

## Harmonisation within Australia

- 4.1 This Chapter considers current levels of legal harmonisation within Australia in particular sectors and areas of law as raised in the evidence and identifies some possible initiatives for further harmonisation. The main areas that were raised in the evidence are:
- Real estate regulation;
  - Legal issues relating to individuals;
  - Personal property securities law and financial services regulation;
  - Partnership law;
  - Consumer protection law;
  - Standards of products regulation;
  - Not-for-profit sector regulation;
  - Therapeutic goods and poisons regulation;
  - Science industry regulation;
  - Regulation of the legal profession;
  - Legal procedures;
  - Statute of limitations;
  - Service of legal proceedings;
  - Contract law and equity;
  - Evidence law;

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

## Recent national developments

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

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

and as State, Territory and local governments undertake their own regulation review processes.<sup>1</sup>

4.4 Specifically, the jurisdictions agreed to:

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

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

- Rail safety regulation;
- Occupational health and safety;<sup>3</sup>
- National trade measurement;
- Chemicals and plastics;
- Development assessment arrangements; and
- Building regulation.<sup>4</sup>

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

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

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

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

- 4.6 At its most recent meeting in July 2006, COAG reaffirmed its commitment to the National Reform Agenda regulatory reform programme and added four further priority 'hotspot' areas to those listed above:
- Environmental assessment and approvals processes;
  - Business name, Australian Business Number and related business registration processes;
  - Personal property securities; and
  - Product safety.<sup>5</sup>
- 4.7 At the July 2006 meeting COAG agreed that '...officials would develop specific reform proposals reflecting the commitments made today and in February which COAG will consider in early 2007'.<sup>6</sup>
- 4.8 In addition to the work of COAG, the Taskforce on Reducing the Regulatory Burden on Business (appointed in October 2005) released its final report, *Rethinking Regulation*, in April 2006. In this report the Taskforce identified 'Overlapping and inconsistent regulatory requirements' as one of the prominent regulatory issues that '...stand out in terms of the likely significance of the burdens for individual businesses and the number of businesses potentially affected'.<sup>7</sup> The Taskforce further stated that:

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

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

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

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

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

- 4.9 In August 2006 the Government responded to the Taskforce's *Rethinking Regulation* report, accepting 158 of its 178 recommendations in whole or in part.<sup>9</sup> In particular, the Committee notes that the Government agreed to the recommendation that there be targeted reviews of areas of regulatory overlap and inconsistency between the Commonwealth and the States/Territories, and also to the recommendation that a framework be developed for national regulatory harmonisation. The Government indicated that the current COAG regulatory reform agenda would implement these recommendations.<sup>10</sup>
- 4.10 At its July 2006 meeting COAG indicated that national harmonisation work is proceeding in regard to jurisdictional payroll tax regimes and occupational health and safety standards as identified in the Taskforce report.<sup>11</sup>
- 4.11 In the context of COAG's considerable regulatory reform agenda – particularly the agreement to work towards regulatory consistency and reduced duplication throughout the jurisdictions – and the Taskforce report, the Committee envisages that its recommendations in this report will complement and support the work of the Commonwealth, States and Territories by highlighting specific areas of concern that require harmonisation.

## Real estate regulation

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

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9 Media release of the Treasurer, the Hon Peter Costello MP, 15 August 2006. This document can be accessed at:

<http://www.treasurer.gov.au/tsr/content/pressreleases/2006/088.asp>.

10 *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business: Australian Government's Response*, pp. 86-87. This document can be accessed at:

<http://www.treasurer.gov.au/contentitem.asp?NavId=002&ContentID=1141>.

11 COAG Communiqué, 14 July 2006, p. 8. The ANZ Bank submitted that there are '...significant differences in the application and operation of payroll tax between States and Territories': *Submission No. 27*, p. 14, and Mr Sean Hughes, ANZ Bank, *Transcript of Evidence*, 7 March 2006, p. 25.

## Regulatory inconsistencies and complexity

4.13 The AGD noted that each State and Territory has its own land register and systems of real property and conveyancing regulation.<sup>12</sup> In its submission the Property Law Reform Alliance (PLRA), which is a ‘...coalition of legal and industry associations’,<sup>13</sup> listed over 70 separate pieces of key legislation from across the States and Territories regulating real estate transactions.<sup>14</sup>

4.14 A number of submissions pointed to inconsistencies and complexity in the regulation of real estate transactions across the different jurisdictions. The AGD, for example, indicated that:

The lack of uniformity with existing States and Territory systems and the absence of a national land register can increase the complexity and costs associated with the conveyancing system, especially where transactions have an interstate element. For example, law firms and financial institutions with offices in several States and Territories cannot standardise procedures or develop manuals and staff training to be implemented across the country. Consumers who purchase property interstate will also be affected as different protections exist in different jurisdictions.<sup>15</sup>

4.15 The ANZ Bank informed the Committee that the ‘...patchwork of State and Territory laws’ causes compliance difficulties for the Bank as a ‘...national financier of real estate transactions’, particularly where interstate real estate transactions are involved.<sup>16</sup> The Bank noted that regulatory inconsistencies add ‘...significant complexity to bank staff compliance training as well as a substantial risk of non-compliance with largely technical requirements’.<sup>17</sup>

4.16 The PLRA stated that:

...the disparate laws and procedures relating to property transactions across state and territory borders mean that any companies investing in property still face significant barriers to efficient business practices. This discourages international

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12 AGD, *Submission No. 26*, p. 30.

13 PLRA, *Submission No. 15*, p. 1. Members include a range of property associations and a number of the Law Societies: PLRA, *Exhibit 32*, p. 1.

14 PLRA, *Submission No. 15*, pp. 4-7.

15 AGD, *Submission No. 26*, p. 30.

16 ANZ Bank, *Submission No. 27*, p. 14.

17 ANZ Bank, *Submission No. 27*, p. 14.

investment and makes property a less attractive investment vehicle for Australian companies... Any individual who moves or invests interstate also faces a completely different set of legal requirements when purchasing (or selling) a property.<sup>18</sup>

4.17 The PLRA submitted that a '...comprehensive reform of Australia's property laws'<sup>19</sup> is required and contended that moving towards uniform real estate laws across the jurisdictions in Australia would:

- Enable the adoption of the most '...efficient, rigorous, and fair system' for real estate transactions in the States and Territories;
- Facilitate interstate real estate transactions for individuals and businesses; and
- Place real estate investment on a '...level playing field with other asset classes'.<sup>20</sup>

4.18 The PLRA informed the Committee that it is currently reviewing inconsistencies in real estate regulation throughout Australia and developing a model Real Property Act.<sup>21</sup>

4.19 While not proposing a comprehensive review of the real estate legislation throughout the States and Territories, the AGD suggested that a reform of title registration on a national basis would be desirable:

...the operation and interpretation of Torrens title differs between each jurisdiction... Having a national registration system would allow for increased security and certainty of title, potentially less delay and expense in transferring title, simplification of the processes and increased accuracy in the transactions. Greater harmonisation would be particularly beneficial at a time when most jurisdictions are moving toward electronic conveyancing and registration systems.<sup>22</sup>

4.20 The Victorian Department of Sustainability and Environment (DSE) informed the Committee of current projects to develop electronic conveyancing systems in the different jurisdictions and a harmonised

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18 PLRA, *Submission No. 15*, p. 2.

19 PLRA, *Submission No. 15*, p. 2.

20 PLRA, *Submission No. 15*, p. 3.

21 PLRA, *Submission No. 15*, pp. 1, 3; see also Mr Murray McCutcheon, PLRA, *Transcript of Evidence*, 6 April 2006, pp. 54-55.

22 AGD, *Submission No. 26*, p. 30.

national Torrens title registration system. With regard to electronic conveyancing, the DSE stated that the Victorian system is due to commence in 2006 and will:

...eliminate the need for settlement parties to arrange and attend a physical venue to complete a property transaction. Electronic conveyancing will offer financial settlement with multilateral electronic funds transfer into nominated bank accounts, self-assessment and payment of duty, and lodgement of electronic instruments with Land Registry for registration, electronically and remotely in one consecutive process. The settlement process... from end to end, will be completed in approximately one hour.<sup>23</sup>

- 4.21 The DSE stated that the electronic conveyancing project is a '...completely new concept not attempted anywhere else in the world' and could result in cost reductions nationwide of at least \$150 million per annum.<sup>24</sup> The DSE indicated that similar initiatives are being progressed in New South Wales, Queensland and South Australia, and that Victoria and New South Wales have prepared an agreement to advance a national electronic conveyancing system that has received in-principle support from all of the other jurisdictions.<sup>25</sup> The Committee also understands that SCAG agreed in November 2006 to monitor the project.<sup>26</sup>
- 4.22 In its submission the ANZ Bank endorsed the Victorian electronic conveyancing project and stated that 'ANZ hopes this project will act as a driver for more national uniformity in conveyancing laws'.<sup>27</sup>
- 4.23 With regard to the national Torrens title registration harmonisation project, the DSE informed the Committee that the project, which was commenced in 2004 by the Australian Registrars of Titles,<sup>28</sup> involves simplifying conveyancing instruments and documentation, reviewing land title legislation in each jurisdiction, and formulating model

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23 DSE, *Submission No. 29*, p. 3.

24 DSE, *Submission No. 29*, pp. 3-4.

25 DSE, *Submission No. 29*, pp. 3-4.

26 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at:

<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0>.

27 ANZ Bank, *Submission No. 27*, p. 14.

28 DSE, *Submission No. 29*, p. 1.



national legislation on Torrens title registration.<sup>29</sup> The model legislation will make full use of technology ‘...to assist in managing differences which would be hard to reconcile with paper documents’.<sup>30</sup> The DSE also stated that the project:

...should allow Australians and their legal and conveyancing advisers the opportunity to undertake conveyancing across Australia in one common form with simple common instruments. For the increasingly centralised lending business of major banks and financial institutions and national legal firms, this will eliminate the need to train staff in the conveyancing and legal systems of eight different jurisdictions. It also opens interstate borders to a far greater extent by allowing the trans-jurisdictional trading of land and interests in land.<sup>31</sup>

- 4.24 The Committee commends the electronic conveyancing and harmonised national Torrens title registration projects outlined above. These are innovative and significant developments which, once adopted widely, will substantially reduce the current regulatory inconsistencies and complexities surrounding real estate transactions in Australia and the associated cost burdens. The Committee also supports the PLRA’s development of a model Real Property Act, which could be implemented on a cooperative basis by means of the applied or complementary legislation mechanisms. The Committee is hopeful that all of these developments will go a considerable way towards achieving a truly national real estate regulatory framework.

## Conveyancing

- 4.25 The Victorian Division of the Australian Institute of Conveyancers (VAIC), a representative association for conveyancers in Victoria, raised the issue of licensing and registration for Victorian conveyancers. In its submission the VAIC indicated that, unlike New South Wales, Victoria had no licensing or registration system for conveyancers.<sup>32</sup> The VAIC submitted that the lack of such a system

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29 DSE, *Submission No. 29*, pp. 1, 4-5. The DSE indicated that the project is supported by the PLRA: p. 4.

30 DSE, *Submission No. 29*, p. 4.

31 DSE, *Submission No. 29*, p. 5.

32 VAIC, *Submission No. 24*, p. 1. The VAIC indicated in oral evidence that the only other jurisdictions without licensing systems for conveyancers are Queensland and the ACT: Mrs Jillean Ludwell, VAIC, *Transcript of Evidence*, 7 March 2006, p. 28.

meant that Victorian conveyancers were limited to performing non-legal work, that there was no officially regulated entry into the conveyancing occupation in Victoria, and that there was no scope for mutual recognition in other jurisdictions.<sup>33</sup>

- 4.26 Subsequent to making its submission, however, the VAIC informed the Committee that a licensing system is to be established in Victoria for conveyancers:

...the Victorian government have finally announced that they are introducing a licensing system for conveyancers in Victoria. ...It will recognise experience and education and require professional indemnity insurance... It will put Victorian conveyancers on a par with their licensed counterparts in other states.<sup>34</sup>

- 4.27 The VAIC indicated that the legislation to establish the licensing system may be introduced in the 2006 spring session of the Victorian Parliament.<sup>35</sup>

## Legal issues relating to individuals

- 4.28 The main legal issues raised in the evidence relating to individuals were power of attorney, statutory declarations, and succession law. Each of these areas is regulated by the States and Territories.

### Power of attorney

- 4.29 The AGD informed the Committee that:

There is different and sometimes conflicting legislation governing the execution and operation of powers of attorney in each State and Territory. Formal requirements (such as registration) also differ which can result in powers of attorney made in one jurisdiction not being recognised in another.<sup>36</sup>

- 4.30 The Department also noted that:

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33 VAIC, *Submission No. 24*, pp. 1-2.

34 Mrs Jillean Ludwell, VAIC, *Transcript of Evidence*, 7 March 2006, p. 28.

35 Mrs Jillean Ludwell, VAIC, *Transcript of Evidence*, 7 March 2006, p. 28

36 AGD, *Submission No. 26*, p. 31.

...SCAG has previously considered the issue of mutual recognition of powers of attorney and in 2000 endorsed draft provisions for the mutual recognition of powers of Attorney. However, only New South Wales, Victoria, Queensland and Tasmania have implemented legislation in accordance with the draft provisions.<sup>37</sup>

- 4.31 As noted at the beginning of this report, one example of senselessness resulting from regulatory inconsistency that emerged during the course of the inquiry is the lack of recognition in the Australian Capital Territory of a power of attorney granted in New South Wales.<sup>38</sup> The LSNSW indicated that:

Power of attorney executed in New South Wales is not effective when a person moves into a nursing home in the ACT. They are in another jurisdiction, regardless of where the assets are. If they have lost the capacity at the time they enter the ACT, they cannot enter into and grant another power of attorney.<sup>39</sup>

- 4.32 The LSNSW stated that this is an issue of '...great concern' relating to '...lack of equality of laws'.<sup>40</sup> Other evidence to the inquiry suggested that power of attorney granted in Queensland will not be recognised in the ACT either. In her submission, Ms Susan Cochrane, who has a parent living in Queensland with executed power of attorney, stated that:

I have been advised by the Office of the Community Advocate that, under relevant legislation in the ACT, I would not be entitled to rely on the Queensland instrument to make decisions... for my father were he to move to the ACT. Instead, the OCA advises me that I will need to go through the process of seeking a guardianship order.<sup>41</sup>

- 4.33 Ms Cochrane indicated that the ACT Government has acknowledged the lack of recognition in the ACT for interstate power of attorney instruments.<sup>42</sup> Ms Cochrane did also note that '...there is legal

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37 AGD, *Submission No. 26*, p. 31.

38 See p. vii above.

39 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 32.

40 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 32.

41 Ms Susan Cochrane, *Submission No. 12*, p. 2.

42 Ms Susan Cochrane, *Submission No. 12*, p. 2. See the 2004 ACT Government issues paper *Substituted Decision-Making: Review of the Powers of Attorney Act 1956*, p. 31. This document can be accessed at: [http://www.jcs.act.gov.au/eLibrary/discuss\\_papers.html](http://www.jcs.act.gov.au/eLibrary/discuss_papers.html).

opinion to the contrary effect about the ACT legislation, so the matter is not free from doubt for donors, donees or third parties'.<sup>43</sup>

- 4.34 The Committee believes that there should be consistency among the jurisdictions with regard to the mutual recognition of power of attorney instruments. Individuals should not be disadvantaged or placed in a difficult position with regard to power of attorney merely because they have moved interstate, particularly given that the decision to grant power of attorney can be stressful enough in itself without added complications. Nor should there be any uncertainty regarding interstate recognition for any party involved with a power of attorney. The Committee agrees with the following statement of the AGD:

With an increasing mobile population, both donors and donees of powers of attorney should be confident of the validity of these instruments interstate.<sup>44</sup>

- 4.35 Accordingly, the Committee is of the view that the Australian Government should raise mutual recognition of power of attorney instruments again at SCAG with a view to expediting uniform and adequate formal mutual recognition, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by SCAG in 2000. The Committee can see little in the way of potential drawbacks to legal harmonisation in this area.

### **Recommendation 11**

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

## **Statutory declarations**

- 4.37 In its submission the AGD indicated that:

Currently, each jurisdiction regulates the making of statutory declarations for the purposes of a law of that jurisdiction.

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43 Ms Susan Cochrane, *Submission No. 12*, p. 2.

