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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, 21 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 Michael Ferguson, Mr Kerr, Mr Murphy and Ms Panopoulos

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 9.32 am

ROSE, Mr Andrew, Executive Officer, Legal Branch, Department of Foreign Affairs and Trade

SAXINGER, Mr Hans, Director, New Zealand Section, South Pacific, Africa and Middle East Division, Department of Foreign Affairs and Trade

ACTING CHAIR (Mr Murphy)—I declare open this public hearing of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the 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-General has identified a number of specific areas for examination by the committee to see whether more uniform approaches can be developed. These are: statute 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, and we may range more widely.

I welcome everybody here today and I am sure our discussions will be very informative. 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 or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission and it has been authorised for publication. I now invite you to make a brief opening statement, if you wish, before we proceed to questions.

Mr Saxinger—Australia's relationship with New Zealand is the closest and most comprehensive relationship we have with any country. For example, New Zealand is the only country with which we hold annual prime ministerial talks, annual trade ministers talks, annual treasurers and finance ministers talks and six-monthly foreign ministers talks. Three of these, as you probably all know, were held recently, in February: prime ministerial talks, treasurers and finance ministers talks and foreign ministers talks. New Zealand also participates in around 25 Australian ministerial council meetings, including meetings under the COAG arrangements—for example, the Ministerial Council of Attorneys-General and the Ministerial Council on the Administration of Justice, which is probably of relevance to this particular inquiry.

As we know, the relationship goes back to the early days of Australian history as well as the conferences on Australia's constitutional arrangements, not to mention the ANZAC tradition. We also share a common heritage based on the rule of law, democracy and the Westminster parliamentary system. We share respect for human rights and adherence to the principles of common law and international law. We note, however, that we are both sovereign countries and take differing policy approaches to foreign and trade policy issues, which reflect our differing views of the world, our respective roles and capabilities and our separate domestic interests and constituencies.

On the economic and commercial fronts, both governments are strongly committed to the closer integration of our two markets, including the closer alignment of our respective legal and regulatory regimes to streamline business activities and create a more favourable climate for trans-Tasman business. These points were reaffirmed during the prime ministerial talks and the talks by the Treasurers in February. As noted in our submission, the centrepiece of the Australia-New Zealand economic relationship is the Australia-New Zealand Closer Economic Relations Trade Agreement, or ANZCERTA, more commonly known as CER. It was signed in 1983 and it is one of the earliest and most comprehensive trade agreements. It is recognised by the World Trade Organisation as a model agreement covering substantially all trade in goods, including agricultural products and services. CER is a living document, and recent changes to the rules of origin provisions and a decision to begin work on adding an investment component have been undertaken.

Turning to the trade relationship in more detail, two-way goods and services trade totalled $19.2 billion in 2004-05. New Zealand is Australia's fifth largest market, taking around five per cent of our exports, and our largest market for ETMs. Australia is New Zealand's No. 1 export market, taking about 20 per cent of their exports, which is up by 13 per cent on the pre-CER figure. Two-way investment is now $61.8 billion and New Zealand is the third largest market for Australian investment abroad. Australia is the largest market for New Zealand investment.

There have not been any recent government studies on the economic benefits of CER. However, some committee members may know that the Joint Standing Committee on Foreign Affairs, Defence and Trade has recently launched a review of the CER process and is seeking public submissions until 19 April. Over the 20 years of CER, the composition of trade between Australia and New Zealand has changed dramatically, reflecting changes in technology, competitiveness, domestic industry structure, trade liberalisation and consumer demand. From an Australian perspective, two-way trade has expanded approximately fivefold since 1983 with an annual average growth of around nine per cent. New Zealand exports to Australia have risen from 13 per cent in 1983, when we signed the CER, to 20 per cent now.

There is a high level of integration of the two economies, and CER is supported by a web of other bilateral arrangements, including arrangements on the movement of people, mutual recognition of standards, taxation, government procurement and aviation. However, most of the goals of CER have now been met and both governments are now focusing on third generation trade facilitation activities which are aimed at creating closer integration of the two economies through regulatory harmonisation and the creation of a more favourable climate for trans-Tasman business collaboration. There are some significant examples. We have joint food standards making arrangements through Food Standards Australia-New Zealand; the Trans-Tasman Mutual Recognition Agreement, which entered into effect in 1998 to create a single market for the sale of goods and the registration of professions; and a treaty signed in 2003 to establish a trans-Tasman therapeutics agency to regulate therapeutic products. Equally, no anti-dumping or safeguard measures are applied under the CER between the two countries. We both rely on our competition policy regulations to address unfair trade practices.

In 2004, the two prime ministers affirmed their commitment to enhancing trans-Tasman business integration through the realisation of a single economic market based on common regulatory frameworks. There has been good progress on the range of behind-the-border initiatives; I understand Treasury will be appearing later this morning and they will provide some

more detail on the background to that. Some examples are the establishment of a joint trans-Tasman council on business supervision and the endorsement of a work program for closer coordination between the ACCC, the Australian Competition and Consumer Commission, and the New Zealand Commerce Commission. As I mentioned earlier, a decision was taken in February that we would look at adding an investment chapter to the CER agreement.

Also in February, the Treasurer of Australia and the finance minister of New Zealand established a regime for the mutual recognition of security offerings and interests in managed investment schemes. There was also an agreement to amend domestic legislation to require APRA and the Reserve Bank of New Zealand to assist each other in banking and prudential matters.

There has been a trans-Tasman accounting standards group established, as well as a trans-Tasman working group to consider streamlining court proceedings and regulatory enforcement between the two countries—and I suspect that A-G's, who are also appearing this morning, will be able to give you some more details on that. As I mentioned earlier, we have a double taxation agreement with New Zealand. As I also mentioned earlier, there is significant ministerial contact between our two countries, and CER ministers meet annually to discuss policy developments under CER and identify areas for further enhancement.

The Australia New Zealand Leadership Forum was established in 2004 and meets annually. This is a second-track mechanism where senior Australian and New Zealand business leaders meet with the aim of progressing understanding and cooperation across the spectrum of trans-Tasman links of particular interest to ANZ business. The next meeting of that will be held in Auckland in May this year. People-to-people links are also very strong, with over one million New Zealand visitors to Australia annually. There are around 375,000 New Zealanders living in Australia and around 60,000 Australians living in New Zealand.

There are more than 80 government-to-government bilateral treaties, protocols and other arrangements of less-than-treaty status which underpin the trans-Tasman relationship. These all attest to the depth, breadth and closeness of that relationship. As noted above and in our submission, these cover areas as diverse as bilateral trade, business law coordination, food and product standards, trans-Tasman travel and aviation links, taxation, social security, health care and government procurement.

More broadly, on foreign policy issues, we share an active cooperative interest in the Pacific, the Solomon Islands, PNG, East Timor, Afghanistan and the East Asia region more generally. Of course, we work together closely in international organisations. At the foreign and trade policy level, the relationship works well, underpinned by numerous bilateral and multilateral agreements, some of which I have mentioned. All of this closer economic activity and these extensive people-to-people links support the push for the closer alignment of Australia's and New Zealand's legal systems. We will obviously hear more about that from A-G's later this morning.

I will just mention one or two things in concluding. There is already close cooperation on legal matters. For example, the Chief Justice of the High Court of Australia chairs the Council of Chief Justices, which meets every six months and involves chief justices from the Commonwealth, the states and territories and New Zealand. There is also good cooperation on

legal issues, with discussions on things such as trans-Tasman court proceedings and regulatory enforcement between the A-G's department and the New Zealand Ministry of Justice.

In concluding, I would raise just one caveat: I am unable to comment on the details and the extent of any domestic legal harmonisation on criminal and civil matters between Australia and New Zealand. Such matters, I would suggest, are best addressed to the A-G's Department. We are more than happy to take questions on broader foreign and trade policy issues with New Zealand. Thank you, Chair. I think I went for a bit longer than five minutes, but I was hoping to give you an overview of how important and diverse that relationship is.

ACTING CHAIR—Thank you, Mr Saxinger. The department states in its submission:

With most of the trade goals of CER met, the way ahead is to create a more favourable climate for trans-Tasman business through regulatory harmonisation.

For the record, can the department clarify why regulatory harmonisation between Australia and New Zealand is the best means of creating a more favourable climate for trans-Tasman business?

Mr Saxinger—As you said, many of the goals of CER have now been met—that is, free trade in goods and free trade in services, with the exception of a handful of areas, and investment hopefully will be addressed in the next 12 months. Notwithstanding the lack of an investment chapter in CER, as I mentioned, two-way investment has been going along quite nicely. As I have shown we have been working on getting closer regulatory harmonisation, in particular in the food standards area, and we are now also looking at the therapeutic goods area. In short, the answer to that is that clearly by having streamlined regulation that is going to be much easier for reduced business costs and also reduced administrative costs both at the government level and also at the commercial level.

ACTING CHAIR—Also in its submission, Mr Saxinger, the department indicates:

... there are philosophical and cultural differences in approach between Australia and New Zealand, particularly in the area of financial regulation.

And:

The issue of national sovereignty is pervasive.

In the department's view, would these philosophic and cultural differences and the issue of national sovereignty present a barrier to harmonisation of legal systems beyond a certain point irrespective of other considerations?

Mr Saxinger—As I mentioned in my opening comments, we are two separate sovereign countries with separate sovereign interests based on our domestic interests as well as our international ones. My experience so far is that, while for New Zealand retaining its sovereignty is clearly a very high point as it is for Australia, it has not led to any overt difficulties that we have not been able to address in terms of regulatory harmonisation. I give an example of the proposed joint therapeutics products agency where obviously there are some very sensitive

domestic regulatory issues. Those discussions are continuing and it is hoped that they will be resolved early some time next year.

ACTING CHAIR—Has the department identified any other potential detriments to Australia that might result from greater legal harmonisation between Australia and New Zealand?

Mr Saxinger—The short answer to that is no.

Ms PANOPOULOS—To follow on from that question, I suppose I am a bit of a sceptic at times. It helps in this job not to believe everything you are told. I find it difficult to believe there is no potential detriment whatsoever, that there are no cons attached to this at all. Surely, some bright spark in the department will have identified a potential problem or detriment?

Mr Saxinger—Potentially, yes, there could be some difficulties, for example, in the banking area where there has been some discussion at times of having a single currency or a single banking regulatory activity. During the Treasurer and Minister of Finance talks in February they did mention that but said that really was not on the agenda at the moment and that some time in the distant future that might happen. Again, that impacts on things like your ability to regulate your economy through monetary policy et cetera, so potentially there are some downsides but as I said the relationship with New Zealand is close and we are working in a very cooperative manner, so we have identified where there are difficulties and managed to work closely on resolving those. But we are two sovereign countries with our various world views and domestic interests.

ACTING CHAIR—Also in the department's submission it is indicated that the Australian-New Zealand Leadership Forum will:

... accelerate the work already begun on a Single Economic Market with a view to creating a seamless trans-Tasman business environment ...

Can the department elaborate on what a seamless business environment might look like?

Mr Saxinger—The Australian-New Zealand Leadership Forum, as I said, was established in 2004 and has now met on two occasions and will again meet in May this year. This is broadly a second-track, high-level business activity. What we are looking at is the various domestic regulatory processes that are potentially creating some difficulties and added costs, and for business to have discussions at a high level and then make recommendations to government to say, 'If we were able to address some of these issues, then we would reduce barriers to trade, and ultimately we may have a very "seamless" regulatory and business environment.'

ACTING CHAIR—The New Zealand government in its submission stated to us:

... identical or unified laws are not a goal in themselves.

Given this, and given the fact that there are legitimate differences between our two countries, do you think a seamless business environment is possible or even desirable?

Mr Saxinger—There are various ways to introduce a seamless environment. As the New Zealanders have put in their submission, they do not see having the same laws as the option, but there are questions about the harmonisation of our two systems so that basically our two legal systems mirror each other in a particular area. Then each country can say, 'We'll mutually recognise that your law is equivalent to our law and vice versa, and therefore if a product or something to do with business meets your law then we will mutually recognise that and vice versa.' That means that business does not have to meet both laws, or it may in fact only meet one law and not the other, which then creates difficulties. The other option is obviously to have one set of regulations, but, as you said, the New Zealanders have said that that may not be the way to go. However, in the case of the joint therapeutic products agency, there will be one set of regulations that apply across the Tasman, but then it will be enforceable in Australia as well as New Zealand.

ACTING CHAIR—Do you have a preference?

Mr Saxinger—I would prefer not to comment on that. All these options are available—

ACTING CHAIR—Do you think the department has a preference?

Mr Saxinger—I do not think the department does have a preference. It pursues all the different avenues—mutual recognition, closer harmonisation and adopting one particular regulation that is trans-Tasman. It really depends on the situation and what is actually possible.

Mr KERR—I want to touch on something that is controversial and awkward between the two countries, which is quarantine. You have not mentioned that, but it does seem to be an area where there has certainly been a lot of public anxiety stressed on both sides of the Tasman—and it is an issue that relates to trade.

