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]

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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:

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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]

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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

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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:

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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]

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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]

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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:

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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.

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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.

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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]

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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

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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.

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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:

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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

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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

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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]

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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]

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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]

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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]

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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

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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:

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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]

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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

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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]

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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]

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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:

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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.

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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.