Submission No. 21.2

Date Received

Australian Government

The Treasury

RECEIVED
30 MAY 2006
BY: LACA

29 May, 2006

Dr Nicholas Horne NH
Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Dr Horne

QUESTIONS ON NOTICE TO TREASURY FROM 21 MARCH 2006 HEARING

Please find below the following departmental responses to questions from the Committee.

As a preliminary comment, it appears from some questions that only harmonisation, in the sense of adopting the same legislative provisions, is under consideration. The recently revised Memorandum of Understanding on coordination of Business Law with New Zealand uses the word 'cooperation', rather than 'harmonisation'. The change of wording seeks to make clear that what is proposed encompasses a wide range of mechanisms which reduce costs for business, consumers and investors in both New Zealand and Australia. It includes mechanisms which will reduce the effect of the border, including sharing of information between regulators, lodging information with only one regulator (with interested parties able to look through from one regulator's website to the other's) and legislative requirements for regulators to support each other in the performance of their duties. In short it seeks to minimise regulatory barriers and compliance costs that can arise from separate regulatory regimes. It does not require that the same legislation be adopted in both countries or that mutual recognition be adopted in all cases.

Further questions from Committee Members who could not attend the 21 March hearing

Harmonisation within Australia

1. *Does the Department have a particular preference for any one of the possible mechanisms for facilitating legal harmonisation within Australia (constitutional amendment, referral of powers, template legislation, co-operative legislative schemes)?*

- *If the Department does have a preferred mechanism, what are the reasons for its preference?*
  - *Is the Department aware of any difficulties or problems with its preferred mechanism?*

Answer: The department has no preferred mechanism. All the above mechanisms have their place. Different mechanisms have their relative advantages and may be useful depending on the circumstances.

Experience with the competition provisions (Part IV) of the *Trade Practices Act 1974* (TPA) and the state and territory application legislation is relevant.

The Hilmer Committee, established in 1992 to inquire into competition policy in Australia, examined the constitutional limitations on the scope of the TPA. Following adoption of the Hilmer Committee's recommendations to improve the coverage of the TPA (as well as other recommendations of the Committee), a set of intergovernmental agreements (National Competition Policy (NCP) agreements) were signed by all Australian governments in 1995. The agreements sought to ensure that all jurisdictions achieved and maintained consistent and complementary competition laws and policies for all businesses in Australia regardless of ownership.

The TPA was amended to include the Competition Code to facilitate its application by the States and Territories. Each State and Territory enacted legislation to apply the Competition Code to its respective legislation to ensure that the Competition Code was administered as a single law of the Commonwealth. The Australian Competition and Consumer Commission (ACCC) was also conferred with functions and powers under these arrangements.

The Commonwealth is required to consult with States and Territories on proposed legislative amendments to Part IV of the TPA as well as in relation to appointments to the ACCC.

2. *What would be the Department's response to the proposition that, even if legal harmonisation is achieved within Australia in a given area(s), separate judicial interpretation in the different jurisdictions will erode such harmonisation over time?*

Answer: It is possible that separate judicial interpretation of mirror provisions could erode an Australia-wide approach over time. Treasury has not undertaken any study of this, nor the effects of the general cross-vesting regime in countering this possible problem.

However, our experience within the consumer policy framework is that legal harmonisation has not been eroded by judicial interpretation in different jurisdictions. The consumer protection provisions of the Commonwealth's TPA are broadly replicated in the state and territory fair trading Acts. While there have been legislative changes leading to some reduction in harmonisation, the reduction has not been a result of judicial interpretation.