Mr Saxinger—Yes, it certainly is an issue that relates to trade. There has been some public controversy, with one case in particular—New Zealand apples. However, I would make the point that this is just one of a very few differences that we do have with New Zealand, and we work very much at keeping this particular issue in context. As I mentioned, the relationship is very broad and deep, and it can certainly sustain those particular little difficulties. More broadly on quarantine, each country is entitled to have its own appropriate level of protection for its quarantine measures. While this can be a difficulty for trade, again we work very closely with New Zealand. It is probably the closest quarantine relationship we have with any country, reflecting the broad relationship. The quarantine issue is always sensitive, but we are working closely with New Zealand on overcoming any difficulties that we have with them.

Mr KERR—I come from Tasmania, so I am acutely aware of the domestic political environment that exists about this. However, in terms of the CER relationship, how does the quarantine regime fit with essentially the idea for a free market?

Mr Saxinger—Quarantine is actually outside the CER. There is a separate quarantine protocol between Australia and New Zealand which says that we will cooperate on quarantine matters. But, again, under FTA type arrangements, quarantine is usually seen as a separate issue and is separately addressed in FTA negotiations to identify that issue. So it is internationally

recognised. While it can be a barrier to trade, there are procedures and practices that countries can adopt to maintain the appropriate level of protection for their particular environment.

Mr KERR—In that regime is there harmonisation?

Mr Saxinger—There can be harmonisation, yes. It is harmonisation mostly to international standards.

Mr KERR—I am not asking a theoretical question. I am asking whether there is harmonisation and, if so, how it operates.

Mr Saxinger—It operates basically to international standards. Countries will try to reflect international standards in their quarantine provisions.

Mr KERR—As between Australia and New Zealand, what is the status of that harmonisation? Is there a common system that is applied in both countries?

Mr Saxinger—That is going a bit beyond my technical knowledge. I think you would really have to address that to the Department of Agriculture, Fisheries and Forestry and Biosecurity Australia.

Mr KERR—On a larger level, you mentioned the prospect of a single currency. That has been on the table on a number of occasions, I think, over the last two decades. Where are we at in relation to discussions there? It has been deferred, has it, for the foreseeable future?

Mr Saxinger—As the Treasurer and finance minister of New Zealand mentioned in February at their meeting, that is an issue that is not on the agenda at the moment. It is aspirational, if you like.

Mr KERR—In terms of market size, compared to I suppose the larger supermarkets of the EU, the Australia-New Zealand CER is a relatively small body. Has there been any consideration given by the department or government at other levels to perhaps expanding the CER type format across our region more broadly?

Mr Saxinger—At the moment, Australia and New Zealand are negotiating with the ASEAN countries for an ASEAN-ANZ free trade agreement. That will extend some of the provisions under CER to ASEAN, assuming that is how the negotiation concludes.

Mr KERR—And the Pacific?

Mr Saxinger—Not at this stage. There is a separate trade agreement with the Pacific countries and Australia.

Mr KERR—And that does not fit the CER type model?

Mr Saxinger—Again, that is not my area, so I really cannot comment on that.

Mr KERR—Could you also reflect on the kinds of linkages that exist between the peoples of New Zealand and Australia. You have mentioned the number of people who live in each country. Are there any current barriers that exist to those issues? I think we reintroduced passport control or visa requirements at some stage. Where are we at in terms of the entitlement to travel, live and settle as between the two countries?

Mr Saxinger—Both countries require that people have passports to travel to each country. Australians do not require a visa to go to New Zealand. New Zealanders get an automatic visa on arrival that allows them—and this applies equally for Australians in New Zealand—to work and study. As I also mentioned, it allows them to have access to the social security systems of each country and also to our health systems.

Mr KERR—So there are no current problems in relation to the free movement of people between the two countries?

Mr Saxinger—Not that I am aware of. We recently also introduced joint Australia-New Zealand immigration gates at Brisbane, Sydney and Melbourne. New Zealanders did that earlier—a few years ago. That is to speed up the travel of people across the Tasman, which is all part of the broader CER single economic market process.

Mr KERR—In terms of the political and cultural linkages, one of the things that has always surprised me about parliamentarians in Australia is that our parliament does not provide frequent opportunities for exchanges between New Zealand parliamentarians and Australian parliamentarians, given essentially the single, common economic market that is intended to be developed and the fact that Australians and New Zealanders can reside in each other's countries, whilst, of course, they are each sovereign and have different political systems. It seems that the debates and discussions that occur are essentially always at the executive level. There is hardly any parliamentary exchange of note. We do not travel freely to each other's countries. It is rare that we even have delegations. It seems to be a puzzling omission. Has any thought has been given to building that as a strong linkage in terms of cementing an effective relationship?

Mr Saxinger—Clearly that is up to the parliaments of the two countries, but we would think that a closer relationship between Australia and New Zealand would only be a positive. Whether the two parliaments want to have a closer relationship is really up to them. As I say, it is certainly consistent with a stronger relationship. I understand there is a parliamentary delegation being planned later this year from Australia to New Zealand. So it does happen, but it is a bit like close cousins.

Mr KERR—It is less common than delegations to Paris, London or other attractive parts of the world. It seems to me that this is our neighbourhood, essentially. That is the point I am making: that, if we are building these institutional relationships around trade and we have significant populations of each other's countries residing in our own, it is a peculiar anomaly that we do not have parliamentary exchange as part of the normal expectation of what an Australian parliamentarian would undertake. Just as one would expect the Department of Foreign Affairs and Trade to have extensive and continuing contact with its New Zealand counterparts, you would expect our parliaments to have similar engagements. Sometimes, perhaps, misunderstandings arise and become inflamed in public debate because of a lack of

understanding of each other's starting points within the parliamentary system. Anyway, that is an observation. I welcome such comment as you would wish to make.

Mr Saxinger—As I said before, I think it seems in principle only a good thing that there be more contact between the various parliaments. Why that does not happen, I do not really know.

Mr MICHAEL FERGUSON—I would like to ask you a question about areas in our relationship where there is not harmonisation. Which areas give Australia a competitive advantage over New Zealand directly as a consequence of not having harmonisation—for example, the apple industry?.

Mr Saxinger—The only one that comes to mind, and I have mentioned it a couple of times, is the therapeutic goods area, where we have a world-class system. That probably gives us a little bit of an advantage with our industry exporting around the world, compared to New Zealand. At the same time, New Zealand has a very good industry as well, which does export. But I think we do have a bit of an advantage there, and that is obviously one of the reasons why Australia and New Zealand have decided to establish a joint therapeutic products agency.

Mr MICHAEL FERGUSON—But is that a good example? Would you say that having a joint body like that benefits both nations significantly, or would it benefit the smaller nation more significantly?

Mr Saxinger—I think it clearly benefits both. It brings in skills and abilities to Australia and provides a bigger market for the other player. Perhaps there are some other areas in the standards area—Australian design standards for motor vehicles, perhaps—where we have an advantage over New Zealand.

Mr MICHAEL FERGUSON—Perhaps I could reframe my question a little. I am asking where there might be some costs to Australia if we were to go down the harmonisation road. Are there areas where Australia currently enjoys a competitive advantage because of our different regulatory environments in different areas?

Mr Saxinger—I cannot think of any at the moment and that sort of information really goes beyond my knowledge base. That is probably best addressed to the industry department or one of the other, more regulatory, agencies.

Mr MICHAEL FERGUSON—But it is a fairly fundamental question, isn't it?

Mr Saxinger—I guess on balance, though, up until now—

Mr MICHAEL FERGUSON—It goes to why we would even want harmonisation. You would have to know this sort of information as a motivator for harmonisation.

Mr Saxinger—Clearly, with the objective of establishing a single economic market that provides opportunities for our business and equally for New Zealand business here, that is an extra market of four million people for us—and, obviously, it is a market of 20 million over here for New Zealand. The more we work together the more ideas can be shared. Clearly we do cooperate in the WTO area on issues. But, again, I do not have the detail of where the main

benefits are; that would require some fairly detailed analysis. The experience so far under CER and the single economic market is that both countries have benefited.

Mr MICHAEL FERGUSON—But if we make it easier because of harmonisation of our systems to, for example, import New Zealand produce or manufactured goods to Australia then clearly that is an area where we would have an overall net cost to us as Australians. Surely you would have some handle on which areas they were, in your role representing the department of trade?

Mr Saxinger—As I say, there has not actually been any detailed analysis of that done at government level, that I am aware of, since CER has been formed. I guess this was one of the bits of thinking behind the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry—to flesh out some of those ideas. It is a little bit surprising that there has not been a lot of economic analysis done, but I cannot explain why that has not been the case. The general principle is that Australia encourages open and fair trade, and that is a two-way street. If we do not let things in here then other countries will not let our exports in there.

Mr MICHAEL FERGUSON—I am not trying to have a philosophical argument. I just want to know what the data said. I am just surprised that there is not that data, to be honest with you.

Ms PANOPOULOS—I am sure there is, somewhere!

Mr MICHAEL FERGUSON—Acting Chair, perhaps we could alert ourselves to that and get that information in the future.

ACTING CHAIR—Yes, we will do our best.

Mr KERR—That is the other inquiry that you mentioned, isn't it—by the Joint Standing Committee on Foreign Affairs, Defence and Trade?

Mr Saxinger—Yes.

Mr KERR—They are doing that as a parallel inquiry.

Mr Saxinger—Yes.

Mr KERR—Does climate change have any consequences? New Zealand has signed up to Kyoto and presumably is a partner now in some of the trading regimes that are being established under that protocol. How do we, in a sense, operate with respect to that? That is a significant new economic market from which, presumably, Australian participation is excluded except if it could be done indirectly through New Zealand.

Mr Saxinger—As far as I am aware, it has not had any impact on the bilateral relationship. It is a matter for New Zealand whether they are a party to the Kyoto protocol and, separately, for Australia. I do know that from a New Zealand perspective, however, they are finding that the commitments they entered into under Kyoto are costing them a lot more money than they had originally anticipated. They were thinking that they were going to gain some significant credits under Kyoto but, more recently, because of their industry structure, they have found that it is

actually going to cost them a lot. But that is really for New Zealand to manage and it has not impacted on the relationship.

Mr KERR—I was not commenting on the pluses or minuses or the wisdom or unwisdom of entry into Kyoto. The fact is that they have and we have not. What I am interested in is this. If we are looking at harmonisation, they are now participating in a market which is established under the protocol in a number of invisibles, including trading credits and participation in markets under the—do they call it the instrument?

Mr Saxinger—Carbon credits?

Mr KERR—Yes, carbon credits instruments. I am asking, I suppose, how the interface between an economic system that is participating in Kyoto and one which is not is operating in a free trade environment?

Mr Saxinger—Again, you have really taken me out of my area of expertise. I can only reiterate that, as far as I know, the fact that New Zealand is a member of Kyoto and we are not has not had any impact on the broader sort of trade relationship. The question is best directed to some experts who know all about these issues rather than to me.

Mr KERR—Who would those experts be?

Mr Saxinger—I would have to get back to you on that, I think—on whether somebody in the department has done any analysis on that. I have not seen any. Also, the Department of the Environment and Heritage may have.

Mr KERR—I am really looking at the economic and trade implications of two trading regimes, one of which is participating in a post Kyoto protocol market in carbon credits and in the whole set of obligations and benefits that come with Kyoto, as opposed to a country which is not; both then operating in a CER environment. I would be interested in perhaps a note, if that is possible, on those issues.

Mr Saxinger—I am not aware of that sort of analysis having been done, but we can let the committee know. We will direct that to the appropriate area and see whether they can respond. That might be the best way.

Mr KERR—And also the opportunities, if there are any, for Australia to participate in that market through the CER arrangement.

Mr Saxinger—Okay.

Ms PANOPOULOS—Noting your comments earlier this morning about the statements in February about a single currency, what preparatory work had the department prepared up to that point regarding a single currency?

Mr Saxinger—We in DFAT had not actually done any work on that. That is really a matter for Treasury to undertake.

Ms PANOPOULOS—There were no discussions with Treasury, no input into those sorts of discussions?

Mr Saxinger—There have not been any discussions on that issue, and it is really a Treasury matter to discuss with their New Zealand counterparts.

Ms PANOPOULOS—One of the other matters I want to ask about is quarantine. You made statements about Australia assisting New Zealand. Particularly around the issue of apples, which is a concern for several of us on this committee, what sort of assistance are you aware of to New Zealand regarding the issue of quarantine and the importation of New Zealand apples?

Mr Saxinger—I am not sure that I actually used the word 'assistance'. What we do have is a very good cooperation with New Zealand at quarantine level. As I mentioned, I think, there is a protocol on quarantine cooperation. There are annual quarantine talks, I understand. There were some talks only a few weeks ago. And there is a great sharing of information and—

Ms PANOPOULOS—But what discussions has the department had with New Zealand representatives regarding the issue of apples?

Mr Saxinger—Again, it is really a discussion that Biosecurity Australia and the Department of Agriculture, Fisheries and Forestry are having. They are leading this process with their New Zealand counterparts. They are still waiting for draft comments to come in on the draft import risk assessment.

Ms PANOPOULOS—The New Zealanders were very upset when several politicians intervened to question the processes adopted by some of our agencies. As Director of the New Zealand Section, are you saying that you had no conversations on or no input into the fallout from—

Mr Saxinger—We have regular discussions on a whole range of issues, one of which is apples, and also about Australia's requests for access into New Zealand. It is raised at ministerial level, but it is a normal discussion that we have with New Zealand, as we have with lots of other countries. The question of fallout is not raised. There is a process happening and—

Ms PANOPOULOS—I know that in your role and the department's role there would be a discussion about all sorts of issues. Perhaps I have not made myself clear. I am not specifically interested in those other matters; I am specifically interested in the discussions you have had about the importation of New Zealand apples. Can you enlighten me in any way?