44 AGD, *Submission No. 26*, p. 31.

However, the classes of persons who may witness statutory declarations and the forms that are to be used differ across jurisdictions.<sup>45</sup>

- 4.38 The range of permitted witnesses for Commonwealth and ACT statutory declarations, for example, is wider than the range of permitted witnesses for a NSW statutory declaration, and the forms that must be used differ also.<sup>46</sup> The AGD submitted that harmonisation across Australia of the forms, rules, and offence provisions relating to statutory declarations would ‘...assist people engaged in business and ordinary citizens’, and that making statutory declarations outside Australia (e.g. in New Zealand) easier by broadening the range of permitted overseas witnesses would also be desirable.<sup>47</sup>
- 4.39 The Committee considers that harmonised forms, rules and offence provisions relating to statutory declarations could certainly be beneficial for users in terms of increasing ease of use and reducing uncertainty. The Committee was pleased to learn that the Attorney-General promoted harmonisation of statutory declaration laws, including the introduction of a single form and an agreed list of potential witnesses, at SCAG in November 2006.<sup>48</sup> The Committee believes however that this move towards harmonisation should also encompass offence provisions and an exploration of the possibility of expanding the class of permitted overseas witnesses.

## **Recommendation 12**

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

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45 AGD, *Submission No. 26*, p. 31.

46 AGD, *Submission No. 26*, p. 31.

47 AGD, *Submission No. 26*, p. 31.

48 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006.

This document can be accessed at:

<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0>.

## Succession law

- 4.41 The AGD informed the Committee that succession law ‘...varies significantly in each State and Territory’,<sup>49</sup> and that:
- ...a will may be recognised as admissible to probate in some States but not in others. So, when a person leaves assets across various States and Territories, the will may not be recognised by all jurisdictions.<sup>50</sup>
- 4.42 The Department indicated that a project has been underway since 1991 to review succession law across Australia and formulate model succession laws for the jurisdictions. The project, coordinated by the Queensland Law Reform Commission (QLRC), has focused on four areas: wills, family provisions, intestacy, and administration of estates.<sup>51</sup> The AGD stated that:
- The QLRC has so far reported on the first two areas [wills and family provisions] and has prepared a supplementary report on Family Provisions. The delay in preparing the report is demonstrative of the complexity of succession law across Australia.<sup>52</sup>
- 4.43 However, in a subsequent submission, the AGD also indicated that:
- The Queensland Law Reform Commission is expected to finalise its reports on Intestacy and the Administration of Estates early in 2006.<sup>53</sup>
- 4.44 The Department further indicated that the Northern Territory and Victoria have legislated to implement the QLRC’s recommendations in relation to wills and that Queensland has legislation before the Parliament also.<sup>54</sup> The Department noted that while this legislation is ‘...largely consistent with the QLRC’s recommendations’, there are some points of ‘...substantial policy departure’.<sup>55</sup>
- 4.45 While it is regrettable that this divergence has arisen, the Committee is heartened by the fact that the implementing legislation to date has been consistent with the QLRC recommendations in the main. The

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49 AGD, *Submission No. 26*, p. 30.

50 AGD, *Submission No. 26*, p. 30.

51 AGD, *Submission No. 26*, p. 30.

52 AGD, *Submission No. 26*, p. 30.

53 AGD, *Submission No. 26.1*, p. 8.

54 AGD, *Submission No. 26.1*, p. 8.

55 AGD, *Submission No. 26.1*, p. 8.

Committee is also mindful of the time that has been taken to reach this point in succession law harmonisation (some 15 years), and considers that a fresh exercise examining harmonisation in this complex area would not be useful or timely. The focus should now be on the completion of the project and the harmonised legislative implementation of the QLRC's recommendations in the remaining jurisdictions.

### **Recommendation 13**

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

## **Personal property securities law and financial services regulation**

### **Personal property securities law**

- 4.47 The AGD indicated that, currently, regulation of personal property securities law:

...is shared between the States and Territories and the Commonwealth. This has led to the development of competing and sometimes contradictory forms of regulation. The current system of regulation is inconsistent, costly and lacks certainty around the priority of competing secured creditors.<sup>56</sup>

- 4.48 In its submission the Department listed over 60 separate pieces of legislation from across the Commonwealth, States and Territories regulating personal property securities.<sup>57</sup> The AGD also detailed a number of specific problems caused by a lack of harmonisation in this area of law such as overlapping, costly and cumbersome registration processes and uncertainty resulting from inconsistent priority rules. Difficulties arising in relation to personal property securities law were

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<sup>56</sup> AGD, *Submission No. 26*, p. 22.

<sup>57</sup> AGD, *Submission No. 26*, pp. 32-33.

also identified by the Queensland Attorney-General<sup>58</sup> and the Australian Finance Conference (AFC).<sup>59</sup>

4.49 The AGD stated that harmonisation in the area of personal property securities law is ‘...highly desirable as it will provide efficiencies [*sic*] improve consistency and certainty for borrowers, lenders and consumers’<sup>60</sup> and will:

- simplify which PPS [personal property securities] nationally are to be subject to registration
- provide clear straightforward registration requirements
- ensure that the information is easily accessible and there is no need to provide for multiple registrations
- simplify administrative processes for registration, and
- ensure clear priority rules.<sup>61</sup>

4.50 The Department also noted international developments in the reform of personal property securities law, particularly New Zealand’s *Personal Property Securities Act 1999*:

The *Properties Securities Act 1999 (NZ)* [*sic*] came into effect in 2002 and established a single procedure for the creation and registration of security interests in personal property as well as a centralised electronic register. New Zealand government officials have reported that its reforms have resulted in increased certainty and confidence to the parties in commercial transactions where personal property is used as a security interest and clarity where competing security interest is an issue.<sup>62</sup>

4.51 The Committee learned that considerable progress has been made towards the national legal harmonisation of personal property securities law in Australia. The AGD informed the Committee that SCAG agreed in March 2005 to establish a working group to examine and develop possibilities for personal property securities law reform, with the goal of establishing a:

...single legal regime for all Australian jurisdictions for the regulation of priorities between the holders of competing PPS

58 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3.

59 AFC, *Submission No. 5*, p. 2. The AFC is a ‘...national finance industry association’: *Submission No. 5*, p. 1.

60 AGD, *Submission No. 26*, p. 22.

61 AGD, *Submission No. 26*, p. 22.

62 AGD, *Submission No. 26*, p. 23.



interests and for the determination of interests between security holders and purchasers.<sup>63</sup>

- 4.52 In a subsequent submission the Department indicated that SCAG released an options paper in April 2006 on the matter which ‘...canvasses policy issues and some of the options available to address them’.<sup>64</sup> The options paper states that:

The benchmarks for any solution are that it would be comprehensive in its coverage, provide legal certainty, and be efficient.<sup>65</sup>

- 4.53 The options paper further states that different legislative measures have been identified for reform, and that:

Each option raises a number of practical and constitutional issues that would need to be worked through. Particular issues relate to the relationship between State and Territory legislation and inconsistent Commonwealth legislation, the conferral of jurisdiction on federal courts and officials and the transitional arrangements.<sup>66</sup>

- 4.54 The Committee was interested to hear that the options paper utilises the New Zealand *Personal Property Securities Act 1999* and that the Attorney-General has ‘...commended the New Zealand model to SCAG’.<sup>67</sup> In separate evidence to the inquiry, Professor Gordon Walker stated that the New Zealand regime is ‘...state of the art and the best in the world’, and that:

...we have this horrific situation in Australia with the states and the territories all having their own version. It is a shambles; it is pre-internet. If we are really talking about coordination or harmonisation, perhaps Australia should be looking at that law in New Zealand. You could virtually lift it

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63 AGD, *Submission No. 26*, p. 23. The AGD also noted work on personal property securities law reform undertaken in previous years by the Australian Law Reform Commission and the Department: see p. 23. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3; and Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 1.

64 AGD, *Submission No. 26.3*, p. 3. The options paper, *Review of the law on Personal Property Securities*, can be accessed at: <http://www.ag.gov.au/pps>.

65 AGD, *Review of the law on Personal Property Securities*, p. 10.

66 AGD, *Review of the law on Personal Property Securities*, p. 15.

67 AGD, *Submission No. 26.3*, p. 3.

up and plonk it down in Australia without too much difficulty.<sup>68</sup>

- 4.55 The AFC expressed its satisfaction with the progress of the SCAG personal property securities reform process,<sup>69</sup> and the AGD stated that the Attorney-General has consulted a range of key stakeholders who have all ‘...indicated their support for the project’.<sup>70</sup>
- 4.56 Most recently, the Committee notes that in July 2006 COAG identified personal properties securities as a ‘hotspot’ priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.<sup>71</sup> COAG stated that:
- A national system facilitating the registration of all types of personal property as security would have tangible economic benefits in terms of business investment and reduced transaction costs.<sup>72</sup>
- 4.57 COAG also stated that it:
- ...endorsed the development by the Standing Committee of Attorneys-General (SCAG) of an efficient and effective national personal properties registration system for security transactions and has asked SCAG to report to it by the end of 2006 on progress with developing options and timeframes for implementing a national system, including identifying any cost and associated consumer protection data implications.<sup>73</sup>
- 4.58 The Attorney-General announced in November 2006 that ‘...significant progress’ has been made in a review of the legislation regulating personal property securities law in Australia and that a series of discussion papers on a national personal property securities register would be released in the near future.<sup>74</sup>

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68 Professor Gordon Walker, *Transcript of Evidence*, 7 March 2006, p. 3. The AFC also expressed support for the New Zealand regulatory approach: Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 23.

69 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

70 AGD, *Submission No. 26.1*, p. 3.

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

72 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

73 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

74 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006.

This document can be accessed at:

<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0>.

- 4.59 The Committee is pleased to see the Australian Government and COAG advancing legal harmonisation of personal property securities law. This is an excellent instance of a regulatory framework that is in strong need of harmonisation, and the Government appears to be committed to this outcome. The Committee will observe the progress of this work with interest.

## Financial services regulation

- 4.60 In its submission the AFC identified regulatory inconsistencies and inefficiencies in the following financial service areas:
- Debt collection – multiple statutes, multiple licensing and registration requirements, educational requirements, and Commonwealth and State debt collection guidelines.
  - Finance broking – multiple statutes, licensing and registration requirements, commission structures, and broking contract requirements.
  - Civil debt recovery – multiple statutes, process requirements, judgment periods, enforcement mechanisms, remedies, statute of limitations inconsistencies.<sup>75</sup>
- 4.61 The AFC submitted that inconsistencies and inefficiencies in these areas ‘...impact adversely on our members’ business efficiencies and compliance costs’, and that harmonisation would ‘...result in significant benefits to our members, their customers, government and consumers as a whole’.<sup>76</sup>
- 4.62 With regard to finance broking, the ANZ Bank elaborated on the regulatory inconsistencies present across the jurisdictions:
- Western Australia, Victoria, New South Wales and the ACT have passed legislation specifically regulating finance brokers. South Australia, Tasmania, the Northern Territory and Queensland are yet to legislate specifically on the topic. The regimes of NSW, Victoria, and the ACT are similar and focus primarily on the disclosure requirements for brokers. They apply only to brokers dealing in consumer credit. The regime in Western Australia goes further by also establishing a licensing regime, code of conduct, and functions for a

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75 AFC, *Submission No. 5*, p. 2. The AFC also raised personal property securities law which is dealt with at paragraphs 4.47 – 4.59 above.

76 AFC, *Submission No. 5*, p. 3.

‘regulator’ which has an ongoing industry oversight role. It also has a wider scope, applying to intermediaries who deal in commercial as well as consumer credit.<sup>77</sup>

- 4.63 The ANZ submitted that this ‘...patchwork of legislation presents difficulties for a financier like ANZ with a national network of finance brokers’:<sup>78</sup>

While ANZ does not have direct compliance responsibility under the various laws, it provides compliance training and support for many brokers and has an obvious interest in ensuring its brokers are competent, appropriately qualified and law abiding. It is much easier for ANZ to set standards for the good character and conduct of its brokers if those standards can be based on one nationally uniform legislative regime with one set of licensing, conduct and disclosure requirements. The difficulties of inconsistent legislation is [sic] compounded for national broking companies, which do have direct responsibility for compliance with this legislation.<sup>79</sup>

- 4.64 The ANZ also informed the Committee that some progress has been made towards national uniform finance broker laws in Australia.<sup>80</sup> In 2004 the NSW Office of Fair Trading released a discussion paper entitled *National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper*.<sup>81</sup> The discussion paper proposes a national regulatory scheme which, it suggests, would:

...address the problems between brokers and consumers which result in market inefficiencies and consumer loss. In effect, the proposals combine features of the Western Australia and New South Wales approaches, but these are enhanced to address current practices and problems.<sup>82</sup>

- 4.65 The ANZ indicated that it ‘...understands draft provisions will be released by the New South Wales Office of Fair Trading in the near future for wide consultation’.<sup>83</sup>

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77 ANZ Bank, *Submission No. 27*, p. 12.

78 ANZ Bank, *Submission No. 27*, p. 12.

79 ANZ Bank, *Submission No. 27*, p. 12.

80 ANZ Bank, *Submission No. 27*, p. 12.

81 This document can be accessed at: <http://www.fairtrading.nsw.gov.au>.

82 *National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper*, p. 60.

83 ANZ Bank, *Submission No. 27*, p. 12.

4.66 The Committee commends the NSW Office of Fair Trading for taking the initiative with this national regulation project. It appears that harmonised finance broker legislation throughout the jurisdictions would reduce the training and compliance burden on business and increase certainty for both practitioners and consumers with regard to practice standards.

4.67 The ANZ also raised the issue of inconsistencies in the regulation of the various forms of stamp duty throughout the jurisdictions. The ANZ submitted that:

There is a strong case for the harmonisation of stamp duty laws throughout the Australian States and Territories. ...significant differences can still be seen, for example, in the way the 'land rich' rules apply in each State... and in the way each State calculates its proportion for the purposes of multi-jurisdictional mortgage stamping (ie with 5 States imposing mortgage duty, 4 different methods are used to calculate the appropriate proportion).<sup>84</sup>

4.68 Other differences cited by the ANZ include inconsistent requirements regarding deed duty, corporate trustee duty and credit business duty, and different time periods among the States regarding the payment of duty.<sup>85</sup> The ANZ stated that inconsistencies between the separate stamp duty regimes '...make it difficult to operate a business on a national basis'.<sup>86</sup>

4.69 The ANZ noted previous efforts to harmonise stamp duty requirements '...through the rewrite of State-based Duties Acts to incorporate the previous uniform provisions',<sup>87</sup> but stated that :

...only Victoria, Tasmania, New South Wales and the Australian Capital Territory adopted a common rewrite model (although a number of initial differences were retained and there have been subsequent amendments resulting in further differences).

Queensland undertook its own rewrite, which is not entirely consistent with the other rewrite jurisdictions. Additionally,

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84 ANZ Bank, *Submission No. 27*, p. 15.

85 ANZ Bank, *Submission No. 27*, pp. 15, 19-23.

86 ANZ Bank, *Submission No. 27*, p. 15.

87 ANZ Bank, *Submission No. 27*, p. 15.

Western Australia has adopted some aspects of the rewrite...  
but remains different in many other respects.<sup>88</sup>

- 4.70 The Committee considers that further investigation into the benefits (and potential disadvantages) of national legal harmonisation of the regulatory frameworks governing debt collection, civil debt recovery, and stamp duty is warranted.

### **Recommendation 14**

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

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

## **Partnership law**

- 4.72 The LSNSW indicated that it has identified partnership law as an area where harmonisation between the jurisdictions is required.<sup>89</sup> From a small business perspective, Tortoise Technologies stated that:

Different states and territories have different laws governing partnerships, which raises practical and operational difficulties for those doing business outside their “home state or territory”.<sup>90</sup>

- 4.73 The AGD stated that it:

...has not developed a model for harmonising partnership laws. The Department supports harmonisation of existing State and Territory laws where practicable.<sup>91</sup>

- 4.74 The Department indicated that SCAG ‘...would be an appropriate forum to pursue such harmonisation’ and that partnership law

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88 ANZ Bank, *Submission No. 27*, p. 15.

89 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36. See also LSNSW, *Exhibit No. 31*, p. 2.

90 Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 7.

91 AGD, *Submission No. 26.3*, p. 2.

harmonisation '...would also require involvement of the Treasury portfolio'.<sup>92</sup>

- 4.75 The AFC indicated that, while it did not have a view on the harmonisation of partnership laws, it did advocate the harmonisation of business name requirements and recognition across the jurisdictions.<sup>93</sup> The Committee notes in this connection that, in July 2006, COAG identified business name, Australian Business Number and related business registration process as a 'hotspot' priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.<sup>94</sup> COAG stated that:

The registration of Australian Business Numbers (ABN) and business names are separate processes that involve registration by various means (that is, on-line, over the counter or by post), at two levels of government. They require a business to provide the same or similar details on a number of occasions. For business, the complexity of the existing processes results in:

- a compliance burden associated with the separate registration for ABN and business names; and
- confusion surrounding the protection rights afforded to business and company names.

