 1987, and under equivalent State and Territory cross-vesting legislation: *Submission No. 26*, p. 12.

Harmonisation of court rules

4.156 The Committee received evidence from the Hon Justice Kevin E Lindgren of the Federal Court of Australia regarding the harmonisation of rules of superior courts in Australia. Justice Lindgren informed the Committee that comprehensive harmonised corporations law rules for the superior courts were produced by a national committee of judges, the Committee on Harmonisation of Rules of Court relating to Corporations, appointed by the Council of Chief Justices of Australia and New Zealand, between 1996 and 1999.[201]

4.157 Justice Lindgren also indicated that further harmonisation of superior court rules has been progressed by other judicial harmonisation committees since the corporations law rules were harmonised. Between 2001 and 2003 harmonised rules relating to subpoenas were produced and were implemented in the jurisdictions (excepting Queensland) in 2004.[202] Subsequent to this, work has been undertaken on harmonised rules relating to discovery, including the completion in 2006 of harmonised rules relating to *Mareva* freezing orders and *Anton Piller* search orders.[203] Justice Lindgren further indicated that work on the harmonisation of rules dealing with service outside the jurisdiction is envisaged in the future.[204]

4.158 The Australian Institute of Judicial Administration Inc (AIJA) noted the work of the judicial harmonisation committees detailed above and indicated that this has not included the Family Court of Australia as '…the nature of the litigation in that court is very different'.[205] The AIJA informed the Committee that work on the harmonisation of court rules has also been advanced among courts within NSW and Queensland (i.e. among the Supreme, District, and Magistrates courts within those States).[206] The AIJA also raised the issue of electronic discovery and submitted that this '…is an area in which it might be sought to achieve a degree of uniformity or harmonization'.[207]

---

201 The Hon Justice Kevin E Lindgren, *Exhibit 33*, p. 1.

202 The Hon Justice Kevin E Lindgren, *Exhibit 33*, p. 2, and *Transcript of Evidence*, 6 April 2006, pp. 60-61.

203 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 1, and *Exhibit 33*, pp. 2, 4.

204 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 2.

205 Professor Gregory Reinhardt, AIJA, *Transcript of Evidence*, 7 March 2006, p. 38.

206 AIJA, *Submission No. 25*, p. 1; Professor Gregory Reinhardt, AIJA, *Transcript of Evidence*, 7 March 2006, p. 38.

207 AIJA, *Submission No. 25*, p. 2.

4.159 The Committee supports this work. Nationally harmonised superior court rules, and harmonised court rules within jurisdictions, will reduce uncertainty and difficulty for practitioners and litigants alike and also assist interjurisdictional practice. In terms of superior court rule harmonisation, the Committee was concerned that there may be some potential for lowest common denominator rules to emerge from the collaborative committee process that has been employed thus far. However, Justice Lindgren stated that the '…harmonisation committees have worked astonishingly well' and indicated that considerable advantages are to be gained from pooling the expertise of judges from the various jurisdictions.[208] The Committee would encourage courts around Australia to continue with this important work.

Judicial decision-making

4.160 The LSNSW proposed the creation of a federal judicial commission to assist consistency in judicial decision-making:

> If you are familiar with the functioning of the Judicial Commission of New South Wales… you will know that they have a tremendous resource to get consistency with sentencing, judgments and penalties. I see great advantage in the creation of a federal judicial commission… with an educative role for judicial education, to get consistency of sentencing.[209]

4.161 The LSNSW further indicated that this commission would function as '…a resource for judges everywhere to have consistency in delivery of judgments and services'.[210]

4.162 The Committee is attracted to this idea. A non-prescriptive commission performing the function outlined by the LSNSW would constitute an invaluable resource for the judiciary, providing comprehensive information regarding decisions made in other jurisdictions and developments and trends in judicial decision-making. By virtue of its educative role, the commission could also encourage and lead to increased consistency in judicial decision-making, particularly with regard to sentencing and penalties.

---

208 The Hon Justice Kevin E Lindgren, *Transcript of Evidence*, 6 April 2006, p. 64.

209 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 40.

210 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 40.

4.163 Furthermore, to complement and augment the work of the TTWG as discussed in the previous Chapter,[211] the Committee considers that the judicial commission could be usefully established on a trans-Tasman basis so as to formally include the New Zealand judiciary. Establishing the commission on this footing would broaden its benefits as an informational and educative resource, particularly if it also included information relating to New Zealand judicial decisions.

4.164 The Committee notes that the Australian Law Reform Commission (ALRC), in its recent report on the sentencing of federal offenders, recommended that:

> In order to promote consistency in the sentencing of federal offenders, the Australian Government should continue to support the development of a comprehensive national database on the sentences imposed on all federal offenders. …The data should be made widely available for use by judicial officers, prosecutors, defence lawyers, researchers and members of the public.[212]

4.165 The Committee supports this recommendation and envisages that a judicial commission along the lines proposed by the LSNSW could provide exactly this type of information, albeit with a much broader remit and focus. The Committee is of the view that the Australian Government, the New Zealand Government, and the States and Territories should investigate the feasibility of establishing such a commission on a trans-Tasman basis.

Recommendation 20

4.166 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General or other appropriate forum undertake an investigation into the feasibility of establishing a trans-Tasman judicial commission to provide a comprehensive informational resource for the Australian and New Zealand judiciary in relation to Australian and New Zealand judicial decisions.**

---

211 See Chapter 3 paragraphs 3.137 – 3.176 above.

212 ALRC Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders*, Recommendation 21-1, pp. 87-88. This report can be accessed at: http://www.alrc.gov.au/inquiries/title/alrc103/index.html.

Statute of limitations

4.167 The main issue raised in relation to statute of limitations was regulatory inconsistency.

Regulatory inconsistency

4.168 The AGD informed the Committee of current regulatory arrangements regarding statute of limitations in the jurisdictions as follows:

- Commonwealth – specific but varying limitation periods exist for causes of action arising under some Commonwealth legislation.[213] Where no limitation period is specified, State and Territory laws are applied as federal law in federal jurisdiction under sections 79 and 80 the Commonwealth *Judiciary Act* 1903.[214] Thus:

  > …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.[215]

- State/Territory – statutes of limitation are in force in every State and Territory.[216] There is some consistency between the States and Territories, for example the high degree of harmonisation regarding limitation periods for actions under contract law (six years for all States and Territories excepting the Northern Territory). However, there is less consistency regarding causes of action arising in other areas, for example in connection with more specialised contracts including bonds, contracts under seal, deeds and covenants.[217]

4.169 With regard to variations among limitation periods under Commonwealth laws, the AGD stated that it '…is not aware of problems having arisen from different limitation periods applying in different areas of activity regulated by Commonwealth law', and that differences may also '…be justified on policy grounds'.[218]

---

213 For example under the TPA and the *Copyright Act* 1968: AGD, *Submission No. 26*, p. 13.

214 AGD, *Submission No. 26*, p. 13.

215 AGD, *Submission No. 26*, p. 13.

216 For example the NSW *Limitation Act* 1969, the Victorian *Limitations of Action Act* 1958, and the WA *Limitation Act* 1935.