Mr Saxinger—As I said, we have discussions on these issues as a normal part of—

Ms PANOPOULOS—What have those discussions entailed, or can you not say?

Mr Saxinger—Generally, we say that there is a process going on in terms of the import risk assessment and—

Ms PANOPOULOS—No, not generally but specifically on the issue of apples.

Mr Saxinger—No, we do not talk about specifics, because it is still a decision that is under consideration. It is really a matter for Agriculture, Fisheries and Forestry and for Biosecurity Australia.

Ms PANOPOULOS—Thank you.

ACTING CHAIR—Mr Rose, is there anything that you would like to say to the committee this morning?

Mr Rose—No, Chair.

ACTING CHAIR—Gentlemen, thank you both for attending the hearing today. I would be grateful if you would send to the secretariat as soon as possible any additional material that you have undertaken to provide. Some members of the committee could not be here today, including the chairman, who sends his apologies, but we are hoping he might be here later. He and other members might have questions that they would like the department to answer on notice. Accordingly, the secretariat will forward these questions to the department.

[10.18 am]

ADAMS, Mrs Kylie, Analyst, Consumer Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

ARCHER, Mr Bradford John Henry, Manager, Energy, Transport and Communications Unit, Competition and Consumer Policy Division, Markets Group, Department of the Treasury

PATCH, Mrs Sandra Louise, Senior Adviser, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

SEEBER, Ms Louise Margaret, Acting Manager, Competition Policy Framework Unit, Markets Group, Department of the Treasury

SMITH, Ms Ruth Viner, Manager, Market Integrity Unit, Corporations and Financial Services Division, Department of the Treasury

WHITE, Mr Damien William, Manager, Prudential Policy, Banking Unit, Department of the Treasury

ACTING CHAIR—Welcome. 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 or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission and it has been authorised for publication. I now invite you to make a brief opening statement—for five minutes or a little bit more, if you wish—before we proceed to questions.

Ms Seeber—Chair, we have chosen not to. We are happy to answer any questions about the issues that have been raised in the submission.

ACTING CHAIR—In its submission, the department states that 'significant benefits' flow from harmonised business law in Australia such as rationalised company registration requirements, certainty for investors, business confidence and reduced regulatory and compliance costs. Against that background, can the department provide some specific examples to the committee of costs to business that result directly from a lack of business law harmonisation within Australia? How are those costs measured?

Ms Seeber—Thank you for the question. The issue I will be talking about is competition laws. In our submission we actually raise the issue of the Hilmer inquiry that was established in 1992 to inquire into competition policy. One of the recommendations was that the competition provisions in part IV of the Trade Practices Act should apply uniformly to all business activities in Australia, including those undertaken by government business enterprises. A number of other recommendations were taken up from the Hilmer committee which resulted in the national competition policy. We have just recently had a Productivity Commission inquiry into the

national competition policy reforms. That report was tabled in April last year and it has served to inform a Council of Australian Governments inquiry into national competition policy which was scheduled last year.

In February 2006, COAG announced a number of things. They announced that the Productivity Commission inquiry found that national competition policy actually brought a large number of benefits to the Australian economy. For instance, they observed that productivity and price changes in key infrastructure areas in the 1990s, to which NCP and related reforms directly contributed, served to increase Australia's gross domestic product by 2.5 per cent, or $20 billion. The national competition policy agreements were signed by all jurisdictions in 1995 and, over the 10-year period, the reforms that were agreed to by all jurisdictions have been undertaken. The Productivity Commission review was designed to try and test the effectiveness of those arrangements. They found that it has had a very positive impact. The Productivity Commission report was tabled in April last year. It sets out their methodology and other benefits that were found.

On 10 February this year, COAG reported on that review, but also agreed to a broad national reform agenda, which covers competition and regulation but also human capital, which is about skills and health reforms. That will be a cooperative approach between the states and the Commonwealth. The next step is for the jurisdictions to work out the detail of intergovernmental agreements. They also agreed to recommit to the principles under national competition policy. So the principles that were in the original agreements in 1995 will be ongoing. In summary, there is not a specific measurement of cost but there is a specific measurement of the net benefit. The national competition policy reforms—part of which are the reforms to extend part IV of the Trade Practices Act across jurisdictions to ensure harmonisation and remove uncertainty to business—have brought a large amount of benefit to the Australian economy.

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

Ms Seeber—I am not sure that work has been done on that. I am not sure that my colleagues would be able to help. That may be something we have to take on notice and get back to you on.

Ms PANOPOULOS—Yes, that would be appreciated.

Ms Seeber—It is from a different area, that is all.

Ms PANOPOULOS—I understand that, but it would be very helpful. I know you cannot answer for the department as a whole, but in your respective areas and in your analysis of relevant matters have you identified and/or investigated any detriments to greater harmonisation between Australia and New Zealand?

Mr MICHAEL FERGUSON—Would any industries in Australia be worse off if we had greater harmonisation?

Ms Smith—The area I come from relates to financial services and we are looking at greater harmonisation of business law. Recently there was a review of the 2000 memorandum of understanding on the coordination of business law between Australia and New Zealand. That

review has now been finished and it is on the Treasury website. A new and revised memorandum of understanding was signed on 22 February and it hoped that greater coordination will come out of that. It relates to insurance, financial services, company law, money-laundering and so on.

ACTING CHAIR—Have you identified any potential disadvantages of having harmonised business law within Australia?

Ms Smith—The area that I represent relates particularly to Corporations Law and we have had Australia-wide uniform legislation since 1991. Are you thinking of other areas of business law?

ACTING CHAIR—No, I am just asking you. Do any other members of the committee want to answer that?

Mr MICHAEL FERGUSON—I would be interested in hearing from Mr White on prudential policy. If Australia were to harmonise with New Zealand on prudential policy would it mean Australia's prudential policy might have to be compromised or would the essential policy components remain but just be worded in a similar fashion?

Mr White—Banking prudential policy is the main part we have been looking at so far; I might quickly mention insurance at the end. Harmonisation focuses on making sure that regulatory frameworks work well together to minimise the difficulties for someone operating in both jurisdictions; it has not been about making them the same. At the beginning of last year our Treasurer and the New Zealand Minister for Finance got together and established the joint Trans-Tasman Council on Banking Supervision. In that agreement we have used the words 'to move towards seamless regulation to minimise regulatory hurdles'. So we are not attempting to make regulations exactly the same in both countries but working out areas where banks operating in both countries might have to do something different or in addition or for both regulators, where it is almost exactly the same thing, and trying to minimise those things.

So, in the first instance, we have some legislative changes that are going to take place both here and in New Zealand that are all about making sure the two regulators can work together more easily and to make it easier for essentially the big four Australian banks, who are the big four banks in both jurisdictions, to operate with them in a way that we describe as 'seamless'. So we are going to make sure that they take account of their actions and what it means for the other jurisdiction. We are going to make it easier for them to share information and perhaps to operate with each other—so the regulator in New Zealand might be able to do things that APRA might have had to send people to New Zealand for; equally, New Zealand might get APRA to do things for the Reserve Bank of New Zealand. It is about making them consult more.

A particular area that was initially causing a lot of difficulty was essentially whether the regulators would be happy with the outsourcing of services across the Tasman in either direction. We have come a long way, through those legislative provisions, towards making the regulators more comfortable that in each country they essentially have legal certainty and that in times of difficulty those services will be maintained and they will be able to call on the other country. So it has basically started out at that level. We are not yet at the level that you are talking about—having the same sorts of laws and prudential standards. It is all about making sure that the ones each country does have work together well.

Mr MICHAEL FERGUSON—Are you saying that the prudential policies of the two nations could in some respects be quite different but that the process for operating in both countries is made less difficult by some aspects of mutual recognition, cutting out some duplication and then making it quite clear where you have to do extra work?

Mr White—Essentially, yes. In the main, the two frameworks operate very similarly but there are some differences. For example, we have depositor preference in our banking act. New Zealanders do not have a depositor preference. That is a fundamental difference to the way it works. You are right—we are trying, within the constraints of how our two frameworks currently look, to make it easier for regulators to work together and for our regulations to work together and therefore to reduce the costs of banks. As I said, the outsourcing one in particular was related to the idea that depositor preference is different on both sides. While we have not changed the way depositor preference works in each country, we have done some other things that have meant that the regulators are more comfortable about the way that they can interact with each other and the requirements that were required for New Zealand branches of Australian banks.

Mr KERR—I do not know who is responsible for, I suppose, the more controversial areas of Corporations Law—disclosure provisions, prospectuses, mergers, takeovers and acquisitions. How do the different standards that apply in Corporations Law create opportunities for difficulty, particularly if we mutually recognise New Zealand as a territory in which corporate restructuring can take place? Will this create difficulties for people essentially to migrate a range of business activities to a jurisdiction that some suggest is less rigorous?

Ms Smith—As to prospectuses, there was a study some time ago and the conclusion was that the outcome was roughly the same in the light of the protection provided for investors. In view of that conclusion, work has been done on mutual recognition of security offerings. There has been a discussion paper. We received a number of submissions in response to that, and they were generally supportive. There were comments particularly on the technicalities. More recently, there has been a treaty signed by Mr Costello and Ms Dalziel, the Minister of Commerce in New Zealand, to support the scheme, and work is now being undertaken on provisions which would amend the Corporations Act to implement that scheme.

As to takeovers, there is some coordination in the sense of cross-appointments between the takeovers panels of the two countries, but I do not know that anyone has pointed to capacity for regulatory arbitrage or whatever that I think you were pointing to.

Mr KERR—I am not even suggesting it. New Zealand has a different corporate structure and some have suggested it is perhaps less sharp-edged on some of the issues that Australia has been legislating to ensure greater oversight.

Ms Smith—In the last few years New Zealand have made certain amendments—for instance, insider trading—which bring them much closer to Australian law, and other areas within the securities regulation.

Mr KERR—I may well be out of date in terms of the response. Can I ask the question of Mr Archer, who may be able to answer the question that I posed to the Department of Foreign Affairs and Trade. The question was about complexities that may exist with New Zealand's

participation in the Kyoto protocol's marketing arrangements for carbon credits and various other instruments that may be open to signatories and how CER impacts in relation to Australian participation in New Zealand.

Mr Archer—Unfortunately I am unable to shed any light on that particular issue. Issues of the Kyoto protocol are beyond my remit within the Competition and Consumer Policy Division, unfortunately.

Mr KERR—Sorry, I thought you were energy?

Mr Archer—Yes, in relation to domestic energy market regulation, but not environmental aspects. The short answer is: I am not aware of any issues but neither would I necessarily expect to be aware of any of those issues.

ACTING CHAIR—Ms Seeber, returning to part IV of the Trade Practices Act, does the department have any intention at this stage to move towards harmonisation of the laws governing implied warranties and conditions in consumer contracts?

Mrs Adams—That question is more appropriately addressed to me. You are referring I think to part V, division 2 of the Trade Practices Act. There are no moves at the moment that I am aware of towards harmonising those provisions of the Trade Practices Act. As far as I am aware, no concerns have been raised with us about the operation of those provisions. Just how different they are between the different jurisdictions, I am not sure.

ACTING CHAIR—If no concerns have been raised, why hasn't there been any move in that direction by the department?

Mrs Adams—Towards harmonisation? Sorry, when I say 'no concerns have been raised', I mean in the sense of an issue with the operation of those provisions between jurisdictions.

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

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

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

Ms Smith—This is continuing to be explored through the Standing Committee of Attorneys-General. I would have to get back to you as to exactly where it stands now.

ACTING CHAIR—Would you have any idea what the main impediments to a constitutional amendment of this nature would be?

Ms Smith—Certainly it would be very complex and there would be a question about explanation.

Mr MICHAEL FERGUSON—I do not know who to address this question to. It is probably best answered by somebody from Treasury. Given that there is broad acceptance that both economies would be strengthened by greater harmonisation, by lower compliance costs and the streamlining of regulatory processes in trade, what work has been done on assessing the impact of greater harmonisation on smaller regional communities in Australia? Is it possible that regional communities may suffer some disadvantage while the national interest may be advantaged? If there is no work being done on that or none already completed, is it Treasury's role to have a look at that?

Ms Smith—The divisions we represent relate to industries which are Australia-wide and will not have a particular impact on regional communities. But we can inquire from other parts of Treasury as to whether work is being done on that.

Mr KERR—It would be useful, because it is part of this dynamic of debate that is always reflected back in the parliament. We think broadly that there is a national interest in freer trade between various economies, but we recognise also that inevitably there are some losers in the process. Identification of those losers and finding proper mechanisms to compensate and to address that loss out of the greater national share of wealth that is emerging is something that many would argue has been less rigorously examined that perhaps it ought. Mr Ferguson and I are from quite a small island community, where these things sometimes emerge in very direct forms.