3. *The Department notes in its submission that the Government, under the auspices of the Ministerial Council on Consumer Affairs (MCCA), is leading a review into the operation of the consumer product safety system in Australia. The Department also notes the Productivity Commission's own recently completed review of the Australian consumer product safety system (p.4).*

- *Given the inconsistencies that exist between the Commonwealth Trade Practices Act and the fair trading legislation of the States and Territories, does the Department have a view on whether more general harmonisation is necessary or desirable between the Commonwealth and the States/Territories in this area?*

  - *If the Department does believe that more general harmonisation in this area is necessary or desirable, does the Department have a view on what would be the best way of achieving it?*

- *As far as the Department is aware, does the Government (or the MCCA) intend to conduct a review of the consumer protection provisions in the Trade Practices Act as a whole?*

Answer: The Ministerial Council on Consumer Affairs (MCCA) is reviewing the consumer product safety system in Australia. To inform this review, the Parliamentary Secretary to the Treasurer commissioned the Productivity Commission to conduct a research study into the Australian consumer product safety system. The report, the *Review of the Australian Consumer Product Safety System*, is the result of that research.

The Productivity Commission found that a strong case exists for harmonising the consumer product safety system in Australia, particularly in relation to legislation across States and Territories. The Commission advocates a single national law and regulator.

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 and to enhancing the proactive nature of the system, including: developing a hazard-based approach to product safety; undertaking a base-line study of product-related accidents; establishing an internet one-stop shop to provide product safety information to businesses and consumers; enhancing business reporting requirements regarding products clearly associated with serious injury or death; ensuring legislative coverage of 'reasonably foreseeable use' in the threshold tests for bans and recall orders; and enhancing the standards making process.

Ministers have directed officials to investigate how the Productivity Commission's recommendations would work in practice, including concurrent work on the mechanics of a single law and regulator approach and on a uniform approach to product safety. Officials will report to the MCCA ahead of the next meeting.

On 7 April 2006, as part of the interim response to the Report of the Taskforce on Reducing the Regulatory Burdens on Business, the Australian Government announced that the Productivity Commission will be requested to undertake an inquiry into the consumer policy framework with a view to promoting greater national consistency in this area and reducing unnecessary regulatory burden.

4. *What, in the Department's view, are the ramifications of the Productivity Commission's review of the consumer product safety system for the harmonisation of product safety laws in Australia?*

Answer: The Productivity Commission acknowledges that the current consumer product safety system delivers reasonable consumer product safety outcomes, but argues that improvements can be made to the existing system.

The recommendations of the report provide an opportunity for governments across Australia to consider the effectiveness of the current consumer product safety system.

5. *In its submission the Department indicates that the Council of Australian Governments (COAG) is expected to consider the Productivity Commission's 2005 report on National Competition Policy arrangements in early 2006 (p.2). The Committee notes that COAG met on 10 February 2006.*

- *Can the Department provide an update for the Committee on the issues and decisions that emerged from the COAG meeting that are relevant to the Committee's inquiry (e.g. regulation best practice reform, consistent national approach to significant infrastructure regulation etc.)?*

Answer: The original National Competition Policy (NCP) arrangements are now drawing to a close. These agreements, entered into by all Australian governments in 1995, have brought substantial benefit to the Australian community, including regional Australia. The Productivity Commission's *Review of National Competition Policy Reforms*, released in April 2005, found that observed productivity and price changes in key infrastructure sectors in the 1990s, to which NCP and related reforms directly contributed, have served to increase Australia's GDP by 2.5 per cent, or $20 billion. By the end of 2005-06, the Australian Government will have paid nearly $5 billion in competition payments to the States and Territories since 1997-98.

At its 10 February 2006 meeting, the Council of Australian Governments (COAG) committed to deliver a substantial new National Reform Agenda, embracing human capital, competition and regulatory reform streams. This agenda is aimed at further raising living standards and improving services by lifting the nation's productivity and workforce participation over the next decade. Below are some of the agreed reform goals in the areas of Competition and Regulation Reform:

Competition

The new competition policy agenda will further boost competition, productivity and the efficient functioning of markets by focusing on further reform and initiatives in the areas of energy, transport and infrastructure regulation and planning. Key reform commitments agreed to by the Australian Government and the States and Territories include the following:

Energy

The establishment of a high-level, expert Energy Reform Implementation Group, to report back to COAG before the end of 2006 with proposals for: achieving a fully national electricity transmission grid; measures to address structural issues affecting the efficiency and competitiveness of the electricity sector; measures to improve financial markets that support energy markets; and the progressive rollout of 'smart' electricity meters for residential users from 2007 (where benefits outweigh the costs), to allow better user management of peak power demand.

