THE HONOURABLE CHRIS PEARCE MP

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The Hon Peter Slipper, MP
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

Thank you for your letter of 8 March 2005 to the Treasurer concerning your Committee's inquiry into the 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.

A submission, focussing on harmonisation of business law within Australia and between Australia and New Zealand of relevance to the Treasury portfolio, is enclosed.

Yours sincerely

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SUBMISSION

TO

THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO LACK OF HARMONISATION WITHIN AUSTRALIA'S LEGAL SYSTEM AND BETWEEN THE LEGAL SYSTEMS OF AUSTRALIA AND NEW ZEALAND

APRIL 2005

PURPOSE

This submission focuses on the harmonisation of business law within Australia, and between Australia and New Zealand. It does not address other particular areas of possible harmonisation which are specified in the terms of reference which are primarily of relevance to other portfolios.

1. HARMONISATION WITHIN AUSTRALIA'S LEGAL SYSTEM

INTRODUCTION

This portfolio has direct experience of harmonisation within Australia's legal system through the competition and consumer protection legislation and the corporations legislation.

It has been recognised that significant benefits flow from having a harmonised business law framework in Australia. The current harmonised corporate law framework in Australia ensures that the significant percentage of companies that transact business across State borders will not face the requirement to register as a foreign company in States or Territories in which the company is not incorporated. Further with a single national securities exchange, the Australian Stock Exchange, the national corporations law arrangements provides a single regime in which participants, listed entities and investors in all the States and Territories can enter into transactions across Australia. National arrangements are particularly significant given that the market for so many products is Australia-wide. In general terms, harmonisation of business regulation assists in providing certainty for investors and business confidence, and reduces regulatory and compliance costs.

This section comments on the competition and consumer legislation and the corporations legislation.

A COMPETITION AND CONSUMER PROTECTION

Competition Laws

The competition provisions of the *Trade Practices Act 1974* (the TPA) are a crucial element of the Australian Government's competition policy. The objective of the TPA is to enhance the welfare of Australians by promoting competition and fair trading and providing for consumer protection.

The TPA generally prohibits corporations from engaging in anticompetitive and unfair trading practices, including misleading and deceptive conduct, and also prohibits the supply of products declared unsafe or which breach mandatory standards.

Originally, the scope of the TPA was limited by the extent of the Commonwealth's constitutional power. The TPA relied primarily on the trade and commerce power and the corporations power and thus could not be applied generally across the country. It did not cover the activities of State or Territory governments or of their instrumentalities. Nor did it apply to the activities of unincorporated entities operating within a state. This meant that individuals, such as those in the professions, were not subject to the competition provisions unless they were within the Australian Capital Territory.

These limitations were examined by the Hilmer Committee, established in 1992 to inquire into competition policy in Australia, which recommended that the competition provisions (Part IV of the TPA) should apply uniformly to all business activity in Australia, including that undertaken by government enterprises, in order to realise fully the gains offered by a more competitive economy. These recommendations, and many other recommendations of the Hilmer Committee, were adopted and implemented by a set of intergovernmental agreements, the National Competition Policy (NCP)

Agreements, concluded by the Commonwealth, State and Territory Governments in 1995. In particular, the Competition Principles Agreement and the Conduct Code Agreement sought to ensure that all jurisdictions achieved and maintained consistent and complementary competition laws and policies for all businesses in Australia, regardless of ownership.

To extend the coverage of Part IV and overcome the constitutional limitations, the Commonwealth amended the TPA to insert Part XIA (the Competition Code). This facilitated the application of the Competition Code by the States and Territories. Part XIA introduced a Schedule version of Part IV into the TPA, which is identical to the ordinary version of that Part, except that it refers to 'persons' rather than 'corporations'.