Mr MICHAEL FERGUSON—Where we come from, it is actually the first question, not a consequential one. If you would take that on notice and, in quite a serious fashion, ask the right branch of your department to answer it, I am sure the committee would be very pleased to receive it, because in looking at the greater national interest and the boost to both countries which, in a macro sense, would eventuate we need to remain very conscious of the impact that it may have at the very local level.

ACTING CHAIR—Thank you all for appearing today. I would be grateful if you could send the secretariat any additional material that you have undertaken to provide as soon as possible, particularly following the questions of Mr Ferguson. There are members of the committee who could not be here today, particularly the chairman, and who have questions that they would like the department to answer on notice. The secretariat will forward those questions to the department.

Proceedings suspended from 10.41 am to 11.01 am

SPENCER, Dr Terry, Member, Implementation Group, Chair, Regulatory and Workplace Practices Working Group, Science Industry Action Agenda

ACTING CHAIR—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. I invite you to make a brief opening statement before we proceed to questions.

Dr Spencer—I thank the committee for giving the Science Industry Action Agenda the opportunity to assist you in your deliberations relating to harmonisation of legal issues relating to trade and commerce—a relatively large task, I would suggest. Since the SIAA made their submission to your inquiry last year, we have entered the implementation phase of our existence. I chair the Regulatory and Workplace Practices Working Group, but I am here essentially to deal with the regulatory area. In the past several months, SIAA have made a number of submissions to several inquiries and task forces concerned with the minimisation of regulatory imposts on industry, one at the Commonwealth level and one at the state level in New South Wales. I note, and the industry notes, that COAG has been active in this arena as well.

The science industry is an interesting one, and I will read a definition. There has been a slight change to the definition given in our submission. It is defined as 'research and development, design, production, sale and distribution of laboratory-related goods, services and intellectual capital used for the measurement, analysis and diagnosis of physical, chemical and biological phenomena'. As you can see, it touches every avenue of our lives—or at least the members of it do. As an industry with an international focus, the science industry believes that Australia should have a single united market, rather than one that is fragmented into nine small units. That is without bringing in New Zealand; I understand you are addressing that issue as well.

Progress has been made to harmonise Australia's internal markets, but more is needed to achieve the outcomes of reduced compliance costs, greater harmonisation with international standards and regulations and greater harmonisation of the administration of standards and regulations in Australia. To achieve these outcomes, the various regulatory bodies should consult more widely with all stakeholders in the industry. As a relatively small industry, we sometimes get forgotten. That is just an aside for you. Regulation is a national competition policy issue, and one for COAG. We note that COAG made some decisions on 10 February this year relating to efforts to harmonise regulation.

Chair, I would like to table, as exhibits for your inquiry, submissions to the reviews referred to earlier. I am not quite sure if they have been handed to you or not.

ACTING CHAIR—Yes, we have received the three, thank you.

Dr Spencer—Key issues in these submissions include size: the industry comprises predominantly small to medium sized enterprises, although I would suggest that it is more towards small sized than medium sized under the definitions that are used. SMEs bear a relatively higher burden of regulation compliance costs. That has been well established by

economists. Complying with Australia's diverse regulatory environment has direct and opportunity costs. I have referred to opportunity cost as a buggery factor because it is one of those buggers of things that you have got to do and you are being kept away from your real work of strategic planning and what not, which brings me to the next issue.

Opportunity costs arise from the diversion of resources to compliance and away from strategic activities such as innovation, securing investment and increasing productivity. It is particularly important that the people who run a small company have time to think. The supplementary submission to the Productivity Commission's task force provides the costs for four case studies, including in-vitro diagnostics, ozone protection, Australia's inventory of chemical substances and material safety data sheets. Elaboration of the standardised cost models within the Commonwealth and state regulatory frameworks is a must, we believe, in order to actually come up with reasonable regulation. There is also a requirement to update any guides and the adoption of best practice guides from other jurisdictions, both national and international. This is happening in many countries at this stage in time; Canada and the UK come to mind.

Updating and expanding the COAG principles and guidelines including a stronger buy-in by the states and territories: we would also like to extend that to local government, which I think COAG is actually now doing. Adoption of the UK one in, one out approach: the UK have adopted an approach whereby when one regulation is promulgated another one has to be removed by the particular department, jurisdiction or regulatory authority so that over time the gross number should not increase. Next is adoption of a stronger regulatory governance framework within regulatory agencies. Next is rationalisation of regulators where possible: again, that has happened in the UK and I understand that is part and parcel of the rationalisation of the functional roles of departments that is happening at the moment in the ACT.

Use of a single issue, high-level task force to address regulatory hotspots: in our industry an example is chemicals. Chemicals are regulated by a plethora of different agencies at both the Commonwealth and state levels. The only way that you can actually get some kind of uniformity and harmonisation is to bring them all together. That requires a high-level task force which has a delegation to make decisions on behalf of the jurisdictions. That is happening with the chemical industry. When I say 'that is happening with the chemical industry', I mean that is happening with the larger chemical industry—pool chemicals and industrial chemicals. The science industry deals with smaller, more high-value chemicals rather than gross amounts. Strengthening the oversight of regulation setting: that comes back to regulatory and corporate governance as well. Next is increased use of mutual recognition arrangements within Australia and internationally.

To give you an illustration of the types of things that the industry deals with, I have a case study which concerns the supply of potential precursors for illicit drugs. There is a code of industry practice that industry members are required to adhere to. That takes about 150 chemicals, divides them into three categories, depending on whether they can be directly converted to an illicit drug—mainly amphetamines but other illicit drugs and such like. In the various states and territories these are regulated by drugs or poisons acts, so there is no harmonisation there. They are controlled by various agencies: it could be Health, the police, Justice or Attorney-General's, although that is probably the same as the previous one. Sometimes more than one jurisdiction has control at the state and territory level. If you look at the variations from state to state as to how category 1 substances—the bad ones—are controlled, you see some

states control 100 per cent of what is in the industry code of practice while some control only 25 per cent, so there is a large variation there. Even though there is a commitment at the state and territory level to harmonise, it is not actually happening. I suggest that is due to priorities. For category 2 substances, which are those which can be eventually converted into illicit substances, again there is a variation from 100 per cent in some states down to zero per cent in other states. So there is a very large discrepancy.

You pose the question in your discussion paper: how might harmonisation be achieved? The industry believes that COAG could justify the greater use of a variant of the template model, namely, that operating in the area of food standards. In this area, amendments to the Food Standards Code after agreement by a majority vote by Commonwealth, state, territory and New Zealand ministers are adopted by reference into relevant legislation. So there is no second step. Once they are approved by the ministerial council, that is it. They become ensconced in the relevant legislation. I think in your discussion paper there was another step where they would have to go through the adoption phase as well. That does not happen with food standards. In conclusion, the industry believes that the overall costs of regulation within Australia can only be lowered through a package of initiatives and that this package should reflect current and national initiatives and best practice. I am happy to answer any questions that the committee might have.

ACTING CHAIR—Thank you. Naturally we have not had the opportunity to look at the three submissions that you have tabled this morning, but your secretary, Mr Ian Beckingham, forwarded a submission to the secretary of our committee.

Dr Spencer—That is right, I think it was early last year.

ACTING CHAIR—Yes, that is correct. On page 4 of that submission, SIAA indicates that it is a costly process for the science industry to comply with Australia's complex regulatory and standards regime.

Dr Spencer—That is right.

ACTING CHAIR—Are you able to provide an estimate of the industry's compliance costs that result directly from regulatory complexity?

Dr Spencer—We provided four case studies to the Productivity Commission inquiry which illustrate the types of things we are talking about. The costings in that submission are dollar amounts based on regulation fees and suchlike. They do not include what I referred to before as the buggery factor, the opportunity costs, particularly for small industries. We are talking about industries employing 10, 20 or 30 people. If you take the major innovator in that industry out to deal with regulatory matters, you are looking at a fairly large impost in terms of what potentially they can do downstream.

ACTING CHAIR—What were those four examples that you put to the Productivity Commission?

Dr Spencer—The four examples were a new regulatory framework for in-vitro diagnostic devices, which comes under TGA; a framework for ozone protection, which comes under the Department of the Environment and Heritage, a different regulator; the Australian Inventory Of

Chemical Substances, which comes under NICNAS, the National Industrial Chemicals Notification and Assessment Scheme, which is basically a TGA subunit; and material safety data sheets, which come under relevant state and Commonwealth OH&S legislation. We tried in those submissions to illustrate that there is a whole raft of different agencies involved in regulating aspects of the science industry and that therefore there is not a one-stop shop. To illustrate that statement, I will give you another case study of one of our members who imports diagnostic kits for analysing testosterone in young children, specifically young males. They are used by pathologists to diagnose precocious development.

ACTING CHAIR—Are you alluding to ADD?

Dr Spencer—No, precocious development is early physical development of the individual as opposed to attention deficit disorder. It is a different kind of precociousness. This particular importer has to go through five different hurdles with five different agencies. I will read them out for you. He is required to get an importation of biological material licence issued by AQIS. That happens every two years. He is required to get a permit to import radioactive isotopes, because the kits contain a very small amount of radioactive iodine. That is the anolyte that is measured at the end. He has to register it on the register of therapeutic goods as a medical device, because it is used for diagnosis in a medical setting. Because it contains testosterone, he is required to get a permit to import anabolic steroids from the Department of Health and Ageing. There is also a new requirement. Because it is an imported chemical, he is required to register that with NICNAS. He has to register with five separate agencies, four of which belong to the same department, the Department of Health and Ageing. Three are also part of the TGA.

The value of that particular kit to him per year is $50,000. Essentially, the cost to the consumer doubles because of these requirements. What we are asking for is that there be, for example, a one-stop shop in this particular case, so he could apply to one agency, which would then farm out the regulatory endorsements to the appropriate entities. If you talk a little bit heretically, there is possibly an argument for one all encompassing regulatory agency, at least at the Commonwealth level, that could handle all of these things. That is not the case at the moment. Within the castle, each person has their own little tower—and sometimes their own castle.

ACTING CHAIR—Thank you, Dr Spencer. Returning to my question, which relates to the original submission that was forwarded by SIAA, which indicated that it is a costly process for the science industry to comply with Australia's complex regulatory and standards regime, are you saying that you are not able to provide an estimate of the industry's compliance costs?

Dr Spencer—I am able to provide those costs for you. For those four examples I gave you, the relevant costs—the direct costs—were $4 million, $1 million, $1.5 million and $71 million.

ACTING CHAIR—To reassure us that these figures are not being plucked out of the air, can you give us some indication of how these compliance costs are measured?

Dr Spencer—We measured them by asking our members to estimate the amount of time that they spent. We then applied an hourly rate. We also took into account the registration fees that are required to undertake these particular things, because all of them come with a fee. As you know, all regulatory agencies have a policy of full cost recovery—which we believe is

appropriate; we have no problems with that. That is how they were worked out. I realise that you have not had a chance to read the submission, but the calculations and the assumptions are in the supplementary submission to the regulation task force paper.

ACTING CHAIR—We might want to flag in relation to that that we will test that after we have had the opportunity to read it. We might, through the secretariat, forward to you written questions on notice so that you can provide further evidence to the committee.

Dr Spencer—We are quite happy to answer any written questions. That is fair.

ACTING CHAIR—We are obviously in a short time frame today so we do not have the opportunity to test that here. On pages 6 to 7 of Mr Beckingham's original submission, the SIAA notes additional problems arising from a lack of regulatory and standards harmonisation, such as Australia's inability to negotiate as a single unit with other countries in relation to weights and measures, electrical product safety standards and processes for regulation and standards formulation in the different jurisdictions. Against that background, for our record can SIAA clarify today whether the problem is the existence of multiple regulatory or standards regimes or the content of the different regimes or both?

Dr Spencer—Yes, the SIAA can comment on that. Under the Constitution, weights and measures is a state matter, yet obviously it impacts greatly on international trade, so therefore it has become an international issue as well. There is an international framework for weights and measures, which is driven out of the International Bureau of Weights and Measures in Paris. Just relating to weights and measures, Australia, as the Commonwealth, is a signatory to the international treaty, and yet the regulations are developed and enforced at the state level—hence the problem. Effectively, there is a mismatch between the delegation and the responsibility.

ACTING CHAIR—Do you see any other problems for the science industry that result from a lack of harmonisation?

Dr Spencer—I personally see some issues, and you have already mentioned those—for example, the electrical one. I am sure that members, if we prompted them, would come up with a large number. I know that they are concerned about particularly the state legislation that impacts. There are two issues: firstly, the state legislation per se and, secondly, the way it is actually enforced. Different states have different enforcement regimes. It is a bit like having a hanging judge or a non-hanging judge should you go to court—a luck of the draw type of thing. If you happen to be located in Victoria for certain things, you will be hit harder than you would be in New South Wales, and that is the case for our members, for example. So there is not a level playing field within Australia.

ACTING CHAIR—Are you confident that harmonisation would remedy the identified problems?

Dr Spencer—It would certainly remedy the problem of the legislation. The enforcement is another issue entirely and that would suggest the requirement of a cultural change in the enforcement agencies. We also believe that one of the things that is creating that problem is that regulations are espoused by a certain level of government. There is a mismatch and a non-communication between the level of the policy people, the regulators per se and the people who

were empowered to do the enforcement. The people who are doing the enforcement have not necessarily been trained and/or informed about the policy reason for the regulation. To them it is a black and white issue, whereas in fact, under some circumstances, regulations are simply guides.