217 AGD, *Submission No. 26*, p. 14.

218 AGD, *Submission No. 26*, p. 13.

4.170 This aside, however, the AGD stated that '…the current state of limitation laws is complex and potentially confusing', and that 'Greater harmonisation of limitation periods and exceptions providing for extensions of time would seem desirable'.[219] The Department indicated that harmonisation of limitation statutes has been '…intermittently considered by SCAG' (in 1994, 1997, 1998, and 2000) and was examined by the Law Reform Commission of Western Australia in 1997 and the ALRC in 2001.[220]

4.171 The Committee notes that the 2001 ALRC report recommended the enactment of a general Commonwealth limitation statute regarding causes of action arising under Commonwealth law.[221] The ALRC also recommended an investigation into:

- the desirability of harmonising existing federal provisions with respect to limitation of actions;
- the enactment of general legislative provisions for determining, among other things, when a limitation period begins to run and the circumstances in which it may be postponed, suspended or extended; and
- whether a federal limitation statute should be enacted for proceedings in federal courts or, more broadly, for all courts exercising federal jurisdiction.[222]

4.172 The AGD noted that 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'.[223]

4.173 The Department identified the following potential benefits that could be gained from greater harmonisation of State and Territory limitation statutes:

- Forum shopping – forum shopping occurred historically to some degree in connection with limitation period differences among jurisdictions, but this has been addressed in the main by the

219 AGD, *Submission No. 26*, pp. 13, 14.

220 AGD, *Submission No. 26*, p. 13; *Submission No. 26.3*, p. 5. The Western Australian Attorney-General indicated that was proposing to reintroduce a bill to '…reform limitation law in WA' into the WA Parliament in 2005: the Hon Jim McGinty MLA, *Submission No. 18*, p. 2.

221 ALRC Report 92: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Recommendation 31-1, p. 68. This report can be accessed at: http://www.alrc.gov.au/inquiries/title/alrc92/index.htm.

222 ALRC Report 92: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Recommendation 31-1, p. 68.

223 AGD, *Submission No. 26*, p. 15.

Commonwealth *Choice of Law (Limitation Periods) Act* 1993 which '…classifies limitation laws as substantive law',[224] and by the High Court in *Pfeiffer v Rogerson* (2000) 172 ALR 625, which '…held that the law of the place where a wrong was committed should be applied to all questions of substance'.[225]

However, forum shopping can still occur and could be further resolved by greater harmonisation of State/Territory limitation periods or by the Commonwealth enacting a limitation regime '…of comprehensive application to civil actions pursued in federal jurisdiction'.[226]

- Elimination of injustices – greater harmonisation of 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. …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. [227]

- Trade and commerce and consumers – greater harmonisation of limitation statutes would enable business to '…better 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'.[228]

4.174 While the AGD affirmed that greater harmonisation of limitation periods (and exceptions for extensions) would seem to be desirable and identified potential benefits to harmonisation, it also stated that:

> …there is a lack of evidence as to whether reform in this area would warrant the resources that would need to be invested.[229]

224 AGD, *Submission No. 26*, p. 14.

225 AGD, *Submission No. 26*, p. 14.

226 AGD, *Submission No. 26*, p. 14. The AGD noted however that '…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': p. 14.

227 AGD, *Submission No. 26*, p. 15.

228 AGD, *Submission No. 26*, p. 15.

229 AGD, *Submission No. 26*, p. 13.

4.175 And that:

> 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.[230]

4.176 The AGD also expressed reservations concerning the establishment of a general Commonwealth limitation statute regarding causes of action arising under Commonwealth law:

> 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 seem 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.[231]

4.177 Yet, in a subsequent submission, the Department stated that:

> …the Australian Government is not convinced that constitutional limitations for Commonwealth action are so uncertain…[232]

4.178 In terms of the current position of statute of limitations reform, the Department indicated that the Government is '…considering the recommendations made by the ALRC' and will '…continue to explore possible harmonisation of Commonwealth and State/Territory limitations legislation through SCAG'.[233]

4.179 The Committee was not impressed by the AGD's approach to statute of limitations harmonisation as revealed in its submissions. Firstly, it is unsatisfactory for the Department to recognise the desirability and potential benefits of harmonisation but then proceed, essentially, to dispose of the issue by stating that harmonisation would involve a lot of work. Secondly, the Committee was not assisted by the AGD indicating in one submission that a general Commonwealth limitation

---

230 AGD, *Submission No. 26*, p. 15; see also *Submission No. 26.3*, p. 4.

231 AGD, *Submission No. 26*, p. 14.

232 AGD, *Submission No. 26.3*, p. 5.

233 AGD, *Submission No. 26*, p. 15; *Submission No. 26.3*, p. 5.

statute might face constitutional difficulties, but then, in another submission, suggesting that the Government is not convinced that such difficulties exist. This does little to illuminate or advance matters.

4.180 Furthermore, the Committee was surprised to learn just how little has been done to advance the harmonisation of limitation statutes over the years. SCAG has considered the issue on four separate occasions over the last twelve years, and the Government has been considering the ALRC recommendations on the matter for the past five years. In its final submission, the last word from the AGD regarding future action is that SCAG '…will continue to explore possible harmonisation of Commonwealth and State/Territory limitations legislation'.[234] This is hardly what the Committee would call progress. In November 2006 the Attorney-General announced that statutes of limitation uniformity was being promoted at SCAG.[235] While the Committee is encouraged by this, expediting harmonisation in this area would seem to be warranted given the length of time that has already passed.

Recommendation 21

4.181 **The Committee recommends that the Australian Government seek to expedite national legislative harmonisation of limitation statutes at the Standing Committee of Attorneys-General.**

Service of legal proceedings

4.182 The Committee was pleased to be informed that 'Certain procedures relating to service of proceedings have already been successfully harmonised'[236] by the AGD:

> The Commonwealth *Service and Execution of Proceedings 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

234 AGD, *Submission No. 26.3*, p. 5.

235 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0.

236 AGD, *Submission No. 26*, p. 11.

> 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.[237]

4.183 The Department elaborated regarding service of civil and criminal process and subpoenas:

> …Section 15 enables initiating process issued out of any State/Territory court in civil proceedings to be served (without leave) throughout Australia. …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.[238]

4.184 The AGD also informed the Committee that a number of amendments for the *Service and Execution of Proceedings Act* 1992 to '…improve the overall efficiency and effectiveness of SEPA' and '…improve cross-border harmonisation' among jurisdictions are currently under consideration or development.[239] Examples include amendments to facilitate the Cross Border Justice scheme among Western Australia, South Australia and the Northern Territory, and amendments to remove inconsistencies with regard to State bail laws.[240]

4.185 The Committee notes again that work on the harmonisation of court rules dealing with service outside the jurisdiction is envisaged in the future.[241]

---

237 AGD, *Submission No. 26*, p. 11.

238 AGD, *Submission No. 26*, p. 11.

239 AGD, *Submission No. 26.3*, p. 11.

240 AGD, *Submission No. 26.3*, p. 11. In a media release of 9 November 2006 the Attorney-General indicated that the harmonisation of elements of civil procedure law throughout Australia in order to allow Australia to accede to the This document can be accessed at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0.

241 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 2; see also paragraph 4.157 above.

Contract law and equity

Contract law

4.186 In their submission Professors Wright and Ellinghaus brought the concept of a model contract code to the attention of the Committee as a possible means of harmonising contract law throughout the jurisdictions. Professors Wright and Ellinghaus stated that:

> At present, in the 8 states and territories of Australia and in New Zealand contract law is largely to found [*sic*] in many thousands of volumes of reported cases.[242]

4.187 Professors Wright and Ellinghaus suggested that 'Codification of contract law is the best means of overcoming jurisdictional differences in trade law which are inevitable in such a system',[243] and that:

> …contracts are fundamental to commerce and we think that to harmonise contract law is therefore both the most necessary and the most effective means of harmonising trade law. …the harmonisation of contract law… is inconceivable without the reduction of those rules to a written statement – in other words, their codification.[244]

4.188 Professors Wright and Ellinghaus indicated that they have formulated a model Australian contract code for this purpose:

> The ACC [Australian Contract Code] was drafted by us for the Law Reform Commission of Victoria. …The ACC contains only 27 short articles. These are stated at a high level of generality. This makes it possible to embody the whole law of contract within them. At the same time, they are sufficiently specific to serve as a practical vehicle for regulating contracts and resolving contract disputes.[245]
>
> …[the 27 articles of the code] state the rules of the case law of contract as it currently prevails both in Australia and in New Zealand in the form of broad principles unencumbered by the

242 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1.

