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

This supplementary submission provides the Committee responses to the further questions received from the Secretariat on 22 March 2006 and questions on notice taken at the public hearing on 21 March 2006.

QUESTIONS FOR THE ATTORNEY-GENERAL'S DEPARTMENT FURTHER TO THE HARMONISATION INQUIRY PUBLIC HEARING

Harmonisation within Australia

1.1. It has been suggested elsewhere that the template method used to enact the competition provisions of Part IV of the Trade Practices Act throughout the jurisdictions is an optimum method for reforming the complex regulation of implied warranties and conditions in consumer contracts by the Trade Practices Act and State/Territory sale of goods legislation.

As far as the Department is aware, is there any intention on the part of the Government at this stage to move towards harmonisation of the law governing implied warranties and conditions in consumer contracts?

- *If the Government does intend to move towards harmonisation in this area, is the template method the preferred method for achieving this harmonisation? Or does the risk of the template method unravelling over time render it undesirable for use here?*

This is a matter for the Treasury portfolio. Under the Commonwealth Administrative Arrangement Order, the Treasury portfolio is responsible for business law and practice and administering the *Trade Practices Act 1974*. The Attorney-General's Department supports harmonisation of existing State and Territory laws where practicable. The Department has not developed a model for harmonising the law governing implied warranties and conditions in consumer contracts.

However, some general observations can be made about the risk of a template method to harmonisation unravelling over time. It is assumed that 'template model' in this context refers to jurisdictions agreeing to enact essentially the same law, based on some coordination of effort beforehand. Inevitably, as jurisdictions have capacity to amend their laws as they see fit, there is some potential for a lack of uniformity to enter into the scheme overtime. However, uniform action is often underpinned by a commitment from jurisdictions (ie intergovernmental agreements or memorandums of understanding). These provide mechanisms for maintaining uniformity and making amendments to harmonised legislation over time. There are often review mechanisms built into the process.

1.2. Does the Department have a view as to whether partnership laws should be harmonised across Australia?

The Attorney-General's Department has not developed a model for harmonising partnership laws. The Department supports harmonisation of existing State and Territory laws where practicable. The Standing Committee of Attorneys-General (SCAG) would be the appropriate forum to pursue such harmonisation.

Harmonisation of partnership law would also require involvement of the Treasury portfolio. Under the Commonwealth Administrative Arrangement Order, the Treasury portfolio is responsible for business law and practice.

1.3. In its submission the Department notes the Standing Committee of Attorneys-General and the Trans-Tasman Working Group as forums that are able to pursue legal harmonisation within Australia and between Australia and New Zealand (pp.8-10). The Committee notes that a number of other forums also exist for pursuing harmonisation.

- *Given the existence of these forums, is the Department of the view that there is a need for additional forums/arrangements for pursuing legal harmonisation at the present time?*

The Department's view is that present forums for pursuing legal harmonisation are sufficient at this stage. SCAG is the principal forum for achieving uniform or harmonised action within the portfolio responsibilities of its members. SCAG uniformity or harmonisation projects are frequently supported by commitment from Government (ie intergovernmental agreements) that provide mechanisms for maintaining uniformity and making amendments to harmonised legislation over time. New Zealand recently committed to its full time involvement in SCAG. This will be useful in pursuing trans-Tasman legal harmonisation.

The Department is aware of some overseas models for pursuing legal harmonisation and monitors them with interest. The Uniform Law Conference of Canada seeks to harmonise the laws of the provinces and territories of Canada and, where appropriate, its federal laws. The National Conference of Commissioners on Uniform State Laws has served the similar purpose of developing consistency between the state jurisdictions in the United States.

1.4. The Department indicates in its supplementary submission that work is continuing on a discussion paper for reform options for personal property securities law in Australia (p.3). In its initial submission the Department noted New Zealand's reform of its personal property securities law and stated that 'Any steps to harmonise Australian laws with New Zealand would seem likely to benefit trans-Tasman opportunities' and that the reform in New Zealand has been beneficial (p.23).