Each State and Territory enacted a Competition Policy Reform Act (CPRA), which came into force between 9 June 1995 (New South Wales) and 21 July 1996 (Western Australia). These Acts applied the Competition Code as a law of that State or Territory (section 5), which ensured that the Competition Code was administered as if it constituted a single law of the Commonwealth. Section 19 of each CPRA specifically confers on the authorities and officers of the Commonwealth, including the Australian Competition and Consumer Commission, the functions and powers set out in the relevant Competition Code.

To ensure that government enterprises are not immune from the competition laws, the Commonwealth amended section 2 of the TPA. Consequently, sections 2A and 2B provide that Part IV binds the Crown in right of the Commonwealth, the States and the Territories in so far as they carry on a business, either directly or through a government authority.

Notwithstanding the aforementioned, the 'universal' coverage of Part IV is not complete. Section 51 of the TPA provides for statutory exemptions. It allows conduct, otherwise in contravention of Part IV, which is specified in, and specifically authorised by, Commonwealth, State or Territory law.

The Conduct Code Agreement requires the Commonwealth to consult with states and territories before it puts forward for Parliamentary consideration any modification to Part IV of the TPA or the Competition Code text. This involves a three month consultation period with states and territories (in accordance with Clause 7 of the Agreement). Once the consultation process is complete, it then involves a 35 day vote on the proposed amendments (in accordance with Clause 6 of the Agreement). In the voting process, each state and territory has one vote. The Commonwealth has two votes, plus a casting vote. If a state or territory has not voted within the 35 day period, that jurisdiction will be taken to have voted in favour of the proposed amendments.

The Productivity Commission has recently provided to the Australian Government its final report from an inquiry into NCP arrangements. The report was tabled on 14 April 2005. As noted above, the extended application of the TPA is a part of the NCP arrangements. The NCP inquiry report notes that the implementation of NCP has brought substantial benefit to the Australian community, including regional Australia, which overall have greatly outweighed the costs. The Commission has suggested that national coordination will be critical to good outcomes in a number of key, future reform areas, including in relation to further enhancing the institutional and regulatory architecture in place to promote efficient competition across the economy. As the inquiry was intended to inform the Council of Australian Governments (COAG) review of NCP, scheduled to be completed in 2005, there will be no formal Government response to this report. The Government's response will instead be the outcome of the COAG review.

The Productivity Commission undertook a review of the application of the TPA to local government in 2002. The PC Report concluded that the current section 2D of the TPA (exempts licensing decisions and internal transactions of local government from Part IV of the TPA) be

repealed and replaced with a new section which provides explicitly that the TPA should apply to local government in so far as it carries on a business.

Legislative amendments which give effect to these recommendations have been endorsed by Government and are currently being considered by the Parliament as Schedule 10 of the Trade Practices Act Amendment Bill No. 1 2005.

The Part IV provisions of the TPA have recently undergone comprehensive review by the Dawson Committee. The Dawson Committee reported in January 2003 and concluded that the competition provisions of the TPA had served Australia well. The Committee also supported the view that the provisions of the TPA should support the competitive process and not particular competitors. Legislative amendments that give effect to the majority of the Dawson recommendations are currently being considered by the Parliament and contained in the Trade Practices Act Amendment Bill No. 1 2005.

Third party access to services provided by significant infrastructure facilities

Access arrangements in Australia comprise both a generic national access regime and several industry-specific regimes governed by Commonwealth or State and Territory legislation. A variety of Commonwealth and State and Territory regulatory bodies are responsible for administering the various regimes.

The national access regime for 'essential' infrastructure services was introduced in the National Competition Policy Agreements as part of the response to the Hilmer Committee's report. The regime facilitates third party access, on 'reasonable' terms and conditions, to the services of certain essential facilities of national significance such as electricity grids or natural gas pipelines, where replicating the infrastructure concerned would not be economically feasible. The object of the access regime is to encourage competition in related markets.

The regulatory provisions of the regime are contained in Part IIIA of the TPA and Clause 6 of the Competition Principles Agreement. Part IIIA is an umbrella framework that sets out mechanisms for permitting third party access to the services supplied by eligible facilities or infrastructure; the arbitration of access disputes; and the roles and responsibilities of the institutions which administer the arrangements.

