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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Harmonisation of legal systems

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 7 March 2006

Members: Mr Slipper *(Chair)*, Mr Murphy *(Deputy Chair)*, Mr Michael Ferguson, Mrs Hull, Mr Kerr, Mr Melham, Ms Panopoulos, Ms Roxon, Mr Secker and Mr Tollner

Members in attendance: Mr Murphy, Ms Panopoulos, Ms Roxon and Mr Slipper

Terms of reference for the inquiry:

To inquire and report on lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand, with particular reference to those differences that have an impact on trade and commerce. In conducting the inquiry, the Committee will focus on ways of reducing costs and duplication. Particular areas the Committee may examine to determine if more efficient uniform approaches can be developed, include but are not limited to:

- Statute of limitations
- Legal procedures
- Partnership laws
- Service of legal proceedings
- Evidence law
- Standards of products
- Legal obstacles to greater federal/state and Australia/New Zealand cooperation.

WITNESSES

Committee met at 9.31 am

WALKER, Professor Gordon Richard, Private capacity

CHAIRMAN (Mr Slipper)—I declare open this Standing Committee on Legal and Constitutional Affairs hearing on the inquiry into harmonisation of legal systems. The committee has been asked by the Attorney-General to inquire into and report on the lack of harmonisation within Australia's legal system and between the legal systems of Australia and New Zealand. We have been asked to focus in particular on those differences that have an impact on trade and commerce. We will be looking at ways of reducing costs and duplication.

The Attorney has identified a number of specific areas for the committee to examine to see if more uniform approaches can be developed. These areas are statutes of limitations, legal procedures, partnership laws, service of legal proceedings, evidence law, standards of products, and legal obstacles to greater federal, state and Australia-New Zealand cooperation. The committee is not limited to just these areas, of course. We may range more widely.

We are privileged today to have Professor Gordon Walker at this public hearing. Although the committee does not require you to give evidence under oath, I advise you that the proceedings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. As you would know, the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Professor, do you wish to make any comments regarding the capacity in which you appear?

Prof. Walker—I am a professor in commercial law at La Trobe University and also head of its law school, but I appear in a private capacity.

CHAIRMAN—We have received two articles from you. They have been received as exhibits to the inquiry. My fellow committee member is the deputy chairman, Mr John Murphy, who is the member for Lowe in New South Wales. We may have other members join us during the course of the proceedings. You may like to kick the matter off with perhaps a brief opening statement of, say, five minutes or thereabouts and then we will proceed to questions.

Prof. Walker—Thank you for inviting me here and thank you to Joanne. In terms of materials, you have copies of the two articles referred to. The other two documents I shall refer to this morning are, firstly, the revised memorandum of understanding on the coordination of business law—that is the revised memorandum of the 2000 MOU—signed 22 February 2006—and, secondly, the treaty between Australia and New Zealand in relation to mutual recognition of securities offerings, also signed 22 February 2006. Both of those documents are available on the New Zealand Securities Commission website and also the Ministry of Economic Development website in New Zealand, that being the responsible ministry, under the ministry of commerce in New Zealand, having oversight of this issue.

I thought I might begin by summarising in general terms some of the key issues as I see them. You will have perhaps seen articles in the press recently, in the *Australian Financial Review*, talking about the difficulty Australia is having in persuading the US to recognise, for example, prospectuses registered in Australia and, indeed, other matters relating to capital markets. That is a good jumping-off point for what I regard as the defining tension in this area.

There has always been a tension between the desire of a nation or a jurisdiction to uphold the integrity of its own capital markets laws in order to protect investors and attract investment, on the one hand, and the desire to enter into bilateral or multilateral relationships. You could call this a tension between nationalism on the one hand and globalisation on the other. It has been a consistent theme in the US for well over 50 years. The US has always taken the view that the rigour of its capital markets regulation should not be compromised or eroded. Perhaps the most vivid example in recent times is the push by the NYSE to relax reporting standards for foreign issuers and so attract more foreign issuers to list on the NYSE on the one hand—

CHAIRMAN—That is the New York Stock Exchange—

Prof. Walker—Exactly—and the countervailing push from the Securities and Exchange Commission which says, 'No, we will not relax our reporting and our oversight of the listing requirements.' The US has always taken a very strong view on this. What we are seeing now in the Australia-US relationship is a kind of version of what we have been observing in the New Zealand-Australia relationship—that is, both countries are saying, 'We have got laws that protect our investors. We also want strong laws because we want to attract foreign investors. We want to be sure of the integrity of our own rules. But, on the other hand, New Zealand and Australia are very close; it is a globalising world and New Zealand and Australia are old friends. Let's see if we can facilitate things.' We are going to see that tension playing out, it seems to me, all the way through this law. That is one point I make at the front of part 1 of the article which has been supplied to you.

The second point is this: certainly up to the 2000 MOU, but going back earlier, most people in my position were not taking this MOU particularly seriously. We did not really take it seriously until post-2000. There was not a lot of work between 1988 and 2000 under the first MOU, the business harmonisation MOU—probably because that word 'harmonisation' summarised the problem. There was never going to be harmonisation—coordination, maybe.

From about 2000 on, we saw quite a lot of movement here, and it was quite a surprise to people like me who were looking at the area. My view is that it is partly explained by globalisation. It might also be 'great man theory of history'; namely, Dr Cullen was pushing this at the New Zealand end. It might have been a greater recognition at the New Zealand end that this was a mechanism to push towards economic union. But, for whatever reason, we saw a lot more traffic post-2000, and it seems to be kicking up—which is good.

The reason I raise this is that one of my first conclusions, when I was reviewing the area in 2004—and I still think this is probably the latest, most up-to-date review or stocktake in the area—was that this MOU about business law coordination seemed to be a declaratory signal or a wooing statement: 'We're ready to talk turkey about economic union.' It is very interesting that in the 2006 version, which is the MOU which has just come out—and I am sure this is not due to any persuasion from me—the key statement in clause 3 is: 'Both governments have committed to the objective of a single economic market.' That is a big shift. That is the first time both governments have come out and said this, and to my mind it is absolutely welcome; because that is the key step.

The third point I would like to make about it is this: New Zealand has more to gain out of this process than Australia, and a lot of the push has come from New Zealand. But there is one key

point that flows through, and that is that in certain key areas New Zealand is going to have to adopt Australian law, if not verbatim then perhaps tweaked to make it a little bit more effective. There has been a lot of talk about harmonisation. The way a lot of lawyers would look at the process so far is to say that if that were the case then when we reframed the Corporations Law why didn't we look at the New Zealand Companies Act 1993? Australia did not.

A related point, which I mentioned earlier to the chairman in private, is the fact that in New Zealand the personal property securities regime has been radically overhauled using Canadian models. There is an electronic central register. The personal property securities regime is state of the art and the best in the world. I know Attorney-General Ruddock is now looking at this matter. He is concerned because 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 up and plonk it down in Australia without too much difficulty. But, in key areas, it seems to me that it is going to be one way. My area of interest is capital markets and securities regulation, so I am quite interested in the way this particular area plays out.

By and large, I welcome the treaty signed on 22 February. I will just draw the committee's attention to article 11 of the treaty. Article 11 is basically the amendment clause. It says:

> If either of the Parties considers that an amendment to this Agreement would be desirable, it may request consultations with the other Party to this end. Such consultations shall be entered into promptly by the Parties, unless they agree otherwise. Any agreed amendments shall enter into force when they have been confirmed by an exchange of diplomatic notes.

The reason I have focused on article 11 in the treaty in relation to mutual recognition of securities offerings is that clearly the next shoe to drop here is going to be legislation or regulations in each country giving effect to the treaty. In other words, we have to take that international law into domestic law via amendment to the New Zealand substantive legislation and possibly here via regulations or a class order.

While we now have the treaty, we do not have the machinery or the implementing domestic legislation. We have, it seems to me, this useful article 11, which is a kind of get-out-of-jail amendment if you want to tinker with things at a future stage. That is where you can do it. It seems to me that it is a very straightforward mechanism. You can simply suggest it. It will be driven by either the Treasurer or the Attorney-General's Department—it is probably Treasury these days. It is effected by the exchange of diplomatic notes.

Why is that bothering me? A key submission I would make in regard to the treaty on the mutual recognition of securities offerings is this: Australia would be very smart to confine it to mutual recognition in respect of listed issuers or issuers seeking listing. As it stands, the treaty talks about issuers simpliciter. To get a feel for this, you will see in the definition section that they call an issuer an individual. It could be a company. I want to take you back to that defining tension we were talking about at the front end of this conversation. On the one hand, the nation wants to ensure the integrity of laws, wants to be best of breed, wants to protect Australian consumers and wants to attract foreign capital. It wants to do that by saying: 'Hey, we've got the

best of breed. The equity risk premium here in Australia is much lower because our laws are pretty tough. The risk of default is a lot lower because we have good oversight of our market.'

There is a problem with the treaty as it stands. Let's take a hypothetical: you are a New Zealand issuer and you are not seeking listing in New Zealand. Under the broad rubric of the treaty as it stands, that New Zealand issuer who is not seeking listing on the NZX or the small version of the NZX—the alternative securities market—can opt into the Australian regime and can offer securities in Australia. So a small issuer in New Zealand could file a prospectus, not seek listing in New Zealand and opt into the mutual recognition regime. They take a plane to Brisbane, with a bunch of documents, to look for a bunch of wealthy tradesmen or New Zealand expats on the Gold Coast or whoever it might be in order to sell securities to them.

Stay with me for a moment. Let's focus on the protective purpose of the legislation. What we are now concerned about is a bunch of guys wandering around the Gold Coast with a prospectus registered in New Zealand. They have opted into the mutual recognition regime. They are free to wander around Australia seeking subscription moneys. Now, why might this be a problem? The problem goes to the vendor securities point. I might say here that this is an example of what I regard as a wider problem. In New Zealand, where you are not seeking listing, the valuing issue of vendor securities would simply be a matter of a directors' valuation.

Let me give you an example. A bunch of guys wander down to a provincial town in New Zealand and they buy what appears to be some intellectual property, for $NZ120,000 cash. The directors have a meeting and they revalue that asset at some millions of dollars and issue themselves bonus shares. In Australia, through the Corporations Act and certainly at listing, there would be a requirement for independent certification and valuation of that asset. The difference in New Zealand is that it is simply a directors' valuation. If they had to go through the listing route, however, they would be caught by the NZX listing rules; the NZX would insist on proper valuation and they would put the stock in escrow—put in the fridge for two or three years. In Australia, they could not even list without an accountant certifying that that valuation was fair and reasonable.

So it seems to me the way to deal with this particular problem is to say, 'We'll confine the operation of this treaty to listed issuers'—those who are already listed on the ASX or indeed any other Australian exchange or, in the case of New Zealand, the NZX, or those seeking listing because they would have to be party to a listing agreement and the NZX would have gone through this issue of vendor securities. The alternative would be that I can revalue something I bought for $120,000 to some millions of dollars, issue millions of shares and then wander around the Gold Coast or wherever it might be selling this worthless paper. I might add here that this is not a fanciful hypothetical; it is in fact real life.