Transport

A review by the Productivity Commission resulting in recommendations to COAG, by end 2006, on optimal methods and possible implementation timeframes for achieving efficient pricing of road and rail freight infrastructure; the harmonisation and reform of rail and road regulation within five years, including improved road and rail safety regulation; the strengthening and coordination of road planning and project appraisal processes by adopting Australian Transport Council-endorsed national guidelines, by December 2006; and the reduction of current and projected urban transport congestion, informed by a review, with a focus on national freight corridors.

Infrastructure regulation

A new Competition and Infrastructure Reform Agreement to provide for a simpler and consistent national system of economic regulation for nationally significant infrastructure, including for ports, railways and other export-related infrastructure. This includes the commitment that all state and territory access regimes will be submitted for certification under

the National Access Regime by 2010, following agreement on a streamlined certification process.

Regulatory reform

The regulatory reform agenda focuses on reducing the regulatory burden imposed by all three levels of government. 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 jurisdictions.

A new reform agenda will provide benefits for both business and consumers. Well-targeted reforms will: increase consumer choice; lower prices; result in improved service quality and reliability; promote an environment of entrepreneurship and innovation; and reduce the regulatory burden on business.

Further detail of the National Reform Agenda is available from the COAG meeting communiqué at: http://www.coag.gov.au/meetings/100206/index.htm.

6. *What would be the Department's view on the concept of a model contract code, applying across the Australian jurisdictions and in New Zealand, as a means of harmonising contract law?*

Answer: If 'model contract code' means the codification of contract law and the adoption of the codified law by all the States/Territories and New Zealand via the adoption of a single model law, then this is not a matter for Treasury. Contract law is a responsibility of the States and Territories.

7. *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?*

Answer: Treasury does not have responsibility for the development and implementation of the trans-Tasman Joint Therapeutics Agency, and has not sought legal advice on the use of the external affairs power to harmonise the regulation of therapeutic goods and poisons within Australia. The Department of Health and Ageing could provide advice on this issue.

Harmonisation between Australia and New Zealand (NZ)

8. *The Department states in its submission that 'economic integration is a desirable goal because differences in regulation can distort the efficient operation of markets, leading to lower levels of real income in domestic economies' (p.6). The Department also states that 'transnational legislative and regulatory co-ordination is needed to achieve the full benefit of economic integration' (p.6).*

- *Can the Department provide some examples of market distortions and lower levels of real income that result from differences in regulation between Australia and New Zealand?*

- *Can the Department provide some examples of costs to trans-Tasman business that result directly from a lack of legal harmonisation between Australia and New Zealand?*

  – *How are these costs measured?*

Answer: Regulatory requirements that force the creation of separate systems can act as a disincentive for firms to provide customers with access to services on both sides of the Tasman, because the synergies from having a single system are lost and links between the two systems are potentially more complex. This outcome is inconsistent with high levels of human, business and trade engagement. In contrast, well-designed harmonisation could be expected to minimise compliance and transaction costs and reduce the cost of capital for firms — which may in turn expand the choices on offer to consumers.

An example of reduced income from differential regulation may be that of prospectus costs. Evidence suggests that issuer costs exist in offering securities in both jurisdictions (although a quantitative study has not been undertaken). A number of companies listed on the Australian Stock Exchange (ASX) have advised the ASX that the cost of providing offer documents to NZ investors may range from $10,000 to $30,000 on average. These figures encompass circumstances where there may be only ten to twenty NZ investors. The ASX also understands that costs for larger companies could total approximately $50,000.