ACTING CHAIR—Finally from me, in the original submission a number of potentially unsafe electrical products entering the Australian market were identified. The committee would like to know whether you could provide evidence or examples of such potentially unsafe products appearing on the Australian market.

Dr Spencer—We could certainly take it on notice to provide you with a list.

Mr MICHAEL FERGUSON—I have a quick question that is just slightly on the edges of our terms of reference and was probably in your thoughts when you were putting your submission together. From an education point of view, which of course is fundamental to the future of science in Australia and to industry around science, would you be able to briefly outline your views about us having eight jurisdictions in science education in Australia and how you see that fragmentation affecting our capacity as a nation to build up a future generation of scientists and engineers?

Dr Spencer—I am not trying to skip the question, but we do have a working group within the SIAA that is addressing that particular issue. It is the Marketing and Technology Services Working Group which, among other things, is looking at that availability of skills and whether they are appropriate. So it is on our radar and it is being addressed at this stage.

Mr MICHAEL FERGUSON—Do you think that you would be able to ask that section or that committee to look at that and perhaps forward some information to the committee?

Dr Spencer—Certainly.

Mr MICHAEL FERGUSON—Would the SIAA be somewhat concerned about the current state of science in pre-tertiary levels of education in Australia?

Dr Spencer—I think it would be a fair statement to say that the SIAA is concerned about the number of students that are being attracted to science, at the secondary level, the tertiary level and the post-tertiary level—the post-graduate level. There is a very small uptake nowadays of people doing masters and PhDs in science. I would suggest that the whole gamut is our concern, particularly as our industry is very highly knowledge intensive. Fifty per cent of our work force have a degree, so it is pretty unusual. Of course, if you have a small drop-off in that, you will have an impact on the industry and its ability to innovate, produce and support Australia's initiatives.

Mr MICHAEL FERGUSON—When you do come back to us, I would be really grateful if you would address those points and also how you see standards changing in the different jurisdictions in Australia, particularly with the philosophical bent now on outcomes based education which is far less about content knowledge, which of course is the key way that we as scientists work.

Dr Spencer—There have certainly been some changes in recent years. In defence of that particular working group, their major emphasis is on the tertiary sector, so whether they can comment in-depth on the secondary sector I am not quite sure.

Mr MICHAEL FERGUSON—That would be terrific.

ACTING CHAIR—Dr Spencer, thank you for your attendance before the committee this morning. I would be grateful if you could send the secretariat any additional material that you have undertaken to provide as soon as possible. Unfortunately some members of the committee, including the chairman, could not be here this morning. They too have questions that they would like to put to you, and the secretariat will forward those questions to you in due course.

Dr Spencer—Thank you. I will leave with the secretariat two copies of our report *Measure by measure*, which you may be interested in reading. It is the report of the action agenda.

ACTING CHAIR—Thank you very much.

[11.28 am]

ANDERSON, Mr Iain Hugh Cairns, First Assistant Secretary, Legal Services and Native Title Division, Attorney-General's Department

DAVIES, Ms Amanda, Assistant Secretary, Classification Branch, Attorney-General's Department

FAULKNER, Mr James Richard, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

PIKE, Mr Layton Bryce, Acting Senior Legal Officer, Classification Branch, Attorney-General's Department

SHEEDY, Ms Joan Marie, Assistant Secretary, Information Law Branch, Attorney-General's Department

ACTING CHAIR—I welcome the representatives from the Attorney-General's Department. 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. The committee has received your submissions and they have been authorised for publication. I invite one of you to make a brief opening statement of perhaps five minutes duration, or more if you wish, before we proceed to questions.

Mr Anderson—The department welcomes the opportunity to appear before the committee today and to contribute to this inquiry. The very nature of Australia's federal system—the split in powers between the Commonwealth and the states and territories—has meant that, over time, each of the Australian jurisdictions has developed its own law and its own approach to certain legal issues, which has inevitably resulted in a patchwork of laws, which at times is confusing and contradictory.

Advances in technology have resulted in greater and speedier access to information and also ease of communication across borders. Businesses need to be able to operate confidently across jurisdictional borders in order to be internationally competitive and to promote trade. Many of our international competitors do not share those sorts of constraints, so we are at an immediate disadvantage in some key areas. Australia's competitiveness can certainly be improved by a gradual and ongoing process of harmonising regulation. To this end, the department continues to encourage coordinated action with the states and territories to harmonise laws in particular areas of legal concern.

As a concept, harmonisation is obviously quite broad. It involves minimising differences and eliminating obstacles to achieve a set objective. When harmonising laws, there is often no need for perfect uniformity of text or model legislation across jurisdictions. Often, harmonisation can be achieved through as little as mutual recognition clauses in respective legislation to ensure that they work together.

The Attorney-General has placed a high priority on initiatives within his portfolio to substantially increase harmonisation. Some examples are the eight systems governing the legal profession, the eight sets of defamation laws and the fragmented system of laws that regulate personal property securities. Many of the harmonisation related projects in the portfolio are well advanced and demonstrate that is it possible to harmonise laws in the national interest.

The key forum in which the Attorney and the department pursue interstate harmonisation is the Standing Committee of Attorneys-General, or SCAG. The department coordinates Australian government involvement in SCAG, and SCAG provides an opportunity for the Attorney to meet with state and territory counterparts and to pursue uniform or harmonised action within his portfolio responsibilities. Over time, the department has also participated in a range of trans-Tasman working groups to progress uniform legislation or other harmonisation initiatives with New Zealand outside of the SCAG process.

As you noted, Mr Acting Chair, the department has provided a submission and a supplementary submission. Each submission is divided into nine parts. I will not go through each of those parts, but they are consistent in terms of looking at mechanisms for achieving harmonisation, looking at forums within the portfolio for harmonisation and then going to a number of different subject areas. We welcome any questions from the committee about the submissions or about the Attorney's portfolio responsibilities.

ACTING CHAIR—Thank you. On pages 3 to 8 of its submission, the department discusses the main mechanisms for achieving harmonisation of legal systems. Does the department have a particular preference for any one of the possible mechanisms for achieving legal harmonisation? If yes, why?

Mr Faulkner—It is probably fair to say that the areas where harmonisation of one sort or another is seen to be a worthwhile exercise are many and varied, and so the particular form that harmonisation might take varies. I think it is unrealistic for anyone to suggest that it is appropriate for anyone to come to this kind of an exercise with a very firm view that harmonisation ought to proceed in one particular way. It is probably true to say that the department recognises that as well as anyone.

We do have some views, I suppose, about some of the advantages that are offered by particular approaches, but that does not mean to say that we or the department or the Attorney-General think that any particular approach should be adopted in every single case. Usually, if we are talking harmonisation we are talking about a range of practical political views as well on the part of the different jurisdictions and it is a matter of negotiating something that everyone thinks is a fair and reasonable result, and I think that has to be the governing rubric. People need to be aware that it is a cooperative undertaking.

That said, I note that in recent times we have seen some interesting developments in the area of references under subsection 51(xxxvii) of the Constitution to facilitate cooperative arrangements and they have been quite effective, I think. We have forms of mirror legislation which have been advanced recently and there are, of course, all kinds of cooperative mechanisms in areas like gene technology and so on that are also very effective. In short, I do not think that the department has a view that harmonisation should proceed in one unvarying

way. There needs to be a recognition that a cooperative action involves agreement on the part of a number of jurisdictions, and that need not be a bad thing.

ACTING CHAIR—Does the department regard constitutional amendment as the least desirable mechanism?

Mr Faulkner—In that regard, when people talk about constitutional amendment I think that it is important to be clear about precisely what people have in mind. One can think of all kinds of ways that one might amend the Constitution to achieve a particular result, and there have indeed been proposals over the years to amend the Constitution in areas that might broadly be characterised as harmonisation. But before anyone thought seriously about constitutional amendment it would need to be clear that everyone agreed that a particular form of amendment was entirely appropriate and that it had some reasonable prospect of success. That is the kind of thing that jurisdictions often take some time to nut out among themselves really. I do not think that it is fair to say that there is any in principle objection to constitutional amendment. On the other hand, one has to recognise that constitutional amendment is a difficult and complex process which has a very poor record of success in Australia—only eight from 44 referenda since Federation.

Increasingly, people expect to understand what it is they are being asked to vote on. It would also have to be said, I think, that in a relatively technical area like this where one presumably is talking about some kind of machinery to facilitate a particular kind of technical outcome, it may be rather difficult to explain to people in a way that is readily understood precisely what is envisaged. One has also to consider, I think, that unfortunately there is a bit of a tendency in Australian referenda for any proposal which talks about the shifting of power to be demonised as an exercise in power grabbing, particularly on the part of the Commonwealth, wherever the truth might lie. All of those factors need to be considered very carefully in the equation when anyone raises the question of the possibility of constitutional amendment.

ACTING CHAIR—Does the department consider that the risk of the template model unravelling over time due to amendments emerging at state and territory render it undesirable as a potential mechanism?

Mr Faulkner—I seem to be hogging the microphone here. I am conscious also of perhaps sounding a little bit evasive here, which is really not my intention. With these terms—'template', 'harmonisation' generally, 'cooperative schemes'—different people tend to have different views about precisely what they mean. One possibility in terms of a template is where, let us say, the Commonwealth might enact a law for the Territory which is then enacted in similar terms in other jurisdictions. Or there may be no model as such, but all of the jurisdictions agree to enact essentially the same law in their own jurisdiction, based on some coordination of efforts beforehand.

To the extent that the department could be said to have a view on this—and subject to the kinds of things I have already said—I think one would have to say that it is not necessarily the case that a template model will not work. One simply has to concede that, where you have multiple jurisdictions with the capacity to amend their laws as they see fit, there is some potential for a lack of uniformity to enter into the scheme irrespective of how uniform it might be when it starts. But, that said, that should not be seen as any suggestion that the template

approach cannot work; it just inevitably carries with it the possibility that there will be a lack of uniformity. And there may be areas where the practical realities are such that even the risk of that kind of lack of uniformity needs to be avoided at all costs.

Most immediately, in the corporations arrangements—which I am sure are the best known of the cooperative exercises over the last few years—it was generally conceded that the centrality of that law to Australia's economic and other interests really dictated that we had an absolutely certain and efficient system of national law, and in that case the reference based cooperative arrangement was seen to be the appropriate one by the participating jurisdictions. I probably would not want to go much beyond that in terms of indicating a preference for template schemes generally.

ACTING CHAIR—In your own opinion, Mr Faulkner, do you think the template model for harmonisation has any hope of succeeding?

Mr Faulkner—It in fact has succeeded to some extent; there are examples of it out there. And I think it is a point worth making that there are many and varied forms of schemes out there, some of them templates, some of them reference based, some of them variations on those themes. So it is there to some extent, and in some cases it will be seen by participating jurisdictions as the appropriate mechanism, and to that extent it is succeeding, I suppose. The point will be, in any consideration or reconsideration of an area, what the best way forward might be. As I say, I think it is often unrealistic to grapple with that question without taking into account the practical realities of the particular positions of the various jurisdictions.

ACTING CHAIR—A number of the submissions already put to this committee point to the significant benefits of harmonised legal systems. Do you know if the department has identified any potential disadvantages to having harmonised legal systems?

Mr Faulkner—Disadvantages? I am not aware that the department has identified any particular disadvantage.

Mr Anderson—I am also not aware that the department has identified any particular areas of disadvantage. At the same time, it needs to be borne in mind that some areas might have a higher priority with respect to harmonisation, depending on the issues that are giving rise to the need for harmonisation: is it compliance costs being inflicted upon business and the community or is it a question of economic impediments being placed in the way of efficient operation of the economy? You need to consider, for example, just the costs of any change in itself. The costs of developing and implementing change across jurisdictions can be potentially significant, and then there are ongoing administrative costs for any new, harmonised regime. So I think that, while we would not necessarily say there are areas where harmonisation would be a disadvantage, there are areas where harmonisation is not necessarily a priority.

ACTING CHAIR—It has been put to this committee by Treasury that, in respect of the Corporations Law, the Commonwealth and the states are continuing to explore the possibility of a constitutional amendment to facilitate the cooperative schemes generally. Are any of you in a position to give this committee an update on the progress of those discussions?

Mr Faulkner—The short answer is that that would be something it would be appropriate to take up with the Attorney, if you wish to pursue that. I would probably only add to what you seem to have been told by Treasury: that it is a quite complex question, in terms of what it is that the various jurisdictions consider to be appropriate. It is worth bearing in mind also that the corporations references, which are references by the states which currently underpin the national law, are, as I understand it, to be continued by the states so as to avoid any possible problem in the interim period, as it were, in these further considerations about theoretical possibilities in the future. Beyond that, there is probably not a lot I can say, I am afraid.

ACTING CHAIR—Bearing in mind that it was the Attorney-General who gave us the reference and the terms of reference for this inquiry, we could take it up with him, but doubtlessly he would rely on people like you to give him an opinion. We would be interested, notwithstanding what he might think, in what your personal view might be.