- *Does the Department favour the adoption (with necessary changes) of the New Zealand Properties Securities Act 1999 in Australia?*

On 11 April 2006, SCAG released an Options Paper on Review of the law on Personal Properties Securities. The Options Paper has been prepared to assist in an assessment of whether there is sufficient in-principle support for progressing reform of the law on personal property securities; and, if there is this support, to engage interested persons in the development of reform proposals. The Options Paper draws on the *New Zealand Personal Property Securities Act 1999* and a draft Bill published in (2002) 14 Bond LR. The Options Paper does not express a preference for any options. It canvasses the policy issues and some of the options available to address them. A copy of the Options Paper is available from <www.ag.gov.au/pps>. SCAG would be the appropriate forum to pursue such harmonisation and the Attorney-General has commended the New Zealand model to SCAG.

1.5. It has been suggested elsewhere that the Government should, under the Joint Therapeutics Agency Treaty with New Zealand, use the external affairs power to harmonise the regulation of therapeutic goods and poisons within Australia via the legislation to establish the trans-Tasman Joint Therapeutics Agency.

- *In the Department's view, would such harmonisation be possible or desirable?*

This is a matter for the Health portfolio (Therapeutic Goods Administration). Under the Commonwealth Administrative Arrangement Order, the Health portfolio is responsible for regulation of therapeutic goods and administering the *Therapeutic Goods Act 1989*. The Department of Health and Ageing was consulted and advised that, in relation to poisons, it is not possible to achieve harmonisation through the *Agreement Between The Government Of Australia And The Government Of New Zealand For The Establishment Of A Joint Scheme For The Regulation Of Therapeutic Products* (the Treaty). However, the regulation of therapeutic products in Australia and New Zealand is to be harmonised through the Treaty. The Attorney-General's Department supports trans-Tasman harmonisation where practicable.

1.6. With reference to statute of limitations reform, in its submission the Department appears to suggest that greater harmonisation of State and Territory limitation statutes would be desirable in some regards (pp. 14-15).

- *What would be the best means of facilitating such harmonisation in the Department's view?*

The question of facilitating such harmonisation would be a matter for discussion at SCAG. At the April 2006 meeting, SCAG Ministers agreed that an agenda item 'harmonisation projects' be established to coordinate efforts, monitor the progress and assist in the prioritisation of harmonisation initiatives. This standing item will target areas where there is significant overlap and/or inconsistency between Commonwealth, State and Territory legislation, and will assist SCAG to work towards nationally consistent and, where appropriate, uniform legislation.

As part of this SCAG item, statutes of limitations have been identified as an area that could benefit from harmonisation. Achieving greater harmonisation of limitation periods, given the range of different causes of actions that would have to be examined, would involve considerable work.

1.7. *Also in reference to statute of limitations reform, the Department indicates that the Government is considering the recommendations of the 2001 ALRC report regarding uniform federal and State/Territory legislation on the limitation of actions and the need for a comprehensive review of the area for determining the new federal limitation statute (p.15). The Department states however that there appears to be 'no urgent need for a single federal limitation statute dealing with limitation periods in a federal jurisdiction and federal courts' and that there 'may be an issue about the Commonwealth's power' to enact such legislation (p.14).*

Can the Department elaborate on what the issue relating to the Commonwealth's power to enact a single federal limitation statute might be?

The Committee has been informed that reform of limitations legislation has been considered by the Standing Committee of Attorneys-General. Can the Department inform the Committee of the outcome or progress of these considerations?

- *As far as the Department is aware, does the Government intend to further explore uniform federal and State/Territory limitations legislation with the States and Territories?*

The possibility of a Commonwealth limitations period was canvassed by the Australian Law Reform Commission (ALRC). In its report, *The Judicial Power of the Commonwealth,* the ALRC suggested that there are 'important constitutional questions regarding the power of Parliament to enact limitations laws regulating proceedings in federal jurisdiction' (p. 573). It noted that, since the High Court's 2000 decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, limitation laws are classified as substantive rather than procedural laws. The ALRC also suggested that it may be difficult to find an appropriate head of power that would allow the Commonwealth to legislate a single federal limitation statute.

While the Australian Government is not convinced that constitutional foundations for Commonwealth action are so uncertain, it agrees that further development of limitation periods under Commonwealth law could not proceed without careful consideration of the Commonwealth constitutional framework.

As set out in the ALRC report:

> in 1994, SCAG considered a report on uniform limitation periods
>
> following the release of the Law Reform Commission of Western Australia's report *Limitation and Notice of Actions*, SCAG again considered the issue at its meetings in December 1997, and
>
> SCAG again considered the issue at its meetings in June 1998 and October 2000.