CHAIRMAN—I was wondering if you would, as soon as you could, draw your opening statement to a close so we have some time for questions. I do not want to stop you right there but if you could maybe draw the threads together so we can proceed to questions.

Prof. Walker—I will close there. My view of this harmonisation is that it is a good thing; it has been kicked around for a long time and it is great to see that it is happening. And it is great to see that, under clause 3 of the MOU between New Zealand and Australia on business law

coordination, it is now in the context of the 'objective of a single economic market'. That seems to me to be a good thing. It is a good policy objective.

There are going to be costs and benefits. My concern, certainly from Australia's point of view, would be to minimise the downside. One way of minimising the downside, certainly with the treaty, is to use that section 11 mechanism and, as a result perhaps of these hearings, to say, 'The smartest way to deal with this is to confine its operation to listed issuers on both sides of the Tasman or to those seeking listing who have entered into a listing agreement.' You do not want the situation where they simply approve the prospectus at the New Zealand end and you have carte blanche to sell it in Australia.

CHAIRMAN—It seems to me that the best form of harmonisation might be to unify the two countries—abolish the states and have a unitary system, one government for Australia and New Zealand. But we have to deal with reality, and that is obviously not going to happen in the short term, if ever. Do you see that there is any realistic prospect of there being an economic union between the two countries? What you have been talking about are individual problems in relation to individual areas—issuers and all that sort of thing—but that is talking about the minutiae. Let us face it: we are two countries. It is an accident of history that New Zealand was not the seventh state. New Zealand opted out. Western Australia, Queensland and other states opted in. Even though New Zealand is as much a nation-state, separate from Australia, as is the United States, if you look at where we are geographically situated and at our shared culture and our shared history—all that sort of thing—where do you see us being in 20 years and what can governments on both sides of the Tasman do to encourage this process?

Prof. Walker—You are quite right: it was line ball in 1901, it seems to me. New Zealand could just have easily joined the Commonwealth at that time.

CHAIRMAN—They were in the preamble of the Constitution.

Prof. Walker—Yes. Certainly James Belich, who is the leading New Zealand historian in this area, said that New Zealand lost a great opportunity. I am a dual citizen of Australia and New Zealand who agrees with that proposition.

CHAIRMAN—I thought I picked up some nuances. You have been here a while, though.

Prof. Walker—Yes. I do not think we are going to get political union. There is a nice little flow chart on page 9 of the submission talking about where we are going, and the next step has to be economic union. We have the free trade agreement. The way I see the phasing—and I am sure this is how the politicians see it, certainly from all the evidence—is that we have pushed this one just about as far as we can go. We have done very well on CERs. The next step is whether we can get to an economic union, to some form of common market or whatever. That is really the next step, and a lot of this movement we see on the legal side seems to me to be just another strand moving in that direction.

How realistic is this? Politics are a big problem on the political union side, quite obviously. If you follow Mike Moore's columns—and Mike is an adjunct professor with us at La Trobe—Mike is saying that it is kind of worrying, because the two countries are going off at a bit of a tangent, with Clarke being more committed to a Swedish/Scandinavian social democrat model

and not too friendly with the US et cetera. My sense of this is that we will push this CER along by informal and formal negotiation but that you will need a precipitating crisis to push the thing along. In other words, the most likely scenario to my mind is some kind of exogenous shock, whether it is economic, with a meltdown in the markets, or a security threat—some kind of precipitating crisis that pushes the issue along a lot more quickly.

CHAIRMAN—Like the sort of thing that forced Newfoundland into Canada?

Prof. Walker—It is either that or political will. I suppose the other way to look at this is to say that with the first MOU, from 1988 to about 2000, there was not very much happening. As with all these things, it is pretty informal and you need someone committed at one end, but hopefully at both ends, to really drive this deal.

CHAIRMAN—Dr Cullen has been pretty good, hasn't he?

Prof. Walker—That is precisely my point. I think the reason the 2000 MOU kicked off and we really got some movement was that Cullen really saw this as a defining moment and something that would enable him to leave his mark on history. It was also a good thing. The argument seems to me to be quite compelling, and it is in one way.

CHAIRMAN—In that table, you do not mention currency union. Where would you put that? How would that benefit what we are talking about?

Prof. Walker—Personally I do not see it happening. It has been debated; it has been talked about at all the ministerials. My general take is that that is not going to happen. There is a whole bunch of arguments. One goes to the business cycle—Australia on commodities; how do you combine the two? I would have thought that you would need to go to some form of economic union first before you go to a common currency.

This business law coordination case has been around for some time and it is actually not a difficult case at all. It seems to me that it is a question of political will on the New Zealand side. It seems to me that what would be very easy to do is simply to adopt—cut and paste, literally—the key provisions in the Australian legislation and park them in the New Zealand legislation. There is an excellent case for that—perhaps with some tweaking—and that would be an excellent start.

Frankly, I just do not know why this has not happened in the area of securities regulation. I suspect it is because it is just a level of expertise issue. When you find out who is running these things, there is a tactical advisory group within the ministry of commerce consisting of, when I last spoke to them, two young people, both under 30, neither of whom had done securities regulation at law school and did not really know anything about the subject. It is not surprising that, if they are the key advisers, not much of it is filtering up the line.

CHAIRMAN—Before I ask my colleagues to ask questions: how much further along the road to harmonisation do you see the EU as being than we are, given the fact that their countries were a lot more disparate than Australia and New Zealand?

Prof. Walker—In my area of securities regulation, we now have books this thick on EU securities regulation, and that seems to have worked pretty well. There are problems that we see in the news every night—the Turkey issue, for instance. The one that really interests me is the new Baltic States in the way they are going and the economic approach they have taken. It seems to me that if the EU can get their act together it should be an absolute doddle for New Zealand and Australia. In fact, I would have thought that one solid week's work in a room like this with some key players would achieve an enormous amount, particularly in my area. It would not be difficult at all.

CHAIRMAN—What would you suggest? How do you suggest we handle it?

Prof. Walker—In the short run, one of the things I would be concerned about is the leakage problem, the protective aspects of the law problem. I would confine this particular treaty to those who are listed and those who are seeking listing. But, on the substantive law side, it seems to me that you could split it up into a set of areas. In the US or China, or in China generally, for example, the experts in the area would thrash out an agreement very quickly and put it up to the requisite political arm for implementation.

For example, in New Zealand we have an offer-to-the-public provision, which has just been abandoned in every ex-British jurisdiction, as a test for a prospectus offering. All they really have to do is abandon that and put in the Australian sections, and in their regulations they need to do something about vendor securities. Again, you look at the rules that the ASX has, which we have in our Corporations Law. These are not big-time issues of national sovereignty or something that is incredibly difficult to get your head around. They are arguably where New Zealand would be going in any event if it were paying much attention to this area of law. It is paying some attention but there are some gaps, it seems to me.

Mr MURPHY—Earlier you stated that New Zealand has more to gain from this agreement.

Prof. Walker—Absolutely.

Mr MURPHY—What does New Zealand stand to gain?

Prof. Walker—New Zealand stands to gain access to Australia's market. I went through the DFAT statistics, specifically page 393 of part 1 where it says that this has been an 'overwhelming success for New Zealand. Australia is the No. 1 export destination and investment destination' et cetera. One of the points here is scale. When talking to New Zealanders—who do not know much about Australia, oddly enough—you get a very odd understanding. I say to them: 'There are three states up the east coast, all of which have bigger economies than New Zealand.' So it is like, 'There are three New Zealands on the east coast of Australia but they're bigger?' The penny then starts to drop that this is a big and close market for New Zealand. There are about 450,000, probably more, New Zealanders here, and many more than are going the other way. The reason is pretty simple: they are coming here as individuals. They are voting with their feet at the rate of about 650 a week to access, on average, wages that are 30 per cent higher. They are going into a much bigger consumer market than they have at home. So it is overwhelmingly in New Zealand's interests to get its act together with Australia.

As I say, I do not see this as a matter of political sovereignty or something anti-nuclear or something as emotive as the Treaty of Waitangi. These are pretty simple issues that could be addressed very quickly, without too much angst at the New Zealand end. In something as neutral as our securities regulation—the Securities Act (NZ) and the Securities Markets Act (NZ) it is pretty simple. In fact we have a bill now in front of the New Zealand parliament called the Securities Legislation Bill, and in key areas such as insider trading they are adopting the Australian regime, slightly tweaked. On continuous disclosure and making information generally available to the market it is the Australian regime, slightly tweaked again. The market manipulation provisions are taken from Australia. Misconduct in secondary market trading is, again, taken from Australia—directly lifted from the Corporations Act. My argument here is: why stop halfway? If you want a trans-Tasman capital market, why not in this area of law, not the substantive Corporations Law but in certain securities regulation, perfectly align them?

Ms ROXON—I want to follow up on that. Isn't it a double-edged sword? You say it is not an emotive or big political issue and that, therefore, it should be able to be fixed. But isn't that the reason why you cannot get everyone in a room together to spend a week on it? How do you see building sufficient political will to take on some of these issues? I am still in Surfers Paradise, where you have your New Zealanders walking around trying to sell these prospectuses to everyone. We do not want to sit and wait until there is some big problem, but has there been any real issue that you could focus on that would motivate people at the political level either in New Zealand or here to take it seriously, as you believe it should be?

Prof. Walker—To a certain extent it is actually happening. What has happened is quite interesting. The former National Party government really did very little during the 1990s in this area, and it is quite ironic that a Labour-led coalition is pushing reform in this area. As part of that reform push they have pulled in Joe Longo, ex-ASIC enforcement and then special counsel for Freehills, to help write a review of the New Zealand securities law. The chair of the New Zealand Securities Commission is Jane Diplock, ex-ASIC NSW. So there is a very strong Australian push in the style of thinking going on there.

The Securities Legislation Bill 2004 I referred to was renewed after the election, so it is still alive and should go through this year. It is largely a raft of amendments based on the Australian law. My point about this is that they are already doing it. I think they should do it a lot quicker and that they should do it particularly in the area of funds raising. It seems to me that that is an absolutely key area, to go back to the example I was giving you.

If this were the US and Australia—you are in the US position on this particular aspect—the US would be saying: 'There's no way we're going to allow this. There's no way we'll allow mutual recognition of securities offerings. We say this would completely erode the integrity of our market, because we have insufficient regulation on matters like the valuation of assets going into a company, vendor securities, and we think that's a bad thing. It will erode the integrity of our market.'

But this is a detail issue. It is not particularly hard to address. It is probably because the people involved in the reform process at the New Zealand end were taking a lot of information and submissions from good Australian securities lawyers, but perhaps they were not getting enough on the accounting side or perhaps they were not looking enough at recent case studies of

offerings in fact that had occurred in New Zealand without listing. That one is, I think, easily cured.

Mr MURPHY—In relation to my question, you have indicated where New Zealand stands to gain from this agreement. Could you also tell the committee where you think Australia stands to lose from the agreement?

Prof. Walker—The short answer is that I will refer to the example I was giving—a New Zealand issuer not seeking listing with a prospectus registered in New Zealand opts into the mutual recognition regime and wanders up to the Gold Coast and starts flogging worthless paper. It is not going to play well in the press when some white-shoers from New Zealand are flogging worthless paper up on the Gold Coast. But it is relatively easily fixed.