Furthermore, the banking industry has made estimates of the compliance costs of developing stand-alone systems in NZ. An industry assessment of the likely impact of requirements under a Reserve Bank of NZ (RBNZ) draft outsourcing policy found upfront costs per bank of between NZ$15 million and NZ$30 million and ongoing costs of between NZ$15 million and NZ$20 million annually. The upfront costs were the estimated costs of establishing parallel systems in NZ, in particular IT platforms. The ongoing costs were the expected result of the inability of banks to make use of potential synergies within their groups. However, recent legislative changes announced by both governments will ameliorate costs to banks as they will oblige the Australian Prudential Regulation Authority (APRA) and the RBNZ to support each other in the performance of their statutory responsibilities.

Moreover, prior to APRA and the RBNZ entering into a Memorandum of Engagement on the implementation of the new Basel Capital Framework for banks with operations in both Australia and NZ, banks were concerned that they would face significant costs if NZ adopted a different approach for calculating capital adequacy requirements. These costs would have included the development of a separate system for calculating capital requirements in NZ and also the costs of holding additional capital in NZ compared with the approach for calculating capital requirements being adopted in Australia.

In addition to the direct costs to banks and their customers from a lack of harmonisation, there are concerns about the potential impact on financial stability and the funds of depositors were a regulator to take action in one country that was to the detriment of the other. In this respect, Treasury notes that NZ assets comprise more than 15 per cent of the total assets of Australian banks, and thus actions which impact the NZ businesses of Australian banks could have flow-on effects for the Australian parent.

9. *In its submission the Department indicates that it 'strongly supports' harmonisation of business law between Australia and New Zealand in order to advance the economic integration of the two countries (p.6).*

- *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?*

Answer: Such differences and the issue of sovereignty need not necessarily act as a barrier to greater harmonisation. Each country has to consider the coordination of its laws with the other in the light of a variety of factors. The value which the individual countries place on economic integration is likely to change over time and when the benefits and any detriments come to light. Many of these issues are best examined on a case-by-case basis. For this reason, the department does not believe there is necessarily any 'point of maximum harmonisation'.

10. *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?*

Answer: Differences in the wider legal framework and in the particular regulatory regimes may prevent greater harmonisation, in the sense of adopting the same requirements. These differences may reflect the philosophical/cultural differences between the two countries. However, they should not impede the adoption of particular coordination mechanisms suited to that area of regulation.

11. *The Committee has been informed that two-way trade in goods between Australia and New Zealand has expanded at an average annual growth rate of 10 per cent since the introduction of the Australia New Zealand Closer Economic Relations Trade Agreement (CER) in 1983.*

- *In the Department's view, would greater regulatory harmonisation between the two countries result in a higher annual growth rate in trade?*

Answer: Initiatives which extend harmonisation may not always translate directly into increased flows of trade in goods between Australia and NZ. Firstly, many of the businesses that may benefit from harmonisation initiatives are involved in the provision of services rather than goods. Secondly, businesses with a cross-border presence often produce goods and services in both countries, and these activities in each country will not be directly reflected in trade statistics. Thirdly, reducing costs through harmonisation can increase cross-border investment flows — which have the potential to enhance capital deepening and increase domestic growth.

The volume of two-way trade between Australia and NZ is influenced by broad economic factors, such as economic growth rates, real exchange rates and changing patterns of global production and consumption. The commencement of Closer Economic Relations (CER) in 1983 coincided with both Australia and NZ opening up to international trade. High initial growth rates in trade between Australia and NZ are likely to have been a product of these developments. High growth rates have tapered off as overall volumes of trade have increased. However ABS data indicates that over the

period between 2000 and 2005, two-way trade in goods between Australia and NZ still grew at a healthy annual rate of 5.2 per cent, faster than the growth rate in Australia's trade with other countries.