According to the ALRC report, the 'view was taken that many of the choice of law problems associated with limitation periods had been resolved' by the passage of the uniform *Choice of Law (Limitation Periods) Act 1993* and the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson* and the matter was removed from the SCAG agenda. However, as set out previously, the Government will continue to explore possible harmonisation of Commonwealth and State/Territory limitations legislation through SCAG.

Harmonisation between Australia and New Zealand

1.8. In its submission the Department states that 'consideration needs to be given to increased trans-Tasman cooperation and the possibility of harmonising some of our laws with New Zealand to benefit trade' (p.3).

It has been noted elsewhere that there are philosophical and cultural differences between Australia and New Zealand and that national sovereignty is a pervasive issue. In the Department's view, would such differences and the issue of sovereignty present a barrier to harmonisation of legal systems beyond a certain point, irrespective of other considerations?

- *If the Department does believe that there is such a point of 'maximum' harmonisation, can the Department suggest where it might be?*

The Department understands that the comment made in the Department of Foreign Affairs and Trade's submission to this Committee, about the philosophical and cultural differences between Australia and New Zealand and the pervasive nature of national sovereignty, was made mainly in relation to harmonisation in regulatory contexts.

In the Department's view, the appropriate level of trans-Tasman harmonisation of laws would vary depending on the area of law in question. A current example is the work of the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, which is co-chaired by a Deputy Secretary of the Attorney-General's Department and a Deputy Secretary of the New Zealand Ministry of Justice.

This Group is considering a regime for harmonising trans-Tasman civil procedure modelled on the Australian *Service and Execution of Process Act 1992* (Cth). The proposal under consideration would allow civil initiating process issued out of any Australian Federal, State or Territory Court to be served in New Zealand, and vice versa. Service would have the same effect and give rise to the same proceedings as if service had occurred in the jurisdiction of issue. Another element of the regime under consideration is that judgments of one country would be enforceable in the other, and would have the same force and effect as if they were judgments of the court in which they are registered. (The Working Group has not yet finalised its recommendations to be put to both governments, but plans to do so later in 2006.)

It is a general principle of private international law, as applied in Australia, that if a final and conclusive judgment given by an overseas court of competent jurisdiction is contrary to the public policy of the state in which it is to be enforced, a defence to enforcement exists. In its discussion paper on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was released for public comment in August 2005, the Working Group expressed the view that the 'public policy' exception should be retained in relation to enforcement of judgments in the other country. This would effectively retain an element of national sovereignty for both countries, should their courts ever be faced with the proposition of enforcing a judgment founded on a law that is unacceptable to the law of the forum.

1.9 *Apart from philosophical/cultural differences between Australia and New Zealand and the issue of national sovereignty, what other difficulties might exist for greater legal harmonisation between the two countries?*

While Australia and New Zealand share a good deal of common history, as nations that were once part of the British Empire and members of the Commonwealth, more recently our common law has developed in different directions. In some cases this has the potential to complicate attempts at harmonisation of the two countries' legal systems.

For example, Australia and New Zealand currently take different approaches to forum non conveniens rules. Australia applies the forum non conveniens test applied by the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. That test requires a court to decline jurisdiction where it is clearly an inappropriate court to decide the dispute. Conversely, New Zealand applies the test stated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 A.C. 460. That test requires the court to decline jurisdiction where there is a more appropriate forum for the trial of the action.

The inconsistency between these two approaches can lead to practical difficulties in the context of trans-Tasman civil litigation. The Discussion Paper released in August 2005 by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement proposed that Australia and New Zealand adopt a common statutory test for deciding which court should 'give way' to the other.

Complications in relation to harmonisation of legal systems might also arise from the fact that Australia is a federation, with powers to legislate on various topics allocated between the Commonwealth and the States in a written constitution. As the Department alluded to in its original submission to the Committee, this has sometimes meant that over time each jurisdiction has developed its own approach on certain legal issues. Harmonisation on some legal issues requires initial agreement between Australia and New Zealand, and in addition the agreement of all Attorneys-General within Australia, followed by the approval of all cabinets and passage of legislation by all Australian parliaments. By contrast, New Zealand, as a unitary system, has fewer parliamentary obstacles to the passage of uniform legislation.

