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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Harmonisation of legal systems

THURSDAY, 6 APRIL 2006

SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 6 April 2006

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

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

Terms of reference for the inquiry:

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

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

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WARREN, Dr Tony, General Manager Regulatory Affairs, Telstra **1**

WATERHOUSE, Mr Paul Alexander, Joint Secretary, Property Law Reform Alliance **51**

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Committee met at 9.44 am

HOWARD, Mrs Rosemary, Managing Director Fixed Line and Packaging, Telstra

KOTLOWITZ, Mr Danny, Solicitor, Telstra

WARREN, Dr Tony, General Manager Regulatory Affairs, Telstra

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

I would like to welcome everyone here today. I am sure that our discussions will be productive. We have representatives from the Telstra Corporation here: Dr Warren, general manager; Mrs Howard and Mr Kotlowitz. 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 both your submissions and they have been authorised for publication. I invite you to make a brief opening statement—say, five minutes—before we proceed to questions.

Dr Warren—Thank you for having us here today. My opening statement, and the main point we would like to make today, is to really urge the committee to focus on the closer economic relations issues between Australia and New Zealand. In particular, we believe that telecoms need to be brought back into the ongoing development of those closer economic relationship arrangements. First of all, good morning. We are here on behalf of Telstra Corporation Ltd. Before I go on I would like to make the point that Mrs Rosemary Howard is currently managing director of Telstra's fixed line business, a role she assumed last year. For 3½ years before that she was the CEO of our New Zealand business. Hence, she really appears here in that capacity.

CHAIRMAN—Are you originally from New Zealand?

Mrs Howard—No, I am not.

Dr Warren—Danny is one of our senior lawyers who works quite closely with the Australian government on day-to-day trade issues. So hopefully we have people here who can work through those issues. I assume you are familiar with Telstra Corporation. You may not be familiar with Telstra's operations in New Zealand. Telstra has operations on both sides of the Tasman. Our wholly owned subsidiary in New Zealand, TelstraClear—

CHAIRMAN—Does that have 12 per cent of the market?

Dr Warren—Yes, it is the second-largest fixed-line telco operator in New Zealand, with 12 per cent of the market over there. It is behind the incumbent, Telecom New Zealand. TelstraClear has substantial operations in telecoms and pay TV, including its own residential access networks in Wellington, Kapiti and Christchurch. TelstraClear has been facing significant market access issues in New Zealand. We have long sought assistance from the Australian government in the context of the CER framework.

CHAIRMAN—So they are sort of like the Optus of New Zealand?

Mrs Howard—That is exactly right.

CHAIRMAN—So the problems that Optus are having here, you are having there.

Mrs Howard—More so. I would love to explain the differences, if you are interested.

Dr Warren—What I would like to emphasise is that we are very supportive of efforts by government to achieve regulatory harmonisation between Australia and New Zealand. It is obviously fundamental to the realisation of a single trans-Tasman market. Our view, however, is that the momentum has slowed in circumstances where a lot could still be achieved. There are further benefits that can be gained from both countries with modest cost and effort. We believe the government should seek to realise those benefits, particularly in the area of sectoral competition regulation.

While there is already a high degree of harmonisation in general competition laws between Australia and New Zealand we think that little attempt has yet been made to harmonise or even coordinate sectoral competition regulation. We believe this is an important oversight. Regulatory harmonisation and national competition policy provided massive impetus within Australia to the creation of a single economic market. Such domestic initiatives provide an important precedent for the future development of the trans-Tasman relationship. Telstra is concerned that the CER agreement does not appear to have kept pace with other international agreements. Telcos are a clear example here. The free trade agreements we negotiated with the US and with Singapore both had telecom chapters but the CER contains no such telecoms chapter.

CHAIRMAN—Maybe that is because it was an earlier agreement.

Dr Warren—Yes, exactly. That is the point. Once upon a time the CER really was the cutting edge agreement. It led international trade agreements both in depth and scope. Regrettably, we think it has started to fall behind. I think that has been a loss to both countries, really. Our submission is that both economies would stand to benefit from updating the CER by including the telecoms chapter. As Telstra has identified in its submission, the telco sector is critical to the future prosperity of both economies; it is clearly an important sector.

There are currently significant divergences in regulatory approaches. New Zealand has a very different regulatory model from Australia. We believe there is considerable scope for greater coordination, which would create much more of a single market. We are disappointed with progress to date on the inclusion of telecoms within the framework for further work of the CER.

Telstra has been making submissions to government requesting that the development of a much more detailed treatment of telecoms be incorporated in the CER work program for a number of years. In the recent business memorandum of understanding work program—

CHAIRMAN—What responses have you had to those submissions?

Dr Warren—Not a vast amount, it has to be said. It is fair to say that we have decent engagement.

CHAIRMAN—No-one can deny the logic of it.

Dr Warren—We have decent engagement. Basically, telecoms were excluded from the MOU on the grounds that both jurisdictions were still bedding down their regulations. The rationale did surprise us, I must say, because our regulations have been in place since 1997 and the New Zealand regulations have been place since 2001—in fact, they are having a stocktake at the moment. So I do not think the bedding down argument really holds water. Maybe we can speculate on the reasons for that.