Mr Faulkner—I do take your point entirely, but I really meant only to say that because these are matters proceeding through SCAG—as Mr Anderson indicated a moment ago, that is the principal forum through which the various states, territory and Commonwealth attorneys-general engage on these issues—I am loath, and I do not really consider that I am in a position, to speak for SCAG ministers. There clearly is a process under way at SCAG to see whether some possibilities are generally agreed as being worth pursuing, and that is certainly under way and it has been under way for some time, which I think reflects the technical difficulty of the area to some extent. It is one thing to say a constitutional amendment would be a good idea; it is another thing to even achieve agreement on precisely how the Constitution might be amended, precisely what the nature of the problem is.

A decision like Hughes, back in 2000, which was the decision which caused people to wonder whether particular kinds of cooperative arrangements like the Corporations Law did have problems with them, is a very complex decision. Even understanding precisely the full extent of the High Court's concerns is not a straightforward matter. Deciding precisely how one might amend the Constitution to deal with that is not straightforward. Deciding how matters of federal jurisdiction which are associated with this might be sorted out is complex. There are questions about the status of the territories which are necessarily involved in all of this. Just getting down to tintacks with those kinds of issues is rather difficult, and those are the kinds of things that SCAG is grappling with.

Then, of course, there are all of the myriad other considerations, such as: is this the kind of thing that could be put to people in a meaningful way? Would people be likely to engage with such a proposition? Should we regard section 51(xxxvii), the reference power, as the answer that we already have? I think personally there is a very respectable argument there, although there are many views on that. In fact, it is rather a controversial point, I imagine some people would think. Those are the kinds of things that SCAG is grappling with and continues to grapple with. I am conscious that it may sound that I am being a little bit evasive there, but they have remained the issues which have been difficult to resolve.

ACTING CHAIR—I understand, Mr Faulkner, and I just have a final question before I hand over to my colleagues. I would like to know the department's view on the concept of a model contract code that would apply across the Australian jurisdictions and in New Zealand as a

means of harmonising contract law, which was proposed in a separate submission to the inquiry. Would you like to answer that, Mr Anderson?

Mr Anderson—Certainly. The department actually does not have a view on that at the moment.

ACTING CHAIR—Why?

Mr Anderson—We noted that it was proposed in a submission. It has not in itself been a matter that the department have had a lot of opportunity to consider. Fundamentally being a state and territory issue, it is something that we have not been focusing on previously.

ACTING CHAIR—If you have more time, you could perhaps—

Mr Anderson—I would be happy to take that on notice.

ACTING CHAIR—We would like to know. We had a rather compelling submission put to us in Melbourne along those lines, and it would be interesting to get the department's view.

Mr Anderson—Certainly. As is usual with these processes, we normally will have regard to the *Hansard* of hearings, when that is available, and we will be looking forward to seeing what was specifically put to the committee to further advance the written submission. I think that would assist us in being able to provide the committee with some views.

ACTING CHAIR—In addition to any other material you might want to put before this committee, I will signal on behalf of the committee that we will put further questions to the department so you will have the opportunity to more fully consider them. This is a monumental inquiry and we have the luxury of only one hour—and I have had the first 20 minutes. I will now hand over to my colleagues.

Mr KERR—One issue that is obviously contemporaneous is intellectual property and the way in which the regimes intersect, particularly given our obligations to amend our copyright law with respect to the US free trade agreement. Will there be any difficulty in the CER context that will emerge as a result of Australian copyright law and intellectual property law changing with respect to harmonisation? Are there any harmonisation issues that arise in the intellectual property field that we should be aware of?

Ms Sheedy—I think we said in our supplementary submission and in our original submission that there are a number of inquiries under way in Australia on copyright in particular, which is what I can speak to, and also in New Zealand . It is very unclear at this stage what the outcomes will be in both countries. I think it would be a little premature to say that there are or are not issues of harmonisation coming out of that. Certainly there has been divergence in our laws in the past. It will be interesting to see whether the various inquiries that are running in both countries either bring us closer together or move us further apart.

Mr KERR—Has it been a problem that has emerged in the CER context?

Ms Sheedy—I understand there were some discussions last year in the copyright area between AGD officials and officials from New Zealand, but I was not a part of that. I am not aware of the outcome, but certainly there were discussions. Both Australia and New Zealand are involved in the ASEAN discussions on a free trade agreement, which will have an IP chapter. I understand that there is some close working going on between the two countries on the IP chapter. But, as I say, there are all these various inquiries in both countries going ahead, so it is very unclear at this stage.

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

Ms Sheedy—I understand that they do not all start ab initio. There is certainly regard had to what is in place from what has already been negotiated. But as somebody who is not involved in the FTA negotiations I think that is a question I would have to take on notice to find out whether there are templates or how it has been approached. We can certainly take that on notice.

Mr KERR—Broadly, the relationship with New Zealand does seem to be fairly unproblematic. There is a whole range of cultural, historical and other factors, like the fact that we have so many New Zealanders living here and Australians living in New Zealand and the like. From A-G's point of view, where would you identify priorities for our attention. Without necessarily suggesting how we should resolve those issues, because we are going to have to grapple with those, are there two, three or four things that stand out as logical issues that should be at the top of the list when we start examining how this relationship develops?

Mr Anderson—With respect to New Zealand, obviously it is, as you say, a very well-established relationship. Underpinning that well-established relationship is the fact that there is often work going on between the jurisdictions. As it happens, there is a working party now which is looking at aspects of civil procedure. There is quite an overlap between the body of work of that working party and the terms of reference of this committee. There is likely to be a circularity whereby views of this committee will be fed back into that process. The original terms of reference of the working party were in 2003, they issued a discussion paper in 2005 and they are currently considering the 32 or so responses to that discussion paper. I anticipate that that process will continue for a longer period than the life of this committee. That said, I think that the matters raised in that discussion paper would probably be the priority issues for the committee to consider, given that they are the matters, in the areas related to the terms of reference of the committee, that Australia and New Zealand themselves think are the priorities.

Mr KERR—How would you summarise those issues? For example, what are the issues that emerge with respect to civil procedures that warrant important attention?

Ms Davies—The working group is looking at civil process and the interrelationship between the two legal systems in terms of court proceedings—things like service of process between the two jurisdictions, appearance by video or other remote links, and recognition of judgments. In other words, it is looking at procedures around how litigation and court processes can be streamlined or work together more effectively.

Essentially the working group identified a range of issues and then put forward a number of proposals for ways in which they might be dealt with. A model is based largely on the Service and Execution of Process Act, as it operates between the states of Australia, as a way of having a model that would allow for similar kinds of things to operate between Australia and New Zealand. There was quite strong support overall for that kind of approach, but there were a number of issues raised that the working group are now working through and trying to identify solutions and further issues that they might need to explore.

Mr KERR—Would existing principles of private international law permit cross-vesting or a model of cross-vesting to emerge? One of the issues in private international law is the appropriateness of a forum. Plainly, in many of these areas litigation could commence on either side of the Tasman, but the same concerns that emerge in any large system of jurisprudence can arise. We have resolved most of those issues in Australia through the cross-vesting scheme. Has there been any examination of that or are there constitutional impediments in vesting the judicial power of one sovereign nation in another? I suspect not, because jurisdiction in private international law is often in relation to subject matter, residency and the like. Most of those issues would seem to not present a problem.

Ms Davies—I do not think the working groups approached it through the concept of cross-vesting. At the moment, New Zealand and Australia apply slightly different tests for which is the appropriate forum. They have proposed that there be a single test, which would operate in both places. That would then resolve quite a lot of the problems that you are talking about. You would not have the possibility of litigation occurring in both jurisdictions at the same time because both countries were applying different tests.

Mr KERR—You could have it applying in both jurisdictions because they are applying the same test—that is one of the real issues in private international law. There are proper rules for declining jurisdiction, and they give plaintiffs the chance to grab whichever jurisdiction they like.

Ms Davies—The aim would be that the application of those tests would result in one court being—

Mr KERR—It does not work in Australia currently. Under all the schemes that exist here, you have a choice of jurisdictions to commence proceedings in. Rules for declining jurisdiction are very much less stringent than rules for accepting it. Essentially, the plaintiff has their choice of jurisdiction within Australia—and, indeed, in respect of international litigation.

Ms Davies—The working group has not explored proposals to limit the ability of plaintiffs to choose the jurisdiction in which to commence proceedings. What it has done is put forward a proposal that there be a single test between the two jurisdictions. I am not aware that any of the submissions received raised any strong concerns about the ability of the plaintiff to choose one or other, although there certainly was support for having a single test across the two.

Mr KERR—At the moment, there is a capacity for mutual recognition of professions. I am not sure how developed that is. How does that apply in contrast to, say, the scheme that operates now internally within Australia, where accountants and lawyers and the like can ply their trade between jurisdictions and, provided they are authorised to practice professionally in one state, can automatically get registration in the others? Is there a like arrangement? I know there is some recognition, but at what level does it operate?

Ms Davies—I am not across that. We would have to take that on notice.

Mr KERR—Could you do that? There are more similarities than differences in the legal, accountancy and like professions. There are still significant differences but, if you go to the United States, there are greater differences between the various states in the United States, which still have very different common laws, than there are between New Zealand and Australia—there is at the least no greater diversity between New Zealand and Australia. It would seem that this area of professional recognition may be one which could be further looked at by us in our inquiry about the CER. I do not think we have submissions on that point—I am not sure. I certainly have not read them, but then I have been a remiss participant.

Mr Anderson—One other aspect to note in relation to mutual recognition is that it only takes you so far in any event. That is why one of the issues that SCAG has been looking at is for the legal profession to develop a proper national legal profession, rather than simply a set of rules for recognition of practitioners which comes at a cost. If you wish to practise in other jurisdictions, they do not allow a firm or a practitioner to simply readily engage across the jurisdictional boundaries.

Mr KERR—Yes, they do, don't they?

Mr Anderson—They do, but they do not allow for recognition.

Mr KERR—I do it every day.

Mr Anderson—Yes, but they do not allow for, say, one firm or practice to engage as a business model in all jurisdictions. There are different rules for trust accounts, whether a practice can be incorporated and things like that, as opposed to individual practitioners.

Mr KERR—Sure; that is true.

Mr Anderson—But mutual recognition is a good start, of course.

Mr KERR—I am wondering whether we are close to a good start in the trans-Tasman arena. If not, how far short of it are we? It was mentioned in the DFAT submission that there was the mutual recognition scheme for professions. I did not pick up anything in the submissions that

addressed whether that was a robust cross-recognition scheme or a quite modest one and the level at which recognition occurred, and whether it means that you still have to submit yourself to some kind of accreditation process or whether you can automatically ply your trade as an accountant, a doctor, a lawyer or whatever, by virtue of your recognition in the other jurisdiction. Of course, this is subject to compliance with the local regulations which, as you said, is a form of recognition reached in Australia.

Mr Anderson—We will certainly take that on notice.

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

Ms Davies—One initiative that I am aware of relates to the land around the Northern Territory, South Australian and Western Australian borders. Those three jurisdictions have been doing work to develop some amendments primarily in the context of allowing people who are arrested or brought in under warrants to be taken to the closest magistrate, which may be across the border. There would be amendments to the Service and Execution of Process Act to follow that. Those three jurisdictions have been working on precisely what model and powers would be needed, and then amendments, as I said, to SEPA would follow. That is the only specific initiative that I am aware of.

Ms PANOPOULOS—And those proposed changes would operate anywhere within those states and that territory, not within a specified region?

Ms Davies—That is my understanding, yes. But, as I say, they are still working on the precise, if you like, parameters for the exercise. At the moment the way that the legislation works is that if somebody is arrested they have to be brought to a magistrate or the police station in that jurisdiction, and they can be a very long distance away. The initiative is to address that specific area, but I am not aware that it is proposed to be contained to a specific geography in that way.

Ms PANOPOULOS—Perhaps that broader question could also be placed on notice.

ACTING CHAIR—I have one final question. Who would like to respond to the proposition that, even if legal harmonisation is achieved within Australia in a given area or areas, separate judicial interpretation in the different jurisdictions will erode such harmonisation over a period of time? Are we wasting our time?

Mr Faulkner—I think not. I think often there will be compelling arguments for harmonisation and uniform approaches. It seems to me the question of judicial involvement will always be an important one. Perhaps I could respond in part by saying that certainly in the case

of the corporations arrangements, to take an example, it was seen as a very good thing generally for the Federal Court to have a jurisdiction in relation to the national corporate arrangements. That was a very important part of the Corporations Law system which came under some increased scrutiny in the wake of the Hughes decision. Prior to the decision in Hughes there had been a decision in a case usually referred to as Wakim which in effect invalidated a part of the cross-vesting arrangements which were referred to a little earlier. The effect of that was to make it difficult for the Federal Court to hear much, if anything, of what was going on in relation to corporate matters. As a result of the new arrangements, which rely on references, the Federal Court has been put back into the picture, which I think is generally regarded as a very good thing.

I will take this opportunity to point out that a particular and significant advantage in the reference based cooperative arrangement, which we see exemplified in the corporations scheme as it currently stands, is that in one stroke we completely avoid the Hughes problem, which is the problem of power in Commonwealth agencies, and the Wakim problem, which is the problem of power in federal courts, by enabling the Commonwealth to enact a simple law of national application. There is no jurisdictional problem, because the federal jurisdiction which ensues can be and is given to state courts. There is no problem with power in the Commonwealth regulator because the state references have topped up any deficiency in that regard. I would like to make the point that a particular advantage of a reference based cooperative arrangement is that there is no jurisdictional problem arising out of Wakim and no power problem arising out of Hughes and we have a single, simple law of national application with resultant advantages in terms of efficiency.