243 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1. See also Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 11.

244 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 12.

245 Professors T Wright and M Ellinghaus, *Submission No. 13*, pp. 1-2; see also *Exhibit 4*.

> detailed mediating rules which are a feature both of case law and of long and complex codes of contract law…[246]

4.189 Professors Wright and Ellinghaus stated that:

> …a uniform contract law based on broad principles would not reduce certainty and in fact is likely to increase it. It would also be more accessible, lead to more fair outcomes, and save costs.[247]

4.190 Professors Wright and Ellinghaus informed the Committee that they have conducted empirical research which supports their claims regarding the model contract code:

> We recently conducted three experiments, involving 1800 participants, comparing the utility of the ACC with Australian case law and with another, more detailed, code (UNIDROIT Principles of International Commercial Contracts). In two of these experiments law students were asked to decide contract disputes drawn from real cases. In the third experiment university students were asked to evaluate judgments deciding the same disputes.[248]
>
> …The most important conclusions supported by our results are:
>
> - It would be beneficial to codify Australian contract law.
> - It would be better to state the law in a small number of broad principles rather than numerous detailed rules.[249]
>
> …On the basis of our research we also conclude:
>
> - Codifying contract law would not diminish predictability. An ACC-type code would increase predictability in easier cases where it is most important.
> - Codifying contract law is likely to lead to more fair outcomes. An ACC-type code would be more likely to do so than an UPICC [UNIDROIT Principles of International Commercial Contracts]-type code.
> - Codes are more accessible (clearer language and logic) than Case Law. An ACC-type code would be more accessible than an UPICC-type Code.

246 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 11.

247 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1.

248 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

249 Professors T Wright and M Ellinghaus, *Exhibit No. 5*, p. 1.

- An ACC-type code would be more efficient (easier to comprehend and apply) than an UPICC-type code or Case Law.[250]

4.191 Professor Wright stated that:

> …from both experiments we got very consistent results. That is actually a significant and important methodological point because… it is a form of triangulation – that is, it suggests the results are robust given that we had two distinctly different paradigms to the extent that the data indicated the same phenomena. That is rather strong.[251]

4.192 The Committee heard that a high level of consensus was reached among those participants in the experiment who used the model contract code to arrive at decisions regarding the provided contractual disputes:

> …it worked out to be the case that 18 of the 20 decision makers in our experimental design in each case using the ACC agreed on the outcome, whereas there was a much lower number, about 14, for the detailed rule users.[252]

4.193 Professor Wright also stated that:

> Bearing in mind that these were appellate cases that had resulted in a dissenting judgment… it is very striking that, in effect, the users of those broad principles… were able to identify half of these difficult appellate cases as essentially being fairly easy, straightforward disputes. The potential benefits to the economy and the country of diverting a significant number of disputes, we might suggest, from litigation to resolution between the parties by agreement would be very significant indeed.[253]

4.194 In terms of implementation of the code, Professors Wright and Ellinghaus indicated that it could be legislated in model/template form by the Commonwealth with application to '…all contracts made by corporations and in interstate trade (on the same constitutional basis of the Trade Practices Act 1974)'.[254] This Commonwealth law

---

250 Professors T Wright and M Ellinghaus, *Exhibit No. 5*, p. 6. See also Professor Wright, *Trancsript of Evidence*, 7 March 2006, p. 14.

251 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 18.

252 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 19.

253 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 19.

254 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

could then '…serve as a model for complementary legislation by the States and New Zealand'.[255] Professors Wright and Ellinghaus also indicated that, alternatively, the code could be '…given authoritative status by other means':[256]

> For example, it could be published as a 'Restatement' following an American model. It could also be officially recommended for adoption by contracting parties as the basis of their contracts.[257]

4.195 The Committee notes that the original model code was drafted in 1992. Professor Wright indicated that some modest changes have been made as required over the intervening years, but noted also that the general principles enshrined in the code are '…relatively static and clear in the law and unchanged.'[258] Professor Wright also indicated that, if the code were to be taken forward, its content would be a '…point of departure' and could be revisited if necessary.[259]

4.196 The Committee noted that codification would not remove the need for legal expertise and advice in the event of contractual disputes. Professor Ellinghaus agreed:

> That is undoubtedly true. We are not in the business of abolishing legal expertise, and we are certainly not in the business of making something that is a professional discipline into something else. …but I think we do have some considerable body of empirical data now which suggests that there will be a significant difference in accessibility if you produce a code.[260]

4.197 A number of other views were also expressed regarding the concept of a model Australian contract code as a means of harmonising contract law throughout the jurisdictions. The AFC indicated its support for a code on a conceptual level, but expressed some doubt on whether it would be necessary, stating that 'Contract law, in a large respect… is pretty much settled' and that it '…is not changing a huge amount, so people know how to effectively give themselves a contract and get on with business'.[261] The AFC also noted the

255 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.
256 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.
257 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.
258 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 16.
259 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 16.
260 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 17.
261 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

existence of the NSW *Contracts Review Act* 1980 which provides for judicial review of certain contracts.[262]

4.198 In his submission Mr Ray Steinwall stated that a contract code '…would have numerous advantages' including the following:

- It would provide an opportunity to review and reform provisions that operate harshly or unjustly.
- It could eliminate inconsistencies in State and Territory laws.
- It could expressly codify complex and at times inconsistent judicial precedent.
- For consumers and small business, a code could assist to de-mystify contract law and make it more accessible through a single instrument.
- A code would ensure consistency across jurisdictions, assisting firms that operate in multiple jurisdictions.[263]

4.199 While Mr Steinwall indicated elsewhere that he could not comment specifically on the model advanced by Professors Wright and Ellinghaus,[264] he did state that '…the broad principle that they have put forward is something that I support'.[265] Mr Steinwall suggested in his submission that the most suitable mechanisms for implementing a model contract code would be either the model/template or the applied legislation mechanisms.[266]

4.200 The LSNSW indicated that it has identified contract law as an area where harmonisation among the jurisdictions is required.[267] In regard to the model advanced by Professors Wright and Ellinghaus, the LSNSW stated that:

> Their view is not terribly inconsistent with the US code for contract law, which I guess applies across the jurisdiction of all the states in the US. There is now and has been for some time consistency in contract law. Even then, like in Australian jurisdictions, there is not a great deal of difference and it is an area where a code could apply. It is like, for example, the experience of the Corporations Act. It is now a national code

262 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

263 Mr Ray Steinwall, *Submission No. 22*, p. 9.

264 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.

265 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.

266 Mr Ray Steinwall, *Submission No. 22*, p. 9.

267 Mr Ian Tunstall, LSNSW, *Transcript of Evidence* 6 April 2006, p. 33; LSNSW, *Exhibit No. 31*, p. 1.

> in the sense that it applies across all jurisdictions. What arises from that, as we are seeing with workplace relations and those sorts of issues, is more consistency across jurisdictions.[268]

4.201 The BCA indicated that it does '…not have a position' on the concept of a model contract code, but stated that:

> There can be some advantages with codification in that you may allow yourself to move beyond things that are largely set and just get on with business or with whatever is in dispute in a particular case. The problems with codification and to some extent the strengths of the common law system are that it is ever changing, flexible, adaptive and all those sorts of things.[269]

4.202 The AGD informed the Committee that it '…has not developed a model contract code' but that 'SCAG would be the appropriate forum to pursue such harmonisation'.[270]

4.203 The Committee acknowledges the detailed evidence from Professors Wright and Ellinghaus concerning a model contract code, but notes that contract in Australia is largely governed by the common law – a common law which, as noted above,[271] is a single unfragmented common law across the jurisdictions and therefore does not require harmonisation as such. While it is certainly possible that codification in this area could have other benefits such as improved accessibility, the Committee is somewhat sceptical as to the need for codification from a harmonisation standpoint. Nevertheless, on balance, the Committee is of the view that a possible national model contract code does warrant further investigation by the Commonwealth, States and Territories.