QUESTIONS ON NOTICE
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
TUESDAY 21 MARCH 2006 CANBERRA

2.1 **Mr John Murphy MP asked the following question at the hearing on 21 May 2006:**

'I would like to know the department's view on the concept of a model contract code that would apply across the Australian jurisdictions and in New Zealand as a means of harmonising contract law, which was proposed in a separate submission to the inquiry.'

The answer to the Member's question is as follows:

The Department has not developed a model contract code. The Attorney-General's Department supports harmonisation of existing State and Territory laws and with New Zealand where practicable. SCAG would be the appropriate forum to pursue such harmonisation.

Harmonisation or codification of contract law would also require involvement of the Treasury portfolio. Under the Commonwealth Administrative Arrangement Order, the Treasury portfolio is responsible for business law and practice.

2.2 **The Hon Duncan Kerr SC MP asked the following question at the hearing on 21 May 2006:**

'As we sign a number of bilateral free trade agreements, each with their own specific provisions, there seems to be an increasing level of statutory complexity in the Australian legal system in a whole range of different areas which may add to compliance difficulties and costs and, in a sense, undermine what, if it were done on a multilateral basis, would be complicated but uniform. I wonder to what degree this is a problem. Is there an attempt to try to get template solutions that run across all these bilateral agreements? Or is each one being, in a sense, negotiated ab initio with no regard to the others so that we are ending up with quite a dense and overlapping set of free trade agreements, each of which increases opportunities for trade between individual countries and Australia but which have various different statutory constructs built into them which perhaps rust up effective participation in trading overall?'

The answer to the honourable Member's question is as follows:

The Attorney-General's Department notes that the Department of Foreign Affairs and Trade has principal responsibility for negotiation strategy and the form of free trade agreements. Accordingly, DFAT has advised as follows:

Australia seeks to conclude high quality FTAs that provide for a consistent approach to their administration by Australia while maximising the market access and other benefits of each agreement, and that are supportive of an open multilateral trading system. Australia pursues these objectives through several avenues.

A key avenue is represented by the emphasis Australia puts on the need for FTAs to be fully compliant with WTO rules. Australia is also an active participant in WTO negotiations aimed at further strengthening these rules to ensure that FTAs are supportive of a strong multilateral system.

Another important avenue is provided by work in a range of international forums aimed at promoting the adoption of best practice approaches in the negotiation of comprehensive FTAs. Australia is an active contributor to this work, including in APEC, which adopted *Best Practices for RTAs/FTAs* in 2004 and has built on these Best Practices by the adoption of *Model Measures for Trade Facilitation in RTAs/FTAs* in 2005. Model measures are intended to promote consistency and coherence among FTAs. APEC is currently working on the development of model measures for other chapters in FTAs.

Complementarity between the FTAs that Australia is negotiating will be facilitated by our emphasis on compliance with the WTO rules, and by drawing on this international work on best practice models. In addition, Australia is putting considerable effort into taking a strategic approach to the four FTAs we are currently negotiating. This involves co-ordinating Australia's negotiating positions on individual issues – such as rules of origin, and the administrative aspects of implementing FTA obligations – to promote consistency, where appropriate, and minimise the danger of different approaches in different FTAs imposing transaction costs on business.

This does not mean that all provisions in individual FTAs should always be identical. As negotiated instruments, there will always be some differences to reflect the various perspectives of different countries and their individual circumstances. However, the approach outlined above should minimise the possibility that such differences could adversely affect the benefits expected from the FTAs.

2.3 **The Hon Duncan Kerr SC MP asked the following question at the hearing on 21 May 2006:**

> *'At the moment, there is a capacity for mutual recognition of professions. I am not sure how developed that is. How does that apply in contrast to, say, the scheme that operates now internally within Australia, where accountants and lawyers and the like can ply their trade between jurisdictions and, provided they are authorised to practice professionally in one state, can automatically get registration in the others? Is there a like arrangement? I know there is some recognition, but at what level does it operate? ..... I did not pick up anything in the submissions that addressed whether that was a robust cross-recognition scheme or a quite modest one and the level at which recognition occurred, and whether it means that you still have to submit yourself to some kind of accreditation process or whether you can automatically ply your trade as an accountant, a doctor, a lawyer or whatever, by virtue of your recognition in the other jurisdiction. Of course, this is subject to compliance with the local regulations which, as you said, is a form of recognition reached in Australia?'*

The answer to the honourable Member's question is as follows:

The Department is not undertaking work on the trans-Tasman recognition of professions. Work on this issue is being undertaken by the Department of Education Science and Training (DEST). Under the Commonwealth Administrative Arrangement Order, the Minister for Education, Science and Training has responsibility for administering the provisions of the *Mutual Recognition Act 1992*

(Cth) (Part 3) (MR Act) and the parts of the *Trans Tasman Mutual Recognition Act 1997* (Cth) (TTMR Act) that relate to occupational provisions.