One other aspect, I suppose, is that a lot of the reasoning underpinning this is about compliance costs. The argument is that if we coordinate the laws we will lower compliance costs. I am, to put it mildly, pretty sceptical about all of this. I do not think there is much in the way of compliance costs whatsoever. But insofar as you open a seamless New Zealand-Australia capital market, that strikes me as being a good thing. I might add that the recent corporatisation of the New Zealand exchange, now the NZX, is a first step towards a possible merger with the ASX. That is where I actually see the much closer union coming up. I see ASX and NZX with cross-shareholdings maybe in the next five or 10 years.

Mr MURPHY—Do you see any other potential problems with closer integration of the Australian and New Zealand economies?

Prof. Walker—I suppose I do, but it is an area that is beyond my expertise. One of the things that I would be concerned about if I were an Australian policy maker would be the immigration side of things. You have seen a bit in the popular press about entering New Zealand, getting residency, getting the passport and then coming across to Australia. In fact, this is pretty notorious. Someone looks at Australia and says, 'I want to get to Australia, I can't go A to B, so I will do the knight's move—two up and then one across—via New Zealand.' Personally, in this environment post 9/11 and this new world we find ourselves in, that is something that I would be more concerned about than, for example, some possible market failures.

Ms ROXON—But that does not come from closer economic ties. That exists as an issue now, doesn't it?

Prof. Walker—Exactly. Looking forward, that is the sort of thing, though, that would certainly bother me a lot more than getting the particular laws right. That is another issue, I guess.

CHAIRMAN—It has been put to the committee that harmonisation might be detrimental in some ways if what is adopted is the lowest common denominator standards between the two countries. Do you see any evidence of this in your examination of what is around?

Prof. Walker—I will make two points. The first MOU was called 'harmonisation'. By the time we got around to the second MOU it was called 'coordination'. Everyone had realised that harmonisation was a nonrunner. It just was not going to happen, and it cannot. It is very difficult.

You have a federal system on the one hand and a Westminster system on the other. At best, what you are going to get is alignment in key areas of economic interdependence—things like, it would seem to me, capital markets, banking regulation, trade practices/competition law, patents, reciprocal recognition of court judgments and enforcement thereof, and those sorts of things. There is a whole bunch of areas where we are going to be separate and distinct, it seems to me.

CHAIRMAN—There being no further questions, on behalf of the committee I would like to thank you for attending the hearing. We appreciate your time.

[10.10 am]

ELLINGHAUS, Associate Professor Fred, Private capacity

WRIGHT, Professor Ted, Private capacity

CHAIRMAN—Welcome. Do you have any comments to make on the capacity in which you appear?

Prof. Ellinghaus—I am Associate Professor of Law at the University of Melbourne but I am appearing on my own behalf.

Prof. Wright—I am Professor and Dean of Law at the University of Newcastle but I am appearing on my own behalf.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission and it has been authorised for publication together with other material that you have given us. Would you like to make a brief opening statement before we proceed to some questions?

Prof. Ellinghaus—Thank you. I would like to thank the committee for the opportunity to appear here in connection with our written submission. What drew Ted and me to make this submission to the committee was a longstanding interest in the codification and global harmonisation of contract law. We are aware that the committee's terms of reference focus on the harmonisation of Australian and New Zealand law with particular reference to differences that have an impact on trade and commerce. Our submission is, in effect, that the best way of harmonising a significant part of Australian and New Zealand trade law is for the two countries to adopt a code of contract law in the form of a short code of relatively few broad principles.

Ted and I have recently completed empirical research which supports the conclusion that it would be beneficial to codify contract law in case law jurisdictions such as Australia and New Zealand in the form of a short code like the draft Australian contract code, published by the Victorian Law Reform Commission in 1992, of which Ted and I are the authors. That is a code which contains a mere 27 articles which 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 detailed mediating rules which are a feature both of case law and of long and complex codes of contract law to which I will refer in a moment.

Our research, which compared the Australian contract code with case law and with a long and complex code, the UNIDROIT Principles of International Commercial Contracts, is briefly described in our written submission and has since been published in the form of a short book and an article. We have brought copies of these publications with us for the use of the committee. Rather than attempt to describe our research in detail at this point we would be glad to answer any questions the committee may wish to ask about it.

What relevance does this have precisely for the harmonisation of Australian and New Zealand law with particular reference to trade and commerce? The answer is really twofold. First of all, 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. Secondly, the harmonisation of contract law, which we understand as the application of the same legal rules to the same transactions and to the same issues in the harmonising jurisdictions, is inconceivable without the reduction of those rules to a written statement—in other words, their codification. We realise that there are less formal methods of harmonisation but we do not address these in our submission.

The need for a written code to serve as a vehicle for harmonisation presents a considerable problem because modern model contract codes, such as the American restatement of the contract, the UNIDROIT principles of international law, and the European principles of contract law are long and full of complex detail. The new Chinese contract law of 1999 is the most recent and regionally significant example of a long and complex code. It has no less than 428 articles. It seems self-evident that such long and detailed codes are unlikely to be an efficient means of harmonisation because it is difficult to achieve agreement at the level of numerous detailed rules. Harmonisation is much more likely to be achieved at the level of broad principles, as even the opponents of broad principles concede.

The problem is that in common law jurisdictions the assumption has been entrenched for more than 200 years that detailed rules are needed in order to achieve effective guidance and predictable outcomes. Our research suggests the contrary. To summarise it very briefly, we found that, when compared with detailed rules—whether provided by case law or by long codes—broad principles, as represented by the draft Australian contract code, produced more just outcomes, were more accessible and efficient and in particular, to put it conservatively, were no less predictable in their application. This means that the fear that a code of broad principles would result in unpredictability and unfairness is groundless. In our view, the adoption of such a code would not only be an act of domestic reform but provide a viable and efficient means of transnational harmonisation. We would urge this committee to recommend the adoption of such a code by the Australian and New Zealand governments. Uniformity of basic contract law in the two jurisdictions would go very far towards resolving differences that have an impact on trade and commerce.

CHAIRMAN—Do we have two jurisdictions or nine jurisdictions?

Prof. Ellinghaus—We have, in theory, one jurisdiction in Australia in private law, but of course, until the High Court has spoken, we effectively have separate jurisdictions which maintain in some significant respects separate contract rules.

CHAIRMAN—And the High Court, when it has to determine the law, if it is sitting as a court of appeal, would have to determine the law in the right of a particular Australian jurisdiction.

Prof. Ellinghaus—No, the High Court has announced that we have an Australian common law, so I do not think it conceives of its task in that way.

CHAIRMAN—But, where legislation in relation to contracts is being interpreted by the High Court, it would have to interpret that legislation in accordance with the legislation of the particular Australian jurisdiction from which the appeal emanated, one would think.

Prof. Ellinghaus—If you are talking about the rules of interpretation, I think they would form part of the common law of contracts, but of course if you are interpreting a state or territorial instrument then that is a separate jurisdictional law.

CHAIRMAN—What you say seems to make a lot of sense to me. How far away are we from it?

Prof. Ellinghaus—Let me put it this way—and this is really the point on which I wanted to conclude: there is a worldwide movement now towards the harmonisation of contract law and of course of other areas of law. So far Australia and New Zealand have played little part in this movement and have indeed been somewhat unconscious, I think, of the strength of that movement. That is why I think it might seem that we are a long way—

Ms ROXON—I am sorry to interrupt. When you are talking about a worldwide movement do you mean a movement around the world within countries or that there is a broader worldwide movement of people trying to set up your 27 principles of contract law to apply internationally?

Prof. Ellinghaus—It probably works at both levels. There are centres of globalised approaches to harmonisation. For example, the New York Law School is one such centre which concentrates ultimately on what seems a distant objective—that is, the global harmonisation of laws. But there are also very real efforts—for example, the European Community provides the most obvious example in which the European Commission has now in effect published a strategy designed to lead to a European civil code including a European contracts code. There is a trend towards the codification of contract law in Asian countries, and the Chinese contract law is the most recent and most spectacular example of that.

Just to conclude this point, it seems to me that because of China's position in this region—and indeed in the world—the Chinese revised contract law of 1999 is likely to become the dominant regional model of contract law, but because of its length and complexity it is unlikely to serve as an efficient vehicle of regional, let alone global, harmonisation. So the adoption by Australia and New Zealand of a short code such as the draft Australian contract code would provide an alternative model of contract law which could serve as a powerful vehicle for regional and perhaps even global harmonisation. It would, I think, produce a state of affairs in which Australia would have a real presence in this debate and would hurry things along.

CHAIRMAN—1992 was when this code was brought down and it is now 2006—according to my calculations, that is 14 years. How was your code received and is it moving forward or has it just fallen by the wayside?

Prof. Ellinghaus—The first point that needs to be made is that within weeks of the publication of this code the Victorian Law Reform Commission was abolished as a result of a change in government, and this seriously interfered with the process of the promulgation of the code and its further development. We did manage to receive quite a number of comments on the code, both favourable and unfavourable, from a number of eminent scholars and other agencies

around the world. We have, from time to time, been the object of attention by scholars. We have recently, because of the progress of the harmonisation debate, renewed our own efforts to get back on what we now conceive to be a vehicle of harmonisation and we have presented our work to international conferences recently.

CHAIRMAN—You gentleman have clearly worked together for a long time. Were you once at the same institution?

Prof. Wright—Yes, I was at Melbourne university in the eighties.

CHAIRMAN—You said you received unfavourable comments about your code. What were they?

Prof. Wright—Essentially that, because it relies on broad principles, it introduced too great an element of subjectivity and uncertainty into the law. That is the reason that we chose to address that issue by a substantial project of empirical research. And that empirical research indicated that that fear was unjustified and that in fact, if anything, broad principles introduce a higher degree of certainty into the law.

Ms ROXON—Is there a fear that comes from it being two stages—a common law country having to make the step to say, 'We will codify something,' when people are a bit uncomfortable about that idea, in contrast to the Europeans doing it, where so much of their civil law is codified and they are well used to dealing with that system? It seems to me that there is a very good argument in what you are putting, but people are uncomfortable—not even so much the parliaments probably as the lawyers—about simplifying things, which does not mean it is not a very good idea. Do you think that is where the reticence is?

Prof. Wright—I do. To bring it back to Mr Slipper's question, I think it is fair to say that in 1992 the Victorian Law Reform Commission, which had established for itself a great reputation as a simplifier of legislation—it had a world-leading reputation for plain-English drafting—thought that it was doing something very bold, and it was doing something very bold, by seeing whether it could apply the same principles to making the common law more accessible. But in 1992 the idea of codification was fairly radical and, as I think Fred said implicitly, harmonisation was scarcely registering on the landscape at all. So, without wanting to seem excessively vain, I think it is fair to say that the idea was well ahead of its time in 1992.

CHAIRMAN—Have you had any feedback from colleagues or others in New Zealand about how they would receive such a code?