Recommendation 22

4.204 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General undertake an investigation into the development and implementation of a national model contract code.**

---

268 Mr Ian Tunstall, LSNSW, *Transcript of Evidence* 6 April 2006, p. 33.

269 Mr Steven Münchenberg, BCA, *Transcript of Evidence*, 6 April 2006, p. 73.

270 AGD, *Submission No. 26.3*, p. 8.

271 See Chapter 2 paragraphs 2.24 – 2.25 above.

Equity

4.205 In his submission Mr Ray Steinwall proposed the codification of equity law. Mr Steinwall stated that:

> Extensively based on judicial precedent (with some statutory modifications), equitable principles are often difficult to state with any precision, reflecting differences of judicial opinion within and across jurisdictions. Precedent based, careful analysis is required of numerous judgments in order to distil binding principles.
>
> …A sense of mystique has therefore built up around equity and with it a degree of specialisation well beyond the ordinary person and indeed many lawyers. In some circles this uniqueness is cultivated because it preserves its long tradition.[272]

4.206 Mr Steinwall submitted that:

> Equity in its current form is an anachronism. It is no longer acceptable that tradition and practice should deprive a person a [*sic*] reasonable understanding of principles that apply to many facets of businesses and commercial dealings. There is no cogent reason (if there ever was) why a serious attempt should not be made to codify the principles of equity.[273]

4.207 More specifically, Mr Steinwall identified a number of '…less well established' equitable principles such as unconscionable conduct, equitable interest in land and fiduciary relationships, specific performance, equitable damages, and innocent misrepresentation that could be apt for codification due to '…commonality between the Commonwealth and the states' in the area of consumer protection law.[274]

4.208 While the Committee does not doubt that equity is a complex area of the law, it does not consider that there is sufficient evidence of regulatory inconsistency or duplication to warrant a recommendation that further exploration of legal harmonisation be undertaken in this area.

---

272 Mr Ray Steinwall, *Submission No. 22*, p. 10.

273 Mr Ray Steinwall, *Submission No. 22*, p. 10.

274 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.

Evidence law

4.209 The AGD informed the Committee of the current regulation of evidence law throughout the jurisdictions:

> 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, 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.[275]

4.210 In its submission to the inquiry, the ALRC noted similarly:

> The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in proceedings, federal or state, before New South Wales courts and some tribunals.
>
> In 2001, Tasmania passed legislation that essentially mirrors the Commonwealth and New South Wales Acts, although there are some differences. In 2004, Norfolk Island passed legislation that essentially mirrors the *Evidence Act 1995* (NSW).[276]

4.211 The AGD indicated that the uniform Evidence Acts are '…limited in scope', being '…largely (but not entirely) concerned only with court (and similar) proceedings',[277] and that there are indeed divergences among the statutes:

> …the differing needs of the partners to the uniform legislation have resulted in departures by individual jurisdictions. …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

275 AGD, *Submission No. 26*, pp. 15-16. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3, and Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 2.

276 ALRC, *Submission No. 32*, p. 2.

277 AGD, *Submission No. 26*, p. 16.

> Evidence Acts have incorporated variations in their legislation even from commencement.[278]

4.212 The Department also indicated that the Commonwealth and NSW jurisdictions '…have a range of special evidence provisions which are not in their Evidence Acts'.[279]

4.213 The ALRC summarised the impact of the Commonwealth *Evidence Act* 1995 as follows:

> …the passage of the *Evidence Act 1995* (Cth) has the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction. As a practical example, a Brisbane barrister defending a client charged with a federal crime before the Queensland Supreme Court would use that state's evidence law – but would use the *Evidence Act 1995* (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the next day.[280]

4.214 The Committee notes that, from July 2004 to December 2005, the ALRC, together with the NSW Law Reform Commission and the Victorian Law Reform Commission (VLRC), conducted a major review of the operation of the *Evidence Act* 1995. In its submission the ALRC also indicated that the inquiry was conducted with the participation of law reform bodies from other jurisdictions:

> Although not formally a part of the process, representatives of the Queensland Law Reform Commission (QLRC), the Tasmanian Law Reform Institute and the Northern Territory Law Reform Committee (NTLRC) also participated in the workshops and meetings leading to the completion of the final report.[281]

---

278 AGD, *Submission No. 26*, p. 16. See also ALRC, *Submission No. 32*, p. 2.

279 AGD, *Submission No. 26*, p. 16. For example the Commonwealth *Judiciary Act* 1903, *Crimes Act* 1914, and *Family Law Act* 1975.

280 ALRC, *Submission No. 32*, p. 2.

281 ALRC, *Submission No. 32*, p. 3. The ALRC's inquiry report indicates that the Law Reform Commission of Western Australia also participated in the inquiry: ALRC Report 102*: Uniform Evidence Law*, p. iii (ALRC letter of transmittal). This report can be accessed at: http://www.alrc.gov.au/inquiries/title/alrc102/index.html. In his submission the Queensland Attorney-General stated that the QLRC had '…a reference for the purpose of inputting into this [the ALRC] review and with a view to subsequent Queensland consideration of the enactment of the uniform evidence laws: *Submission No. 19*, p. 4.

4.215 In its submission the ALRC informed the Committee that the main aims of the inquiry were:

> …to identify and address any defects in the uniform Evidence Acts, and to maintain and further the harmonisation of the laws of evidence throughout Australia.[282]

4.216 The ALRC indicated that the inquiry report (released December 2005) contains a number of recommendations '…directed to maintaining uniformity in evidence law'.[283] The ALRC summarised the recommendations of the report regarding harmonisation of evidence law as follows:

- SCAG should adopt an Inter-governmental agreement (IGA) providing that, subject to limited exceptions, any proposed changes to the uniform Evidence Acts must be approved by SCAG. The IGA should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the IGA, and the proposed amendment must be considered and approved by SCAG before being implemented (Recommendation 2-1);
- all Australian jurisdictions should work towards harmonisation of provisions on related (but 'non-core') matters not otherwise covered in the uniform Evidence Acts, such as children's evidence and offence-specific evidentiary provisions (Recommendation 2-2); and
- Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years of the tabling of ALRC 102 (Recommendation 2-3).[284]

4.217 Stating that '…a strong movement has emerged towards the harmonisation of evidence laws in Australia based on the uniform Evidence Act',[285] the ALRC also informed the Committee of the following developments in the various jurisdictions regarding the harmonisation of evidence law:

- In February 2006 the Commonwealth and State Attorneys-General established a working group to '…advise them on amendments arising from the report's recommendations'. The Commonwealth

282 ALRC, *Submission No. 32*, p. 3.
283 ALRC, *Submission No. 32*, p. 3.
284 ALRC, *Submission No. 32*, p. 3.
285 ALRC, *Submission No. 32*, p. 3.

Attorney-General and Minister for Justice also affirmed the Government's support for national uniformity in evidence laws.[286]

- Also in February 2006 the VLRC released a report on the implementation of the uniform evidence legislation in Victoria, with recommendations detailing amendments to both Victorian legislation and the uniform Evidence Act that would be required upon implementation.[287] The Committee notes the following key recommendation of the VLRC report:

  > Except as provided for in the following recommendations, the Victorian UEA should be drafted to mirror the current provisions of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), amended in accordance with the recommendations of the joint Final Report.[288]

- In May 2005 the Northern Territory Law Reform Committee (NTLRC) was asked by the NT Attorney-General to review the existing NT evidence legislation and to:

  > …advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into the Northern Territory, including the modification of the existing provisions of the Uniform Evidence Act.[289]

  This review is ongoing. The Committee notes the following statement in a discussion paper released by the NTLRC for the purposes of its review:

  > It would seem to be in the interests of the Northern Territory to be involved in the uniform system and to make its own contributions to the sturdy improvement of this branch of the law.[290]

---

286 ALRC, *Submission No. 32*, p. 3. See also joint media release of the Attorney-General, the Hon Philip Ruddock MP, and the Minister for Justice and Customs, Senator the Hon Chris Ellison MP, 8 February 2006. This document can be accessed at: http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/Media_Releases_2006_First_Quarter_8_February_2006_-_Tabling_of_the_Report_on_Uniform_Evidence_Law_-_0112006.