COAG has agreed that the Small Business Ministerial Council is to develop a model that delivers a seamless, single on-line registration system for both ABN and business names, including trademark searching and report back to COAG with its recommendations, cost implications and a proposed timeline for implementation by the end of 2006.<sup>95</sup>

- 4.76 The Committee is of the view that harmonisation of partnership laws between the jurisdictions warrants further investigation by SCAG.

## Recommendation 15

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

92 AGD, *Submission No. 26.3*, pp. 2-3.

93 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 25.

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

95 Attachment E to COAG Communiqué of 14 July 2006, p. 1.

## Consumer protection law

4.78 Consumer protection in Australia is regulated by the Commonwealth *Trade Practices Act 1974* (TPA) and *Australian Securities and Investments Commission Act 2001* and by State and Territory consumer protection legislation.<sup>96</sup> Treasury noted that:

...the consumer protection provisions of the TPA are replicated in the fair trading legislation of each of the Australian states and territories. Additionally, the state and territory fair trading agencies also regulate specific subject areas either through their Fair Trading Acts or through other pieces of legislation. The subject areas regulated by the states and territories vary from state to state.<sup>97</sup>

4.79 Treasury also noted that enforcement of consumer protection regulation:

...primarily falls to Australia's consumer protection regulators both at the Commonwealth level with the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), and at the state and territory level with their fair trading offices.<sup>98</sup>

4.80 The main issue raised in the evidence in relation to consumer protection law was regulatory inconsistency.

## Regulatory inconsistencies in implied warranties in consumer contracts

4.81 In his submission Mr Ray Steinwall informed the Committee of the combined Commonwealth and State/Territory regulatory framework governing implied warranties in consumer contracts:

In each Australian State and Territory and in New Zealand, sale of goods legislation provides for terms to be implied in contracts for the sale of goods. The provisions generally permit implied warranties to be modified or excluded. Effective exclusion of implied warranties therefore deprives consumers of the benefit of important post sale consumer

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96 For example the various State and Territory Fair Trading Acts and Sale of Goods Acts.

97 Treasury, *Submission No. 21.1*, p. 4.

98 Treasury, *Submission No. 21.1*, p. 4.



protection. To alleviate the impact on consumers, provisions in the Commonwealth *Trade Practices Act 1974*... the New Zealand *Consumer Guarantees Act 1993*... and equivalent legislation in the States and Territories prohibit exclusion or 'contracting out' of the implied terms in consumer transactions, variously described.<sup>99</sup>

4.82 While recognising that, 'From a policy perspective, broadly the laws are consistent',<sup>100</sup> Mr Steinwall identified a number of notable inconsistencies among the jurisdictions in relation to non-excludable implied warranties as follows:

- Lack of express provisions – Queensland, Tasmania and the ACT lack express provisions regarding non-excludable implied terms in consumer contracts;
- Definition of 'consumer' – 'consumer' is variously defined across the jurisdictions according to factors such as the value of the goods/consideration; the nature of the supplier; and the purpose of the goods;<sup>101</sup> and
- Aspects of implied warranties – differences exist among the jurisdictions regarding aspects of implied warranties including compliance of goods with their description; merchantable quality of goods; fitness for purpose of goods; and compliance of samples with goods. Minor differences also exist among the jurisdictions regarding freedom of goods from encumbrances.<sup>102</sup>

4.83 Mr Steinwall stated that, as a result of these inconsistencies:

Firms operating in multiple Australian jurisdictions and in Trans-Tasman trade face significant costs in complying with different statutory provisions. These include the costs of obtaining legal advice, different trading terms and consumer warranty brochures in different jurisdictions, compliance programs and staff training and education.<sup>103</sup>

4.84 Mr Steinwall also pointed out that consumers '...cannot be expected to know, understand or appreciate the significance of jurisdictional

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99 Mr Ray Steinwall, *Submission No. 22*, p. 2.

100 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 27.

101 Mr Steinwall stated that the '...considerable differences in the fundamental definition of 'consumer'' is 'Particularly regrettable': *Submission No. 22*, p. 7.

102 Mr Ray Steinwall, *Submission No.22*, pp. 2-6, 11-47.

103 Mr Ray Steinwall, *Submission No. 22*, p. 7.

differences, essential for effective enforcement of their rights'.<sup>104</sup> In order to remedy the inconsistencies among the jurisdictions in the legislation governing non-excludable implied warranties, Mr Steinwall submitted that the applied legislation mechanism used to establish the Competition Codes of the States and Territories should also be utilised to achieve a national harmonised regulatory framework for implied warranties:

In 1999 the Commonwealth enacted the Schedule version of Part IV of the TPA – the competition provisions of the TPA. ...Each State and Territory passed application legislation applying the Schedule version in their jurisdictions – known as the Competition Code. ...A similar scheme should be applied to achieve a uniform national consumer law in Australia. It is particularly suitable as a model as the Commonwealth, States and Territories each have concurrent jurisdiction for consumer protection.<sup>105</sup>

- 4.85 The AGD stated that it '...has not developed a model for harmonising the law governing implied warranties and conditions in consumer contracts' as this is properly a matter for the Treasury portfolio,<sup>106</sup> but also stated that it '...supports harmonisation of existing State and Territory laws where practicable'.<sup>107</sup>
- 4.86 The Committee considers that national harmonisation of the regulatory framework governing non-excludable implied warranties in consumer contracts could be beneficial for both businesses and consumers alike by assisting to reduce compliance costs and uncertainty. The matter should be raised for further exploration at the Ministerial Council on Consumer Affairs (MCCA) (see Recommendation 16 below).

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104 Mr Ray Steinwall, *Submission No. 22*, p. 7. See also *Transcript of Evidence*, 6 April 2006, p. 26.

105 Mr Ray Steinwall, *Submission No. 22*, p. 8. Mr Steinwall also noted that inter-governmental agreements which underpin the Competition Code '...provide mechanisms for consultation on legislative amendments and a transparent process for exclusions and exemptions': p. 8.

106 AGD *Submission No. 26.3*, p. 2.

107 AGD *Submission No. 26.3*, p. 2.

## Regulatory inconsistencies in other areas

4.87 Regulatory inconsistencies among the jurisdictions were raised in relation to a number of other areas of consumer protection law as well. In its submission the ANZ Bank stated that:

...there have been several legislative developments in various States and Territories in recent years that have created some inconsistencies in consumer protection laws across the country. It appears State and Territory Governments are increasingly using fair trading legislation as a means to drive consumer protection initiatives which do not necessarily have national support.<sup>108</sup>

4.88 Telstra Corporation Ltd also nominated inconsistency as an issue of concern and stated that '...there is an immediate need for greater harmonisation of some State, Territory and Federal consumer protection laws'.<sup>109</sup> The ANZ and Telstra identified regulatory inconsistencies in the following specific areas:

- Consumer contracts – duplication between a code registered under the Commonwealth *Telecommunications Act 1997*, applying to carriers and carriage service providers and regarding unfair terms in consumer contracts, and current or proposed legislation covering the same/similar subject matter in some States and Territories (e.g. Part 2B of the Victorian *Fair Trading Act 1999*).<sup>110</sup>
- Unsolicited marketing and telephone marketing – multiple regulatory bodies and legislative regimes, particularly inconsistencies between Victorian and New South Wales Fair Trading Acts relating to scope of regulation; permitted call times; consumer disclosure, exclusions; cooling-off periods; contractual consent; and penalties for breach.<sup>111</sup>
- Door-to-door sales – differences among the State and Territory regulatory regimes regarding minimum contract consideration values; prescribed forms for cooling off period and contract

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108 ANZ Bank, *Submission No. 27*, p. 9.

109 Telstra, *Submission No. 7*, p. 8.

110 Telstra, *Submission No. 7*, p. 9.

111 ANZ Bank, *Submission No. 27*, pp. 10-11; Telstra, *Submission No. 7*, pp. 10-12. In its report the Taskforce on Reducing the Regulatory Burden on Business noted differences in direct marketing regulation and recommended that SCAG endorse national consistency in privacy-based legislation. See *Rethinking Regulation*, pp. 54-58.

cancellation information; cooling off periods; and permitted call times.<sup>112</sup>

- Trade promotions – inconsistencies among State and Territory regulatory regimes regarding permit, scrutineer, certification, and winner notification requirements; fees; draw location requirements; and terms and conditions disclosure requirements.<sup>113</sup>
- Third party trading stamps – divergence among State and Territory legislation regarding the supply, redemption, and publication of third party trading stamps, which are vouchers provided in relation to sales and promotions.<sup>114</sup>

4.89 The ANZ and Telstra identified a number of adverse effects resulting from these regulatory inconsistencies including:

- Increased compliance costs;
- Increased complexity of compliance arrangements, rules and procedures;
- Difficulties in maintaining clear and consistent compliance rules for staff;
- Reduced flexibility to allocate staff and resources as required;
- Prevention of legitimate business activity; and
- Increased risk of non-compliance due to complexity.<sup>115</sup>

4.90 The Committee is conscious that there have been a number of developments in the area of consumer protection policy and regulation since the Committee commenced its inquiry in early 2005. The Productivity Commission, in its February 2005 report on National Competition Policy reforms, recommended that the Australian Government ‘...establish a national review into consumer protection policy and administration in Australia’, including a focus on ‘...mechanisms for coordinating policy development and application across jurisdictions and for avoiding regulatory duplication’.<sup>116</sup> Indeed, the Commission nominated consumer protection policy as

112 Telstra, *Submission No. 7*, pp. 12-13.

113 Telstra, *Submission No. 7*, pp. 13-14; ANZ Bank, *Submission No. 27*, p. 17.

114 Telstra, *Submission No. 7*, p. 14.

115 ANZ Bank, *Submission No. 27*, pp. 11, 17-18; Telstra, *Submission No. 7*, pp. 10, 13-15.

116 Productivity Commission, *Review of National Competition Policy Reforms*, p. xlix. This report can be accessed at: <http://www.pc.gov.au/inquiry/ncp/finalreport/>.

one of the priority areas for national reform on its proposed national reform agenda and stated that:

...it seems clear that ineffective national coordination mechanisms have led to regulatory inefficiencies and inconsistencies, to the detriment of both consumers and businesses.<sup>117</sup>

4.91 In April 2005 the Australian Government indicated its commitment to national harmonisation of the consumer policy framework through the MCCA.<sup>118</sup> The Government also stated that:

...all jurisdictions have committed themselves to the objective of harmonisation as part of the overall strategic agenda of the Council.<sup>119</sup>

4.92 At its February 2006 meeting, COAG acknowledged the importance of effective regulation for consumer protection and agreed that the jurisdictions would take steps to reduce the burden of regulation,<sup>120</sup> including the identification of reforms to:

...enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies.<sup>121</sup>

4.93 In relation to the COAG agreement Treasury noted that:

Key commitments agreed to by the Australian Government and the States and Territories include: establishing effective gatekeeping arrangements for new regulation; targeted annual reviews of existing regulation; and promoting harmonisation and reducing duplication in regulation across Australia. A new reform agenda will provide benefits for both business and consumers.<sup>122</sup>

4.94 Treasury further informed the Committee that, in April 2006, the Government announced that the Productivity Commission would be

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117 Productivity Commission, *Review of National Competition Policy Reforms*, p. xl.

118 Media release of the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, 22 April 2005. This document can be accessed at:  
<http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2005/011.asp>.

119 Media release of the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, 22 April 2005.

120 COAG Communiqué, 10 February 2006, p. 8.

121 COAG Communiqué, 10 February 2006, p. 8. See also Attachment B to the Communiqué, pp. 4-7, and paragraph 4.4 above.

122 Treasury, *Submission No. 21.2*, p. 5.

requested to conduct an '...inquiry into the consumer policy framework with a view to promoting greater national consistency in this area and reducing unnecessary regulatory burden'.<sup>123</sup>

- 4.95 In relation to telemarketing, the Committee notes that the Australian Government is in the process of establishing a national Do Not Call Register, which will enable individuals to register their details in order to avoid receiving unsolicited telemarketing calls. The Register, established by the Commonwealth *Do Not Call Register Act 2006*, is expected to be operational in May 2007.<sup>124</sup>
- 4.96 The Committee supports these initiatives. The COAG agreement and the commitment from all jurisdictions through the MCCA to achieve a national harmonised consumer policy framework are significant developments which should result in a higher level of consistency in consumer protection policy and regulation. In order to assist this work, the Committee considers that the areas of regulatory inconsistency identified above should be further explored by the MCCA.

### **Recommendation 16**

- 4.97 **The Committee recommends that the Australian Government propose that the Ministerial Council on Consumer Affairs undertake an exploration of the national harmonisation of consumer protection legislation governing the following areas:**
- **Consumer contracts including non-excludable implied warranties;**
  - **Unsolicited marketing and telephone marketing;**
  - **Door-to-door sales;**
  - **Trade promotions; and**
  - **Vouchers provided in relation to sales and promotions.**

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123 Treasury, *Submission No. 21.2*, p. 3.

124 Further information regarding the Do Not Call Register can be accessed at: [http://www.dcita.gov.au/tel/do\\_not\\_call](http://www.dcita.gov.au/tel/do_not_call).

## Standards of products regulation

- 4.98 The main issue raised in the evidence in relation to standards of products regulation was inconsistency among the jurisdictions in relation to electrical product safety regulation.

## Inconsistencies in electrical product safety regulation

- 4.99 The SIAA registered its concern regarding the regulatory framework for electrical product safety in Australia:

Electrical safety compliance in Australia is regulated by the individual States and Territories rather than being coordinated at the national level. This situation has lead [sic] to some potentially unsafe electrical products entering into the Australian market.<sup>125</sup>

...Individual States/Territories, as is their right, have different approaches to the policing of compliance with their respective regulations. ...the approaches are inconsistent across Australia and compliance in this area is not seen as a priority. The outcome is that endogenous manufacturers and importers of brand name electrical goods/equipment are placed at a market disadvantage because they "play the game" and ensure their products comply with all regulations/standards and are therefore deemed to be safe.<sup>126</sup>

- 4.100 The SIAA provided a number of examples of unsafe electrical products (including domestic products) that were recalled from the Australian market between April 2005 and April 2006.<sup>127</sup>

- 4.101 The SIAA also informed the Committee that the electrical industry has indicated its desire for a single national regulatory regime for electrical product safety:

The electrical industry's peak body, Australian Electrical and Electronic Manufacturers Association (AEEMA), has suggested that the State and Territory legislation be superseded by Australian legislation that is complementary to Part 5A of the *Trade Practices Act* (1974). AEEMA has also

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125 SIAA, *Submission No. 14*, p. 6.

126 SIAA, *Submission No. 14.1*, p. 1 of 7.

127 SIAA, *Submission No. 14.1*, p. 1 of 2.

suggested that a National Electricity Safety Regulator be created and overseen by a Ministerial Council.<sup>128</sup>

- 4.102 The Committee also received evidence on electrical product safety regulation from the Electrical Safety Office Queensland (ESOQ). The ESOQ, which is responsible for ‘...developing and enforcing standards for electrical safety and promoting strategies for improved electrical safety performance across the community’ in Queensland,<sup>129</sup> stated that:

In the interest of safety the regulatory authority in each Australian state and territory administers a uniform approvals scheme, aimed at preventing the sale of unsafe electrical equipment in Australia. This is achieved through State based legislation.

...National uniformity is supported and progressed through close co-operation and liaison with other jurisdictions in various forums. The most important of these is the Electrical Regulatory Authorities Council (ERAC). ERAC, which includes New Zealand, is the forum that coordinates the harmonisation of electrical product safety and enforcement issues. ...approvals issued in one state are recognised across Australia and New Zealand.<sup>130</sup>

- 4.103 The ESOQ also informed the Committee that:

Electrical product safety standards have been harmonised across Australia and New Zealand with joint publication of AS/NZS standards for many years. Australian and New Zealand electrical regulators actively participate in Standard Committees.<sup>131</sup>

- 4.104 The ESOQ further stated that:

The development of a list of agreed nationally prescribed electrical products has served to enhance national uniformity for safety of electrical equipment. Under this system,

128 SIAA, *Submission No. 14*, p. 6. The SIAA also indicated that ‘...AEEMA has not at this stage taken the cause of national legislation any further’ due to the process being ‘...”stuck” between two sets of state/territory regulators. These are those represented by membership of the Electrical Regulatory Authorities Council (ERAC) and those represented by the Ministerial Council on Consumer Affairs (MCCA)’: *Submission No. 14.1*, p. 1 of 7.