Prof. Ellinghaus—We have not specifically had feedback and we have not sought to elicit any, but I think a relevant point would be to say that New Zealand has passed at least three contract law statutes which in effect codify, in the form of broad principles, three discrete areas of contract law. So in a sense New Zealand has shown greater willingness to walk down that path than has the Australian government.

CHAIRMAN—Given that the European Union is a combination of countries with quite different histories and quite different legal systems, how much further are they along the road to

a common contract law than are Australia and the jurisdictions within Australia, and also between Australia and New Zealand?

Prof. Ellinghaus—They are considerably further along the road.

CHAIRMAN—Which is a remarkable effort on their part, isn't it?

Prof. Ellinghaus—Yes, indeed. Efforts to produce a European contract law date back in much the same way—the analogy has only now struck me—as our efforts date back to the 1990s. For some considerable time, the idea of Europeanising contract law was the preserve of a bunch of scholars, particularly an outfit under the leadership of a Danish professor called Ole Lando. I do not know precisely what position he occupies in the European Commission, but he has now acquired an institutional basis for those endeavours. The European Commission has published a strategy which is explicitly designed to culminate in the production of a European contracts code. A code, in draft form, is available and has been available for some time. So I do not think there is much doubt that we will finish up with a European contract law. The only question is whether it will be in fact a European civil code, even broader than contract law.

Mr MURPHY—Professors, since the Law Reform Commission's discussion paper was issued in 1992, what have been some of the most sensible responses from either of the federal governments or any of the state governments?

Prof. Wright—We had a submission before the commission was abolished from the Commonwealth Attorney-General's Department. Unfortunately, we have not looked at it recently. I can only say in general terms that it was fairly positive, and I am sure we could dig it out—probably more easily than you could dig it out of the files of 15 years ago. We will find the submission we got from the Commonwealth Attorney-General's Department. I do not recall that we got many other submissions from governmental agencies.

I think it is fair to say that we did get a much more positive response from people engaged in everyday practice, if I can put it that way, than we got from the academy and senior people in the judiciary and the bar who have a much more significant personal investment, as it were, in the complexity of the law. Those to whom a simplified law was an obvious asset tended to respond fairly positively.

Ms ROXON—Can you be more direct about that? It is not going to cause offence to anybody here. Do you mean that the people in the trade and commerce were more responsive to it than the lawyers were or do you mean that the legal profession's representative bodies were less supportive than individual practitioners were?

Prof. Wright—I mean the former. Within the profession there was a clear difference. Truthfully, we had a small number of submissions. As Fred said, because of the abolition of the commission, we lost the institutional framework within which extensive consultations might have taken place. Both during that period and then subsequent to that period, we did hear occasionally from practitioners—solicitors—who thought it was a great thing and found it a useful tool, making the law much more accessible to them. Likewise, I recall that we had a couple of short submissions from some of the business representatives, though I cannot

remember which ones—I think the Australian Finance Conference might have been one of them. Again, they were short but, in general terms, quite positive towards the idea of codification.

Ms ROXON—If we were to run with this idea now, would there be a need to revisit the actual content of what you wrote in 1992, given the time that has elapsed, or is it, because it was written with the general principles in mind, still a document with currency that really does not need to be revisited?

Prof. Wright—There are several answers. The first is that we have made fairly modest changes, almost editorial changes, to it ourselves over the years. However, you identified that it purports to be a statement of general principles, and those general principles are relatively static and clear in the law and are unchanged. I think the other point would be that we are not wanting to push the code as such. Obviously we accept that, if this idea were put forward as a venture—that is, let's adopt a code of Australian-New Zealand contract law—people would want to revisit the statement of that law themselves.

Ms ROXON—But you are committed to the objective as well as the content.

Prof. Wright—Yes, and we believe that the draft ACC is a very strong solid point of departure for such a venture, and we offer it as a model for that purpose.

Mr MURPHY—Are there any other practical ways in which laws can be simplified, apart from by creating uniform legislative schemes?

Prof. Ellinghaus—If you are thinking about the law in the form of written rules, which is essentially what it boils down to, particularly in trade or commerce, then the answer is no. I think that is the level at which you have to operate, isn't it?

Mr MURPHY—Okay.

Ms PANOPOULOS—On what do you base your belief that a uniform contract law would be more accessible? I ask that because I am a bit of a cynic. Whenever there is an attempt to simplify an area of law, it often becomes more complex. Why do you think it will work in this instance?

Prof. Wright—I will let Fred add to this, but I think the first thing is that you have to acknowledge, even if you are a cynic, that it is not hard to improve on the point of departure in a case law system like Australia's, where this body of law is only to be found in the thousands of decisions of courts deciding actual cases. That is not a very accessible form of law—indeed, without any doubt it is one of the reasons why legal services are so expensive. You need specially trained skill in the art of even finding the law.

Ms PANOPOULOS—Even if the legal principles were clearly established in a code, case law would still be relied upon for interpretation of what the code is, almost as much, I would have thought, as we have seen in other areas where the law has been codified.

Prof. Wright—You have put your finger on the point that we have ourselves recognised we need to address in more detail in our published work, but I think the short answer is that it is

relied upon in a different way—that is, case law in such systems is used as illustrations of the application of the principle rather than as a source of an additional elaborating or mediating rule. That has a very big impact on the extent to which case law is consulted. I use this example: in a case where the parties in dispute are a landlord and a lessee of a retail shop premise and there is an issue about whether or not the tenant—or the landlord, for that matter—is entitled to terminate their contract, in a case law system to answer that question you have to explore, as you know, a vast range of authorities dealing with the right to terminate a contract and in fact possibly even ancillary elements that set up that right. They may range anywhere from matters dealing with terminations of shipping contracts through to termination of hairdresser employees in a hairdressing salon, whereas in this system you would consult and have the need to consult only a few cases dealing directly with similar kinds of facts. The principle itself is the governing rule and you are only looking for an indication of how that applies.

Ms PANOPOULOS—Yes, it would result in some sort of additional simplicity and accessibility, but we are starting from a very low base. What I am perhaps putting to you is, even if we do go down that path of codification, it will still be comparatively expensive and would still require legal experts in a situation of a contractual dispute.

Prof. Ellinghaus—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 wanted to add this point: the research which we have done at least in part addresses issues of accessibility, so we have some empirical evidence and not merely opinions on this issue. This is obviously not the forum in which to go into the detail of our experiments, 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.

Ms PANOPOULOS—In your opinion, would that significant difference or improvement rely heavily on the manner in which codification occurred?

Prof. Ellinghaus—Yes.

Prof. Wright—Yes, it is critical.

Ms PANOPOULOS—Because you could have a situation where it is made worse.

Prof. Ellinghaus—Yes. If you do 428 articles, as the Chinese contract law has just done, you are not making things certainly better, I think—or perhaps you are, but only marginally.

CHAIRMAN—At the outset I think you mentioned some other publications. Would you like to table them? Do you have them here?

Prof. Wright—Yes, I have them right here in my hand. If you want, I will table them now. They are referred to in our submission as being in press. Those are in fact now publications.

CHAIRMAN—Ms Roxon has another question but, before she asks it, can you tell us more about the experiment you conducted comparing the Australian contract code with Australian case law?

Prof. Wright—I have passed over the publication but I should be able to remember it.

Ms ROXON—We can hand it back to you, if you would like, while you are talking.

Prof. Wright—I will take the slim one, thank you, to refresh my memory. Basically, we conducted three fairly large experiments involving a total of 1,800 participants. Two of those experiments involved giving law students a decision-making task. The third experiment involved giving non-law students—that was our audience of lay people—judgments deciding, in fact, the same disputes according to three different models of law. One was Australian case law, one was the UNIDROIT principles—the long complex code—and the third was the Australian contracts code. The disputes themselves were drawn from real cases. In fact, they were all appellate cases in which there had been a dissenting judgment. The reason for that was that we wanted to have disputes which we thought were realistic disputes of the kind that generate controversy. We also wanted it to be the case that they were difficult and, indeed, that either outcome was a plausible outcome.

The decision makers were given a statement of the facts of that dispute, which we prepared based on the original judgment, and then they were given a law statement drawn, as I say, on one of the three sets of law and they were told to assume that that was the only relevant law to decide the dispute. They were asked to decide it, give reasons and then answer a questionnaire about the decision-making task using fairly typical social science research methods to explore the task. The judgment readers were asked to read two judgments on the dispute, one for the plaintiff and one for the defendant. Each one of those judgments was based on one of the law models and every possible combination, if you follow me, of law models was employed in the experiment so that we could control for the effect of outcome separate from the effect of law model on people's assessments of the decisions. We gathered a range of data. We had a considerable amount of, essentially, data which could be analysed by quantitative statistical techniques from the decision-making task. We knew how long it took people to make the decisions, we performed an evaluation of the quality of their reasons and we knew, of course, whether or not they decided for the plaintiff or the defendant.

Ms ROXON—It sounds terribly like a law exam.

Prof. Wright—It was. In fact that is one of our justifications for saying that, albeit this is an unusual application of the experimental methodology in our field, it was nevertheless an experiment which resembled real life conditions since we were at least asking law students, trainee lawyers, to perform a task much like a task they would be expected to perform in practice and indeed in the same manner as they are assessed on their ability to perform that task in law school. I think I have probably covered the drift of the design but from both experiments we got very consistent results. That is actually a significant and important methodological point because—to use the science disciplines term—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.

Among the findings that I think stand out and are relevant to the concerns that we have mentioned about broad principle codes, our group of 10 cases, as it happened—we thought, as experimenters and as contract lawyers—contained five that were quite difficult and five that were in relative terms easier. When we calculated the level of consensus reached by our decision

makers—and we had a measure of predictability, which was agreement amongst different decision makers—we found that there was no statistical difference in the level of agreement overall between the three law model groups. In the so-called easier case group, the users of the ACC reached a very high level of consensus—that is, there was a much higher level of agreement and therefore, one could suggest, predictability amongst users of broad principles.

It was a particularly striking result because 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. Bearing in mind that these were appellate cases that had resulted in a dissenting judgment, we think—coming back to Ms Panopoulos's question about the potential benefits or economies of broad principles in application—that it is very striking that, in effect, the users of those broad principles agreed with us and 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.

Ms ROXON—I am conscious that we are nearly out of time, but I just want to explore briefly this US restatement idea. Can you give us a little summary of how it works and are there any barriers to us doing it here? It does not require any constitutional change or anything like that to do it, does it?

Prof. Ellinghaus—No. We have thought of this ourselves as a possible form of producing, in effect, a code-like state of affairs, and that is more or less what has happened in the United States. The American restatement of contracts has absolutely no official status. It has not been enacted by any state, but there is a point of regular resort by the United States judiciary—

Ms ROXON—Who actually produced it?

Prof. Wright—It is the American Law Institute, which is a non-profit body or organisation, isn't it?

Prof. Ellinghaus—Yes, it is.

Prof. Wright—It is not unlike, at an international level, the UNIDROIT, which has likewise produced—

Ms ROXON—So it has no official status but high consensus about its value, essentially?

Prof. Ellinghaus—Yes, it does.