The Competition Principles Agreement states explicitly that the national access regime is not intended to cover a service provided by means of a facility where the State or Territory in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles described at Clause 6 of the Agreement. Thus, the Competition Principles Agreement encourages a degree of harmonisation between the national access regime and the industry-specific regimes of the States and Territories.

The Productivity Commission completed a review of the national access regime in 2001. The Commission supported the retention of the regime and the dual legislation approach - the generic national access regime side-by-side with specific industry regimes. The Commission did make thirty-three recommendations to improve the operation of the national access regime, including in relation to clarifying the regime's objectives and scope, strengthening incentives for commercial negotiation and improving the certainty and transparency of regulatory processes.

The Australian Government will soon be introducing legislation into the Parliament to amend Part IIIA and thereby implement its response to the Commission's recommendations. The response, developed in close consultation with the States and Territories, supports most of the Commission's recommendations. The Australian Government has announced its intention to work with States and

Territories to consider and progress appropriate changes to Clause 6 of the Competition Principles Agreement in light of the amendments to be made to Part IIIA.

Consumer Protection

The TPA is also Australia's primary legislation in relation to consumer protection and fair trading. The consumer provisions of the TPA prohibit corporations from engaging in unfair trading practices, imply certain conditions and warranties in consumer contracts and provide a mechanism for responding to unsafe products in the market. At the Commonwealth level, the unfair trading practices provisions are also replicated specifically for financial services in the *Australian Securities and Investments Commission Act 2001*.

To ensure the consumer provisions apply to all Australian businesses, 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.

Enforcement primarily falls to Australia's consumer protection regulators both at the Commonwealth level with the Australian Competition and Consumer Commission (ACCC) and ASIC and at the state and territory level with their fair trading offices.

The Australian Government actively participates in the Ministerial Council on Consumer Affairs (MCCA), the Standing Committee of Officials of Consumer Affairs (SCOCA) and their associated advisory committees.

MCCA provides an avenue for the Australian Government, the state and territory governments and the New Zealand Government to discuss consumer issues of national significance. MCCA is tasked with considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues.

In August 2004, MCCA committed to undertaking a review of MCCA, SCOCA and the supporting advisory committees and working groups. The review will examine the structure, operations, performance and achievements of MCCA to ensure that MCCA remains focussed and effective in ensuring consumers are adequately protected in Australia.

The Parliamentary Secretary to the Treasurer, The Hon Chris Pearce MP is currently the Chair of MCCA. In its year as Chair of MCCA, the Australian Government is seeking to ensure that MCCA and its supporting bodies are effective and are able to deliver swift, appropriate and consistent outcomes for consumers. In particular, the Government will work cooperatively with the state and territory governments to ensure that the work of MCCA focuses on issues of national significance.

Under the auspices of MCCA, the Australian Government is leading a review into the operation of the Australian consumer product safety system. The review has identified that while the product safety provisions of the TPA and state and territory fair trading acts are similar there are inconsistencies in the laws and the manner in which they are administered and enforced.

The Australian Government has commissioned a Productivity Commission research study into the impacts of options for reforming the Australian consumer product safety system.

B. CORPORATIONS LEGISLATION

The current corporations legislation is based on power referred by the States in addition to the Commonwealth's own power.

Two successful challenges to the previous 'applied laws' model in the late 1990s necessitated a review of the constitutional underpinning of the corporations legislation. The Commonwealth and States agreed that the only feasible option that would lead to the desired result in the time available was a reference of powers from the States under s 51(xxxvii) of the Commonwealth of Australia Constitution. The States agreed to refer their constitutional powers in respect of, in general terms, the formation of corporations, corporate regulation and the regulation of financial services and products to the Commonwealth for the next five years.

The result of this agreement was:

- the enactment by the States of the referral legislation (for example, the NSW *Corporations (Commonwealth Powers) Act 2001* and ancillary legislation);
- the enactment by the Commonwealth of the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* on the basis of its own and the referred power; and
- a new formal agreement, the Corporations Agreement 2002, which reflected the new constitutional basis of the legislative scheme.