129 ESOQ, *Submission No. 11*, p. 2.

130 ESOQ, *Submission No. 11*, pp. 2-3.

131 ESOQ, *Submission No. 11*, p. 2.



electrical equipment may be classified as being 'Prescribed Electrical Equipment'. ...Prescribed electrical equipment must have a certificate of approval prior to being sold or offered for sale in any State or Territory of Australia. ...Also, by agreement between all Australian electrical regulators, there is legislation in each State and Territory that requires non-prescribed electrical equipment to comply with the requirements of *AS/NZS 3820:1998/Amdt 1:2004 – Essential safety requirements for low voltage electrical equipment*.<sup>132</sup>

- 4.105 Despite the ESOQ's emphasis on congruence among the jurisdictions in respect of electrical product safety regulation, the Committee notes the following statement on this issue by the Productivity Commission in its January 2006 report on the Australian consumer product safety system:

The relevant electrical safety Acts and/or regulations of each of the jurisdictions aim to prevent the sale of unsafe electrical products. The particular safety obligations imposed on suppliers are worded differently in each jurisdiction. As one example, in Western Australia, the *Electricity Act 1945* requires that all electrical appliances/equipment sold are in a safe condition. 'Safe' means that no significant risk of injury or death to any person, or damage to any property is likely to result from the proper use of the electrical appliances/equipment.<sup>133</sup>

- 4.106 This would suggest that the SIAA's contention regarding inconsistencies among the jurisdictions has some merit. Treasury informed the Committee that in its report the Productivity Commission:

...found that a strong case exists for harmonising the consumer product safety system in Australia, particularly in

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132 ESOQ, *Submission No. 11*, p. 3.

133 Productivity Commission, *Review of the Australia Consumer Product Safety System*, p. 426. This report can be accessed at: <http://www.pc.gov.au/study/productsafety/finalreport/>. This study was commissioned by the Australian Government to inform an MCCA-led review of the Australian consumer product safety system: see Treasury, *Submission No. 21.1*, p. 4 and *Submission No. 21.2*, p. 3. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, pp. 2-3.

relation to legislation across States and Territories. The Commission advocates a single national law and regulator.<sup>134</sup>

4.107 Treasury also stated that:

Treasury is still examining the findings of the report. The findings were considered at the MCCA meeting in May 2006. At that meeting, Ministers broadly supported the recommendations of the Commission. Ministers noted that they are committed to greater harmonisation of Australia's product safety system...<sup>135</sup>

4.108 Most recently, the Committee notes that in July 2006 COAG identified product safety as a 'hotspot' priority area for cross-jurisdictional regulatory reform as part of its National Reform Agenda.<sup>136</sup> COAG stated that:

COAG has requested the MCCA to develop options for a national system for product safety regulations without increasing the regulatory burden and report back to it with a recommended approach by the end of 2006.<sup>137</sup>

4.109 The Committee is pleased to see that national harmonisation of Australia's consumer product safety system is firmly on the MCCA and COAG agendas. The Committee considers that harmonisation of the electrical product safety regulatory framework should be part of this work if it is not so already.

### Recommendation 17

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

134 Treasury, *Submission No. 21.2*, p. 3. See also SIAA, *Submission No. 14.1*, pp. 6 of 7 – 7 of 7. Another submission to the inquiry suggested that '...greater emphasis should be placed on educating producers as to the practical requirements of quality, safety and applications of products to be produced': Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 10.

135 Treasury, *Submission No. 21.2*, p. 3.

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

137 Attachment E to COAG Communiqué of 14 July 2006, p. 2.

## Not-for-profit sector regulation

- 4.111 The main issue raised in the evidence in relation to not-for-profit sector regulation was regulatory inconsistency and complexity.

### Regulatory inconsistency and complexity

- 4.112 In oral evidence the FIA stated that:

In surveying our members, what we have found is that over 50 per cent of our members work across state borders. The disparities, the differences, the discrepancies and some of the inconsistencies between [*sic*] state and federal legislation make it very difficult to carry on a national campaign. This has significant importance for Australia in that... it was recently established that Australians give \$11 billion to charitable causes per annum.<sup>138</sup>

- 4.113 The FIA cited recent research on the not-for-profit regulatory environment in its evidence to the inquiry. The Committee was informed of a 2004 survey-based investigation of ‘...almost 2,000 not-for-profits in Australia that are registered as companies limited by guarantee’,<sup>139</sup> which found that the ‘...regulatory framework that underpins the sector is complex and riddled with inconsistencies’.<sup>140</sup> The FIA indicated that this study also highlighted the following regulatory difficulties for not-for-profit organisations:

- There are ‘...myriad possible legal structures’ for not-for-profit organisations;
- There is a ‘...confusing mix... between State and Federal regulations and regulators’; and
- There is a ‘...lack of nationally consistent reporting obligations’.<sup>141</sup>

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138 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 42. Dr Wallace indicated that the FIA has a membership of some 1,500 individuals, which, combined with up to 3,000 individual subscribers, represent some 2,000 Australian charitable organisations: p. 42.

139 FIA, *Submission No. 9*, p. 9.

140 S. Woodward and S. Marshall (2004), *A Better Framework – reforming not-for-profit regulation*. University of Melbourne: Centre for Corporate Law and Securities Regulation, p. 1, cited in FIA, *Submission No. 9*, p. 9.

141 FIA, *Submission No. 9*, p. 9.

- 4.114 The FIA also cited a 2003 study which found that the regulatory framework for incorporation of not-for-profit organisations is a ‘...confusing muddle’:<sup>142</sup>

When for-profit companies wish to raise funds, by issuing shares or debentures, they seek permission from the same regulator that handled their incorporation. When nonprofits wish to raise funds they must seek a licence from yet another regulator. These are state and territory government agencies, operating under different pieces of legislation that differ in some aspects across jurisdictions. These differences make conducting a national fundraising campaign a nightmare.<sup>143</sup>

- 4.115 The FIA indicated the major consequence of these regulatory inconsistencies and complexities for not-for-profit organisations is increased compliance costs and an associated reduction in the proportion of funds reaching their target:

...anything that makes that fundraising more complex and more difficult adds to the costs of fundraising and will therefore mean that some of the money that is given does not go directly to the cause, because it is absorbed through the costs in complying with different legislation and regulation in different states and also federally.<sup>144</sup>

- 4.116 As noted earlier in this report, the FIA estimated that its member fundraising organisations can incur compliance costs of up to a full-time staff member salary or more due to regulatory duplication.<sup>145</sup>
- 4.117 The FIA submitted that a ‘...simplified and rational legislative framework’<sup>146</sup> is necessary to simplify the regulatory environment for the not-for-profit sector and reduce compliance costs. In order to achieve this goal, the FIA proposed a wide-ranging reform agenda including the establishment of a single Commonwealth regulatory framework ‘...covering all corporate bodies including for-profit, not-for-profit and incorporated associations’; the establishment of a new national regulator for the not-for-profit sector; the development of a national mandatory code of conduct for the sector; and the

142 M. Lyons (2003), ‘The Legal and regulatory environment of the Third Sector’, *The Asian Journal of Public Administration* 25(1), cited in FIA, *Submission No. 9*, p. 9.

143 M. Lyons (2003), ‘The Legal and regulatory environment of the Third Sector’, *The Asian Journal of Public Administration* 25(1), cited in FIA, *Submission No. 9*, p. 9.

144 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 42.

145 See Chapter 2 paragraph 2.7 above.

146 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 43.

development of specialised national accounting standards for the sector.<sup>147</sup> The FIA also suggested two other specific measures:

- The development of a single specialised legal structure for not-for-profit organisations by ‘...combining the best aspects of the corporations law and the incorporated associations laws’;<sup>148</sup> and
- Harmonisation of the financial reporting and disclosure requirements for not-for-profit organisations across the jurisdictions.<sup>149</sup>

4.118 The Committee was informed that the not-for-profit sector is ‘...absolutely emphatic about the need for one regulatory system’.<sup>150</sup>

4.119 While a single Commonwealth framework covering all corporate bodies and the development of codes of conduct and accounting standards go beyond the scope of the inquiry of the Committee,<sup>151</sup> the Committee is attracted to the other proposals advanced by the FIA. A single national regulator would greatly simplify fundraising compliance for the not-for-profit sector, while a simple but adequate legal structure for not-for-profit organisations, developed from existing legislation, would provide a stable, purpose-built legal identity and streamline compliance obligations. National harmonisation of current reporting and disclosure requirements for the not-for-profit sector would also assist in reducing compliance costs and in maintaining community confidence in the sector. In addition, the Committee considers that a review of the current licensing and registration requirements for not-for-profit organisations across the jurisdictions should be undertaken with a view to legal harmonisation.

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147 FIA, *Submission No. 9*, pp. 3-4, 10.

148 FIA, *Submission No. 9*, p. 3, 10.

149 FIA, *Submission No. 9*, p. 4, 10.

150 Dr Sue-Anne Wallace, FIA, *Transcript of Evidence*, 6 April 2006, p. 45.

151 As the FIA recognised: see *Submission No. 9*, p. 10.

## Recommendation 18

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

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

## Therapeutic goods and poisons regulation

4.121 The main issue raised in the evidence in relation to therapeutic goods and poisons regulation was regulatory inconsistency.

### Regulatory inconsistency

4.122 The Australian Self-Medication Industry (ASMI), an industry association which represents ‘...the interests of all non-prescription medicine (including complementary medicines) manufacturers in Australia’,<sup>152</sup> informed the Committee that:

Therapeutic goods are regulated at the Commonwealth level under the *Therapeutic Goods Act 1989*... The Act contains an apparently complete statutory scheme which regulates the manufacture, registration (after evaluation), listing, sale and advertising of therapeutic goods. Therapeutic goods are defined in s.3 of the Act to include all products which make a therapeutic claim...<sup>153</sup>

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152 ASMI, *Submission No. 20*, p. 1.

153 ASMI, *Submission No. 20*, p. 3.

4.123 ASMI also advised that the ‘...regulatory environment for therapeutic goods in Australia is partly a Commonwealth and partly a State responsibility’.<sup>154</sup> ASMI indicated that the Commonwealth *Therapeutic Goods Act 1989* does not extend to corporations trading only within a State or to sole traders and permits the States to regulate these businesses:

...the actions of other than sole traders or one-State corporations are uniformly regulated by the Commonwealth Act, but the former are governed in various fashions under the same or similar State laws.<sup>155</sup>

4.124 ASMI stated that this has enabled the marketing of non-TGA registered products: ‘...sole traders are well aware of the “loophole” which they have exploited to offer products which have not been listed or registered by the TGA’.<sup>156</sup> ASMI also advised that s.9 of the Commonwealth Act ‘...allows arrangements to be made with the States for them to carry out, in effect, some functions the Act assigns to the Commonwealth’s Therapeutic Goods Administration (TGA).’<sup>157</sup>

4.125 ASMI’s main contention was that there are inconsistencies among the different State poisons regimes (which extend to medications) and the arrangements for poisons regulation:

The States also retain control of so-called “poisons” legislation and this means subtle but commercially inefficient State-by-State differences.<sup>158</sup>

...The *SUSDP* [Standard for the Uniform Scheduling of Drugs and Poisons] has been developed by the National Drugs and Poisons Scheduling Committee (NDPSC). ...The decisions of the NDPSC are subject to ratification by each State and Territory. There is not established uniform procedure for this process. Each State can cherry-pick what it likes or dislikes of the decisions, and/or amend or vary its decision, and/or delay its entry into force.<sup>159</sup>

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154 ASMI, *Submission No. 20*, p. ii.

155 ASMI, *Submission No. 20*, p. 5. ASMI cited ss. 6 and 4 of the Commonwealth *Therapeutic Goods Act 1989* in this connexion.

156 ASMI, *Submission No. 20*, p. 5. ASMI stated that this was especially so in Queensland and cited an example of an Ibuprofen medication advertised by a Queensland sole trader: *Submission No. 20*, pp. 5-6.

157 ASMI, *Submission No. 20*, p. 5.

158 ASMI, *Submission No. 20*, p. ii.

159 ASMI, *Submission No. 20*, pp. 7-8.

- 4.126 ASMI provided examples of inconsistencies such as different display requirements for the same product and uncertainty regarding permitted advertising dates for a product across the jurisdictions.<sup>160</sup> ASMI stated that the consequences of these inconsistencies for the therapeutic medication industry:
- ...have been anything but academic or trivial. There is no doubt that existing overlaps and uncertainties add to management and compliance costs to industry. Consumers end up paying more. Our efforts to grow export marketing are hampered to some extent as well.<sup>161</sup>
- 4.127 The SIAA also raised inconsistency with regard to the regulation of poisons, drug precursors and therapeutic substances across the jurisdictions and submitted that:
- The industry is seeking the introduction of a harmonised national code of practice that Commonwealth, State and Territory Governments use for packaging and labeling [*sic*] of hazardous substances – poisons, precursors for drugs and explosives and therapeutic substances.<sup>162</sup>
- 4.128 ASMI proposed that the Australian legislation establishing the Australia-New Zealand Therapeutic Products Agency should be utilised to ‘...improve and simplify the regulatory arrangements’<sup>163</sup> by establishing a ‘...completely uniform regulatory scheme’<sup>164</sup> for therapeutic products and poisons across the jurisdictions. The Committee put this to the AGD, which, in consultation with the Department of Health and Ageing, advised that ‘...in relation to poisons, it is not possible to achieve harmonisation’ within Australia by means of the treaty between Australia and New Zealand establishing the joint agency.<sup>165</sup>
- 4.129 ASMI also indicated that the State and Territory poisons regimes were reviewed in 1999 (the Galbally Review) as part of the national competition legislation review process.<sup>166</sup> The Committee notes that this review made a number of recommendations for ‘...national

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160 See ASMI, *Submission No. 20*, pp. 8-9.

161 ASMI, *Submission No. 20*, p. 11.

162 SIAA, *Submission No. 14*, pp. 5-6.

163 ASMI, *Submission No. 20*, p. 11.

164 ASMI, *Submission No. 20*, p. ii.

165 AGD, *Submission No. 26.3*, p. 4.

166 ASMI, *Submission No. 20*, pp. 9-10.



uniformity of regulations through legislative reforms',<sup>167</sup> and that the review and the response of the Australian Health Ministers' Advisory Council were considered and endorsed by COAG in June 2005. Significantly, COAG agreed '...to move closer towards a national uniform system of regulation of medicines and poisons' and recognised that such harmonisation would bring '...significant administrative efficiencies and cost-savings'.<sup>168</sup> The Committee also notes that the TGA has separately announced that:

While the target timeframe for implementation of the Galbally Review recommendations (as accepted in the response) is within twelve months from the time of COAG endorsement, many of the recommendations which involve legislative change are to be implemented for the commencement of the trans-Tasman regulatory agency for therapeutic products on 1 July 2006.<sup>169</sup>

- 4.130 As noted in Chapters 2 and 3,<sup>170</sup> the Australia-New Zealand Therapeutic Products Agency is currently in development. ASMI stated that it '...has been a strong supporter of the Australian and New Zealand Government's decision to establish a joint agency to regulate therapeutic products'.<sup>171</sup> The Committee applauds COAG's commitment to work towards national uniform regulation of medicines and poisons within Australia and its recognition of the benefits of national harmonisation in this area. Harmonisation should eliminate many of the regulatory inconsistencies currently frustrating the industry and reduce compliance costs.

## Science industry regulation

- 4.131 The main issue raised in the evidence in relation to science industry regulation was regulatory inconsistency, complexity and duplication. The SIAA defined the science industry as:

...research and development, design, production, sale and distribution of laboratory-related goods, services and

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167 TGA website, <http://www.tga.gov.au/docs/html/rdpdf.htm>. The Galbally Review document is also accessible at this website.

168 TGA website, <http://www.tga.gov.au/docs/html/rdpdf.htm>.

169 TGA website, <http://www.tga.gov.au/docs/html/rdpdf.htm>.

170 See Chapter 2 paragraph 2.64 and Chapter 3 paragraph 3.52 above.

171 ASMI, *Submission No. 20*, p. 10.

intellectual capital used for the measurement, analysis and diagnosis of physical, chemical and biological phenomena.<sup>172</sup>

## Regulatory inconsistency, complexity and duplication

4.132 In its submission the SIAA outlined the regulatory context for the science industry in Australia:

...Australia has a complex regulatory regime. Its nine jurisdictions... each have their own regulations and standards that are administered by many different regulatory bodies. The Commonwealth alone has around 60 Government Departments and agencies, and 40 national standard-setting bodies and Ministerial Councils that have power to prepare or administer regulations.<sup>173</sup>

4.133 The SIAA raised the following specific concerns:

- The inconsistency administration of certain regulations relevant to the industry;
- The lack of consultation by governments in their formulation and implementation of regulations and national codes of practice;
- The alignment of Australian regulations and standards with relevant international ones; and
- Industry awareness of product certification regulations and standards.<sup>174</sup>

4.134 The SIAA acknowledged that progress has already been made towards regulatory harmonisation in Australia in certain areas including building codes, chemicals and plastics regulation, and weights and measures.<sup>175</sup> However, the SIAA stated that further harmonisation is required in relation to poisons, drugs and explosives precursors, in vitro diagnostics, weights and measures, and electrical product safety.<sup>176</sup>

4.135 In terms of the consequences of the lack of harmonisation in these areas, the SIAA stated that:

It is a costly process for the industry to remain compliant with all the regulations and standards under this

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172 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 20.