Ms ROXON—So it could happen here but in a form where there was a higher level of consensus about—

Prof. Ellinghaus—You would need an institutional framework of some kind. If you are going to publish a restatement, it has to have some institutional backing to make it work.

Ms ROXON—Okay. Thank you.

CHAIRMAN—Thank you very much, professors. We are out of time. I do appreciate your coming in and wish you well.

Prof. Ellinghaus—Thank you.

[10.49 am]

HUGHES, Mr Sean, Group General Manager, Compliance, Australia and New Zealand Banking Group Ltd

NASH, Ms Jane Erin, Head of Government and Regulatory Affairs, Australia and New Zealand Banking Group Ltd

CHAIRMAN—Welcome. Thank you very much for appearing before the committee. Ms Nash, does your role relate to Australia or to Australia and New Zealand?

Ms Nash—It relates mainly to Australia.

Mr Hughes—My role is global, across all 27 countries in which we operate.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We received your submission and supplementary submission, which have been authorised for publication. Would you like to make a brief opening statement on behalf of the bank before we proceed to questions?

Ms Nash—We have a short statement. Firstly, I would like to say that we appreciate the opportunity to appear before the committee. As we mentioned in our submission, we consider ourselves well placed to comment on the need for harmonisation of laws, both within Australia and between Australia and New Zealand, as we provide banking and financial services to all parts of Australia and ANZ is the largest bank in New Zealand measured by net assets, since we acquired the National Bank of New Zealand in 2003.

CHAIRMAN—The ANZ Banking Group operated there before.

Ms Nash—That is correct.

CHAIRMAN—Does it still operate there separately from the National Bank of New Zealand?

Ms Nash—No. It is one group but it does retain two brands in the market.

Mr Hughes—Depending on the services. For instance, at the retail end it operates two separate brands; however, at the institutional or corporate end it can operate as a single entity.

CHAIRMAN—Thank you.

Ms Nash—We understand the inquiry is focused on differences in law that have an impact on trade and commerce. For a national organisation like ANZ, cost and complexity in compliance often arise from inconsistency in law between states and between the state and federal legal systems. We have highlighted examples of these inconsistencies in our submissions, where we

have pointed out that they can increase the complexity of compliance training, make compliance breaches more likely due to confusion—both on our part and on the part of our customers—about requirements and can increase reliance on professional advice, which tends to increase costs. The inquiry is an important part of the current review of business regulation in Australia. We have provided a submission to the federal government's business regulation task force, and your committee has a copy of that submission. We note that each state and territory is now being encouraged through COAG to conduct their own reviews.

One point that we would like to make is the importance of coordination between jurisdictions in the way inconsistent or duplicated regulation is addressed. We have recommended in our submission to the business regulation task force that inconsistency in regulation between state, territory and federal jurisdictions be accorded a high priority at COAG. Once again, we are pleased to be here today and hope we can help you with your questions.

CHAIRMAN—Thank you. I can recall reading somewhere that, apparently, instead of converging, banking regulation between Australia and New Zealand is actually diverging. I think I can recall the situation of the Westpac Bank, where they were being forced to form separate entities and not have the one entity operating across the Tasman. Is my recollection correct?

Ms Nash—It is correct up to a certain point. There have been events aimed at harmonising the two sets of regulation over the past 12 months. Let me speak about ANZ rather than Westpac. The regulator there, the Reserve Bank of New Zealand, has sought through its policies to, essentially, insulate New Zealand's banking system from any shocks that could arise as a result of a problem with a parent bank in Australia. Ninety per cent of the banks in New Zealand are Australian owned, so its policy basically said that, when it comes to what it calls 'systemically important banks', which applies to virtually all of the Australian banks that operate there, they would need to set up stand-alone support functions or facilities in New Zealand—for example, transaction processing. This policy as it started would have required that the processing of transactions be done in New Zealand rather than in Australia.

Given that banking is a global activity, that really means that you would have to duplicate your operations, so it is a lot more expensive and you cannot take advantage of the sorts of economies of scale that you would otherwise be able to do. So that policy would have required a suboptimal arrangement for ANZ. In fact, we spent $50 million in setting up separate facilities in New Zealand. Since that occurred, there have been decisions between our Treasurer, Peter Costello, and the New Zealand Minister for Finance, Michael Cullen. They agreed that there should be a process of harmonisation between the prudential regulators—APRA in Australia and the Reserve Bank of New Zealand in New Zealand. The point that they got to was that the Reserve Bank of New Zealand's policy is now worded somewhat differently. They have outlined the objectives that they would like to see, which still include protecting their banking system from potential shocks, but they will enter into discussions with individual banks to determine the exact arrangements that will be put in place to meet that end.

CHAIRMAN—I understand the National Bank of New Zealand is obviously a subsidiary bank, but is the ANZ in New Zealand a subsidiary bank, like a separate entity, or is it part of the same company operating banking operations within Australia?

Mr Hughes—It is a separate legal entity operating in New Zealand, and the merged entity of ANZ and the National Bank is roughly a 30 per cent subsidiary of the group. They operate as two separate legal entities registered in New Zealand, so from a legal perspective it is quite separate from the Australian bank. However, put together they are a subsidiary of the group.

CHAIRMAN—Is there a different board of directors?

Ms Nash—Yes. They have a separate board.

CHAIRMAN—Has the bank ever attempted to measure the cost of lack of harmonisation on its business operations?

Mr Hughes—As between Australia and New Zealand?

CHAIRMAN—And also within Australia.

Mr Hughes—Not in a direct sense. I suppose the only way we would be looking at that particular issue would be, for instance, the additional staff costs, which is not an exercise that we have undertaken. We would look at the additional cost of recruiting and training staff to perform like functions in each jurisdiction. For instance, in our submission we referred to, in the context of occupational health and safety, the requirement to have in place in some of the jurisdictions specific staff to carry out functions that could be performed at a national level but which cannot be because of the state based requirements. So we do not have a figure for you today.

CHAIRMAN—Obviously the concerns of the ANZ bank must be concerns shared by your banking competitors—at least, those which operate across the Tasman. I think the National Australia Bank and Westpac are also in New Zealand.

Mr Hughes—And the Commonwealth Bank.

CHAIRMAN—Has your peak banking body done anything about making representations to governments on both sides with respect to the lack of harmonisation, what it is costing, the inefficiencies and how it is just not appropriate in 2006?

Ms Nash—Yes, it has. The Australian Bankers Association has made a number of submissions, both to the Reserve Bank of New Zealand, through the development of their policy over the last 12 months or so, and to our Treasurer here.

CHAIRMAN—And the responses have been somewhat heartening, given the statements the Treasurer has made in conjunction with Dr Cullen?

Ms Nash—They have been. I think it is fair to say that good progress has been made on that particular issue.

Mr Hughes—There have also been specific representations made at an industry wide level in relation to what has been perceived as the unintended impact of the FSR regime extending across the Tasman to include New Zealand customers as well. That argument has been put and we remain hopeful of some refinement in that area.

CHAIRMAN—Dr Cullen and others have talked about the possibility of a currency union. Do you see that as being anything more than a pipedream? Were it to come into effect, how would that impact in a favourable sense on harmonisation?

Ms Nash—This is a very difficult issue. Arguments of economic efficiency are not the prime arguments here, I would have thought. There are issues to do with sovereignty.

CHAIRMAN—A lot of countries share currencies—look at the EU. Even Timor has got the US dollar and other countries have the Australian dollar.

Ms Nash—That is right; the EU does share currencies. I think that has probably made it difficult for some of its larger economies to run their economies and their macropolicies. I do not necessarily think that it would be a better thing. I think it would require closer analysis.

Mr Hughes—The other thing, as I mentioned in my introduction, is that we are a global bank. We operate in 27 different countries. We are used to dealing in a range of currencies. Sometimes being able to transact in different currencies actually offers some advantages as well.

Mr MURPHY—Has the ANZ Bank ever attempted to measure the cost of the lack of harmonisation within Australia to its business operations?

Mr Hughes—Not to my knowledge. The best that we would probably be able to do would be to simply count the salary cost or the FTE cost of having additional compliance staff in place to address specific state based or territorial regulation.

Mr MURPHY—Can you update us on what is happening with the Joint Trans-Tasman Council on Banking Supervision? Do you think enough is being done? Is the pace of change sufficient?

Ms Nash—Yes, we can update you on that. The Reserve Bank of New Zealand has recently issued a finalised policy on outsourcing, which was a contentious point for us because, as I was saying a few minutes ago, 90 per cent of the banks in New Zealand are Australian owned and, in the absence of a policy saying that we would have to locate, for example, our transaction processing facilities in New Zealand, we would keep them in Australia and take advantage of economies of scale in processing.

As to where the process between Australia and New Zealand has got to on that, there was on 22 February, I think, a joint announcement by the Treasurer and Minister Cullen to say that the recommendations of that trans-Tasman council would be implemented. That involves legislation being enacted in both countries that would materially, we believe, decrease the risk of a problem occurring in Australia impacting on our New Zealand operations in an adverse way. The reason I focus on this is that this is the central issue for the Reserve Bank of New Zealand. Essentially, they want to protect their banking system from shocks from outside of the system due to financial stress in the Australian parent.

Mr MURPHY—Does the ANZ Bank operate autonomously in both New Zealand and Australia?

Mr Hughes—It depends on what you mean by 'autonomously'. As legal entities they are separate. However, to the extent permitted in terms of specific privacy information and other requirements, obviously information is shared between the two countries, and we have to take a global—including outside Australia and New Zealand—perspective of the bank's operations at all times.

Mr MURPHY—How much of an issue are the differences between both countries?

Mr Hughes—It is something of a chicken and egg type situation. Over time we have obviously developed both systems and products which address the specific needs of the New Zealand customer base and the New Zealand regulatory requirements. To answer your question in a different way, there are very few products that we offer in Australia that are mirrored in New Zealand.

Mr MURPHY—Are the fees and charges similar?

Mr Hughes—Again, they are a product of competition.

CHAIRMAN—You would have a client dealing with your bank on both sides of the Tasman. When that client deals with the ANZ Bank do you treat yourself as one entity as far as security is concerned? He could borrow in New Zealand using Australian security and so on?

Mr Hughes—Again, to the extent that is permitted that can occur. You can operate on both sides of the Tasman. However, as I mentioned before in relation to the potential application of FSR, that has created some problems for us in being able to offer financial products on both sides of the Tasman with the unintended consequence that all the FSR disclosure requirements and conduct requirements may apply to a New Zealand customer or vice versa—a New Zealand bank or branch offering services to Australian based residents may unintentionally be in breach of FSR. It depends on the regulatory requirements.

Ms PANOPOULOS—There have been several areas referred to within Australia as causing difficulties because of a lack of harmonisation between the state jurisdictions. You have mentioned several areas: workers comp, stamp duty, taxes, et cetera. This area is of particular interest to me because I have an electorate on a state border—particularly with Albury-Wodonga. It is not a normal state situation but a town that operates as one.

CHAIRMAN—Wodonga, not Albury.

Ms PANOPOULOS—Yes. I do know the boundaries of my electorate, thank you, Chairman. Of the areas you mentioned, which top two would you rate as the most costly to the business or the most bothersome?