287 ALRC, *Submission No. 32*, p. 3.

288 VLRC, *Implementing the Uniform Evidence Act*, p. xix (Recommendation 1). This document can be accessed at: http://www.lawreform.vic.gov.au/CA256A25002C7735/All/FE13302D8880AEF3CA25718D00799163?OpenDocument&1=34-Publications~&2=~&3=~.

289 ALRC, *Submission No. 32*, pp. 3-4.

290 NTLRC, *Uniform Evidence Acts: Discussion Paper*, p. 8. This document can be accessed at: http://www.nt.gov.au/justice/graphpages/lawmake/lawref.shtml#curr.

- From March – September 2005 the QLRC conducted its own review of the uniform Evidence Acts. The ALRC indicated that the terms of reference for the QLRC review '…did not require the QLRC to advise on the action required to facilitate the introduction of the uniform Evidence Act into Queensland'.[291] The Committee notes that the QLRC report focused on:

  > …areas of particular concern to Queensland by identifying differences between Queensland evidence law and the uniform Evidence Acts, and addressing the questions raised in the ALRC's Issues Paper and proposals made in the Discussion Paper.[292]

  The QLRC report also states that the QLRC '…examined the advantages and disadvantages of the differing approaches to evidence law in Queensland and under the uniform Evidence Acts'.[293]

- The Attorneys-General of Western Australia and South Australia have '…placed the introduction of the Uniform Evidence Act on their respective legislative agendas'.[294]

4.218 The Committee agrees with the AGD that '…Uniform evidence legislation is an important and achievable aim'.[295] The importance of harmonisation in this crucial area of the law has been recognised for well over a decade, and the Committee supports the recent recommendations of the ALRC in this regard. In particular, the measures proposed by the ALRC in recommendations 2-1 and 2-2 of its report should assist in furthering harmonisation and minimising the level of divergence that can develop between the jurisdictions that have implemented the uniform Evidence Acts. While it is also encouraging to see that some of the jurisdictions that did not participate in the enactment of the uniform Evidence Acts are now moving towards participation in the uniform system, the Committee does believe that the move towards a harmonised evidence law system needs a stronger impetus and a greater sense of urgency in order for the goal to finally be realised. It would be appropriate for the federal Government to provide this additional momentum,

---

291 ALRC, *Submission No. 32*, p. 4.

292 QLRC, *A Review of the Uniform Evidence Acts*, p. 6. This document can be accessed at: http://www.qlrc.qld.gov.au/publications.htm.

293 QLRC, *A Review of the Uniform Evidence Acts*, p. 6.

294 ALRC, *Submission No. 32*, p. 4.

295 AGD, *Submission No. 26*, p. 15.

particularly in reference to those jurisdictions which are not yet moving directly towards participation in the uniform system.

Recommendation 23

4.219 **The Committee recommends that the Australian Government, at the Standing Committee of Attorneys-General or other appropriate forum, should highlight the strong need to finally achieve a national uniform evidence law system and seek to give fresh impetus to this goal.**

The Committee also recommends that the Australian Government should seek to maintain this impetus until the uniform evidence law system is achieved.

Model criminal code

4.220 The Committee would also like to comment on the issue of a Model Criminal Code for Australia, although this issue was not raised in the evidence to the inquiry. The Committee notes that work on a Model Criminal Code for Australia has been pursued by the Model Criminal Code Officers Committee (MCCOC) of SCAG since 1990, with reports on various parts of the Model Code released by the MCCOC incrementally since 1995.[296] The Committee also notes that, while the Commonwealth has implemented much of the Code, implementation across the other jurisdictions has been uneven, with some jurisdictions legislating certain parts of the Code or even particular offences. The ACT and the Northern Territory are the only jurisdictions (apart from the Commonwealth) to have implemented the first two chapters of the Code outlining the general principles of criminal responsibility.

4.221 As with the national uniform evidence law system, the Committee is of the view that a stronger impetus and a greater sense of urgency needs to be given to the Model Criminal Code project in order for the goal of a national code to be realised across Australia. The Model Criminal Code deals with a fundamental area of the law and has been under development for some 15 years; the federal Government should now provide additional momentum in order to advance implementation of the Code nationally.

296 The MCCOC reports can be accessed at: http://www.aic.gov.au/links/mcc.html. The most recent investigations of the MCCOC have been a report on double jeopardy law reform (2004) and a discussion paper on the criminal law relating to drink spiking (2006).

Recommendation 24

4.222 **The Committee recommends that the Australian Government, at the Standing Committee of Attorneys-General or other appropriate forum, should highlight the strong need to move ahead with the national implementation of the MCCOC Model Criminal Code and seek to give fresh impetus to this goal.**

The Committee also recommends that the Australian Government should seek to maintain this impetus until the Code is implemented nationally.

Privacy law

4.223 In its initial submission the AGD informed the Committee that privacy regulation in Australia is comprised of the Commonwealth *Privacy Act* 1988 together with a number of State and Territory regulatory regimes:

> 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.
>
> …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.[297]

4.224 The AGD subsequently informed the Committee that Tasmania has also enacted privacy legislation (the *Personal Information and Protection Act 2004*) for its public sector.[298]

4.225 The Committee was also informed that a draft National Health Privacy Code has been developed by the Commonwealth and the States for the purpose of achieving '…nationally consistent privacy arrangements for health information across public and private sectors'.[299] The draft Code is to be considered in 2006.[300]

4.226 The AGD stated that:

> 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.[301]

4.227 The Committee notes that in 2005 the Office of the Privacy Commissioner (OPC) completed a review of the private sector provisions of the *Privacy Act* 1988. In terms of harmonisation, the OPC found that:

> The Privacy Act has not achieved its object of establishing a 'single comprehensive national scheme' for the protection of personal information. …The lack of national consistency contributes significantly to the costs imposed on business.[302]

4.228 Among the OPC's recommendations to redress this issue were the following:

> The Australian Government should consider asking the Council of Australian Governments (COAG) to endorse national consistency in all privacy related legislation.
>
> The Australian Government should consider setting in place mechanisms to address inconsistencies that have come about,

---

297 AGD, *Submission No. 26*, p. 24.

298 AGD, *Submission No. 26.1*, p. 4.

299 AGD, *Submission No. 26*, p. 25.

300 AGD, *Submission No. 26.1*, p. 4.

301 AGD, *Submission No. 26*, p. 24.

302 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p. 48. This report can be accessed at: http://www.privacy.gov.au/act/review/index.html.

> or will come about, as a result of exemptions in the Privacy Act, for example, in the area of workplace surveillance.
>
> The Australian Government should consider commissioning a systematic examination of both the IPPs and the NPPs with a view to developing a single set of principles that would apply to both Australian Government agencies and private sector organisations. This would address the issues surrounding Australian Government contractors.[303]

4.229 Both the AGD and the ANZ Bank also raised the issue of workplace privacy regulation. The AGD indicated that workplace privacy in relation to private sector employee records is the subject of inconsistent regulation by the States and Territories:

> Private sector employee records are excluded from the protection of the *Privacy Act 1988* (Cth). This has created an opportunity for the States and Territories to legislate in the area of workplace privacy and has led to inconsistencies across jurisdictions. For example, NSW legislation governing the privacy of health information exempts employee records from the operation of the legislation whereas similar legislation in Victoria does not.[304]

4.230 The ANZ registered concerns regarding '…recent developments in Workplace Surveillance reform toward state-based legislation':[305]

> A move toward state-based workplace privacy regulation would re-open the prospect of non-uniform laws throughout Australia. Nationally operating entities such as ANZ could be subjected to contradictory laws affecting their national workforces. This would be likely to create significant additional compliance costs due to systems modifications, altered practices and staff training in order to manage the differences and ensure compliance. A state-by-state approach also fails to recognise that technology does not recognise borders, and the provisions in these developments ignore the technologically neutral objective of the Federal Privacy Act.[306]

---

303 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p. 48.