173 SIAA, *Submission No. 14*, p. 4.

174 SIAA, *Submission No. 14*, p. 5.

175 SIAA, *Submission No. 14*, p. 5.

176 SIAA, *Submission No. 14*, p. 5.

administrative framework. This reduces the industry's international competitiveness and is a significant impediment to the efficient operation of the market. The costs associated with such compliance are ultimately borne by the community.<sup>177</sup>

4.136 As noted earlier in this report, the SIAA also provided specific examples of compliance costs due to regulatory duplication or overlap as follows:

- Over \$1 million in compliance costs for 100 SMEs involved in the importation of ozone-depleting substances due to requirements under two separate ozone protection and product stewardship regimes;
- Over \$71 million in compliance costs for at least 100 SMEs due to statutory requirements to provide Material Safety Data Sheets for chemicals, combined with \$1.5 million in compliance costs due to reporting requirements under the Commonwealth National Industrial Chemicals Notification and Assessment Scheme for certain classes and volumes of chemicals supplied to laboratories; and
- An annual compliance cost of \$50 000 for one importer of diagnostic kits due to the registration requirements of five separate government agencies.<sup>178</sup>

4.137 The SIAA stated in its submission that one of its '...key priorities' is to:

...progress the harmonisation of regulations and standards relevant to the science industry across Australia's nine jurisdictions and their alignment with relevant international standards.<sup>179</sup>

4.138 Accordingly, the SIAA submitted that '...Australia should be a single, united market rather than one which is fragmented into nine small markets'.<sup>180</sup> In pursuit of this, the SIAA indicated that the science industry is seeking the following harmonisation measures:

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177 SIAA, *Submission No. 14*, p. 4. The SIAA also indicated that the science industry is '...primarily composed of SMEs' and that '...regulation impacts more on SMEs than non-SMEs': *Submission No. 14.1*, p. 4 of 7.

178 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23 (see also p. viii and Chapter 2 paragraph 2.5 above).

179 SIAA, *Submission No. 14*, p. 3.

180 SIAA, *Submission No. 14*, p. 4.

- A '...harmonised national code of practice' for the packaging and labelling of hazardous substances including poisons, precursors for drugs and explosives, and therapeutic substances;
- A '...fully uniform, national trade measurement system';
- National coordination of electrical product safety regulation;
- A '...common and more inclusive process for the development of the reporting and monitoring requirements on hazardous substances'; and
- The '...alignment of Australian regulations and standards with relevant international ones such as CE Mark, UL Certification, US Food and Drug Administration and the quality standards ISO and American Stand Test Method'.<sup>181</sup> The SIAA stated here that the benefits would include '...improved market access and decreased compliance costs due to mutual recognition' at the international level.<sup>182</sup>

4.139 The SIAA stated in conclusion that:

...the industry believes that the overall costs of regulation within Australia can only be lowered through a package of initiatives and that this package should reflect current and national initiatives and best practice.<sup>183</sup>

4.140 Electrical product safety regulation and the regulation of poisons and therapeutic substances are considered separately at paragraphs 4.99 – 4.110 and 4.121 – 4.130 respectively above. With regard to the proposals for a code of practice for the packaging and labelling of hazardous substances and the international alignment of Australian regulations and standards proposals, the Committee considers that these issues do not properly come within the scope of its inquiry. Codes of practice are often best developed by industry (at least in the first instance) and do not necessarily require legislative action, and the issue of aligning Australian regulations and standards with those of other countries (apart from New Zealand) ranges beyond the inquiry terms of reference.

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181 SIAA, *Submission No. 14*, pp. 5-7.

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

183 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 22. Dr Spencer also stated that '...the industry believes that COAG could justify the greater use of a variant of the template model, namely, that operating in the area of food standards': *Transcript of Evidence*, 21 March 2006, p. 22.

4.141 With regard to trade measurement, the Committee notes that national trade measurement was identified by COAG in February 2006 as a 'hotspot' priority area for cross-jurisdictional reform as part of its National Reform Agenda.<sup>184</sup> COAG agreed to request that the MCCA:

...develop a recommendation for introducing a national system of trade measurement that would rationalise the different regulatory regimes of the Commonwealth, States and Territories and streamline the present arrangements for cost recovery and the certification of trade measuring instruments; and

...report back to COAG with its recommendations and a proposed timeline for implementation for COAG consideration before the end of 2006.<sup>185</sup>

4.142 The Committee also notes that chemicals and plastics regulation was identified by COAG in February 2006 as another 'hotspot' priority area for cross-jurisdictional reform.<sup>186</sup> COAG agreed to:

...establish a ministerial taskforce, with each jurisdiction nominating one responsible Minister, to develop measures to achieve a streamlined and harmonised system of national chemicals and plastics regulation, and reporting progress to COAG by mid 2006.<sup>187</sup>

4.143 The Committee supports the SIAA's proposal for a common and inclusive process for developing monitoring and reporting requirements for hazardous substances. A national framework establishing such a process would assist in reducing compliance costs and uncertainty for the industry and help to ensure the adoption of best practice requirements.

## Recommendation 19

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

184 See paragraph 4.5 above. This was also noted by the SIAA: *Submission No. 14.1*, p. 2 of 7.

185 Attachment B to COAG Communiqué of 10 February 2006, p. 6.

186 See paragraph 4.5 above. This was also noted by the SIAA: *Submission No. 14.1*, p. 2 of 7.

187 Attachment B to COAG Communiqué of 10 February 2006, p. 6.

## Regulation of the legal profession

- 4.145 The main issue raised in relation to regulation of the legal profession was the National Legal Profession project.

### The National Legal Profession project

- 4.146 The AGD informed the Committee that reform to achieve national harmonised regulation of the legal profession in Australia – the National Legal Profession project – has been in progress since 2002.<sup>188</sup> The Department indicated that existing regulation of the profession across the jurisdictions is inconsistent:

...lawyers practising in more than one jurisdiction are forced to restructure their practice to abide by the rules of each jurisdiction they practice in. This duplication of administration results in higher administrative costs and overheads for practitioners and presents an impediment to interstate practice. Also, inconsistent requirements particularly in the areas of admission, costs and standards of conduct create uncertainty for consumers.<sup>189</sup>

- 4.147 The AGD stated that the object of the National Legal Profession project is to:

...ensure nationally consistent regulation in the main aspects of the legal profession, including admission and practice, the reservation of legal work, trust accounts, costs and costs review, complaints and discipline, professional indemnity insurance, fidelity funds, incorporated legal practices and multi-disciplinary practices, external administration (ie the appointment of receivers and administrators to a practice) and the regulation of foreign lawyers.<sup>190</sup>

- 4.148 The Department advised that model legislation implementing the project, developed by SCAG and supported by a Memorandum of Understanding agreed to by all jurisdictions,<sup>191</sup> has been enacted by NSW and Victoria and partially enacted by Queensland, and that all

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188 AGD, *Submission No. 26*, p. 27.

189 AGD, *Submission No. 26*, p. 27.

190 AGD, *Submission No. 26*, p. 27.

191 See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 4, and Chapter 2 paragraph 2.26 above.

jurisdictions are expected to enact implementing legislation in 2006.<sup>192</sup> The Department stated that comprehensive implementation of the model legislation across Australia is ‘...fundamental to the success of the project’ and that, if this is not realised, ‘...the regulation of the legal profession will remain a mix of contradictory laws.’<sup>193</sup>

- 4.149 The Department further indicated that, while the project has ‘...moved the harmonisation of the legal profession forward enormously’,<sup>194</sup> there will still be differences among the jurisdictions once the model legislation is fully in place:

The model provisions are divided into three different types: core-uniform, core-consistent and non-core. Under the MOU, jurisdictions need to implement the core provisions, but only need to ensure uniformity in the core-uniform provisions. The non-core provisions are optional. The result of this is that there will still be significant areas of divergence in regulation.<sup>195</sup>

- 4.150 The AGD advised that:

...this divergence may be problematic if it impacts on the trade of legal services or disadvantages lawyers practicing [*sic*] in one jurisdiction over lawyers in another. For example, not all jurisdictions have committed to implementing the model provisions for incorporated legal practices. This means that some jurisdictions will allow corporations with non-lawyer directors who provide a range of legal and non-legal services to practice law while others will not. ...As a result, some legal practices may be competitively disadvantaged in certain jurisdictions by not being able to choose their preferred structure.<sup>196</sup>

- 4.151 The LSNSW indicated that differences among the jurisdictions regarding trust account and cost agreement elements of the model legislation have already had ‘...a tremendous impact on the practical delivery of legal services’:

One... large law firm has set up a complete independent department to work out the trust account provisions in each

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192 AGD, *Submission No. 26*, p. 27; *Submission No. 26.1*, p. 7.

193 AGD, *Submission No. 26.1*, p. 7.

194 AGD, *Submission No. 26*, p. 27.

195 AGD, *Submission No. 26.1*, p. 7.

196 AGD, *Submission No. 26*, pp. 27-28.

of its jurisdictions and has applied millions of dollars to getting it right in each state.<sup>197</sup>

4.152 The LSNSW further stated that:

These little hiccups, where the states have not complied exactly with the momentum and the direction of the legislation, have added tremendous costs and practical problems, and not just for large law firms – though they are a good example – but for the little dweller on the coast as well and on the borders.<sup>198</sup>

4.153 The Committee considers it unfortunate that a project intended to achieve consistent regulation and reduced costs for the legal profession has already led to increased compliance costs and difficulties for legal practitioners. The AGD advised that:

The Australian Government continues to press for uniformity to the greatest possible extent, so as to minimise contrary or conflicting regulation between [*sic*] the jurisdictions. However, there is an increasing concern that the divergence in regulation may undermine the ultimate goals of the national legal project to facilitate the inter-jurisdictional trade of legal services.<sup>199</sup>

4.154 While the Committee welcomes the real progress that has been made by the National Legal Profession towards harmonised regulation of the legal profession in Australia, it is most regrettable that material differences are already apparent. The Committee supports the Government's continued efforts to achieve uniformity.

## Legal procedures

4.155 The main issues raised in relation to legal procedures were harmonisation of court rules and judicial decision-making.<sup>200</sup>

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197 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36.

198 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 36.

199 AGD, *Submission No. 26.1*, p. 7.

200 The AGD also noted current *forum non conveniens* regulation under the Commonwealth *Service and Execution of Proceedings Act 1992*, the *Jurisdiction of Courts (Cross-vesting) Act 1987*, and under equivalent State and Territory cross-vesting legislation: *Submission No. 26*, p. 12.



## Harmonisation of court rules

- 4.156 The Committee received evidence from the Hon Justice Kevin E Lindgren of the Federal Court of Australia regarding the harmonisation of rules of superior courts in Australia. Justice Lindgren informed the Committee that comprehensive harmonised corporations law rules for the superior courts were produced by a national committee of judges, the Committee on Harmonisation of Rules of Court relating to Corporations, appointed by the Council of Chief Justices of Australia and New Zealand, between 1996 and 1999.<sup>201</sup>
- 4.157 Justice Lindgren also indicated that further harmonisation of superior court rules has been progressed by other judicial harmonisation committees since the corporations law rules were harmonised. Between 2001 and 2003 harmonised rules relating to subpoenas were produced and were implemented in the jurisdictions (excepting Queensland) in 2004.<sup>202</sup> Subsequent to this, work has been undertaken on harmonised rules relating to discovery, including the completion in 2006 of harmonised rules relating to *Mareva* freezing orders and *Anton Piller* search orders.<sup>203</sup> Justice Lindgren further indicated that work on the harmonisation of rules dealing with service outside the jurisdiction is envisaged in the future.<sup>204</sup>
- 4.158 The Australian Institute of Judicial Administration Inc (AIJA) noted the work of the judicial harmonisation committees detailed above and indicated that this has not included the Family Court of Australia as ‘...the nature of the litigation in that court is very different’.<sup>205</sup> The AIJA informed the Committee that work on the harmonisation of court rules has also been advanced among courts within NSW and Queensland (i.e. among the Supreme, District, and Magistrates courts within those States).<sup>206</sup> The AIJA also raised the issue of electronic discovery and submitted that this ‘...is an area in which it might be sought to achieve a degree of uniformity or harmonization’.<sup>207</sup>

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201 The Hon Justice Kevin E Lindgren, *Exhibit 33*, p. 1.

202 The Hon Justice Kevin E Lindgren, *Exhibit 33*, p. 2, and *Transcript of Evidence*, 6 April 2006, pp. 60-61.

203 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 1, and *Exhibit 33*, pp. 2, 4.

204 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 2.

205 Professor Gregory Reinhardt, AIJA, *Transcript of Evidence*, 7 March 2006, p. 38.

206 AIJA, *Submission No. 25*, p. 1; Professor Gregory Reinhardt, AIJA, *Transcript of Evidence*, 7 March 2006, p. 38.

207 AIJA, *Submission No. 25*, p. 2.

4.159 The Committee supports this work. Nationally harmonised superior court rules, and harmonised court rules within jurisdictions, will reduce uncertainty and difficulty for practitioners and litigants alike and also assist interjurisdictional practice. In terms of superior court rule harmonisation, the Committee was concerned that there may be some potential for lowest common denominator rules to emerge from the collaborative committee process that has been employed thus far. However, Justice Lindgren stated that the ‘...harmonisation committees have worked astonishingly well’ and indicated that considerable advantages are to be gained from pooling the expertise of judges from the various jurisdictions.<sup>208</sup> The Committee would encourage courts around Australia to continue with this important work.

## Judicial decision-making

4.160 The LSNSW proposed the creation of a federal judicial commission to assist consistency in judicial decision-making:

If you are familiar with the functioning of the Judicial Commission of New South Wales... you will know that they have a tremendous resource to get consistency with sentencing, judgments and penalties. I see great advantage in the creation of a federal judicial commission... with an educative role for judicial education, to get consistency of sentencing.<sup>209</sup>

4.161 The LSNSW further indicated that this commission would function as ‘...a resource for judges everywhere to have consistency in delivery of judgments and services’.<sup>210</sup>

4.162 The Committee is attracted to this idea. A non-prescriptive commission performing the function outlined by the LSNSW would constitute an invaluable resource for the judiciary, providing comprehensive information regarding decisions made in other jurisdictions and developments and trends in judicial decision-making. By virtue of its educative role, the commission could also encourage and lead to increased consistency in judicial decision-making, particularly with regard to sentencing and penalties.

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208 The Hon Justice Kevin E Lindgren, *Transcript of Evidence*, 6 April 2006, p. 64.

209 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 40.

210 Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 40.

- 4.163 Furthermore, to complement and augment the work of the TTWG as discussed in the previous Chapter,<sup>211</sup> the Committee considers that the judicial commission could be usefully established on a trans-Tasman basis so as to formally include the New Zealand judiciary. Establishing the commission on this footing would broaden its benefits as an informational and educative resource, particularly if it also included information relating to New Zealand judicial decisions.
- 4.164 The Committee notes that the Australian Law Reform Commission (ALRC), in its recent report on the sentencing of federal offenders, recommended that:
- In order to promote consistency in the sentencing of federal offenders, the Australian Government should continue to support the development of a comprehensive national database on the sentences imposed on all federal offenders. ...The data should be made widely available for use by judicial officers, prosecutors, defence lawyers, researchers and members of the public.<sup>212</sup>
- 4.165 The Committee supports this recommendation and envisages that a judicial commission along the lines proposed by the LSNSW could provide exactly this type of information, albeit with a much broader remit and focus. The Committee is of the view that the Australian Government, the New Zealand Government, and the States and Territories should investigate the feasibility of establishing such a commission on a trans-Tasman basis.

## Recommendation 20

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

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211 See Chapter 3 paragraphs 3.137 – 3.176 above.

212 ALRC Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders*, Recommendation 21-1, pp. 87-88. This report can be accessed at: <http://www.alrc.gov.au/inquiries/title/alrc103/index.html>.