The State legislation and the Agreement address the States' concerns about the use of the power. The legislation includes provision for termination of the references, and the Agreement specifically addresses the purposes for which the referred power may be used.

As in the previous Commonwealth/State scheme, the Corporations Agreement 2002 provides that:

- The Ministerial Council for Corporations must be consulted by the Commonwealth in relation to all amendments to the relevant legislation, and its approval is required for certain amendments.
- Members of the Council must be consulted regarding appointments to certain relevant bodies – for example, the Australian Securities and Investments Commission; and
- The Commonwealth must continue to pay forgone revenue payments.

The Corporations Agreement 2002 is to be found at www.treasury.gov.au.

This model follows two based on variations of an 'applied laws' regime, with differing administrative arrangements, in the 1980s and then in the 1990s.

The current model provides a sound constitutional basis, ensuring one law applicable across Australia, enforced by one regulator. However, the referral of power by the States was expressed to be for five years. The States agreed in 2004 to extend that reference for a further five years. This decision, at meetings of the Ministerial Council for Corporations, was reflected in a press release dated 5 November 2004 (Press Release No. 1 of 2004 of the Hon Chris Pearce MP). Recent media reports, however, indicate that at least one State may no longer be committed to extending the reference of power.

The Commonwealth and the States are continuing to explore the possibility of a constitutional amendment to facilitate 'co-operative' schemes generally.

2 CO-ORDINATION OF BUSINESS LAW BETWEEN AUSTRALIA AND NEW ZEALAND

INTRODUCTION

The Treasury strongly supports harmonisation of business law between Australia and New Zealand. Harmonisation offers the prospect of reducing the costs of regulatory supervision and business compliance for trans-Tasman trade and investment. Given that Australia and New Zealand have similar legal and cultural backgrounds, along with long standing trade and investment activity between the two economies, a program to address impediments to trade and investment is an important element in the closer integration of the two economies.

The benefits of co-ordination of business law between Australia and New Zealand

The mutual benefits to be obtained by Australia and New Zealand in co-ordinating business law are described in the Memorandum of Understanding dated 31 August 2000 between the two countries on co-ordination of business law (the MOU). This, the second MOU on this subject, sits under the umbrella of the Australia-New Zealand Closer Economic Relations Trade Agreement which took effect in 1983 and refers to the desire of both countries to deepen the trans-Tasman relationship within the global market. It:

- reflects the desire of both Governments to deepen the relationship between the two countries, creating a mutually beneficial trans-Tasman commercial environment; and
- 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.

Economic integration is a desirable goal because differences in regulation can distort the efficient operation of markets, leading to lower levels of real income in domestic economies. Consequently, transnational legislative and regulatory co-ordination is needed to achieve the full benefit of economic integration. Further, given that both economies have a long history of trade and investment flows between them, it is a logical extension of this natural development to ensure that there are no unnecessary impediments to the free flow of capital and goods between the two economies.

Approaches to co-ordination of business law

The MOU refers to the array of approaches that exist to achieve the goal of increased co-ordination of business law. It states 'Both Governments recognise that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so that they do not create barriers to trade and investment. In working towards greater co-ordination the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition' (clause 4 of the MOU).

This variety of approaches is reflected in the examples of co-ordination projects referred to below:

- a joint approach to influencing the development and implementation of international accounting standards;
- consideration to the possibility of joint institutions in a number of business law areas in the longer term;

- mutual recognition of securities offer documents;
- gradual reduction in the steps required for companies to operate across the Tasman with the aim of mutual recognition of companies in the longer term; and
- mechanisms which will assist in dealing with cross-border insolvency.

New Zealand has also unilaterally harmonised with Australia a number of aspects of its law relating to, for example, the securities industry in recent years. In addition, the effect of convergence of international standards in some areas has affected the Australia-New Zealand relationship - both countries are, for example, adopting International Financial Reporting Standards.