304 AGD, *Submission No. 26.1*, p. 4.

305 ANZ Bank, *Submission No. 27*, p. 12.

306 ANZ Bank, *Submission No. 27*, p. 13.

4.231 The ANZ noted the 2005 OPC review of the private sector provisions of the *Privacy Act* 1988, including the OPC's recommendation that the Government consider mechanisms to address exemption inconsistencies in the Act such as those in the area of workplace surveillance (See paragraph 4.228 above).[307] The ANZ stated that:

> While recognising that State-based consideration of legislation on this issue derives from a desire to ensure privacy protection for workers, the development of nationally applicable standards would be preferable. This approach would avoid a patchwork of State and Territory legislation while delivering an agreed standard of privacy protection for workers balanced with the needs of employers to protect their businesses and customers.[308]

4.232 The AGD also indicated its support for regulatory harmonisation in the area of workplace privacy:

> Workplace privacy is an area… where it would be desirable to have a nationally consistent workplace privacy regime to provide protection for the personal information of workers.[309]

4.233 The Department indicated that SCAG is '…currently exploring possible policy approaches for nationally consistent workplace privacy laws'.[310]

4.234 The Committee notes that in January 2006 the ALRC commenced a comprehensive inquiry into the operation of the Commonwealth *Privacy Act* 1998 and related laws. The terms of reference for the inquiry require the ALRC to consider a range of issues relating to the *Privacy Act* 1988 including privacy regimes in other jurisdictions and the minimisation of the regulatory burden on business. The inquiry is to be completed by March 2008.[311]

4.235 The Committee is of the view that, if it has not already done so, the Government should highlight the issue of regulatory inconsistency, both in relation to privacy regulation generally and workplace privacy regulation specifically, in its submissions to the ALRC inquiry.

---

307 ANZ Bank, *Submission No. 27*, p. 13.

308 ANZ Bank, *Submission No. 27*, pp. 13-14.

309 AGD, *Submission No. 26.1*, p. 4.

310 AGD, *Submission No. 26.1*, p. 4.

311 Further information regarding the ALRC's inquiry can be accessed at: http://www.alrc.gov.au/inquiries/current/privacy/index.htm.

Recommendation 25

4.236 **The Committee recommends that the Australian Government should highlight the issue of regulatory inconsistency in privacy regulation, including in the area of workplace privacy regulation, in its submissions to the current Australian Law Reform Commission inquiry into the Commonwealth *Privacy Act* 1988 and related laws.**

Defamation law

4.237 The AGD informed the Committee that in 2004 the Government released the outline of a model bill to form the basis of a national defamation law '…limited to matters within Commonwealth constitutional power'.[312] The model bill would have been '…a code for most defamation proceedings',[313] with some areas remaining within State jurisdiction. Subsequent to this, the States and Territories advanced their own proposal for uniform defamation legislation involving the States and Territories enacting model provisions in each jurisdiction.

4.238 The AGD indicated that in 2005 and early 2006 each of the States and the ACT enacted '…substantially uniform defamation laws based on the model provisions put forward in the State and Territory proposal'.[314] The Committee notes that the NT also passed its defamation legislation in early 2006. The AGD stated however that there are still some differences between the jurisdictions:

> The Australian Government has been encouraged by the progress that has been made. It remains regrettable, however, that differences remain between the jurisdictions in relation to the provision of juries. The Australian Government will continue to support reform in relation to the provision of alternative remedies and the rights of corporations to sue.[315]

4.239 The Committee is pleased that such substantial progress has been made towards the harmonisation of defamation law throughout

312 AGD, *Submission No. 26*, p. 28.

313 AGD, *Submission No. 26*, p. 29.

314 AGD, *Submission No. 26.1*, p. 7. See also Queensland Attorney-General, the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 1.

315 AGD, *Submission No. 26.1*, p. 7.

Australia. The Committee would encourage all of the jurisdictions to now complete the task and advance harmonisation in the outstanding areas of difference.

Workers' compensation regulation

4.240 The ANZ Bank indicated that there are inconsistencies among the various State and Territory regulatory regimes governing workers' compensation in relation to benefits calculation and the requirements for rights and responsibilities documentation, financial and prudential safeguards, reporting, and audit.[316] The ANZ indicated that this situation translates to increased compliance costs:

> This patchwork of State-based legislation means ANZ is unable to centralise its management of Workers Compensation issues and benefit from a more efficient allocation of resources. ANZ retains staff in Queensland, ACT, Tasmania, South Australia and Western Australia to ensure compliance with the State-specific reporting and financial obligations, even though ANZ employs a relatively small number of staff in these states and even though the workers' compensation claims in these areas can number as few as one or two at any one time.[317]

4.241 The Committee notes that the Productivity Commission conducted an inquiry into the national workers' compensation and occupational health and safety regulatory frameworks in 2003-2004. With respect to workers' compensation, in its report the Commission found that:

> Existing national coordinating mechanisms have proven ineffective in resolving the compliance complexities and costs for multi-state employers.[318]

4.242 However, the Commission also found that a single national workers' compensation framework was not desirable:

---

316 ANZ Bank, *Submission No. 27*, p. 16. In his submission the Queensland Minister for Employment, Training and Industrial Relations raised the issue of the *Workplace Relations Amendment (Work Choices) Act* 2005: the Hon Tom Barton MP, *Submission No. 11.1*, pp. 1-3.

317 ANZ Bank, *Submission No. 27*, p. 16.

318 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 146. This report can be accessed at: http://www.pc.gov.au/inquiry/workerscomp/finalreport/index.html.

> The Commission has no evidence of support by the States and Territories for a single uniform national workers' compensation scheme. Many of the stakeholders at the individual jurisdictional level have suggested that concessions won in hard fought negotiations would not be willingly surrendered for the sake of national uniformity.[319]
>
> …the Commission does not support national uniformity of workers' compensation for its own sake. In arriving at this view, the Commission recognises that the majority of employers (who are predominantly small to medium enterprises) and their employees operate only within a single jurisdiction. To them, national uniformity has little relevance. Further, it is not apparent that there is any single perfect or best scheme. Best practice can be reflected in a number of different ways and schemes must constantly adapt to the wider socio-economic environment within which they operate. Innovation and learning should be encouraged.[320]

4.243 The Commission recommended instead that:

- The Government should '…develop an alternative national workers' compensation scheme to operate in parallel to existing State and Territory schemes';
- The '…current regulatory framework for the oversight of the Australian Government's workers' compensation schemes and occupational health and safety regimes be strengthened by progressively developing the Safety, Rehabilitation and Compensation (SRC) Commission as a stand-alone regulator'; and that
- The 'States and Territories join with the Australian Government to establish immediately a new national body for workers' compensation', with the Commonwealth and State/Territory Governments having responsibility for '…implementation, with a view to improving the performance of their respective schemes and, over time, achieving national consistency'.[321]

---

319 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 146.

320 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 147.

321 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, pp. 149-150.