## Statute of limitations

4.167 The main issue raised in relation to statute of limitations was regulatory inconsistency.

## Regulatory inconsistency

4.168 The AGD informed the Committee of current regulatory arrangements regarding statute of limitations in the jurisdictions as follows:

- Commonwealth – specific but varying limitation periods exist for causes of action arising under some Commonwealth legislation.<sup>213</sup> Where no limitation period is specified, State and Territory laws are applied as federal law in federal jurisdiction under sections 79 and 80 the Commonwealth *Judiciary Act* 1903.<sup>214</sup> Thus:

...any court exercising federal jurisdiction in a State or Territory will apply the limitation law of the State or Territory as federal law if that State or Territory law is the law of the cause of action.<sup>215</sup>

- State/Territory – statutes of limitation are in force in every State and Territory.<sup>216</sup> There is some consistency between the States and Territories, for example the high degree of harmonisation regarding limitation periods for actions under contract law (six years for all States and Territories excepting the Northern Territory). However, there is less consistency regarding causes of action arising in other areas, for example in connection with more specialised contracts including bonds, contracts under seal, deeds and covenants.<sup>217</sup>

4.169 With regard to variations among limitation periods under Commonwealth laws, the AGD stated that it ‘...is not aware of problems having arisen from different limitation periods applying in different areas of activity regulated by Commonwealth law’, and that differences may also ‘...be justified on policy grounds’.<sup>218</sup>

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213 For example under the TPA and the *Copyright Act* 1968: AGD, *Submission No. 26*, p. 13.

214 AGD, *Submission No. 26*, p. 13.

215 AGD, *Submission No. 26*, p. 13.

216 For example the NSW *Limitation Act* 1969, the Victorian *Limitations of Action Act* 1958, and the WA *Limitation Act* 1935.

217 AGD, *Submission No. 26*, p. 14.

218 AGD, *Submission No. 26*, p. 13.

- 4.170 This aside, however, the AGD stated that ‘...the current state of limitation laws is complex and potentially confusing’, and that ‘Greater harmonisation of limitation periods and exceptions providing for extensions of time would seem desirable’.<sup>219</sup> The Department indicated that harmonisation of limitation statutes has been ‘...intermittently considered by SCAG’ (in 1994, 1997, 1998, and 2000) and was examined by the Law Reform Commission of Western Australia in 1997 and the ALRC in 2001.<sup>220</sup>
- 4.171 The Committee notes that the 2001 ALRC report recommended the enactment of a general Commonwealth limitation statute regarding causes of action arising under Commonwealth law.<sup>221</sup> The ALRC also recommended an investigation into:
- the desirability of harmonising existing federal provisions with respect to limitation of actions;
  - the enactment of general legislative provisions for determining, among other things, when a limitation period begins to run and the circumstances in which it may be postponed, suspended or extended; and
  - whether a federal limitation statute should be enacted for proceedings in federal courts or, more broadly, for all courts exercising federal jurisdiction.<sup>222</sup>
- 4.172 The AGD noted that the ALRC ‘...considered that uniform federal, State and Territory legislation on the limitation of actions would be a desirable means of providing certainty and equality in this area of the law’.<sup>223</sup>
- 4.173 The Department identified the following potential benefits that could be gained from greater harmonisation of State and Territory limitation statutes:
- Forum shopping – forum shopping occurred historically to some degree in connection with limitation period differences among jurisdictions, but this has been addressed in the main by the

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219 AGD, *Submission No. 26*, pp. 13, 14.

220 AGD, *Submission No. 26*, p. 13; *Submission No. 26.3*, p. 5. The Western Australian Attorney-General indicated that was proposing to reintroduce a bill to ‘...reform limitation law in WA’ into the WA Parliament in 2005: the Hon Jim McGinty MLA, *Submission No. 18*, p. 2.

221 ALRC Report 92: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Recommendation 31-1, p. 68. This report can be accessed at: <http://www.alrc.gov.au/inquiries/title/alrc92/index.htm>.

222 ALRC Report 92: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Recommendation 31-1, p. 68.

223 AGD, *Submission No. 26*, p. 15.

Commonwealth *Choice of Law (Limitation Periods) Act 1993* which ‘...classifies limitation laws as substantive law’,<sup>224</sup> and by the High Court in *Pfeiffer v Rogerson* (2000) 172 ALR 625, which ‘...held that the law of the place where a wrong was committed should be applied to all questions of substance’.<sup>225</sup>

However, forum shopping can still occur and could be further resolved by greater harmonisation of State/Territory limitation periods or by the Commonwealth enacting a limitation regime ‘...of comprehensive application to civil actions pursued in federal jurisdiction’.<sup>226</sup>

- Elimination of injustices – greater harmonisation of limitation periods would:
  - ...prevent inequality created by reliance on State and Territory laws where parties in the same situation may be treated differently by virtue of the different operation of state limitation statutes. ...this could be an issue, for example, in class actions for product liability claims where the relevant failure to warn occurred (and hence the tort was committed) where each plaintiff purchased or consumed a product.<sup>227</sup>
- Trade and commerce and consumers – greater harmonisation of limitation statutes would enable business to ‘...better assess risks of potentially successful civil actions against them. Also, they may be able to reduce costs for enforcing their legal (mainly contractual) rights’. Consumers may also ‘...benefit from greater certainty of limitation periods under consumer protection and other laws’.<sup>228</sup>

4.174 While the AGD affirmed that greater harmonisation of limitation periods (and exceptions for extensions) would seem to be desirable and identified potential benefits to harmonisation, it also stated that:

...there is a lack of evidence as to whether reform in this area would warrant the resources that would need to be invested.<sup>229</sup>

224 AGD, *Submission No. 26*, p. 14.

225 AGD, *Submission No. 26*, p. 14.

226 AGD, *Submission No. 26*, p. 14. The AGD noted however that ‘...where actions are brought in State and federal jurisdiction relying on the same sets of facts, a comprehensive Commonwealth limitation law would not necessarily preclude concern about different limitation periods being relevant to the proceedings’: p. 14.

227 AGD, *Submission No. 26*, p. 15.

228 AGD, *Submission No. 26*, p. 15.

229 AGD, *Submission No. 26*, p. 13.

4.175 And that:

Any review of federal and State and Territory limitation laws would also need to consider laws which provide criteria and procedures for extending time limits and the interaction of federal, State and Territory procedures. Given the range of different causes of actions which would have to be examined, achieving greater harmonisation of limitation periods would involve considerable work.<sup>230</sup>

4.176 The AGD also expressed reservations concerning the establishment of a general Commonwealth limitation statute regarding causes of action arising under Commonwealth law:

It has previously been suggested that a single federal limitation statute dealing with limitation periods in federal jurisdiction and federal courts would simplify litigation. However, there does not seem to be an urgent need for this. Also, there may be an issue about the Commonwealth's power to enact a limitation law regulating proceedings in federal jurisdiction.<sup>231</sup>

4.177 Yet, in a subsequent submission, the Department stated that:

...the Australian Government is not convinced that constitutional limitations for Commonwealth action are so uncertain...<sup>232</sup>

4.178 In terms of the current position of statute of limitations reform, the Department indicated that the Government is '...considering the recommendations made by the ALRC' and will '...continue to explore possible harmonisation of Commonwealth and State/Territory limitations legislation through SCAG'.<sup>233</sup>

4.179 The Committee was not impressed by the AGD's approach to statute of limitations harmonisation as revealed in its submissions. Firstly, it is unsatisfactory for the Department to recognise the desirability and potential benefits of harmonisation but then proceed, essentially, to dispose of the issue by stating that harmonisation would involve a lot of work. Secondly, the Committee was not assisted by the AGD indicating in one submission that a general Commonwealth limitation

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230 AGD, *Submission No. 26*, p. 15; see also *Submission No. 26.3*, p. 4.

231 AGD, *Submission No. 26*, p. 14.

232 AGD, *Submission No. 26.3*, p. 5.

233 AGD, *Submission No. 26*, p. 15; *Submission No. 26.3*, p. 5.

statute might face constitutional difficulties, but then, in another submission, suggesting that the Government is not convinced that such difficulties exist. This does little to illuminate or advance matters.

- 4.180 Furthermore, the Committee was surprised to learn just how little has been done to advance the harmonisation of limitation statutes over the years. SCAG has considered the issue on four separate occasions over the last twelve years, and the Government has been considering the ALRC recommendations on the matter for the past five years. In its final submission, the last word from the AGD regarding future action is that SCAG '...will continue to explore possible harmonisation of Commonwealth and State/Territory limitations legislation'.<sup>234</sup> This is hardly what the Committee would call progress. In November 2006 the Attorney-General announced that statutes of limitation uniformity was being promoted at SCAG.<sup>235</sup> While the Committee is encouraged by this, expediting harmonisation in this area would seem to be warranted given the length of time that has already passed.

### Recommendation 21

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

## Service of legal proceedings

- 4.182 The Committee was pleased to be informed that 'Certain procedures relating to service of proceedings have already been successfully harmonised'<sup>236</sup> by the AGD:

The Commonwealth *Service and Execution of Proceedings Act* 1992 (SEPA) provides for the service and execution, throughout Australia, of process of courts and tribunals, and related procedures. SEPA overrides State law for the

234 AGD, *Submission No. 26.3*, p. 5.

235 Media release of the Attorney-General, the Hon Philip Ruddock MP, 9 November 2006. This document can be accessed at:  
<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0>.

236 AGD, *Submission No. 26*, p. 11.



interstate service and execution of process and judgments covered by the Act. Amendments are only made to the SEPA where State and Territory agreement has been secured.

Under SEPA, the service of originating process from any State or Territory court is allowed on a defendant across all Australian jurisdictions.<sup>237</sup>

- 4.183 The Department elaborated regarding service of civil and criminal process and subpoenas:

...Section 15 enables initiating process issued out of any State/Territory court in civil proceedings to be served (without leave) throughout Australia. ...In effect, this means that interstate service has the same effect as service in the place of issue. Similar principles apply to criminal proceedings under section 24.

Separate provision is made in SEPA for the service of subpoenas, to allow a subpoena issued in any State or Territory to be served in any part of Australia.<sup>238</sup>

- 4.184 The AGD also informed the Committee that a number of amendments for the *Service and Execution of Proceedings Act 1992* to '...improve the overall efficiency and effectiveness of SEPA' and '...improve cross-border harmonisation' among jurisdictions are currently under consideration or development.<sup>239</sup> Examples include amendments to facilitate the Cross Border Justice scheme among Western Australia, South Australia and the Northern Territory, and amendments to remove inconsistencies with regard to State bail laws.<sup>240</sup>

- 4.185 The Committee notes again that work on the harmonisation of court rules dealing with service outside the jurisdiction is envisaged in the future.<sup>241</sup>

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237 AGD, *Submission No. 26*, p. 11.

238 AGD, *Submission No. 26*, p. 11.

239 AGD, *Submission No. 26.3*, p. 11.

240 AGD, *Submission No. 26.3*, p. 11. In a media release of 9 November 2006 the Attorney-General indicated that the harmonisation of elements of civil procedure law throughout Australia in order to allow Australia to accede to the This document can be accessed at: <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP7596387205672A55CA256B49001162E0>.

241 The Hon Justice Kevin E Lindgren, *Submission No. 6*, p. 2; see also paragraph 4.157 above.

## Contract law and equity

### Contract law

4.186 In their submission Professors Wright and Ellinghaus brought the concept of a model contract code to the attention of the Committee as a possible means of harmonising contract law throughout the jurisdictions. Professors Wright and Ellinghaus stated that:

At present, in the 8 states and territories of Australia and in New Zealand contract law is largely to found [*sic*] in many thousands of volumes of reported cases.<sup>242</sup>

4.187 Professors Wright and Ellinghaus suggested that ‘Codification of contract law is the best means of overcoming jurisdictional differences in trade law which are inevitable in such a system’,<sup>243</sup> and that:

...contracts are fundamental to commerce and we think that to harmonise contract law is therefore both the most necessary and the most effective means of harmonising trade law. ...the harmonisation of contract law... is inconceivable without the reduction of those rules to a written statement – in other words, their codification.<sup>244</sup>

4.188 Professors Wright and Ellinghaus indicated that they have formulated a model Australian contract code for this purpose:

The ACC [Australian Contract Code] was drafted by us for the Law Reform Commission of Victoria. ...The ACC contains only 27 short articles. These are stated at a high level of generality. This makes it possible to embody the whole law of contract within them. At the same time, they are sufficiently specific to serve as a practical vehicle for regulating contracts and resolving contract disputes.<sup>245</sup>

...[the 27 articles of the code] state the rules of the case law of contract as it currently prevails both in Australia and in New Zealand in the form of broad principles unencumbered by the

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242 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1.

243 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1. See also Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 11.

244 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 12.

245 Professors T Wright and M Ellinghaus, *Submission No. 13*, pp. 1-2; see also *Exhibit 4*.

detailed mediating rules which are a feature both of case law and of long and complex codes of contract law...<sup>246</sup>

4.189 Professors Wright and Ellinghaus stated that:

...a uniform contract law based on broad principles would not reduce certainty and in fact is likely to increase it. It would also be more accessible, lead to more fair outcomes, and save costs.<sup>247</sup>

4.190 Professors Wright and Ellinghaus informed the Committee that they have conducted empirical research which supports their claims regarding the model contract code:

We recently conducted three experiments, involving 1800 participants, comparing the utility of the ACC with Australian case law and with another, more detailed, code (UNIDROIT Principles of International Commercial Contracts). In two of these experiments law students were asked to decide contract disputes drawn from real cases. In the third experiment university students were asked to evaluate judgments deciding the same disputes.<sup>248</sup>

...The most important conclusions supported by our results are:

- It would be beneficial to codify Australian contract law.
- It would be better to state the law in a small number of broad principles rather than numerous detailed rules.<sup>249</sup>

...On the basis of our research we also conclude:

- Codifying contract law would not diminish predictability. An ACC-type code would increase predictability in easier cases where it is most important.
- Codifying contract law is likely to lead to more fair outcomes. An ACC-type code would be more likely to do so than an UPICC [UNIDROIT Principles of International Commercial Contracts]-type code.
- Codes are more accessible (clearer language and logic) than Case Law. An ACC-type code would be more accessible than an UPICC-type Code.

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246 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 11.

247 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 1.

248 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

249 Professors T Wright and M Ellinghaus, *Exhibit No. 5*, p. 1.

- An ACC-type code would be more efficient (easier to comprehend and apply) than an UPICC-type code or Case Law.<sup>250</sup>

4.191 Professor Wright stated that:

...from both experiments we got very consistent results. That is actually a significant and important methodological point because... it is a form of triangulation – that is, it suggests the results are robust given that we had two distinctly different paradigms to the extent that the data indicated the same phenomena. That is rather strong.<sup>251</sup>

4.192 The Committee heard that a high level of consensus was reached among those participants in the experiment who used the model contract code to arrive at decisions regarding the provided contractual disputes:

...it worked out to be the case that 18 of the 20 decision makers in our experimental design in each case using the ACC agreed on the outcome, whereas there was a much lower number, about 14, for the detailed rule users.<sup>252</sup>

4.193 Professor Wright also stated that:

Bearing in mind that these were appellate cases that had resulted in a dissenting judgment... it is very striking that, in effect, the users of those broad principles... were able to identify half of these difficult appellate cases as essentially being fairly easy, straightforward disputes. The potential benefits to the economy and the country of diverting a significant number of disputes, we might suggest, from litigation to resolution between the parties by agreement would be very significant indeed.<sup>253</sup>

4.194 In terms of implementation of the code, Professors Wright and Ellinghaus indicated that it could be legislated in model/template form by the Commonwealth with application to ‘...all contracts made by corporations and in interstate trade (on the same constitutional basis of the Trade Practices Act 1974)’.<sup>254</sup> This Commonwealth law

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250 Professors T Wright and M Ellinghaus, *Exhibit No. 5*, p. 6. See also Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 14.

251 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 18.

252 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 19.

253 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 19.

254 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

could then '...serve as a model for complementary legislation by the States and New Zealand'.<sup>255</sup> Professors Wright and Ellinghaus also indicated that, alternatively, the code could be '...given authoritative status by other means':<sup>256</sup>

For example, it could be published as a 'Restatement' following an American model. It could also be officially recommended for adoption by contracting parties as the basis of their contracts.<sup>257</sup>

4.195 The Committee notes that the original model code was drafted in 1992. Professor Wright indicated that some modest changes have been made as required over the intervening years, but noted also that the general principles enshrined in the code are '...relatively static and clear in the law and unchanged.'<sup>258</sup> Professor Wright also indicated that, if the code were to be taken forward, its content would be a '...point of departure' and could be revisited if necessary.<sup>259</sup>

4.196 The Committee noted that codification would not remove the need for legal expertise and advice in the event of contractual disputes. Professor Ellinghaus agreed:

That is undoubtedly true. We are not in the business of abolishing legal expertise, and we are certainly not in the business of making something that is a professional discipline into something else. ...but I think we do have some considerable body of empirical data now which suggests that there will be a significant difference in accessibility if you produce a code.<sup>260</sup>

4.197 A number of other views were also expressed regarding the concept of a model Australian contract code as a means of harmonising contract law throughout the jurisdictions. The AFC indicated its support for a code on a conceptual level, but expressed some doubt on whether it would be necessary, stating that 'Contract law, in a large respect... is pretty much settled' and that it '...is not changing a huge amount, so people know how to effectively give themselves a contract and get on with business'.<sup>261</sup> The AFC also noted the

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255 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

256 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

257 Professors T Wright and M Ellinghaus, *Submission No. 13*, p. 2.

258 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 16.