The MR Act gives effect to the Mutual Recognition Agreement (MRA)—an agreement between the Commonwealth, States and Territories to remove barriers to trade in goods and the mobility of labour between Australian States and Territories. The TTMR Act gives effect to the Trans Tasman Mutual Recognition Arrangement (TTMRA)—an agreement between the Commonwealth, States, Territories and New Zealand that extends the MRA to New Zealand.

Under the TTMRA/MRA (Mutual Recognition Scheme), a person registered or licensed to carry out an occupation (with the exception of medical practitioners) in one jurisdiction is entitled to carry out an equivalent occupation in any other participating jurisdiction. An individual can carry out their occupation in the new jurisdiction without the need to undergo further assessment of qualifications or experience. However, conditions may be imposed to achieve equivalence.

Professions are regulated at the State/Territory government level. Moves towards harmonisation need to be driven and supported by the relevant professional bodies in each State/Territory and New Zealand.

An Evaluation of the Mutual Recognition Scheme was undertaken by the Productivity Commission (PC) in October 2003. The PC found that while data is limited, there are indications of increased activity to harmonise standards for a number of registered occupations (including the legal profession) and increased labour mobility across jurisdictions. The evaluation of the Mutual Recognition Scheme by the PC is a matter for the Treasury portfolio.

Following consideration of a Committee on Regulatory Review Interim Report in May 2004, the Prime Minister and Premiers, Chief Ministers and the New Zealand Prime Minister noted 29 of the PC's findings and requested further work be undertaken in relation to the remaining 45 findings through a final report formulated by a new Cross-Jurisdictional Review (CJR) Forum. A final report to the Council of Australian Governments (COAG) and the New Zealand Government by the CJR Forum has been endorsed by COAG and the Prime Minister of New Zealand.

2.4 **Ms Sophie Panopoulos MP asked the following question at the hearing on 21 May 2006:**

'With regard to the harmonisation between different jurisdictions in Australia, are you aware of any work within the department specifically focusing on particular harmonisation at the borders of different jurisdictions? The reason I say that is that the greatest problem on a day-to-day basis in commercial dealings is where you have towns on either side of the border. I will be parochial for a minute. Wodonga is within my electorate and Albury is across the border. It is probably the largest cross-border twin city, but I am mindful that there are other examples around the nation. Perhaps some of us have a particular interest and focus on this. I know at various times there have been working groups on these cross-border anomaly committees. Has the department likewise prepared any particular information or been involved in such discussions?'

The answer to the Member's question is as follows:

The Department has recently been undertaking work on a range of amendments to the *Service and Execution of Process Act 1992* (SEPA), including amendments to facilitate the Cross Border Justice Scheme.

The Cross Border Justice Scheme is a cooperative scheme, with the objective of improving the delivery of justice services to the cross-border region of Western Australia, South Australia and the Northern Territory (the Ngaanyatjarra, Pitjantjatara Yankunytjatjara 'the NPY lands'), particularly by removing any obstacles to the delivery of these services caused by State and Territory borders.

The Attorney-General has recently written to his State and Territory colleagues seeking their views on these amendments and several other amendments to improve the overall efficiency and effectiveness of SEPA.

Other possible amendments to improve the efficiency and effectiveness of SEPA that are currently under consideration include:

Amendments to Part 7 of SEPA, which concerns the enforcement of fines imposed by courts of summary jurisdiction, to eliminate existing inconsistencies with State bail legislation

Amendments to SEPA to accommodate the interstate taking of evidence by audio or video link under State and Territory legislation

Amendments to allow for warrants issued by parole boards and similar bodies to be executed interstate, and

Amendments in relation to applications for summary judgment against interstate defendants.

These other amendments are not focussed on the particular issue of harmonisation where towns are located at borders. However, their general effect will improve cross-border harmonisation.