It is expected that greater harmonisation of business law between Australia and New Zealand will lead to greater consultation on legislative policy issues which may lead to amendments of the business law of either country. This is obviously necessary if the two regimes are to remain harmonised.

Review of the Memorandum of Understanding

A review of the MOU will take place this year in accordance with the commitment included in the MOU to review it every five years. The arrangements for that review and the matters to be considered during the review are currently being discussed.

COORDINATION PROJECTS CARRIED OUT UNDER THE MOU

The annex to the 2000 MOU listed areas of business law where work on coordination was to be undertaken. These are listed in Attachment A. Of the matters where work is currently being undertaken an update on progress on the following projects is outlined in this document:

(i) Accounting Standards
(ii) Mutual recognition of companies
(iii) Cross-border insolvency
(iv) Mutual recognition of offer documents
(v) Competition law and consumer protection
(vi) Trans-Tasman Council on Banking Supervision
(vii) Trans Tasman Mutual Recognition
(viii) Relevant projects in other portfolios

Of relevance in the success of a number of these proposals is co-operation between regulators. This includes information sharing in accordance with the statutory mutual assistance regimes, as well as at the more informal level. In this connection, we note the current co-operative arrangements – for example, between ASIC on the one hand and the New Zealand Securities Commission and the New Zealand Registrar of Companies on the other. Cross-appointments (for example, between the Takeovers Panels of Australia and New Zealand) and meetings of regulators also assist in developing better understanding between regulators.

(i) Accounting standards

On 30 January 2004, the Commonwealth Treasurer, the Hon Peter Costello MP, and the NZ Minister of Finance, the Hon Dr Michael Cullen, announced the formation of the Trans-Tasman Accounting Standards Advisory Group (TTASAG). The purpose of TTASAG is to:

- progress work towards common accounting standards in Australia and New Zealand in order to reduce transaction costs for businesses operating in both countries; and

- enhance the influence of the two countries in the development of international accounting standards.

Membership of 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.

To date TTASAG has focused on:

- 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.

A number of reciprocal cross-appointments have been made between Australian and New Zealand accounting standard setters and oversight bodies to formalise and increase high-level coordination between those bodies.

(ii) **Mutual recognition of companies**

The MOU calls for harmonisation of company laws, in particular the mutual cross-recognition of companies. When fully implemented, cross-recognition will significantly reduce compliance costs for companies operating in both markets.

At this time, the legal and administrative differences between the Australian and New Zealand company law regimes prevent the full cross-recognition of companies. However, the Australian Treasury, Australian Securities and Investments Commission, New Zealand Ministry for Economic Development and the New Zealand Securities Commission have been discussing methods for a three stage implementation of mutual recognition. This process will allow for gradual reduction of requirements and barriers prior to full recognition being granted by both countries.

It is expected that this process will result in measures aimed at reducing duplication in reporting requirements being implemented in 2005-06.

(iii) Cross border insolvency

It is expected that a draft Bill will be released in the second half of 2005, concerning the enactment by Australia of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross-Border Insolvency. The Model Law was developed in 1997, and provides mechanisms for dealing with cases of cross-border insolvencies.

The purpose of the Model Law is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- co-operation between the courts and other authorities involved in cases of cross-border insolvency;
- greater legal certainty for trade and investment;

- fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons;
- protection and maximisation of the value of assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The UNCITRAL Model Law has been adopted in Japan, India, South Africa, Mexico, Montenegro and Eritrea. It is also being considered for adoption in USA, UK, Canada and Malaysia.

New Zealand is also in the process of developing draft legislation. There has been discussion at officials level about the ideas of information sharing at the drafting stage, and further cooperation in streamlining procedures under the Model Law.