259 Professor Wright, *Transcript of Evidence*, 7 March 2006, p. 16.

260 Professor Ellinghaus, *Transcript of Evidence*, 7 March 2006, p. 17.

261 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

existence of the NSW *Contracts Review Act* 1980 which provides for judicial review of certain contracts.<sup>262</sup>

4.198 In his submission Mr Ray Steinwall stated that a contract code ‘...would have numerous advantages’ including the following:

- It would provide an opportunity to review and reform provisions that operate harshly or unjustly.
- It could eliminate inconsistencies in State and Territory laws.
- It could expressly codify complex and at times inconsistent judicial precedent.
- For consumers and small business, a code could assist to de-mystify contract law and make it more accessible through a single instrument.
- A code would ensure consistency across jurisdictions, assisting firms that operate in multiple jurisdictions.<sup>263</sup>

4.199 While Mr Steinwall indicated elsewhere that he could not comment specifically on the model advanced by Professors Wright and Ellinghaus,<sup>264</sup> he did state that ‘...the broad principle that they have put forward is something that I support’.<sup>265</sup> Mr Steinwall suggested in his submission that the most suitable mechanisms for implementing a model contract code would be either the model/template or the applied legislation mechanisms.<sup>266</sup>

4.200 The LSNSW indicated that it has identified contract law as an area where harmonisation among the jurisdictions is required.<sup>267</sup> In regard to the model advanced by Professors Wright and Ellinghaus, the LSNSW stated that:

Their view is not terribly inconsistent with the US code for contract law, which I guess applies across the jurisdiction of all the states in the US. There is now and has been for some time consistency in contract law. Even then, like in Australian jurisdictions, there is not a great deal of difference and it is an area where a code could apply. It is like, for example, the experience of the Corporations Act. It is now a national code

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262 Mr Stephen Edwards, AFC, *Transcript of Evidence*, 6 April 2006, p. 24.

263 Mr Ray Steinwall, *Submission No. 22*, p. 9.

264 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.

265 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.

266 Mr Ray Steinwall, *Submission No. 22*, p. 9.

267 Mr Ian Tunstall, LSNSW, *Transcript of Evidence* 6 April 2006, p. 33; LSNSW, *Exhibit No. 31*, p. 1.

in the sense that it applies across all jurisdictions. What arises from that, as we are seeing with workplace relations and those sorts of issues, is more consistency across jurisdictions.<sup>268</sup>

- 4.201 The BCA indicated that it does '...not have a position' on the concept of a model contract code, but stated that:

There can be some advantages with codification in that you may allow yourself to move beyond things that are largely set and just get on with business or with whatever is in dispute in a particular case. The problems with codification and to some extent the strengths of the common law system are that it is ever changing, flexible, adaptive and all those sorts of things.<sup>269</sup>

- 4.202 The AGD informed the Committee that it '...has not developed a model contract code' but that 'SCAG would be the appropriate forum to pursue such harmonisation'.<sup>270</sup>

- 4.203 The Committee acknowledges the detailed evidence from Professors Wright and Ellinghaus concerning a model contract code, but notes that contract in Australia is largely governed by the common law – a common law which, as noted above,<sup>271</sup> is a single unfragmented common law across the jurisdictions and therefore does not require harmonisation as such. While it is certainly possible that codification in this area could have other benefits such as improved accessibility, the Committee is somewhat sceptical as to the need for codification from a harmonisation standpoint. Nevertheless, on balance, the Committee is of the view that a possible national model contract code does warrant further investigation by the Commonwealth, States and Territories.

## Recommendation 22

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

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268 Mr Ian Tunstall, LSNSW, *Transcript of Evidence* 6 April 2006, p. 33.

269 Mr Steven Münchenberg, BCA, *Transcript of Evidence*, 6 April 2006, p. 73.

270 AGD, *Submission No. 26.3*, p. 8.

271 See Chapter 2 paragraphs 2.24 – 2.25 above.

## Equity

- 4.205 In his submission Mr Ray Steinwall proposed the codification of equity law. Mr Steinwall stated that:

Extensively based on judicial precedent (with some statutory modifications), equitable principles are often difficult to state with any precision, reflecting differences of judicial opinion within and across jurisdictions. Precedent based, careful analysis is required of numerous judgments in order to distil binding principles.

...A sense of mystique has therefore built up around equity and with it a degree of specialisation well beyond the ordinary person and indeed many lawyers. In some circles this uniqueness is cultivated because it preserves its long tradition.<sup>272</sup>

- 4.206 Mr Steinwall submitted that:

Equity in its current form is an anachronism. It is no longer acceptable that tradition and practice should deprive a person a [*sic*] reasonable understanding of principles that apply to many facets of businesses and commercial dealings. There is no cogent reason (if there ever was) why a serious attempt should not be made to codify the principles of equity.<sup>273</sup>

- 4.207 More specifically, Mr Steinwall identified a number of '...less well established' equitable principles such as unconscionable conduct, equitable interest in land and fiduciary relationships, specific performance, equitable damages, and innocent misrepresentation that could be apt for codification due to '...commonality between the Commonwealth and the states' in the area of consumer protection law.<sup>274</sup>

- 4.208 While the Committee does not doubt that equity is a complex area of the law, it does not consider that there is sufficient evidence of regulatory inconsistency or duplication to warrant a recommendation that further exploration of legal harmonisation be undertaken in this area.

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272 Mr Ray Steinwall, *Submission No. 22*, p. 10.

273 Mr Ray Steinwall, *Submission No. 22*, p. 10.

274 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 29.



## Evidence law

- 4.209 The AGD informed the Committee of the current regulation of evidence law throughout the jurisdictions:

In the early 1990s, SCAG developed a proposal for a model Evidence Act. In 1995, the Commonwealth and New South Wales passed nearly identical legislation. The Commonwealth *Evidence Act 1995* applies in federal courts and the Australian Capital Territory. Since then, Tasmania and Norfolk Island have also passed parallel, but not identical, legislation. These Acts are collectively known as 'the uniform Evidence Acts'. The other jurisdictions continue to rely on a combination of existing statute, common law and applicable rules of court. However, the Victorian Government has now announced its intention to develop a similar Act.<sup>275</sup>

- 4.210 In its submission to the inquiry, the ALRC noted similarly:

The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in proceedings, federal or state, before New South Wales courts and some tribunals.

In 2001, Tasmania passed legislation that essentially mirrors the Commonwealth and New South Wales Acts, although there are some differences. In 2004, Norfolk Island passed legislation that essentially mirrors the *Evidence Act 1995* (NSW).<sup>276</sup>

- 4.211 The AGD indicated that the uniform Evidence Acts are '...limited in scope', being '...largely (but not entirely) concerned only with court (and similar) proceedings',<sup>277</sup> and that there are indeed divergences among the statutes:

...the differing needs of the partners to the uniform legislation have resulted in departures by individual jurisdictions. ...A comparison of the various Acts shows there are a number of additional provisions which appear in various jurisdictions. A number of participants in the uniform

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275 AGD, *Submission No. 26*, pp. 15-16. See also Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 3, and Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 2.

276 ALRC, *Submission No. 32*, p. 2.

277 AGD, *Submission No. 26*, p. 16.

Evidence Acts have incorporated variations in their legislation even from commencement.<sup>278</sup>

4.212 The Department also indicated that the Commonwealth and NSW jurisdictions '...have a range of special evidence provisions which are not in their Evidence Acts'.<sup>279</sup>

4.213 The ALRC summarised the impact of the Commonwealth *Evidence Act* 1995 as follows:

...the passage of the *Evidence Act* 1995 (Cth) has the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction. As a practical example, a Brisbane barrister defending a client charged with a federal crime before the Queensland Supreme Court would use that state's evidence law - but would use the *Evidence Act* 1995 (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the next day.<sup>280</sup>

4.214 The Committee notes that, from July 2004 to December 2005, the ALRC, together with the NSW Law Reform Commission and the Victorian Law Reform Commission (VLRC), conducted a major review of the operation of the *Evidence Act* 1995. In its submission the ALRC also indicated that the inquiry was conducted with the participation of law reform bodies from other jurisdictions:

Although not formally a part of the process, representatives of the Queensland Law Reform Commission (QLRC), the Tasmanian Law Reform Institute and the Northern Territory Law Reform Committee (NTLRC) also participated in the workshops and meetings leading to the completion of the final report.<sup>281</sup>

278 AGD, *Submission No. 26*, p. 16. See also ALRC, *Submission No. 32*, p. 2.

279 AGD, *Submission No. 26*, p. 16. For example the Commonwealth *Judiciary Act* 1903, *Crimes Act* 1914, and *Family Law Act* 1975.

280 ALRC, *Submission No. 32*, p. 2.

281 ALRC, *Submission No. 32*, p. 3. The ALRC's inquiry report indicates that the Law Reform Commission of Western Australia also participated in the inquiry: ALRC Report 102: *Uniform Evidence Law*, p. iii (ALRC letter of transmittal). This report can be accessed at: <http://www.alrc.gov.au/inquiries/title/alrc102/index.html>. In his submission the Queensland Attorney-General stated that the QLRC had '...a reference for the purpose of inputting into this [the ALRC] review and with a view to subsequent Queensland consideration of the enactment of the uniform evidence laws: *Submission No. 19*, p. 4.

4.215 In its submission the ALRC informed the Committee that the main aims of the inquiry were:

...to identify and address any defects in the uniform Evidence Acts, and to maintain and further the harmonisation of the laws of evidence throughout Australia.<sup>282</sup>

4.216 The ALRC indicated that the inquiry report (released December 2005) contains a number of recommendations '...directed to maintaining uniformity in evidence law'.<sup>283</sup> The ALRC summarised the recommendations of the report regarding harmonisation of evidence law as follows:

- SCAG should adopt an Inter-governmental agreement (IGA) providing that, subject to limited exceptions, any proposed changes to the uniform Evidence Acts must be approved by SCAG. The IGA should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the IGA, and the proposed amendment must be considered and approved by SCAG before being implemented (Recommendation 2-1);
- all Australian jurisdictions should work towards harmonisation of provisions on related (but 'non-core') matters not otherwise covered in the uniform Evidence Acts, such as children's evidence and offence-specific evidentiary provisions (Recommendation 2-2); and
- Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years of the tabling of ALRC 102 (Recommendation 2-3).<sup>284</sup>

4.217 Stating that '...a strong movement has emerged towards the harmonisation of evidence laws in Australia based on the uniform Evidence Act',<sup>285</sup> the ALRC also informed the Committee of the following developments in the various jurisdictions regarding the harmonisation of evidence law:

- In February 2006 the Commonwealth and State Attorneys-General established a working group to '...advise them on amendments arising from the report's recommendations'. The Commonwealth

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282 ALRC, *Submission No. 32*, p. 3.

283 ALRC, *Submission No. 32*, p. 3.

284 ALRC, *Submission No. 32*, p. 3.

285 ALRC, *Submission No. 32*, p. 3.

Attorney-General and Minister for Justice also affirmed the Government's support for national uniformity in evidence laws.<sup>286</sup>

- Also in February 2006 the VLRC released a report on the implementation of the uniform evidence legislation in Victoria, with recommendations detailing amendments to both Victorian legislation and the uniform Evidence Act that would be required upon implementation.<sup>287</sup> The Committee notes the following key recommendation of the VLRC report:

Except as provided for in the following recommendations, the Victorian UEA should be drafted to mirror the current provisions of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), amended in accordance with the recommendations of the joint Final Report.<sup>288</sup>

- In May 2005 the Northern Territory Law Reform Committee (NTLRC) was asked by the NT Attorney-General to review the existing NT evidence legislation and to:

...advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into the Northern Territory, including the modification of the existing provisions of the Uniform Evidence Act.<sup>289</sup>

This review is ongoing. The Committee notes the following statement in a discussion paper released by the NTLRC for the purposes of its review:

It would seem to be in the interests of the Northern Territory to be involved in the uniform system and to make its own contributions to the sturdy improvement of this branch of the law.<sup>290</sup>

286 ALRC, *Submission No. 32*, p. 3. See also joint media release of the Attorney-General, the Hon Philip Ruddock MP, and the Minister for Justice and Customs, Senator the Hon Chris Ellison MP, 8 February 2006. This document can be accessed at: [http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/Media\\_Releases\\_2006\\_First\\_Quarter\\_8\\_February\\_2006\\_-\\_Tabling\\_of\\_the\\_Report\\_on\\_Uniform\\_Evidence\\_Law\\_-\\_0112006](http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/Media_Releases_2006_First_Quarter_8_February_2006_-_Tabling_of_the_Report_on_Uniform_Evidence_Law_-_0112006).

287 ALRC, *Submission No. 32*, p. 3.

288 VLRC, *Implementing the Uniform Evidence Act*, p. xix (Recommendation 1). This document can be accessed at: <http://www.lawreform.vic.gov.au/CA256A25002C7735/All/FE13302D8880AEF3CA25718D00799163?OpenDocument&1=34-Publications~&2=~&3=~>.

289 ALRC, *Submission No. 32*, pp. 3-4.

290 NTLRC, *Uniform Evidence Acts: Discussion Paper*, p. 8. This document can be accessed at: <http://www.nt.gov.au/justice/graphpages/lawmake/lawref.shtml#curr>.

- From March – September 2005 the QLRC conducted its own review of the uniform Evidence Acts. The ALRC indicated that the terms of reference for the QLRC review ‘...did not require the QLRC to advise on the action required to facilitate the introduction of the uniform Evidence Act into Queensland’.<sup>291</sup> The Committee notes that the QLRC report focused on:

...areas of particular concern to Queensland by identifying differences between Queensland evidence law and the uniform Evidence Acts, and addressing the questions raised in the ALRC’s Issues Paper and proposals made in the Discussion Paper.<sup>292</sup>

The QLRC report also states that the QLRC ‘...examined the advantages and disadvantages of the differing approaches to evidence law in Queensland and under the uniform Evidence Acts’.<sup>293</sup>

- The Attorneys-General of Western Australia and South Australia have ‘...placed the introduction of the Uniform Evidence Act on their respective legislative agendas’.<sup>294</sup>

4.218 The Committee agrees with the AGD that ‘...Uniform evidence legislation is an important and achievable aim’.<sup>295</sup> The importance of harmonisation in this crucial area of the law has been recognised for well over a decade, and the Committee supports the recent recommendations of the ALRC in this regard. In particular, the measures proposed by the ALRC in recommendations 2-1 and 2-2 of its report should assist in furthering harmonisation and minimising the level of divergence that can develop between the jurisdictions that have implemented the uniform Evidence Acts. While it is also encouraging to see that some of the jurisdictions that did not participate in the enactment of the uniform Evidence Acts are now moving towards participation in the uniform system, the Committee does believe that the move towards a harmonised evidence law system needs a stronger impetus and a greater sense of urgency in order for the goal to finally be realised. It would be appropriate for the federal Government to provide this additional momentum,

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291 ALRC, *Submission No. 32*, p. 4.

292 QLRC, *A Review of the Uniform Evidence Acts*, p. 6. This document can be accessed at: <http://www qlrc.qld.gov.au/publications.htm>.

293 QLRC, *A Review of the Uniform Evidence Acts*, p. 6.

294 ALRC, *Submission No. 32*, p. 4.

295 AGD, *Submission No. 26*, p. 15.

particularly in reference to those jurisdictions which are not yet moving directly towards participation in the uniform system.

### **Recommendation 23**

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

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

### **Model criminal code**

4.220 The Committee would also like to comment on the issue of a Model Criminal Code for Australia, although this issue was not raised in the evidence to the inquiry. The Committee notes that work on a Model Criminal Code for Australia has been pursued by the Model Criminal Code Officers Committee (MCCOC) of SCAG since 1990, with reports on various parts of the Model Code released by the MCCOC incrementally since 1995.<sup>296</sup> The Committee also notes that, while the Commonwealth has implemented much of the Code, implementation across the other jurisdictions has been uneven, with some jurisdictions legislating certain parts of the Code or even particular offences. The ACT and the Northern Territory are the only jurisdictions (apart from the Commonwealth) to have implemented the first two chapters of the Code outlining the general principles of criminal responsibility.