Mr Hughes—We do not have empirical data before us to answer your question but intuitively we feel that the payroll stamp duty taxes and the occupational health and safety requirements are the two most problematic, given the numbers of staff and volumes of transactions in relation to both instances.

Ms PANOPOULOS—You will be pleased to know that the OH&S issue is something that small- and medium-sized businesses also list as their most costly areas. On page 2 of your submission you have listed several areas of increased complexity. Are you able to elaborate on those areas?

Mr Hughes—Are you referring to the December 2005 submission?

Ms PANOPOULOS—I am referring to the May 2005 submission.

Ms Nash—Are you referring to the listing of things such as increased complexity of compliance? Are you referring to that list?

Ms PANOPOULOS—Yes.

Mr Hughes—One of the regulatory obligations for each of our businesses is to maintain—as indeed any good business sense would require—a register of all of the obligations to which that business is subject. We have recently, for instance, compiled a list of obligations for our institutional businesses—this is the larger scale customer servicing businesses. The number of obligations just for those businesses in Australia exceeds 2,200. Inevitably, what that entails is an assessment of the risks associated with those obligations, the risk of breach, the consequences of breach and the varying controls which have to be put in place to prevent those breaches occurring. We have spoken here about compliance training, supervision, testing and monitoring.

The nub of the issue for us is the inconsistent regulatory requirements between states and territories. We accept that there will always be a large number of obligations which we are subject to, given the nature of our business, but we operate on a national basis and where those obligations differ or conflict that creates additional burdens for us in managing those obligations and training our staff. The reality is that we are a Melbourne based bank and the vast bulk of our staff are located in Melbourne but they operate and service customers nationally. If we are required to put in place different processes, controls, supervision and monitoring depending on each state and territory then inevitably that will not only create complexity for our staff but add to the costs, which will be passed on to consumers.

Ms ROXON—I would like to ask about a different issue. You have made some comments as a very large employer. I ask you to answer this question with your employer hat on. Regarding the key areas that you think need reform, I notice you mention occupational health and safety, payroll tax and WorkCover. You must also be bankers for very many large organisations as well. Are they the sorts of key issues that are raised as an employer rather than as a banker—obviously, within your financial area you have your expertise in banking—or are they just ones giving you particular grief or concern at the moment?

Mr Hughes—I would not say just at the moment. As banking becomes more complex, as the competitive environment becomes more acute and as there are varying responses to perceived failures in banking conduct then the list of requirements and the risk of non-adherence to those requirements inevitably increases.

Ms ROXON—None of those things particularly relates to competition between banks or the pressures in banking. Tell me if you are not comfortable being outside your area of expertise, but

I am asking because a number of the people we have making submissions are not employers. We have a lot of people coming as representative bodies or as academics with a particular perspective. It just seemed an opportunity to ask you. We know that COAG has already raised some of these issues as hot spots for federal-state relations, and occupational health and safety is one of them. I thought you might be able to give us a bit of an insight into where those problem areas are as an employer without having to go into any particular detail.

Mr Hughes—I am not sure whether this is a response to your question but when we analyse the mistakes or the incidents which occur within a bank—and any bank is making mistakes on a daily basis; that is the nature of business—we find that the predominant cause of those mistakes is human error. The predominant cause of human error is a lack of understanding or familiarity with the requirements. We have done that level of analysis.

Ms ROXON—Is that with the requirements of the different regulatory systems that you are working in, in terms of the financial regulation, or the different requirements for health and safety, WorkCover or other things? The reason I am asking is that you flag it and because I am trying to understand whether you see it as a priority as well or whether it is just something that has been included with a range of other areas in which you would support increased harmonisation.

Ms Nash—Some of these issues arise as a result of our being a large employer and others arise as a result of the nature of our business. The payroll tax one is clearly as a result of being a large employer, and stamp duty is as a result of the nature of our business. The common thread, if you like, is—what Sean has referred to—the fact that wherever you have complexity, you tend to get errors. I am not sure if that answers your question. You are not looking as if it does.

Ms ROXON—No, but perhaps I am not asking it clearly enough. I know that we are going to be pressed for time and there are plenty of other people who want to raise questions. I can follow it up with you later if I need to. It may not be a path that the inquiry wants to go down. It was just an opportunity to get from you, with your employer hat on, some feedback on those areas. You have given us quite a lot of detail on the banking and regulatory areas, and we do not have as many submissions yet on these other areas. I was just curious. I think my idle curiosity is satisfied. If we want to pursue it further than that, we can always get back in touch with you.

Mr Hughes—We are happy to answer that.

Ms Nash—We would be happy to.

ACTING CHAIR (Mr Murphy)—Thank you, Ms Nash and Mr Hughes, for attending the hearing today.

Ms Nash—Thanks very much.

[11.23 pm]

LUDWELL, Mrs Jillean Leigh, National Secretary and Chief Executive Officer, Victorian Division, Australian Institute of Conveyancers

CHAIRMAN—Welcome. Do you have any comments to make about the capacity in which you appear?

Mrs Ludwell—I am the Chief Executive Officer of the Australian Institute of Conveyancers, Victorian division, and I have recently been appointed as the national secretary of the national body.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received a submission from you. It has been authorised for publication. Would you like to make a brief opening statement?

Mrs Ludwell—Thank you for the opportunity to address you today. We found out about the committee's inquiry quite late in the piece; hence our submission was fairly brief. We are an organisation that represents conveyancers in Victoria and we are also a division of a national body. We have been attempting for many years to get the Victorian government to introduce some form of licensing or regulation of conveyancers in Victoria, to enable them to be on a par with their counterparts in the other states.

Deregulation was wonderful, but there are restrictions to deregulation, which means that educational and experience qualifications do not count for anything because they are not recognised by any government organisation or regulatory regime. It has taken a long while but, between the time we made our submission and now, the Victorian government have finally announced that they are introducing a licensing system for conveyancers in Victoria. We are very pleased about that, but it will be a long time before the bill is introduced. It will hopefully be in the spring session. It will recognise experience and education and require professional indemnity insurance, which has not been a requirement under the current act in Victoria. It will put Victorian conveyancers on a par with their licensed counterparts in other states.

CHAIRMAN—Some other states.

Mrs Ludwell—Yes. The only states that are not licensed are Queensland and the ACT.

Ms ROXON—Is there recognition across the states where there is licensing?

Mrs Ludwell—It hinges on the legal work component. New South Wales has a very extensive definition of legal work or conveyancing work that the licensed conveyancers can undertake. There is no such definition in the states where the other licences are, but they have authority by

other means, under the regulation, to do some forms of legal work. That has been the stumbling block, basically, between the other states.

CHAIRMAN—I am from Queensland. Historically, in Queensland they used to have barristers of the Supreme Court of Queensland, solicitors of the Supreme Court of Queensland and conveyancers of the Supreme Court of Queensland. But I gather that no conveyancer was able to be admitted before the Supreme Court to practise as a conveyancer after 1923 or something like that. So, for all intents and purposes, there are none. Can you tell me what a conveyancer is and what a conveyancer can do? I used to be a lawyer with a fairly large conveyancing practice myself.

Mrs Ludwell—I can only speak from the perspective of Victoria, because of the way the system works.

CHAIRMAN—Because your submission says that the current situation in Victoria, prior to the introduction of this legislation, means that—and these are my words, not yours—you have to undertake expensive legal fees in the process of carrying out what you do. Maybe you could take that into account in your answer.

Mrs Ludwell—It is a fairly blurred situation in Victoria. The main documentation for conveyancers in Victoria is the section 32, or disclosure, statement, which can be a brief one or a more extensive one. Then there is the contract, which, in Victoria, is able to be prepared by real estate agents. They have the authority in the Estate Agents Act to do that. Therefore, over a long period of time, since about 1985, real estate agents have prepared the contract notes. That took the barrier away from conveyancers getting out there and working on their own. If the agents are preparing the contract note, really the only document that is in contention is the transfer of land, which is legal work. We all agree it is legal work, but it is not rocket science. That is one area that we have had to employ solicitors to do. So right from the start that has been where the expense lies. Plus, there are other areas of the conveyancing process—notice of recision and powers of attorney—and things like that which could be undertaken by conveyancers. Unfortunately, the law prohibits that, so we have to sideline that to a solicitor to do.

CHAIRMAN—In Queensland the real estate agent would usually prepare the contract. The duplicate copy of the contract goes to the vendor's solicitor. The original goes to the purchaser's solicitor. What can a conveyancer in Victoria do currently and what more will a conveyancer be able to do if this legislation is enacted?

Mrs Ludwell—As I said, if I am acting for a vendor client, they give me instructions to prepare the section 32, so I do the titles search—

CHAIRMAN—What is the section 32?

Mrs Ludwell—The disclosure statement. It is section 32 of the Sale of Land Act. It has to incorporate certain things from section 32 of the Sale of Land Act—a copy of the title, planning, rates, building approvals and things like that. You make all those investigations. You then prepare the section 32 statement and give it to the client, who signs it and gives it to their agent. The agent finds a buyer, does a simple two-page contract note and then sends that to the conveyancer, solicitor or whoever is acting on the other side. Then we take it from there. We do

all the investigations, liaising with the bank and getting all the figures right. Section 27, which is a release-of-deposit situation, operates in Victoria, so if a person wants to get an early release of deposit they do not have to wait until the settlement. Unlike in other states, they can get an early release of deposit. It is a fairly convoluted process that we undertake to get an early release of deposit. Basically, it is the same as a solicitor does; it is just outside the legal office. The conveyancers do it down here, and we prepare the section 32 statement as well.

CHAIRMAN—I imagine that there would be different points of view in the community. The point of view in Queensland has been that only legally qualified people should be able to carry out legal work. When we used to have conveyancers, they were legal practitioners who had that particular expertise. So I imagine that we are not all going to agree on who should do what.

Mrs Ludwell—Certainly.

CHAIRMAN—Thank you for explaining that to me. You ask us as a committee to make certain recommendations. I think that might be difficult, bearing in mind that to make those recommendations you would first have to achieve a consensus on whether conveyancers should be allowed to do what many people consider to be legal work. I accept that there are differing views perhaps around this table—I know Mr Murphy has some interesting views on legal practitioners at times—and in the community.

Mr MURPHY—Mr Slipper is alluding to my campaign against those members of the legal profession who employed family law and bankruptcy to avoid their obligations to the taxation commissioner.

Mrs Ludwell—I see.

Ms ROXON—You are not being asked to comment on that.

Mr MURPHY—No, you are not being asked to. What are the main arguments being used to oppose such a licensing scheme for conveyancers?

Mrs Ludwell—In Victoria, the deregulation of the whole system came about during the Kennett era. We were told at the time that reforming the legal profession so extensively took up all the time and so they could not turn their attention to conveyancers, so it lapsed. They introduced this ridiculous part of the legislation which allowed us to be recognised as conveyancers and running conveyancing businesses, but it did not give us the authority to do any of the legal work involved in the conveyancing process and it did not require it to be mandatory to have professional indemnity insurance, so it really gave you no other recognition. It just said that you can be a conveyancer running a conveyancing business, but nothing else.