4.244 In its response to the Commission's report, the Government acknowledged the Commission's findings regarding the national workers' compensation framework and the associated compliance burdens:

> The Commission found fundamental differences in Australian workers' compensation arrangements. The differences relate to the design elements of the schemes in terms of coverage, benefits and self-insurance obligations. The result is a compliance burden for multi-State employers and uncertainty for employers and employees. Multi-state corporations employ over a quarter of Australian employees and the costs to them of meeting the requirements of the various jurisdictions, rather than those of a single national scheme, can be in the order of millions of dollars a year.[322]

4.245 Despite this, the Government did not agree with the first and third of the Commission's recommendations as set out above, while agreeing to further examine the second. With regard to the first recommendation, the Government stated that:

> The Commission's national workers' compensation proposal would result in a substantial shift to the Government of responsibility for an area of the economy that is traditionally a State matter.
>
> …The Commission's model would… establish national institutional bodies that remove the influence of industry parties and States might have on the policy direction of these core workplace relations areas. Responses to the Commission's Interim Report also demonstrated that any attempt by the Government to legislate for the Commission's model. [*sic*] would not be supported by the States, major employer groups and unions.[323]

4.246 With regard to the third recommendation, the Government stated that:

> The Government considers that the establishment of a separate body for workers' compensation to run in parallel

322 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, para. 14. This document can be accessed at: http://www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp.

323 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, paras. 39 and 41.

> with NOHSC would be duplicative and not build on the synergies between the OHS and workers' compensation systems.[324]

4.247 Elsewhere in its response, however, the Government did indicate that it would be taking action to address the Commission's findings regarding the ineffectiveness of existing national workers' compensation (and occupational health and safety) coordination arrangements:

> …it is therefore timely to further pursue greater national coordination of these programmes through the establishment of a non-legislative national OHS and workers' compensation advisory council – the Australian Safety and Compensation Council (ASCC). The ASCC would develop the policy and strategic direction for these programmes under the guidance of the Workplace Relations Ministers' Council (WRMC).[325]
>
> …the work of the ASCC on workers' compensation would be to identify and recommend to WRMC design elements of schemes to gain consistency in the regulatory framework.[326]

4.248 The Committee notes that the Australian Safety and Compensation Council held its first meeting in October 2005.[327]

Intergovernmental agreements

4.249 Dr Simon Evans noted the role of intergovernmental agreements in relation to legal harmonisation:

> …attempts to harmonise legal systems at a federal or international level involve a degree of coordination between governments which is often achieved through intergovernmental agreements. These agreements may take a

---

324 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, para. 47.

325 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, para. 30.

326 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, para. 33.

327 Further information regarding the ASCC can be accessed at: http://www.nohsc.gov.au/AboutNohsc/.

> vast array of forms and vary greatly in formality and complexity.[328]

4.250 Dr Evans contended that intergovernmental agreements '…pose risks to the central constitutional values of democratic law-making, transparency, accountability and responsible government':[329]

> Public information about the existence of intergovernmental agreements is scarce, and access to their substantive content is difficult and *ad hoc*. …many Australians may be unaware of the existence of agreements with immense practical significance for Australian law and politics. This is clearly contrary to the rule of law ideals of transparency and accessibility of legal materials.[330]
>
> …Agreements are typically formed by senior members of the Executive, often at fori such as the Ministerial Councils. There is little opportunity for Parliamentary input into the details of agreements or for members of the executive to account for their contents, until draft legislation is presented to parliaments on a take-it-or-leave-it basis. This constitutes a serious 'democratic deficit' that is compounded when the agreement underlying the proposed legislation is not well publicised.[331]

4.251 Dr Evans stated that a '…system of scrutiny and consultation is required to ensure the agreement making process is subject to the principles of transparency and accountability in government'.[332] Specifically, Dr Evans recommended that intergovernmental agreements should be circulated in draft form prior to finalisation for public scrutiny and comment and considered by parliamentary committees in each jurisdiction, and that the current register of intergovernmental agreements should be augmented so as to include all agreements requiring legislative implementation.[333]

4.252 The Committee agrees with Dr Evans in relation to intergovernmental agreements. These agreements can be significant components of harmonisation between governments (and intergovernmental

328 Dr Simon Evans, *Submission No. 31*, p. 3.

329 Dr Simon Evans, *Submission No. 31*, p. 1.

330 Dr Simon Evans, *Submission No. 31*, p. 3.

331 Dr Simon Evans, *Submission No. 31*, p. 4.

332 Dr Simon Evans, *Submission No. 31*, p. 3.

333 Dr Simon Evans, *Submission No. 31*, pp. 1-2. The current register of intergovernmental agreements can be accessed at: http://www.coag.gov.au/guide_agreements.htm.

coordination more generally) and, in the interests of transparency and accountability, should be made available for public and parliamentary scrutiny while in draft form. The register of intergovernmental agreements maintained by COAG should also include all agreements requiring legislative implementation.

Recommendation 26

4.253 **The Committee recommends that the Australian Government raise, at the Council of Australian Governments or other appropriate forum:**

- **The circulation of draft intergovernmental agreements for public scrutiny and comment;**
- **The parliamentary scrutiny of draft intergovernmental agreements; and**
- **The augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation**

With a view to the implementation of these reforms throughout the jurisdictions.

Harmonisation between Australia and New Zealand

4.254 The Committee notes that, in many of the areas considered above, there is considerable interaction and activity across the Tasman as well as within Australia. In some cases, such as therapeutic goods regulation, work is already in process to achieve legal harmonisation between Australia and New Zealand. To the Committee, it seems to be a matter of logic that if legal harmonisation is to be progressed within Australia in a given area, then harmonisation in that area should also be pursued between Australia and New Zealand where there is a mutual benefit. In particular, given the progress that has been made towards harmonisation in Australia in areas such as court rules, the regulation of the legal profession, and defamation, and the progress that has been made by the TTWG towards aligning the legal frameworks of Australia and New Zealand,[334] the Committee believes that working towards a single trans-Tasman legal market should be a special focus of this work.

334 See Chapter 3 paragraphs 3.137 – 3.176 above.

Recommendation 27

4.255 **The Committee recommends that the Australian governments discuss with the New Zealand Government the trans-Tasman harmonisation of legal systems in respect of all matters relating to Australian harmonisation where there can be mutual benefit. A special focus of this discussion should be the goal of achieving a single trans-Tasman legal market.**

Hon Peter Slipper MP

Chairman

A

Appendix A : List of submissions

1	Viscopy Ltd
2	Professor George Williams
3	Dr Glenister Sheil
4	Tortoise Technologies Pty Ltd
5	Australian Finance Conference
6	Hon Justice Kevin Lindgren
7	Telstra Corporation Limited
7.1	Telstra Corporation Limited (supplementary)
8	Realty Conveyancing Services
9	Fundraising Institute of Australia Ltd
10	Law Society of New South Wales
11	Queensland Minister for Employment, Training and Industrial Relations
11.1	Queensland Minister for Employment, Training and Industrial Relations (supplementary)
12	Ms Susan Cochrane
13	Professor Ted Wright and Professor Fred Ellinghaus
14	Science Industry Action Agenda
14.1	Science Industry Action Agenda (supplementary)

15	Property Law Reform Alliance
16	Business Council of Australia
17	Screenrights
18	Attorney General of Western Australia
19	Attorney General of Queensland
19.1	Attorney General of Queensland (supplementary)
20	Australian Self-Medication Industry
21	Department of the Treasury
21.1	Department of the Treasury (supplementary)
21.2	Department of the Treasury (supplementary)
22	Mr Ray Steinwall
23	New Zealand Government
23.1	New Zealand Government (supplementary)
24	Australian Institute of Conveyancers (Victorian Division) Inc.
25	The Australian Institute of Judicial Administration Incorporated
26	Attorney-General's Department
26.1	Attorney-General's Department (supplementary)
26.2	Attorney-General's Department (supplementary)
26.3	Attorney-General's Department (supplementary)
27	Australia and New Zealand Banking Group Limited
27.1	Australia and New Zealand Banking Group Limited (supplementary)
28	Department of Foreign Affairs and Trade
28.1	Department of Foreign Affairs and Trade (supplementary)
29	Department of Sustainability and Environment Victoria
30	Mr Kevin Lindeberg
30.1	Mr Kevin Lindeberg (supplementary)
31	Dr Simon Evans
32	Australian Law Reform Commission

33 Ms Narelle McDonald

B

Appendix B: Public hearings

Tuesday, 7 March 2006 - Melbourne

Individuals

Professor Gordon Walker

Professor Fred Ellinghaus

Professor Ted Wright

Australia and New Zealand Banking Group Limited

Mr Sean Hughes, Group General Manager, Compliance

Ms Jane Nash, Head of Government and Regulatory Affairs

Australian Institute of Conveyancers (Victorian Division) Inc.