(iv) Mutual recognition of offer documents

On 4 October 2001, the then Australian Minister for Financial Services and Regulation, the Hon Joe Hockey MP, wrote to the then New Zealand Minister of Commerce, the Hon Paul Swain, proposing that Australia and New Zealand consider formal processes of mutual recognition in financial services regulation. Officials were invited to consider arrangements for mutual recognition in the areas of fundraising and collective investment schemes.

The potential benefits of a trans-Tasman mutual recognition arrangement 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
- providing investors with more opportunities to manage risk through geographical diversification of their investments.

Officials agreed in 2002 on the following set of principles:

- an issuer should be able to offer securities in both countries using a single disclosure document that satisfies the requirements of the home jurisdiction;
- investors should be able to pursue statutory remedies in the courts of either jurisdiction; and
- both ASIC and the New Zealand Securities Commission (NZSC) should be able to take enforcement action in relation to an offer of securities under the mutual recognition arrangement.

Officials, in consultation with ASIC and NZSC, have developed further and refined the detailed proposal for an agreement based on these principles, which will provide for mutual recognition of regulated offers of securities and interests in managed investment schemes. The proposed regime would 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.

A joint Australian/New Zealand discussion paper based on the above principles was released on 18 May 2004 for two months' public consultation. 29 submissions were received from Australian and New Zealand respondents. Subject to various comments, nearly all respondents strongly support putting in place a mutual recognition regime along the lines described in the paper. Account was taken of the submissions received in framing the treaty and will be taken in framing the domestic legislation.

At a meeting on 4 February 2005, Australian and New Zealand officers largely agreed, subject to further policy consideration of regulatory enforcement and other issues, upon the terms of the proposed regime and treaty.

The treaty is expected to be finalised in the next few months. Domestic legislation will be needed in each country to implement the arrangement.

(v) Competition and Consumer protection

Productivity Commission Research Report

The Productivity Commission's (the Commission's) Final Report into Australia and New Zealand Competition and Consumer Regimes identified that there has been significant convergence of Australia's and New Zealand's competition and consumer protection regimes. Consequently, the regimes are not significantly impeding businesses operating in Australasian markets.

On 29 June 2004, the Treasurer commissioned the research study in the context of the Australia New Zealand Closer Economic Relations Trade Agreement, and associated agreements. The objective of this study was to examine the potential to improve the trans-Tasman business environment through greater coordination, cooperation and integration of the Australian and New Zealand consumer protection and policy regimes.

The Commission released its Final Research Report on 13 January 2005 which was informed by a Draft Research Report in October 2004 and roundtables which were held during November 2004.

The Commission considered that although the regimes are already highly integrated, the long term objective of a single economic market for Australia and New Zealand would be assisted by a package of measures involving a transitional approach to integration of the two regimes, including:

- Retaining, but further harmonising, the two sets of laws in relation to competition and consumer protection policy.
- Making more formal the policy dialogue between the two Governments on competition policy.
- Providing scope for businesses to have certain approvals considered on a 'single track' (but with separate formal decisions by each jurisdiction).
- Enhancing cooperation between the two regulatory institutions (the Australian Competition and Consumer Commission and the New Zealand Commerce Commission), including in relation to enforcement and research.
- Providing for investigative powers of regulators to be used to assist the regulator in the other country.
- Enhancing the information sharing powers of the respective regulators (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure).
- Adding consideration of impediments to a single economic market to the scope of the proposed review of Australian consumer protection.

The Commission's Report and its recommendations were endorsed in principle by the Hon Peter Costello MP and the Hon Dr Michael Cullen at their meeting of 17 February 2005. Officials in both Australia and New Zealand are presently considering how best to implement these recommendations.

Information sharing

The Commission made a number of recommendations that relate to the ability of regulators to use information gathering powers for the purposes of investigative assistance, information sharing and the disclosure of confidential or protected information.

- Implementing these recommendations would involve amendments to section 155 of the *Trade Practices Act 1974*.

- Officials from both Australia and New Zealand are considering the options expressed in the PC Report and have expressed a desire that amendments be multi-lateral in approach and not apply specifically to New Zealand.