We have been lobbying the government for a long time to get that changed to make sure people are properly qualified. I understand that Mr Slipper does not agree with that, and there are a lot of people who do not. It has gone on for so long because the legal profession have wanted to have that as a monopoly, and they always have had a monopoly of that legal work component. People who have qualifications, education and experience in certain areas should have those qualifications recognised. There are courses available that we have instigated with RMIT that have been running for some time. They are eminently good courses because they are

predominantly for conveyancers. There is a business component as well, but they are predominantly for conveyancers and cover all legal areas in conveyancing. I have not done a law degree, but my understanding is that there is not a lot of conveyancing in a law degree, whereas the courses that RMIT are offering have a fairly strong component in conveyancing.

CHAIRMAN—The main argument for legalising conveyancers has been cost in the sense that solicitors used to charge in accordance with the Queensland Law Society's scale of fees, but that is all now deregulated. Frankly, people can get conveyancing done for a couple of hundred dollars through a legal office.

Ms PANOPOULOS—Sorry to interrupt the flow of questions. What would be the standard cost, the standard fee, for conveyancing services for, say, a $400,000 or $500,000 house?

Mrs Ludwell—It does not go on the value of the house, for a start. For instance, I charge $630 as a flat rate for conveyancing, and that includes the costs, the out-of-pocket expenses and the GST.

CHAIRMAN—On a purchase?

Mrs Ludwell—On a purchase.

Ms PANOPOULOS—And attendance at settlement?

Mrs Ludwell—Yes, that includes everything.

CHAIRMAN—And you have to pay some of that to a solicitor, do you, to prepare the documents?

Mrs Ludwell—Yes.

CHAIRMAN—How much of that would be paid?

Mrs Ludwell—I cannot give you that exact figure because our organisation has established a retained solicitor whom we employ. So we levy all our members, and that retained solicitor does the work that we feed out to him.

Ms PANOPOULOS—Are you familiar with what standard scale cost a solicitor would charge for the same service?

Mrs Ludwell—In the suburbs solicitors will compete on the same level, because the reason the conveyancers came in in 1985 has meant that the actual fee structure has changed significantly. So you will find in suburbs a lot of solicitors will compete with that figure; they will be charging $600 to $700. Obviously as you go into the city, in the CBD, you will get much higher prices. Because conveyancers actually have operated in Victoria for some time, the level of conveyancing fees has significantly come down. The new legislation is not going to affect that as much because—we will have some extra expenses, obviously, being regulated—we will have a saving in that we do not have to pay that solicitor the levy that we have to pay to get the legal work done.

CHAIRMAN—Given the fact that you only have 200 members, what proportion of conveyancing in Victoria would be done by conveyancers? Is it proposed that conveyancers can only do residential conveyancing, or can they do hotels, commercial properties and all those sorts of things?

Mrs Ludwell—Certainly not. We will be arguing for full commercial work.

CHAIRMAN—Currently?

Mrs Ludwell—Currently they do. There is nothing defined as to what they can and cannot do.

Mr MURPHY—I make the observation that 25 to 30 years ago in New South Wales dental technicians and dental prostheses, which is what they wanted to be known as, took on the dentists to get chair-side status for doing such things as partial plates and full upper and lower dentures. They were able to overcome the campaign by the dentists to stop the dental technicians getting direct access to the patients. Obviously it is human nature for the professions to protect their patches.

Mrs Ludwell—Of course.

CHAIRMAN—They did the work anyway.

Mr MURPHY—That is right. They did the work, and they still do.

Mrs Ludwell—Conveyancers have done the work in solicitors' offices for years and years.

Mr MURPHY—I know.

Mrs Ludwell—I ran a huge department in a middle-level firm for about eight years.

Mr MURPHY—I worked in my father's legal practice and did the same thing.

Mrs Ludwell—I trained all the young solicitors that went through. Basically, the reason that it did change was that I got to a stage where I could not get any further in the firm—you cannot have a share of the profits, you did not have any career path in front of you, you could not get any decent money for what you were doing. So when the opportunity came to step out of that solicitor's office and go out on my own, as a few people had started to do, I decided to take that risk. I never regret it and I have never looked back, and it has been a fantastic journey.

Mr MURPHY—Are you looking to have the same model as New South Wales?

Mrs Ludwell—Exactly the same model, yes. We think that is actually a very clear and concise model, plus the fact that New South Wales conveyancing is very similar to Victorian conveyancing in the depth of knowledge that you have to have in the area.

CHAIRMAN—Except the lawyers prepare the contracts in New South Wales, don't they?

Mrs Ludwell—So do the licensed conveyancers.

CHAIRMAN—I do not want this to be a provocative question, but if you are charging at about the same level as suburban solicitors, why would someone go to a conveyancer with, presumably, a lower level of training and without professional indemnity insurance and that sort of thing?

Mrs Ludwell—No, I would not agree with that. They go because there is a choice. That is what competition is all about: choice. They get a very good personal service from most conveyancers. They are not all as mature as I am, but there are a lot of very experienced people out there providing choice and good, personal, competent and professional service. That is why we have 40 to 45 per cent of the market in Victoria.

Ms PANOPOULOS—Most people hate solicitors, Peter.

Mrs Ludwell—As I said, only 200 members belong to our association but, because of deregulation, we are only a voluntary organisation. There are probably about—

CHAIRMAN—So there are many more conveyancers.

Mrs Ludwell—There are about 800 out there. One of the reasons that prompted the government, apart from our pushing for it thoroughly over a long period of time, was that some money—to the tune of about $9 million—went missing down in Geelong the year before last. It was blatantly obvious that, because of the deregulation, there were no checks and balances on people who were able to take money off the unsuspecting public.

CHAIRMAN—Do you run trust accounts?

Mrs Ludwell—No. There is nothing to stop me from running a trust account, but we elect not to run trust accounts. Our members elect not to run trust accounts because there was such a negative lot of publicity that the Law Institute undertook against conveyancers, saying, 'They'll run trust accounts and pinch your money.' We decided as a body that we would prohibit our members from having trust accounts.

CHAIRMAN—Some other conveyancers would?

Mrs Ludwell—Yes. They certainly do. We certainly cannot run deposit-taking trust accounts, which are the only ones which would be of any use to us. Only real estate agents and lawyers can actually hold trust accounts to put deposits in. I can go and open a trust account tomorrow. There is nothing to stop me.

Ms PANOPOULOS—You mentioned the frustration at having to wait for quite a significant period of time before there was even any talk of a bill being introduced into the state parliament. When did you commence discussions advocating this sort of reform with the state government?

Mrs Ludwell—About 1990, 1992 or something like that. We had a lot of input into a working party that came up with the Legal Practice Act in 1996. As I said, because they had reformed the legal profession so significantly they did not have time to turn their attention to conveyancers

and just shoved a few words in and that was it. Since that time, we have been lobbying the government of whichever persuasion. We have gone to the Productivity Commission and the National Competition Council. We have lobbied everybody to try to get some form of recognition for our members.

Ms PANOPOULOS—Have you been given any indication of when the bill will be introduced?

Mrs Ludwell—It was only announced in January this year that the bill is going to be introduced.

Ms PANOPOULOS—And you do not have a draft?

Mrs Ludwell—No. We have had some initial discussions with Consumer Affairs. They are hoping for the spring session, but who knows.

Ms PANOPOULOS—Thank you.

Mrs Ludwell—I will just mention one thing about harmonisation. With regard to the electronic conveyancing process that is going to be coming in in the next few years, it is extremely important that electronic conveyancing works within an Australia that is harmonised as far as the legislation is concerned. That has been a problem in Victoria, because there is no recognition of the conveyancers in Victoria. Hopefully this bill will now rectify that.

CHAIRMAN—Thank you very much for appearing before us. None of the questioning was personal. In my case, I was operating from a lack of understanding of what conveyancers actually do in Victoria.

[11.44 am]

REINHARDT, Professor Gregory John, Executive Director, Australian Institute of Judicial Administration

CHAIRMAN—Welcome. Where is your professorial position?

Prof. Reinhardt—That is something I hold as the result of an affiliation between my institute and Monash University. There is an affiliation agreement between the two bodies and, as part of that arrangement, I have the designated title of professor.

CHAIRMAN—Thank you. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false of misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission. It has been authorised for publication. I invite you to make a brief opening statement of, say, five minutes before we proceed to questions.

Prof. Reinhardt—Just by way of background, the Australian Institute of Judicial Administration is a body concerned, as probably its title indicates, with judicial administration, and it is in that capacity that I speak about the question of harmonisation today. The institute does not have any fixed view on whether harmonisation of court procedures, evidence or any other aspect of what I might call 'adjectival law' should be harmonised; rather, its concern is to be involved in research and to assist in relation to research and thinking about those particular matters.

The institute itself is a body that is funded by government—and by that I mean all of the governments of the country—and by its membership, which consists of some thousand persons.

CHAIRMAN—But it is not trans-Tasman.

Prof. Reinhardt—It is indeed.

CHAIRMAN—So it is the Australasian?

Prof. Reinhardt—No, it is the Australian. We get away with continuing to call it the Australian Institute of Judicial Administration, which is historic, but it does in fact have a significant New Zealand membership.

CHAIRMAN—Is it also supported by the New Zealand government financially?

Prof. Reinhardt—No, there is no financial contribution from the New Zealand government, but we do have a very significant number of members from that country. We are concerned with trans-Tasman matters as well. I think Justice Lindgren of the Federal Court has given a submission to this committee and may indeed have given evidence—but I am not sure about that. What I brought with me today and which I am happy to table are a couple of documents

that perhaps indicate the institute's interest in the area of harmonisation of court rules particularly. One of those is a document the genesis of which was a submission by Mr Maurie Stack, a solicitor from New South Wales, for a research proposal in relation to the topic of harmonisation. I will, with the leave of the committee, table that.

Ms ROXON—Professor, could I interrupt on your introduction for a moment just on the issue of court rules. At the federal level, the majority of court rules are not set by the legislature but by the courts themselves. Given that this is going to be the main focus of your comments, can you take us through how any legislative body is going to have a role in seeking to harmonise the rules in the way that the organisation desires? It seems to me that the courts could go off and do that if they chose.

CHAIRMAN—And, further to Ms Roxon's question, my understanding is that most state jurisdictions also have the judges making the rules.

Prof. Reinhardt—It is fair to say that in all jurisdictions the formulation of the rules rests with the judges, subject of course to the fact that parliament can disallow any rules because they are in the nature of subordinate legislation. I think that is a statement that is true of all of the jurisdictions—certainly all the ones that I am aware of. That is certainly the position in Victoria, and I would think at the Commonwealth level as well.

CHAIRMAN—So why haven't the judges done it in cooperation through your organisation?

Prof. Reinhardt—Perhaps one word might describe it. I think there is a degree of parochialism, and the view that 'we can do things in a way which we think is best'.

Ms ROXON—It is very unusual for us to be asked to get over other people's parochialism rather than the other way round! So it is quite a refreshing proposal for us to have.