Ms Jillean Ludwell, Chief Executive Officer

Australian Institute of Judicial Administration Incorporated

Professor Greg Reinhardt, Executive Director

Tuesday, 21 March 2006 - Canberra

Department of Foreign Affairs and Trade

Mr Andrew Rose, Executive Officer, Legal Branch

Mr Hans Saxinger, Director, New Zealand Section

Department of the Treasury

Mrs Kylie Adams, Analyst, Consumer Policy Framework Unit, Competition and Consumer Policy Division

Mr Bradford Archer, Manager, Energy, Transport and Communications Unit

Mrs Sandra Patch, Senior Advisor, Competition and Consumer Policy Division

Ms Louise Seeber, Acting Manager, Competition Policy Framework Unit

Ms Ruth Smith, Manager, Marketing Integrity Unit

Mr Damien White, Manager, Prudential Policy - Banking Unit

Science Industry Action Agenda

Dr Terry Spencer, Chair, Regulatory and Workplace Practices Working Group

Attorney General Department

Mr Iain Anderson, First Assistant Secretary, Legal Services and Native Title Division

Ms Amanda Davies, Assistant Secretary, Classification Branch

Mr James Faulkner, Assistant Secretary, Constitutional Policy Unit

Mr Layton Pike, Acting Senior Legal Officer, Classification Branch

Ms Joan Sheedy, Assistant Secretary, Information Law Branch

New Zealand High Commission

Mr Guy Beatson, Counsellor (Economic)

HE Mrs Kate Lackey, High Commissioner

Ms Paula Wilson, Counsellor

Thursday, 6 April 2006 - Sydney

Telstra Corporation Limited

Ms Rosemary Howard, Managing Director, Fixed Line and Packaging

Mr Danny Kotlowitz, Solicitor

Mr Tony Warren, General Manager, Regulatory Affairs

Screenrights

Mr James Dickinson, Licensing Executive

Mr Simon Lake, Chief Executive Officer

Australian Finance Conference Ltd

Mr Stephen Edwards, Legal and Market Consultant

Individual

Mr Ray Steinwall

Law Society of New South Wales

Mrs June McPhie, President

Mr Ian Tunstall, Member, Litigation Law and Practice Committee

Fundraising Institute of Australia Ltd

Mr Andrew Markwell, Chairman

Ms Sue-Anne Wallace, Chief Executive Officer

Property Law Reform Alliance

Mr Murray McCutcheon, Chairman

Mr Paul Waterhouse, Joint Secretary

Viscopy Ltd

Ms Chryssy Tintner, Chief Executive Officer

Committees on Harmonisation of Court Rules of the Council of Chief Justices of Australia and New Zealand

The Hon Justice Kevin Lindgren, Convenor

Business Council of Australia

Mr Steven Münchenberg, Deputy Chief Executive

Individual

Professor George Williams

C

Appendix C: Exhibits

From Professor Gordon Walker:

1 Walker, G, 'The CER Agreement and Trans-Tasman Securities Regulation: Part 1' (2004).

2 Walker, G, 'The CER Agreement and Trans-Tasman Securities Regulations: Part 2' (2004).

From Professor George Williams:

3 Williams, G, 'Co-operative Federalism and the Revival of the Corporations Law: Wakim and Beyond' in *Company and Securities Law Journal,* Vol. 20, No. 3, May 2002.

From Professors Wright and Ellinghaus:

4 Law Reform Commission of Victoria, *Discussion Paper No. 27: An Australian Contract Code,* (1992).

5 Ellinghaus and Wright; 'Summary chapter, Models of Contract Law: an empirical evaluation of their utility' (for publication July 2005),

From Science Industry Action Agenda:

6 Science Industry Action Agenda, *Measure by Measure: Advancing commercialisation, collaboration, and coordination in Australia's science industry. (2005)*

From Australian Self-Medication Industry:

7 Submission by the Proprietary Medicines Association of Australia Inc to National Review of Drugs, Poisons and Controlled Substances Legislation, 1999.

8 Letter to the Secretariat, Review of Drugs, Poisons and Controlled Substances Legislation from ASMI, 6 October 2000.

9 ASMI Submission to National Competition Review of Drugs and Poisons Regulation, July 2001.

10 Submission by ASMI to the Joint Standing Committee on Treaties inquiry into the Agreement between Australia and New Zealand to establish a Joint Scheme for the Regulation of Therapeutic Products, April 2004.

From Australian Institute of Conveyancers (Victorian Division) Inc:

11 Submission by Australian Institute of Conveyancers (Victorian Division) Inc to the Victorian Government on the 2003 Review of the Mutual Recognition Agreement and the Trans Tasman Mutual Recognition Agreement.

12 Report to National Competition Council on Review of the Conveyancing Profession Under Legal Services Provisions, Australian Institute of Conveyancers (Victorian Division) Inc.

13 Extract: Part 13 - Conveyancing Businesses - *Legal Practice Act 1996.*

14 Extract: Part 1, Section 4, *Conveyancers Licensing Act 2003.*

From New Zealand High Commission:

15 Arrangements between The Australian Parties and New Zealand relating to Trans-Tasman Mutual Recognition.

16 Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law.

17 Terms of Reference for a Joint Working Group of Officials on Trans-Tasman Court Proceedings and Regulatory Enforcement.

18 Discussion Paper, Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests.

19 Agreement between the Government of New Zealand and Government of Australia for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products.

From Australian Self-Medication Industry:

20 Submission to the Regulation Taskforce by Australian Self-Medication Industry: Relating to the Scheduling of Drugs and Poisons, November 2005.

From Australia and New Zealand Banking Group Limited:

21 ANZ Submission to the Taskforce on Reducing the Regulatory Burden on Business, December 2005.

From Attorney-General's Department:

22 Trans-Tasman Court Proceedings and Regulatory Enforcement: A public discussion paper by the Trans-Tasman Working Group, August 2005.

23 Australia Law Reform Commission, *Uniform Evidence Law*, Report, December 2005.

From Australian Institute of Judicial Administration Incorporated:

24 Proposal for Harmonisation of Corporations Law Rules of Court, September 1997.

25 National Uniform Court Procedures: Proposal for Research Project, February 1997.

From Professors Wright and Ellinghaus:

26 Ellinghaus and Wright, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Rules? An Empirical Investigation', *in Texas Wesleyan Law Review,* Vol 11, No 2, 2005.

27 Ellinghaus and Wright, *Models of Contract Law: An Empirical Evaluation of their Utility,* Themis Press, 2005.

From Science Industry Action Agenda:

28 Regulation Taskforce Submission from Science Industry Action Agenda (SIAA).

29 Science Industry Action Agenda, Supplementary Submission to the Regulation Taskforce, December 2005.

30 New South Wales Regulation Review: Submission from The Science Industry Action Agenda (SIAA).

From The Law Society of New South Wales:

31 Correspondence from Mrs June McPhie, President, New South Wales Law Society to Director General, NSW Attorney General's Department regarding uniform legislation, 24 March 2006.

From Property Law Reform Alliance:

32 Members of the Property Law Reform Alliance, January 2006.

From Hon Justice Kevin Lindgren:

33 Lindgren, K, 'Harmonisation of Rules of Court in Australia'. Paper for Australian Institute of Judicial Administration (AIJA) Annual Conference, September 2004.

Confidential

34