4.221 As with the national uniform evidence law system, the Committee is of the view that a stronger impetus and a greater sense of urgency needs to be given to the Model Criminal Code project in order for the goal of a national code to be realised across Australia. The Model Criminal Code deals with a fundamental area of the law and has been under development for some 15 years; the federal Government should now provide additional momentum in order to advance implementation of the Code nationally.

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<sup>296</sup> The MCCOC reports can be accessed at: <http://www.aic.gov.au/links/mcc.html>. The most recent investigations of the MCCOC have been a report on double jeopardy law reform (2004) and a discussion paper on the criminal law relating to drink spiking (2006).

## Recommendation 24

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

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

## Privacy law

- 4.223 In its initial submission the AGD informed the Committee that privacy regulation in Australia is comprised of the Commonwealth *Privacy Act* 1988 together with a number of State and Territory regulatory regimes:

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

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

protect the privacy of personal information in public sector agencies.<sup>297</sup>

4.224 The AGD subsequently informed the Committee that Tasmania has also enacted privacy legislation (the *Personal Information and Protection Act 2004*) for its public sector.<sup>298</sup>

4.225 The Committee was also informed that a draft National Health Privacy Code has been developed by the Commonwealth and the States for the purpose of achieving '...nationally consistent privacy arrangements for health information across public and private sectors'.<sup>299</sup> The draft Code is to be considered in 2006.<sup>300</sup>

4.226 The AGD stated that:

Greater harmonisation of privacy laws between Australian jurisdictions would be desirable as it would minimise confusion and uncertainty for businesses and consumers who need to comply with the regulation.<sup>301</sup>

4.227 The Committee notes that in 2005 the Office of the Privacy Commissioner (OPC) completed a review of the private sector provisions of the *Privacy Act 1988*. In terms of harmonisation, the OPC found that:

The Privacy Act has not achieved its object of establishing a 'single comprehensive national scheme' for the protection of personal information. ...The lack of national consistency contributes significantly to the costs imposed on business.<sup>302</sup>

4.228 Among the OPC's recommendations to redress this issue were the following:

The Australian Government should consider asking the Council of Australian Governments (COAG) to endorse national consistency in all privacy related legislation.

The Australian Government should consider setting in place mechanisms to address inconsistencies that have come about,

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297 AGD, *Submission No. 26*, p. 24.

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

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

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

301 AGD, *Submission No. 26*, p. 24.

302 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p. 48. This report can be accessed at: <http://www.privacy.gov.au/act/review/index.html>.



or will come about, as a result of exemptions in the Privacy Act, for example, in the area of workplace surveillance.

The Australian Government should consider commissioning a systematic examination of both the IPPs and the NPPs with a view to developing a single set of principles that would apply to both Australian Government agencies and private sector organisations. This would address the issues surrounding Australian Government contractors.<sup>303</sup>

- 4.229 Both the AGD and the ANZ Bank also raised the issue of workplace privacy regulation. The AGD indicated that workplace privacy in relation to private sector employee records is the subject of inconsistent regulation by the States and Territories:

Private sector employee records are excluded from the protection of the *Privacy Act 1988* (Cth). This has created an opportunity for the States and Territories to legislate in the area of workplace privacy and has led to inconsistencies across jurisdictions. For example, NSW legislation governing the privacy of health information exempts employee records from the operation of the legislation whereas similar legislation in Victoria does not.<sup>304</sup>

- 4.230 The ANZ registered concerns regarding ‘...recent developments in Workplace Surveillance reform toward state-based legislation’:<sup>305</sup>

A move toward state-based workplace privacy regulation would re-open the prospect of non-uniform laws throughout Australia. Nationally operating entities such as ANZ could be subjected to contradictory laws affecting their national workforces. This would be likely to create significant additional compliance costs due to systems modifications, altered practices and staff training in order to manage the differences and ensure compliance. A state-by-state approach also fails to recognise that technology does not recognise borders, and the provisions in these developments ignore the technologically neutral objective of the Federal Privacy Act.<sup>306</sup>

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303 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p. 48.

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

305 ANZ Bank, *Submission No. 27*, p. 12.

306 ANZ Bank, *Submission No. 27*, p. 13.

- 4.231 The ANZ noted the 2005 OPC review of the private sector provisions of the *Privacy Act 1988*, including the OPC's recommendation that the Government consider mechanisms to address exemption inconsistencies in the Act such as those in the area of workplace surveillance (See paragraph 4.228 above).<sup>307</sup> The ANZ stated that:

While recognising that State-based consideration of legislation on this issue derives from a desire to ensure privacy protection for workers, the development of nationally applicable standards would be preferable. This approach would avoid a patchwork of State and Territory legislation while delivering an agreed standard of privacy protection for workers balanced with the needs of employers to protect their businesses and customers.<sup>308</sup>

- 4.232 The AGD also indicated its support for regulatory harmonisation in the area of workplace privacy:

Workplace privacy is an area... where it would be desirable to have a nationally consistent workplace privacy regime to provide protection for the personal information of workers.<sup>309</sup>

- 4.233 The Department indicated that SCAG is '...currently exploring possible policy approaches for nationally consistent workplace privacy laws'.<sup>310</sup>

- 4.234 The Committee notes that in January 2006 the ALRC commenced a comprehensive inquiry into the operation of the Commonwealth *Privacy Act 1998* and related laws. The terms of reference for the inquiry require the ALRC to consider a range of issues relating to the *Privacy Act 1988* including privacy regimes in other jurisdictions and the minimisation of the regulatory burden on business. The inquiry is to be completed by March 2008.<sup>311</sup>

- 4.235 The Committee is of the view that, if it has not already done so, the Government should highlight the issue of regulatory inconsistency, both in relation to privacy regulation generally and workplace privacy regulation specifically, in its submissions to the ALRC inquiry.

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307 ANZ Bank, *Submission No. 27*, p. 13.

308 ANZ Bank, *Submission No. 27*, pp. 13-14.

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

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

311 Further information regarding the ALRC's inquiry can be accessed at:  
<http://www.alrc.gov.au/inquiries/current/privacy/index.htm>.

## Recommendation 25

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

## Defamation law

- 4.237 The AGD informed the Committee that in 2004 the Government released the outline of a model bill to form the basis of a national defamation law ‘...limited to matters within Commonwealth constitutional power’.<sup>312</sup> The model bill would have been ‘...a code for most defamation proceedings’,<sup>313</sup> with some areas remaining within State jurisdiction. Subsequent to this, the States and Territories advanced their own proposal for uniform defamation legislation involving the States and Territories enacting model provisions in each jurisdiction.
- 4.238 The AGD indicated that in 2005 and early 2006 each of the States and the ACT enacted ‘...substantially uniform defamation laws based on the model provisions put forward in the State and Territory proposal’.<sup>314</sup> The Committee notes that the NT also passed its defamation legislation in early 2006. The AGD stated however that there are still some differences between the jurisdictions:

The Australian Government has been encouraged by the progress that has been made. It remains regrettable, however, that differences remain between the jurisdictions in relation to the provision of juries. The Australian Government will continue to support reform in relation to the provision of alternative remedies and the rights of corporations to sue.<sup>315</sup>

- 4.239 The Committee is pleased that such substantial progress has been made towards the harmonisation of defamation law throughout

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312 AGD, *Submission No. 26*, p. 28.

313 AGD, *Submission No. 26*, p. 29.

314 AGD, *Submission No. 26.1*, p. 7. See also Queensland Attorney-General, the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 1.

315 AGD, *Submission No. 26.1*, p. 7.

Australia. The Committee would encourage all of the jurisdictions to now complete the task and advance harmonisation in the outstanding areas of difference.

## Workers' compensation regulation

4.240 The ANZ Bank indicated that there are inconsistencies among the various State and Territory regulatory regimes governing workers' compensation in relation to benefits calculation and the requirements for rights and responsibilities documentation, financial and prudential safeguards, reporting, and audit.<sup>316</sup> The ANZ indicated that this situation translates to increased compliance costs:

This patchwork of State-based legislation means ANZ is unable to centralise its management of Workers Compensation issues and benefit from a more efficient allocation of resources. ANZ retains staff in Queensland, ACT, Tasmania, South Australia and Western Australia to ensure compliance with the State-specific reporting and financial obligations, even though ANZ employs a relatively small number of staff in these states and even though the workers' compensation claims in these areas can number as few as one or two at any one time.<sup>317</sup>

4.241 The Committee notes that the Productivity Commission conducted an inquiry into the national workers' compensation and occupational health and safety regulatory frameworks in 2003-2004. With respect to workers' compensation, in its report the Commission found that:

Existing national coordinating mechanisms have proven ineffective in resolving the compliance complexities and costs for multi-state employers.<sup>318</sup>

4.242 However, the Commission also found that a single national workers' compensation framework was not desirable:

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316 ANZ Bank, *Submission No. 27*, p. 16. In his submission the Queensland Minister for Employment, Training and Industrial Relations raised the issue of the *Workplace Relations Amendment (Work Choices) Act 2005*: the Hon Tom Barton MP, *Submission No. 11.1*, pp. 1-3.

317 ANZ Bank, *Submission No. 27*, p. 16.

318 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 146. This report can be accessed at: <http://www.pc.gov.au/inquiry/workerscomp/finalreport/index.html>.

The Commission has no evidence of support by the States and Territories for a single uniform national workers' compensation scheme. Many of the stakeholders at the individual jurisdictional level have suggested that concessions won in hard fought negotiations would not be willingly surrendered for the sake of national uniformity.<sup>319</sup>

...the Commission does not support national uniformity of workers' compensation for its own sake. In arriving at this view, the Commission recognises that the majority of employers (who are predominantly small to medium enterprises) and their employees operate only within a single jurisdiction. To them, national uniformity has little relevance. Further, it is not apparent that there is any single perfect or best scheme. Best practice can be reflected in a number of different ways and schemes must constantly adapt to the wider socio-economic environment within which they operate. Innovation and learning should be encouraged.<sup>320</sup>

4.243 The Commission recommended instead that:

- The Government should '...develop an alternative national workers' compensation scheme to operate in parallel to existing State and Territory schemes';
- The '...current regulatory framework for the oversight of the Australian Government's workers' compensation schemes and occupational health and safety regimes be strengthened by progressively developing the Safety, Rehabilitation and Compensation (SRC) Commission as a stand-alone regulator'; and that
- The 'States and Territories join with the Australian Government to establish immediately a new national body for workers' compensation', with the Commonwealth and State/Territory Governments having responsibility for '...implementation, with a view to improving the performance of their respective schemes and, over time, achieving national consistency'.<sup>321</sup>

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319 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 146.

320 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, p. 147.

321 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, pp. 149-150.

- 4.244 In its response to the Commission's report, the Government acknowledged the Commission's findings regarding the national workers' compensation framework and the associated compliance burdens:

The Commission found fundamental differences in Australian workers' compensation arrangements. The differences relate to the design elements of the schemes in terms of coverage, benefits and self-insurance obligations. The result is a compliance burden for multi-State employers and uncertainty for employers and employees. Multi-state corporations employ over a quarter of Australian employees and the costs to them of meeting the requirements of the various jurisdictions, rather than those of a single national scheme, can be in the order of millions of dollars a year.<sup>322</sup>

- 4.245 Despite this, the Government did not agree with the first and third of the Commission's recommendations as set out above, while agreeing to further examine the second. With regard to the first recommendation, the Government stated that:

The Commission's national workers' compensation proposal would result in a substantial shift to the Government of responsibility for an area of the economy that is traditionally a State matter.

...The Commission's model would... establish national institutional bodies that remove the influence of industry parties and States might have on the policy direction of these core workplace relations areas. Responses to the Commission's Interim Report also demonstrated that any attempt by the Government to legislate for the Commission's model. [*sic*] would not be supported by the States, major employer groups and unions.<sup>323</sup>

- 4.246 With regard to the third recommendation, the Government stated that:

The Government considers that the establishment of a separate body for workers' compensation to run in parallel

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322 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, para. 14. This document can be accessed at: [http://www.treasurer.gov.au/tsr/content/publications/workers\\_compensation\\_response.asp](http://www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp).

323 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004*, paras. 39 and 41.

with NOHSC would be duplicative and not build on the synergies between the OHS and workers' compensation systems.<sup>324</sup>

- 4.247 Elsewhere in its response, however, the Government did indicate that it would be taking action to address the Commission's findings regarding the ineffectiveness of existing national workers' compensation (and occupational health and safety) coordination arrangements:

...it is therefore timely to further pursue greater national coordination of these programmes through the establishment of a non-legislative national OHS and workers' compensation advisory council – the Australian Safety and Compensation Council (ASCC). The ASCC would develop the policy and strategic direction for these programmes under the guidance of the Workplace Relations Ministers' Council (WRMC).<sup>325</sup>

...the work of the ASCC on workers' compensation would be to identify and recommend to WRMC design elements of schemes to gain consistency in the regulatory framework.<sup>326</sup>

- 4.248 The Committee notes that the Australian Safety and Compensation Council held its first meeting in October 2005.<sup>327</sup>

## Intergovernmental agreements

- 4.249 Dr Simon Evans noted the role of intergovernmental agreements in relation to legal harmonisation:

...attempts to harmonise legal systems at a federal or international level involve a degree of coordination between governments which is often achieved through intergovernmental agreements. These agreements may take a

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324 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004, para. 47.*

325 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004, para. 30.*

326 *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27, 16 March 2004, para. 33.*

327 Further information regarding the ASCC can be accessed at:  
<http://www.nohsc.gov.au/AboutNohsc/>.

vast array of forms and vary greatly in formality and complexity.<sup>328</sup>

- 4.250 Dr Evans contended that intergovernmental agreements ‘...pose risks to the central constitutional values of democratic law-making, transparency, accountability and responsible government’:<sup>329</sup>

Public information about the existence of intergovernmental agreements is scarce, and access to their substantive content is difficult and *ad hoc*. ...many Australians may be unaware of the existence of agreements with immense practical significance for Australian law and politics. This is clearly contrary to the rule of law ideals of transparency and accessibility of legal materials.<sup>330</sup>

...Agreements are typically formed by senior members of the Executive, often at fori such as the Ministerial Councils. There is little opportunity for Parliamentary input into the details of agreements or for members of the executive to account for their contents, until draft legislation is presented to parliaments on a take-it-or-leave-it basis. This constitutes a serious ‘democratic deficit’ that is compounded when the agreement underlying the proposed legislation is not well publicised.<sup>331</sup>

- 4.251 Dr Evans stated that a ‘...system of scrutiny and consultation is required to ensure the agreement making process is subject to the principles of transparency and accountability in government’.<sup>332</sup> Specifically, Dr Evans recommended that intergovernmental agreements should be circulated in draft form prior to finalisation for public scrutiny and comment and considered by parliamentary committees in each jurisdiction, and that the current register of intergovernmental agreements should be augmented so as to include all agreements requiring legislative implementation.<sup>333</sup>

- 4.252 The Committee agrees with Dr Evans in relation to intergovernmental agreements. These agreements can be significant components of harmonisation between governments (and intergovernmental

328 Dr Simon Evans, *Submission No. 31*, p. 3.

329 Dr Simon Evans, *Submission No. 31*, p. 1.

330 Dr Simon Evans, *Submission No. 31*, p. 3.

331 Dr Simon Evans, *Submission No. 31*, p. 4.

332 Dr Simon Evans, *Submission No. 31*, p. 3.

333 Dr Simon Evans, *Submission No. 31*, pp. 1-2. The current register of intergovernmental agreements can be accessed at: [http://www.coag.gov.au/guide\\_agreements.htm](http://www.coag.gov.au/guide_agreements.htm).



coordination more generally) and, in the interests of transparency and accountability, should be made available for public and parliamentary scrutiny while in draft form. The register of intergovernmental agreements maintained by COAG should also include all agreements requiring legislative implementation.

### **Recommendation 26**

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

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

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

## **Harmonisation between Australia and New Zealand**

4.254 The Committee notes that, in many of the areas considered above, there is considerable interaction and activity across the Tasman as well as within Australia. In some cases, such as therapeutic goods regulation, work is already in process to achieve legal harmonisation between Australia and New Zealand. To the Committee, it seems to be a matter of logic that if legal harmonisation is to be progressed within Australia in a given area, then harmonisation in that area should also be pursued between Australia and New Zealand where there is a mutual benefit. In particular, given the progress that has been made towards harmonisation in Australia in areas such as court rules, the regulation of the legal profession, and defamation, and the progress that has been made by the TTWG towards aligning the legal frameworks of Australia and New Zealand,<sup>334</sup> the Committee believes that working towards a single trans-Tasman legal market should be a special focus of this work.

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334 See Chapter 3 paragraphs 3.137 – 3.176 above.

**Recommendation 27**

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

Hon Peter Slipper MP

Chairman