Prof. Reinhardt—Certainly amongst the practising profession there is a concern that if you are practising in one part of Australia and you are forced to deal with a process that emanates from another jurisdiction, there are difficulties associated with that. If you look in due course at the document that I have just tabled along with another document—one that I worked up in consultation with our research committee; it is a proposal for harmonisation of Corporations Law court rules and was ultimately the work that Justice Lindgren's committee undertook—I think you will see that.

But ultimately what you find happening is that, even with the best endeavours to try and harmonise rules—and we have had the Corporations Law court rules, the subpoena rules and, most recently, those concerned with freezing orders—the judges in each of the courts say, 'That's all very well but, quite frankly, we are happy with the rules that we have—why should we change them?' What you could do is to have a second set of rules which are equally valid, which people throughout Australia could actually use and which would achieve the same purpose, combined with the rules that exist in each jurisdiction.

Ms ROXON—Given that we are looking at harmonisation, wouldn't that just create a further different set of rules rather than bring the existing ones together in any consistent way?

Prof. Reinhardt—That is the problem with that analysis, I think. If you have two sets of rules, it only complicates things.

Ms ROXON—So is the proposal, then, that it would be beneficial for the legislature to take a more active role in participating in the way the rules are established because that will give some impetus to harmonisation? Is that the kernel?

Prof. Reinhardt—I think the argument would be that if the legislature were more directive in relation to the matter, so far as saying, 'As a matter of principle, what we would like to do is to achieve this'—

Ms ROXON—But wouldn't your organisation and every other court tell us to mind our own business and keep out of the courts' area, in terms of separation of powers and everything else? I am playing devil's advocate—

Prof. Reinhardt—Of course.

Ms ROXON—but isn't that what we would be told?

CHAIRMAN—Would your members support that statement that the legislature should become more prescriptive?

Prof. Reinhardt—I do not think that matter has ever been put to the members directly, so I do not think that I can answer that question directly. But there is, as Ms Roxon has said, a problem in that the judges, putting forward the normal judicial independence arguments, would say, 'You're really interfering with what we're doing.'

Ms ROXON—Don't get me wrong—I think having consistent court rules would be in absolutely everybody's best interests. I cannot imagine—without having discussed it with my colleagues—that anyone would think it was a bad idea. But I am very concerned about the mechanism that you would use to achieve that and not at all confident that we in this committee could make recommendations that might be helpful in leading that way.

Prof. Reinhardt—The mechanism is, I agree, difficult. I think that one really needs to start with the premise that there perhaps ought not to be any direct interference in what might be regarded as intrastate litigation. It is when litigation crosses state borders that there is probably a problem, in that you might have a firm of solicitors in, say, Queensland and a firm of solicitors in Victoria dealing with the same action in relation to what might be a Victorian proceeding. The Queensland practitioner will be unaware of what the procedures are in Victoria. What happens then is that an agent has to be engaged, and there is cost and expense associated with that. Perhaps we really need to concentrate on that aspect of it rather than on what is purely an intrastate matter.

CHAIRMAN—Without wanting to pre-empt the decision or the recommendations of the committee, I do not think there would be any problem with the committee recommending that there ought to be as much harmonisation of court rules as possible. However, it seems that the best means of achieving that, apart from a bland statement from us, would be for your organisation to move in that direction.

Prof. Reinhardt—We have been trying.

Ms PANOPOULOS—I would like to clarify the issue of harmonisation of court rules. Are you aiming for a harmonisation of court rules between equivalent courts in different states—the Supreme Court of Victoria and the Supreme Court of New South Wales—or are you aiming for a harmonisation of court rules across all courts within a state and obviously interstate? To me, the latter would seem to be perhaps not desirable, because for obvious reasons we have different rules in the Magistrates Court, in the Family Court and in courts dealing predominantly with commercial matters. Issues of evidence are very different. What sort of harmonisation are you concerned with?

Prof. Reinhardt—We have been concerned to date with the harmonisation of court rules between what I might call the superior courts of the country—that is, the Federal Court and the state and territory Supreme Courts, not the Family Court, because I think the nature of the litigation in that court is very different. What has been happening, however, at the same time, uninspired by anything that we may have been involved in, is a harmonisation within states in relation to the various jurisdictions. For example, in New South Wales there is now harmonisation of rules between the Supreme Court and the District Court, and the District Court and the Magistrates Court. That also has happened in Queensland, and I think it is also proposed in South Australia, which has developed a new set of rules which I understand is to be adopted cross-jurisdictionally. But that is not something that we have been directly involved in.

Ms PANOPOULOS—So you are looking at harmonisation of court rules as they relate to Supreme Courts and the Federal Court.

Ms ROXON—Can I take you back to a comment that you made about the interstate agents. Again, I am calling on my recollection of practice, which is somewhat hazy now, but—

Prof. Reinhardt—Mine gets hazy too as time goes by.

Ms ROXON—it is not the court rules that require the employing of an interstate agent, is it? It is actually a whole lot of the legal practice rules which we are hoping now, with this national recognition, are actually going to change. I remember when I was admitted I got admitted to the various courts so there was not an issue if you needed to appear in other courts, but whenever you had a matter in another state you had to have an agent for service and all sorts of other things that did not appear to be about the court rules. Could you clarify whether it is the court rules that dictate that?

Prof. Reinhardt—Leaving aside national admission, it is true that there are problems in a Queensland solicitor who is not admitted in Victoria doing legal work in relation to a Victorian matter—although even there, as the result of the changes brought about by the Service and Execution of Process Act in 1992, where proceedings are served across state borders then a solicitor who receives that process in another jurisdiction can in fact act. But all of the court rules contemplate the fact, generally speaking, that an appearance will be lodged which gives an address for service within a defined geographic radius of the court where the proceeding is issued. So there is that problem.

Ms ROXON—Changing the topic slightly, and we had interrupted you along the way—

CHAIRMAN—We did not mean to be discourteous.

Ms ROXON—I am interested that the organisation does not want to express a view about the substantive areas that we are looking at other than with respect to court rules. Is that because it is very hard within your organisation to get a collective view on things or is it because there is an active decision not to? I ask because I would have thought that there are a number of judicial officers who would be extremely interested in, for example, the contract code proposal that was put to us earlier by other witnesses, or any proposal that we might have to have our corporate law changed to become consistent with New Zealand or vice versa. The judges in your organisation are the experts in applying the current law and I would have thought would have lots of opinions on it. Can you just talk through why it is that you have actively decided not to put in a submission on those issues?

Prof. Reinhardt—I think I can answer that in that I think it is outside our remit. We are a body that is concerned with judicial administration, which basically means that our outlook is adjectival rather than in relation to substantive law.

Ms ROXON—Yes, I know you said that at the start. So it is actually a specific 'we do not want to step outside that area'?

Prof. Reinhardt—Our charter is very much concerned with judicial administration. It is the way that the courts work or operate. It is a matter of adjectival things rather than actually being involved in relation to what might be called 'law reform' in matters of substantive law.

Ms ROXON—It is a silly distinction in a way when you know how much it affects the way the courts operate. The laws that they are applying and inconsistencies between states and other things are a nightmare for many courts.

Prof. Reinhardt—Yes, and I am sure there are individual judges within the organisation that have views about matters to do with substantive law such as the ones you have identified. It is certainly something that I can take back to our body and say, 'Perhaps we should, if need be, change our charter to allow us to look at these broader types of matters.' Maybe our members would in fact be interested in that. But, at the moment, our remit is really one that is confined to what I call adjectival type matters because they touch upon the way in which the courts operate.

Ms PANOPOULOS—If you were to change your charter, would you then be duplicating the roles of other organisations that have a broad charter and comment on all sorts of areas of proposed law reform?

Prof. Reinhardt—That may well be. The Judicial Conference of Australia, with which the AIJA is confused from time to time, is a body that has a research capacity, but its program is really concerned with acting as—I do not like to use the term in one sense—a trade union for judges, in that it is a spokesperson or spokesbody in relation to terms and conditions of judges and what their expectations are et cetera. People within the law tend to speak of it as a trade union for judges. I think though that the only other outlet the judges would have in relation to change in substantive law would be through representation on law reform bodies such as the Victorian Law Reform Commission.

Ms PANOPOULOS—Surely it may be difficult to get the same degree of consensus about substantive areas of law reform than on issues of direct concern and relevance to judges.

Prof. Reinhardt—Sure. I think sometimes judges are a little bit reticent to become involved or to express their views about law reform without a specific body which enables them to do that, because there is then the possibility that someone will come along in a court case and say, 'All right, you have expressed a view about X, you ought not to be hearing this particular case.' What judges will do, of course, if they see in a case before them that there is some inequity that has arisen as the result of some inadequacy in relation to the substantive law, is that they or the chief justice will write to the Attorney and say, 'I think you ought to look at this.'

Ms PANOPOULOS—If you do take the message back, as you stated earlier, that the suggestion has been made for them to look at broader issues, you may perhaps be good enough to also take back the message that there are others on the committee that would understand the pressure and concern that many judges would feel and their reluctance to go down that path, which would be quite an appropriate and understandable response.

Prof. Reinhardt—Thank you.

Mr MURPHY—Many people argue that we should be simplifying our laws rather than harmonising them. Do you or the institute have a view about that proposition?

Prof. Reinhardt—Again, I speak in relation to what I described as adjectival or the answer to that would be yes. Indeed, the other document that I will table refers to that. What has happened in relation to procedural matters is that those who are drafting new rules have tried to state some overriding principles in relation to the way in which rules should operate by saying, 'The rules are simply a means to an end, and we should be trying to use them to minimise costs to be more efficient and so on, and then to treat the rules that are under that as subsidiary to that overriding principle.' I think those who have been drawing up rules recently have been trying to simplify the wording of them to make them a little bit more intelligible. Certainly, there is a real problem with a lot of the written law that we see coming out in its lack of simplicity.

Mr MURPHY—I agree.

CHAIRMAN—Do you think it is possible that you might become the Australasian organisation through the official involvement of New Zealand? Do you think that would be a good thing as far as encouraging harmonisation is concerned?

Prof. Reinhardt—I cannot, in response to that question, answer definitely for the institute. My own personal view is that there would be a lot to be gained through having a formal trans-Tasman dimension through the institute for the types of things we are talking about.

CHAIRMAN—Given the fact that we have trans-Tasman ministerial councils—I used to sit on one—in areas, and I imagine there is some standing committee of attorneys-general of the states, territories and New Zealand, maybe that is something that your organisation could possibly request be put on the agenda for discussion.

Prof. Reinhardt—Certainly.

CHAIRMAN—The other question in relation to New Zealand is: has your organisation had much discussion with the New Zealand legal profession about harmonisation between Australia and New Zealand?

Prof. Reinhardt—No, not really much discussion at all. We had our annual conference in New Zealand last year which was well attended by New Zealand delegates but that was not a matter that was on that agenda. It was on the agenda for the conference the year before but the New Zealanders were not involved in that particular area.

CHAIRMAN—Thank you for appearing before us today. The secretariat will send you a draft of your evidence and you can make any necessary corrections. If there is any additional material you would like us to have, please pass that on to us.

Resolved (on motion by **Mr Murphy,** seconded by **Ms Roxon**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.06 pm