12. *The Department focuses on the harmonisation of business law between Australia and New Zealand in its submission.*

- *In the Department's view, are there any other areas of legal harmonisation that would be desirable between Australia and New Zealand?*

Answer: Business law harmonisation opportunities remain the priority reform area for Treasury. The Memorandum of Understanding on the coordination of business law between Australia and NZ already encompasses issues that are within the general notion of business law but outside this portfolio. These include intellectual property laws and anti-money laundering regulations.

13. *Has the Department identified any potential detriment(s) to Australia that might result from greater legal harmonisation between Australia and New Zealand?*

Answer: There is potential for some transitional problems to emerge in the shift to more harmonised systems. Please also refer to the answer to Question 19.

14. *What would be the Department's response to the proposition that, even if legal harmonisation is achieved between Australia and New Zealand in a given area(s), separate judicial interpretation in the two countries will erode such harmonisation over time?*

Answer: Please refer to the answer to Question 2.

15. *In its submission the Department notes the framework for the co-ordination of business law between Australia and New Zealand and details the various projects currently in train under the Memorandum of Understanding on the co-ordination of business law between the two countries (pp.6-13, Attachment A).*

- *Given the existence of the CER, the MOU, the Single Economic Market initiative, the Trans-Tasman Mutual Recognition Arrangement, and all of the other agreements and activities which advance legal harmonisation between Australia and New Zealand, is the Department of the view that there is a need for additional arrangements/activities for pursuing harmonisation at this time, or do the existing arrangements suffice?*

Answer: Additional arrangements may be required to implement coordination in particular areas. Treasury is not aware of the need for further overarching arrangements.

Questions asked at the hearing on 21 March 2006

16. *Ms PANOPOULOS—What preparatory work has the department undertaken regarding a single currency between Australia and New Zealand?*

Answer: Treasury has not done preparatory work for the Government on a single currency with NZ.

17. *Mr KERR—Can I ask the question of Mr Archer, who may be able to answer the question that I posed to the Department of Foreign Affairs and Trade. The question was about complexities that may exist with New Zealand's participation in the Kyoto protocol's marketing arrangements for carbon credits and various other instruments that may be open to signatories and how CER impacts in relation to Australian participation in New Zealand.*

Answer: We are not aware of any direct impacts on trade with NZ as a result of Australia not having ratified the Kyoto Protocol.

18. *ACTING CHAIR—With reference to the Corporations Law, in its submission the department states:*

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

Can someone provide an update for the committee on the progress of these explorations?

Answer: The issue of possible constitutional amendments in relation to cooperative legislative schemes is currently being considered by the Standing Committee of Attorneys-General (SCAG). As part of this process, a range of issues have been under consideration by officials from the Australian Government and the States and Territories. The Special Committee of Solicitors-General has also been consulted for its views. There are still many issues to be considered by SCAG before deciding whether a constitutional referendum might be desirable.

19. *Mr MICHAEL FERGUSON—Given that there is broad acceptance that both economies would be strengthened by greater harmonisation, by lower compliance costs and the streamlining of regulatory processes in trade, what work has been done on assessing the impact of greater harmonisation on smaller regional communities in Australia? Is it possible that regional communities may suffer some disadvantage while the national interest may be advantaged? If there is no work being done on that or none already completed, is it Treasury's role to have a look at that?*

Answer: Treasury considers that harmonisation should increase economic efficiency by reducing the costs of compliance to business. The benefits of this should flow broadly throughout the Australian community. Treasury has not been involved in assessments of the regional impact of business law harmonisation on smaller regional communities in Australia and is not, therefore, in a position to comment in any detail on possible regional effects. However, Treasury has no reason to believe that regional areas would be disadvantaged by reforms aimed at reducing regulatory compliance costs for trans-Tasman businesses. The agency responsible for regional policy is the Department of Transport and Regional Services.

I trust this information will be of assistance to the Committee.

Yours sincerely

Irene Sim
General Manager
Strategic Communications Division