Consumer Policy

The Commission recommended that any upcoming review of Australia's consumer policy, including legislation (specifically Part V of the *Trade Practices Act 1974* and also state legislation), should include an examination of the possible impediments in the current arrangements to greater economic integration between Australia and New Zealand.

(vi) Trans-Tasman Council on Banking Supervision

On 17 February 2005, in a joint media statement, the Hon Peter Costello MP and the Hon Dr Michael Cullen referred to the benefit in moving towards seamless regulation of the Australian and New Zealand banking markets.

For this purpose, they agreed on a Trans-Tasman Council on Banking Supervision. The Council will, among other things, enhance co-operation on the supervision of trans-Tasman banks and information sharing between respective supervisors and 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.

The Council will be chaired jointly by the Secretaries to the Treasuries of Australia and New Zealand, and will also include senior officials from APRA, RBNZ and the RBA.

(vii) Trans-Tasman Mutual Recognition Arrangement

The Trans Tasman Mutual Recognition Arrangement (TTMRA) extends Australia's Mutual Recognition scheme operating between the Commonwealth, State and Territory jurisdictions to include New Zealand. The TTMRA commenced operation in 1998. 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.

A review of the mutual recognition schemes was undertaken by the Productivity Commission in 2003 and found that the TTMRA has clearly been effective in achieving their objectives of assisting the integration of the Australian and New Zealand economies and promoting competitiveness. The Productivity Commission review also acknowledged the cooperation between Australia and New Zealand on consumer product safety regulations as an outstanding TTMRA success. To further improve the effectiveness of the TTMRA in relation to product safety, the Productivity Commission review proposed that the Ministerial Council on Consumer Affairs (MCCA) be asked to report to the Council of Australian Governments on the feasibility of an integrated, more flexible approach to product bans, recalls and temporary exemptions.

MCCA is currently undertaking a review of Australia's Product Safety Framework. The Product Safety review will include an examination of the administrative issues surrounding bans, recalls, information sharing and temporary exemptions.

In 1997 MCCA undertook a TTMRA consumer product cooperation program to resolve the differences between the Australian and New Zealand regulations. At the commencement of the TTMRA there were some 300 consumer product regulations applying in Australian jurisdictions, and about 14 in New Zealand. The TTMRA consumer product cooperation program determined that all but one of the regulations can be subject to mutual recognition or are effectively harmonised.

The remaining regulation relates to motor vehicle child restraints, which have different safety requirements in New Zealand and Australia. Because harmonisation of this regulation is dependent on the possible alignment of Australian and New Zealand regulations for motor vehicles, it is being recommended that the regulation be transferred to the motor vehicle Cooperation Program. This transfer would conclude the Cooperation Program for consumer products.

(viii) Relevant projects in other portfolios

The Federal Attorney-General's Department and the New Zealand Ministry of Justice are preparing a discussion paper which:

- highlights a number of recurrent problems that arise in civil court proceedings with a trans-Tasman element or the enforcement of regulatory regimes such as for securities law or competition law;
- discusses options for addressing those problems and indicates (in most cases) a preferred solution; and
- seeks views on the options and preferred solution.

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.

Intellectual property is also mentioned in the work program of the current MOU. This is also handled within the Attorney-General's portfolio.

ATTACHMENT A

(a) Providing for the cross-recognition of companies

(b) Seeking to achieve greater compatibility in our disclosure regimes in relation to financial products

(c) Managing cross-border insolvency

(d) Providing a regulatory framework for recognising in each jurisdiction a stock market operating in compliance with comparable rules of the other jurisdiction

(e) Exploring the potential for more closely coordinating the granting and recognition of registered intellectual property rights

(f) Facilitating information sharing and, where appropriate, jointly participating in policy, compliance and education programs on consumer issues relating to business law including consumer protection in electronic commerce

(g) Seeking to achieve greater consistency in legislation affecting electronic transactions

(h) Exploring the potential for greater consistency in trans-Tasman application and enforcement of competition law.