Mr KERR—There is no problem provided the references are not rescinded.

Mr Faulkner—All I would say on that front is that—

Mr KERR—I am not promoting the idea of rescinding the references, but I think lawfully it is open to a—

Mr Faulkner—Quite so, and that is an important point to make. Indeed, that may be a significant virtue of the arrangement, because states understandably are loath to hand over power, and I think it is sometimes misunderstood as a handing over of power. It is not a handing over of power any more than a handing over of power is involved in the original corporations arrangements. It is simply a cooperative scheme where the legislative participation of the states comes at a slightly different stage. It gives a simpler, more efficient result.

Mr KERR—Could I ask a question that follows up on that because of the elegance of that answer in resolution to a problem. Would not the same outcome be possible within the ambit of the external affairs power were political will to come to the point where a similar reference could be given by New Zealand, for example, to integrate certain aspects of the CER arrangement under a similar reference arrangement? We are nowhere near that at the moment, and it might be thought to present political or conceptual difficulties in that field, but legally would there be any impediment? The power would exist under the external affairs, which would seem to have the same advantages. I am tossing this out without great depth of reflection, but it does seem to have the same advantage in the sense of saying, 'You can walk away from this should you reach a stage of political antagonism such that you no longer are willing to participate in it, but provided

we do share common objectives in this particular area—it might be corporations law or it may be something else—a reference analogy could be done with the parliament accepting the request of New Zealand and perhaps New Zealand accepting the request of our parliament and mutually reinforcing structures being put in place.'

Mr Faulkner—I can certainly see where you are coming from. That is a rather complex proposition, I must say. I can certainly see what analogies might be drawn, but it seems fundamental to me that in the case of references by the states pursuant to section 51(xxxvii) of the Constitution, we have a situation whereby a state simply facilitates the Commonwealth law which the state—if it chooses to—can walk away from by withdrawing its power. As you would be aware I am sure, probably better than most, reliance on the external affairs power is an entirely different proposition, and I am not saying anything at all about that in what I am saying about section 51(xxxvii). I can imagine that people would want to look very differently at an arrangement which, in truth, was a Commonwealth law based on the external affairs power, notwithstanding that it would to some extent reflect, allude to or draw upon some international instrument of the sort that I think you are talking about. It struck me in legal and constitutional terms as quite a different proposition, notwithstanding that I can see where you are coming from.

Mr KERR—They are different in the sense that the root stock of the power is different, but I am asking whether a similar conceptual model could apply. I am trying to think of any constitutional constraints that would prevent it in Australia—

Mr Faulkner—Probably the question ultimately comes back to one of constitutional power. If you have power under the external affairs to do it—

Mr KERR—There is no doubt about that. There would be nothing more quintessentially the exercise of a foreign affairs power than to implement an agreement between Australia and New Zealand with respect to a common trading regime or a common corporations framework. It would not have to be reduced to a treaty form. The law is very clear on that. The real question is whether there are other components in the constitutional structure that might be engaged in that dimension which are not engaged in a reference given to the Commonwealth by the states. Just off the top of my head, I cannot think of any, but I have given that all of 30 seconds reflection. Would it be possible to have some reflection on that, because it seems to me to be perhaps a direction this committee might explore by way of a report to the Attorney-General as opening up avenues for flexible but much more substantive cooperation, provided that the parliaments of both countries come to a view that that is a desirable thing to do?

Mr Faulkner—I rather suspect there would be different considerations but, like you, I would have to concede that it is a rather complex proposition and one that would need to be thought through.

ACTING CHAIR—Thank you. I would like to thank each and every one of you for your attendance here today. The secretariat will send you a copy of the transcript of your evidence, and any corrections that need to be made can be made. I would be grateful if you could also send the secretariat any additional material that you have undertaken to provide as a result of our questions without notice. As I mentioned earlier, some members of the committee were unable to be here today. They have questions which will be forwarded to you by the secretariat. I would be

grateful if you would give them the same considered, thoughtful response that you have today, which will assist us with this inquiry. Thank you very much.

Proceedings suspended from 12.21 pm to 1.38 pm

BEATSON, Mr Guy William, Counsellor (Economic) New Zealand High Commission

LACKEY, Her Excellency Mrs Kate, High Commissioner, New Zealand High Commission

WILSON, Ms Paula, Counsellor, New Zealand High Commission

ACTING CHAIR—I would like to welcome the representatives of the New Zealand government. The committee appreciates the government's willingness to provide further evidence for its harmonisation inquiry hearings today. The committee has received the submission of the New Zealand government. As you are aware, it has been authorised for publication. I invite you, Your Excellency, to make a brief opening statement of perhaps five minutes duration before we proceed to questions.

Mrs Lackey—Thank you. I would be very happy to take up that invitation. I want to stress that we very much welcome this opportunity to meet with you today on the important subject of regulatory harmonisation. As I hope our submission has made clear, the New Zealand government places a high value on the progress that successive Australian and New Zealand governments have made in developing and implementing the array of intergovernmental arrangements and agreements which have underpinned the steady growth in trans-Tasman economic activity over the past two decades. The CER architecture which governments have established over the past 20-odd years has a very good reputation internationally as reflecting best practice in trade policy. We believe there is an opportunity for us to leverage this very high reputation in the regulatory area and establish what we are doing in the single economic market as providing a good model to be followed in our region and beyond. With those few brief remarks, I would just reiterate how pleased we are to be able to meet with you today and, with my colleagues, I am very happy to take any questions from your committee.

ACTING CHAIR—Thank you. In its submission, the New Zealand government indicates that there is 'a desire to deepen and broaden the economic relationship by advancing the concept of a single economic market or seamless business environment'. That is in paragraph 2. How far do you think the government sees this move towards a single economic market progressing in the final analysis?

Mrs Lackey—In response to that I should say that neither of our governments has really articulated what an end point for a single economic market might look like. Rather, the SEM process represents a political commitment to systematically identify and move forward on initiatives that seek to reduce barriers to trans-Tasman trade in goods, services, labour and capital. As I am sure the committee knows, there is currently an extensive work program that both governments have committed to working through over the next couple of years. A large component of this will fall under the recently revised Memorandum of Understanding on the Coordination of Business Law, and the action agenda which is set out in the MOU identifies work in a number of areas. I will just briefly touch on those. There is to be further work on the coordination of the regulation of financial intermediaries, coordination of insurance regulation, information sharing amongst our regulators and consideration of the respective financial reporting frameworks and standards in both countries. We are also exploring the desirability of adopting a mechanism which would allow for the disqualification of persons from managing

corporations in one jurisdiction to apply in the other jurisdiction—in other words, if a company director is banned in New Zealand, the question arises: should that person also be banned in Australia? As another example, we are working on the coordination of anti-money-laundering supervisory frameworks.

I should perhaps add that work on the business law coordination is not limited to the action agenda set out in the memorandum of understanding and can be expanded by the two governments if other new initiatives are identified. To follow up on that, I note that work is already under way in a range of areas outside the scope of this memorandum of understanding. Examples include ways of facilitating goods and people moving through our borders. An example of that—and one which is very much welcomed by New Zealanders—is that at Australian airports you now have a single customs and immigration lane for Australians and New Zealanders. That has long been the case in New Zealand but was recently introduced in Australia and, as I say, is very much welcomed.

There is also work being done on coordinating sector specific regulation. A prime example there is the prudential regulation of our banks, under the auspices of the trans-Tasman Banking Council, where Mr Costello and Dr Cullen have recently announced significant progress. There is also discussion under way about adding an investment chapter to the closer economic relations agreement of 1983. Let me say once again that, beyond that, New Zealand is very keen to explore any other initiatives or ideas that might arise from the committee's considerations to reduce barriers to trans-Tasman trade.

ACTING CHAIR—In potentially moving to a single economic market, do you see that that could encompass a single currency one day?

Mrs Lackey—That is a question that tends to come up very often. To put this on record, I need to say that the New Zealand government is not considering a single currency at this stage. I cannot and should not speak for the Australian government, but I understand that is very much Australia's view as well. The case for a single currency raises a variety of quite complex issues and challenges. Ministers on both sides of the Tasman have made it pretty clear that they think there are more pressing tasks to be pursued in the meantime.

ACTING CHAIR—The government refers in its submission to 'pressure from firms operating in both economies for a more common business environment'. That is in paragraph 3.3. Are you aware of particular matters that businesses have raised with the government as needing to be addressed?

Mrs Lackey—Yes. I could give two or three examples, and I guess there will be others. Concerns that have been raised with the New Zealand government include issues in relation to superannuation contributions that arise when employees move across the Tasman. With the increasing number of companies operating trans-Tasman, that has certainly become an issue as people go back and forth. Issues have also been raised around the suitability of some Australian regulations to a New Zealand business environment, especially given the smaller size of most of our firms and the potential for unnecessary extra cost to be imposed. Issues have also been raised around the whole area—again a very complex area—of the coordination of taxation, including taxation on company dividends. As I said, tax is a pretty complex area but it is an issue that the businesses have flagged with the New Zealand government.

ACTING CHAIR—Are you aware of whether there has been any unfavourable comment from New Zealand businesses regarding greater coordination, especially from businesses that do not operate across the Tasman?

Mrs Lackey—In response to that I could refer to a major study of trans-Tasman integration that was completed in May 2004 by the New Zealand Ministry of Economic Development in partnership with a consulting firm. As part of the study, in-depth interviews were done with approximately 40 major companies across a number of sectors. The interviews generally endorsed the value of existing means of coordination. Among the New Zealand businesses interviewed, the most significant barriers identified were less about regulation and regulatory obstacles and more to do with the types of problems associated with the smallness of firms in New Zealand and I guess the inherent difficulty of smaller firms breaking into a much larger and more complex market as exists in Australia.

ACTING CHAIR—Bearing that in mind, given the differences in size between the Australian and New Zealand economies, do you believe the government perceives that there is any pressure to change its own laws to better align with those of Australia?

Mrs Lackey—No, I do not think there is any such pressure, but the New Zealand government certainly recognise that there can be benefits in aligning regulations. The government take this into account when they are evaluating proposed changes on the New Zealand side. In other words, when we are looking at reviewing or reconsidering the New Zealand government's approach on a particular issue, it is now becoming pretty much standard practice to check what approach Australia is taking. That is only prudent and sensible and, increasingly, it is part of the work of New Zealand government departments in preparing policy advice.

Mr Beatson—I could add to that. That is one of the underlying principles of the memorandum of understanding on business law coordination.

ACTING CHAIR—Yes—point taken. Do you think the government could draw to our attention any instances where Australia has moved to more closely follow the New Zealand approach rather than the reverse? Surely we could learn from you.

Ms PANOPOULOS—We have.

Mrs Lackey—I think, as I have said, both Australian and New Zealand regulators closely watch developments in each other's jurisdictions, and that is certainly the way it ought to be. There are some examples of Australia, I think, following a similar approach to that taken in New Zealand. One is the legislative framework for the conduct of fiscal policy and reporting on the government's fiscal position: in this case there are striking resemblances between Australia's Charter of Budget Honesty Act 1998 and New Zealand's Fiscal Responsibility Act 1994. I gather other examples can be found in respect of directors duties: the relevant sections of Australia's Corporations Act 2001 were significantly influenced by the corresponding provisions of the Companies Act that was enacted in New Zealand in 1993. So I think it goes both ways in terms of looking at good ideas coming out on either side of the Tasman.

ACTING CHAIR—In its submission, the New Zealand government indicates:

There are … many forms of legal coordination that do not require identical laws.

That is at paragraph 15. Can the government expand on this and provide the committee with some examples of where coordination has been achieved without duplication of laws?

Mrs Lackey—Yes. I think the most significant and wide-ranging examples of this type of approach are pretty fully set out in part 3 of the New Zealand government's written submission. But, just to summarise that, it is our belief that the Trans-Tasman Mutual Recognition Arrangement is the best example of such coordination without duplicating our laws. As the committee will know, it provides for the mutual recognition of regulatory requirements relating to the sale of goods and the mutual recognition of registered occupations, even though our respective rules are not exactly the same and certainly not identical. In addition, if I could flag that the cooperation between enforcement agencies, such as that which takes place between the ACCC and the New Zealand Commerce Commission, is very close and very effective, but it is not based on any duplication of our laws.

Ms PANOPOULOS—With regard to the mutual recognition of occupations, are there still some barriers? I know that it is a broad question; I could narrow it down for future questions on notice, but perhaps for today I could narrow it down to the medical profession and medical specialists. Has there been any problem with mutual recognition in that regard?

Ms Wilson—We might have to take that on notice. As far as I understand it, medical specialists are specifically ruled out of the TTMRA unless they were trained in New Zealand or Australia. That means that people who qualify as doctors in New Zealand, who went through a New Zealand medical school, can have their qualifications recognised in Australia. However, if they went to medical school in a third country and are recognised to operate in New Zealand, that does not transfer across the Tasman, as I understand it. I can take your question on notice and check, but I do not think we are aware of any specific problems arising in the medical field.

Mr KERR—This morning when we were talking to the Australian Attorney-General's Department, a side wind blew into our discussion—or one that I was interested in. They were pointing out the benefit of the convenience of the process that has been adopted in Australia, after the High Court struck down a number of legislative schemes in the corporations area, where states had referred certain powers to the Commonwealth government for specific periods but of course with the capacity to withdraw at a later stage should they see fit. Obviously, the expectation and hope is that those circumstances do not arise. Nonetheless, the capacity to do so is there, to sustain the legal autonomy of the states.

I asked the representatives of the Australian Attorney's department whether there was any constitutional impediment in Australia to the New Zealand parliament passing a law that would effectively refer power to Australia to legislate with respect to a particular subject matter for a limited period of time, because it struck me that there was an opportunity to develop a means of addressing closer cooperation should we reach political agreement that it is desirable not necessarily in the Corporations Law but perhaps in some area where it was agreed between the two countries that, at least in this band of rules, we should have common rules and common enforcement rather than a split scheme. They have gone away to explore it from the constitutional end of Australia.

It also strikes me—and conceivably it is possible—that the Australian parliament might choose to show similar respect for the New Zealand parliament by conferring on it a similar power. It does not really matter at which end the law is made if the intention in that area is for one law to apply for a particular period and one parliament to enact laws which cover the whole of the polity. I am not certain whether there would be anything in New Zealand's constitutional structure or heritage that would preclude such a development were it to be desired by governments, but I would appreciate perhaps an instinctive response now and, later, one that is more thought through, because my understanding of the New Zealand constitutional position is that, as a unitary state with a parliament capable of exercising the plenary powers of that state, there would be nothing constitutionally to prohibit making a law which made an external document—the law of another country—apply.

Even in Australia, I do not think there is any impediment to it. The Australian parliament could pass a law that says that a particular convention, as amended from time to time—made by the United Nations or somebody else—is to have affect in Australia, always reserving the fact that it could withdraw at any stage from that arrangement. I am not certain whether in either country there are constitutional impediments to that kind of cooperative arrangement, which has only in recent times emerged as effectively possible constitutionally between the states and the Commonwealth government, but it seems an interesting way of addressing perhaps a narrow band of issues in the first instance, but issues where there is a will to have not only greater cooperation but common laws and common enforcement means.

I may be recalling this evidence imperfectly, but I think there was some suggestion this morning that in the area of assessment of drugs there was an intention to set up a common regulator to apply common rules. It struck me that every system of that kind potentially suffers from the problem that, as changes emerge in one jurisdiction, they are not coordinated, not timed effectively and the like. This mechanism might enable a more seamless application of that intention, were it to be desired. I throw that on the table because I had not thought of it until this morning, and I am not trying to solicit a detailed response.

Mrs Lackey—Not being a constitutional lawyer, I am probably obliged to take that on notice so that we can consult with our lawyers in Wellington. You asked for an instinctive reaction. I think, in principle, the New Zealand government has taken and is taking a very pragmatic approach to the various avenues of bringing our two economies closer together, removing impediments to freer flows of trade and to other economic issues.

You mentioned the therapeutics agencies. I will comment briefly on that. Our two governments are in the process of setting up a joint therapeutics agency. This will in a sense be the first genuinely binational Australian and New Zealand body. It will be set up by a treaty but will be implemented by legislation both in New Zealand and Australia that effectively mirrors the other. Each parliament will pass its legislation, but to all intents and purposes that legislation will be identical, although there might be some minor differences due to different parliamentary processes. One can see in that an example of where both parliaments remain sovereign and pass legislation, but the legislation is in effect virtually the same.

Mr KERR—I understand that. I am delighted that that is happening. One of the interesting points that the Attorney's submission put to us was that, although it was never intended, when the High Court struck down mirror legislation approaches in a couple of High Court cases which

touched on issues which do not really relate to constitutional problems between Australia and New Zealand, they struck lucky in a sense in utilisation of the references power. That avoided the problem where, just because of time passing and minor variations happening from jurisdiction to jurisdiction, with the best of intentions mirror legislation got rather tarnished because one jurisdiction took a particular course in one area and another took a different course in another area. And the restraint on misuse of this reference arrangement is that any of the parties which pursue aims and objectives which are not common then risk the fragmentation of the whole by the withdrawal of the reference. So they were suggesting that, almost by accident, a much more convenient, effective and utilitarian kind of model was found than each parliament passing rules and then having different timetables for their legislation and different priorities in cabinet and what have you, so that these things sometimes got out of sync.

Mrs Lackey—Thank you for that. To the extent that I can provide a more detailed explanation in writing after reference back to New Zealand, I would be very happy to do so. In terms of that question of the possible divergence of laws over time, that is something that, in their meeting last month in Melbourne, the Australian Treasurer and the New Zealand finance minister commented on, in particular with reference to the memorandum of understanding on business law. Both ministers were mindful that, over time, Australia and New Zealand would in a number of areas perhaps be able to bring their laws very closely together so that if they were not identical they would certainly be harmonised. However, with the passage of time there is always the prospect that we would start to diverge again, not because of any particular intention on either side but, rather, because that is just how things happen.

In the Memorandum of Understanding on the Harmonisation of Business Law, both governments explicitly recognised the challenge of maintaining alignment in areas where there are coordinated regimes. That issue of divergence is something that both our governments are mindful of. I appreciate that does not fully respond to your question, but perhaps it is a sidelight on it.

Mr KERR—You have responded much more fully than I could have, had that been thrown at me at short notice, so thank you.

ACTING CHAIR—Following on from Mr Kerr's line of questioning: accepting the proposition that legal harmonisation of a number of laws between our countries is achieved, is it possible that separate judicial interpretation in different jurisdictions could erode such harmonisation over time? A court in New Zealand that is unique to New Zealand might see the law differently from one in Australia. I put this in another way to the Attorney-General's Department: could we be wasting our time? In other words, is it all too difficult?

Mrs Lackey—I think this gets to the essence of the extent of political commitment on both sides of the Tasman by both our governments to making these initiatives towards a single economic market work. Apart from the regular consultations between senior officials of our various departments, New Zealand ministers do take part in Australian ministerial councils where they have an opportunity to be part of the discussion about perhaps new or emerging trends amongst Australian jurisdictions, so they can keep themselves well informed in that respect. There is a whole structure of very high-level consultation between Australia and New Zealand headed by the annual meetings between our two Prime Ministers. Our foreign ministers meet every six months. Our trade and economic ministers meet once a year. Our defence

ministers meet once a year. So there are regular, high-level exchanges, and one would anticipate that through those mechanisms it would be possible to detect if there were different interpretations arising in our two countries. Given a political will to address those divergences or differences, that issue could be tackled.

Mr Beatson—There are two things that are important here. As for the first one, you are right: there is that common law tradition that exists in both Australia and New Zealand and that has the potential to have the effect you outlined. I think it is interesting to look at where the judiciary then looks for precedents. Take the recent High Court case on industrial relations advertising as an example. Peppered throughout that judgment are references to the Auckland Harbour Board case of several decades ago. It is interesting that from something as obscure as that you are starting to see New Zealand precedents reflected in Australian High Court judgments.

ACTING CHAIR—Of course.

Mr Beatson—In that instance you have got a situation where the judiciary on each side of the Tasman is particularly aware of the judgments being made in the other jurisdiction. Certainly the interactions I have had with the judiciary in New Zealand suggest that that is something they value because of the range of precedents that exist.

The second thing to say—and you would have heard from the Attorney-General's Department this morning on this—is that there is work being done on trans-Tasman court proceedings and enforcement. A lot of that stuff is to start down that track, to try to make sure that there is more alignment in that part of the regulatory environment.

ACTING CHAIR—So we need both political and judicial goodwill?

Mr Beatson—To the extent that what we are talking about is a regulatory system, we have got to have all parts of that system starting to work together at least in some fashion.

Mr KERR—I have raised three issues which may be more problematic. The first is the Kyoto protocol. I am wondering whether there are any areas for friction, given that New Zealand now has the capacity to enter into and has entered into arrangements which provide trading rights and the like in carbon credits, and whether there is a problem of intersection between New Zealand's participation in the Kyoto protocol and CER entitlements. I am not sure whether it would emerge or not. It seems to me to be something that at some stage is likely to raise a problem.

Mrs Lackey—I am not aware of there being issues in that area, but I will take that question on advice to get further written comment to you. While New Zealand is a signatory to the Kyoto agreement, we are watching with great interest the new six-partnership arrangement that Australia has recently entered into. A number of the provisions are seen in that arrangement as being supportive of the aims of the Kyoto agreement. I should not refer to the Australian government's position, but as I understand it this new partnership is seen as not being in competition or conflict with Kyoto but broadly supportive of the aims. On the specifics of whether there is scope for difference given our different stance on climate change, I would have to get advice on that, if I may.

Mr KERR—On copyright, Australia has undertaken to make quite substantial changes to its own copyright regime as a result of the free trade agreement it entered into with the United States. This committee has recently looked at some of those issues and completed a rather difficult inquiry at short notice. It would seem potentially an area of complexity in the free trade arrangement—intellectual property more broadly, perhaps, including patents, designs and the like. I just wondered whether that has been picked up as an issue in discussions between the governments and whether it is something we should focus on.

Mrs Lackey—Again, I do not have detailed information on those issues. I might ask Ms Wilson to comment, but we are happy to take that on notice to provide fuller information after consulting with Wellington.

Ms Wilson—At the moment, our laws on all areas of intellectual property are done completely separately in New Zealand to Australia. In the last five years there has been an update of quite a lot of the New Zealand legislation on intellectual property, including on copyright. In doing that they again came over here to see where Australia was headed, and I think they also looked at where the US was going. I think that review has been completed and the new law has been passed by Guy's ministry—the Ministry of Economic Development. I am not sure whether they have any time line within that to have another look at the legislation based on changes that might have been made in Australia pursuant to the US FTA, and we can take that point on notice.

Mr KERR—We have not made our changes yet, in fact.

Mr Beatson—Certainly, intellectual property is one of the coordination issues in the memorandum of understanding on business law coordination, and that is both coordination of policy as well as thinking about institutional arrangements.

Mr KERR—We should have taken that into account in our report. Sadly, we did not, but that may have been due to pressure of time. My last point is one that Mr Ferguson and I are acutely aware of, coming from Tasmania, where this issue has been a fairly hot one—and that is quarantine, in particular the case of apples and fire blight. I am told that there is an ongoing process, but is quarantine an area which is particularly outside of the CER type arrangement? How does it fit?

Ms Wilson—Quarantine regulations are still done completely independently, so they are not subject to the trans-Tasman mutual recognition arrangement or anything like that, and that is against the background that we each have different pests and diseases and we each want to maintain whatever disease-free status we have. There is cooperation going on at the lower level to try and align, for example, the quarantine requirements we have for third countries. So if the US are exporting something to New Zealand which they also want to export to Australia we are trying to talk to each other at the broad level to get those kinds of things aligned and facilitate trade across the border as far as we can. But quarantine itself, especially on sensitive issues like apples and the other commodities which are still under discussion, is still done completely independently—and there is a process in Australia for considering a request for access for our apples at the moment, which we hope will be completed soon.

Mr KERR—It turns people like Mr Ferguson and I into fierce little parochialists.

Mr MICHAEL FERGUSON—He's quite right about that —he's a southern Tasmanian and I'm a northern Tasmanian!

Mrs Lackey—I am obliged to comment that the New Zealand government's position on access to Australia for New Zealand apples is based on science—and science that has been confirmed through the WTO dispute settlement mechanism. Our apples have been barred from Australia for something like 84 years, and we look forward to an early resolution of the issue.

Mr KERR—I am not trying to provoke a trans-Tasman dispute here!

ACTING CHAIR—Thank you, Mrs Lackey, Mr Beatson and Ms Wilson for your appearance here today. Could you take on notice the other questions without notice and provide further material. Some of the members of this committee could not be here today and they too might want to ask specific questions of your government. The secretariat might put further questions directly to your government in relation to the matters that have been raised here today. Thank you very much again for your thoughtful and considered response.

Mrs Lackey—Thank you very much indeed. It has been a pleasure to be here and take part in this process. Clearly, the issues being reviewed by the committee are of enormous importance, certainly to New Zealand. In that respect, as your study draws to a close I leave with you the thought that you might wish to visit New Zealand to pursue some of these important questions very directly with the key New Zealand government ministers and departments. Thank you for giving us the opportunity to meet with you today.

ACTING CHAIR—What a splendid suggestion.

Mr KERR—Might I say that rather provocatively in earlier evidence I raised with the Department of Foreign Affairs and Trade the absurdity that at an executive level we have these close relationships but parliamentarians do not travel frequently to each other's country and we do not have entitlements to do so. It seems of a different age, when the relationship was quite different and the Tasman was seen as almost a three-day crossing, that we do not have an effective parliamentary dialogue on a routine basis.

Mrs Lackey—I absolutely agree with that. It had occurred to us—and we have raised it from time to time—that it would be a splendid idea if travel from Australia to New Zealand were regarded as domestic travel in terms of Australia's parliamentary provisions. It is our belief that that would allow for a greatly increased tempo of parliamentary cooperation and consultation—and that could only be a good thing.

Resolved (on motion by **Mr Murphy**):

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

Committee adjourned at 2.18 pm