Mrs Howard—I am quite certain that Telecom New Zealand is behind the New Zealand government being influenced to argue that telecommunications should stay out of the agreement. Effectively, Telecom New Zealand gains from the differences between the two regimes. It has a highly protected monopoly in New Zealand. So your comparison earlier to Optus versus TelstraClear, for instance—

CHAIRMAN—It cannot have a monopoly if you have 12 per cent of the market. It might have overwhelming market dominance.

Mrs Howard—That is a fair point, but what I mean by that is that, whereas in Australia the challengers like Optus can buy access to bottleneck services from Telstra—and certainly you can argue at what price—in New Zealand that access to bottleneck services is not available.

CHAIRMAN—I think you have probably answered the question, but I was going to ask: what difficulties is Telstra having in New Zealand that Optus is not having in Australia?

Mrs Howard—I would summarise them around, first of all, the access to bottleneck services. For example, here you can get local services resale and you can buy that to sell to residential customers in Australia until you have enough critical mass to build your own services.

CHAIRMAN—Why would you ever build your own?

Mrs Howard—It is about a commercial decision of build versus buy. If you can build, once you have critical mass you can build cheaper than you can buy, then you make that decision as a challenger. In New Zealand you literally have had to build. There has been virtually no opportunity to buy. So here there has been local services resale since 1993-94. Over there we got that in 2004. And we got a two per cent discount, not a 14 per cent discount as the challengers enjoy here.

CHAIRMAN—So essentially, in New Zealand currently a subscriber is able to subscribe solely to TelstraClear—is that it?

Mrs Howard—TelstraClear is our subsidiary, yes.

CHAIRMAN—And you are able to provide to that subscriber the full range of telecom services, but your dispute is that you are not making the same margin on the services you buy in from Telecom New Zealand as Optus is on the services it buys from you?

Mrs Howard—My argument is that, first of all, the access to any services still has not occurred or has been very late. So, for example—

CHAIRMAN—But you said that in 2004 that access was given.

Mrs Howard—For residential phone line access.

CHAIRMAN—But not for business phone lines?

Mrs Howard—Yes, that is available as well, but not for broadband access—so that is still not available. Or, for example, a data access only became available within the last year, even though—and the New Zealand Commerce Commission is now pursuing Telecom for this—they proved that Telecom New Zealand was being anticompetitive in not providing us with data access services for six years. But it took them six years to take action against them; the damage to our business had by then been done. So it is too little, it is too late, it is too slow, it is too light and the margins are too small. We have been able to build in certain parts of the country and there we have 40 per cent market share because of the economics of the build equation but, beyond that, it is too expensive or not possible for us to get access.

Another point is that here we have what we call number portability—so if you choose to move from one service provider to another, for either fixed or mobile lines, you can do it, just like that.

CHAIRMAN—It is only for the last few years that we have had that.

Mrs Howard—Since 1997, I think, for local lines and since 1999 for mobile.

CHAIRMAN—Mobile took longer.

Mrs Howard—In New Zealand, it does not exist. There is no number portability. So, again, that really makes it far more difficult for businesses and residential customers to move service provider.

Dr Warren—But I think it is important to add to that, Mr Chairman, that we do not believe that New Zealand has got it fundamentally wrong and Australia has got it fundamentally right. We do not think there is a monopoly of wisdom on either side of the Tasman.

CHAIRMAN—Maybe there is no wisdom on either side!

Dr Warren—Or anywhere! Yes, exactly. But what we find to be somewhat silly is that, if you add New Zealand to the Australian market, it is akin to adding Queensland. And, if you add Australia to the New Zealand market—

CHAIRMAN—A less productive Queensland!

Dr Warren—Exactly. It seems to us that the vision of a single market makes a lot of sense. It would be good for us to have an expansion to that market. The problem is that the regulation in New Zealand is extremely light handed and the regulation in Australia, we would argue, is extremely heavy handed. But that is a separate debate. We believe that a dialogue between the two countries, to try and seek convergence of that regulation over time—we accept that it is not going to happen overnight—makes much more sense than the current situation, where we have a divergence of regulation.

CHAIRMAN—At least in respect of telecommunications we are really only dealing with regulation on one side of the Tasman compared with regulation on the other. With respect to other aspects of the law, we have the problems of different regulations among the several states. At least that is not a problem you have got.

Mrs Howard—That is correct.

Dr Warren—You have nice Commonwealth authority on this side, too.

CHAIRMAN—The other thing is that the New Zealand High Commission and the New Zealand government are taking a close interest in this inquiry—a higher interest, actually, than I thought they would. So the points that you made will be noted, no doubt, and the committee will consider those points in its report.

I said at an earlier hearing that the best form of harmonisation is probably to roll the two countries in together and just scrap all the states; that way you would not have a problem. But we have to look at what is achievable. What is your view on what is the best means of achieving convergence of regulatory laws on both sides of the Tasman?

What appeals to me is something like what we do with the Therapeutic Goods Administration—a combined regulator, with representation from both sides. But, if that is not possible—and often it is not, for sovereignty reasons—then we have to look at other mechanisms. I think we have suggested in the paper we have circulated to people that it could be done by referral of powers. That is obviously not going to happen between Australia and New Zealand but it could happen by, I think, a template model—a constitutional amendment does not apply. What would you say?

Dr Warren—I think we would probably agree with you; it would be nice to jump to a perfect world but that is not going to happen. What we have suggested in our submission is, first of all, on the regulatory front that we should have resource sharing and commonality between the two regulatory regimes. The Commerce Commission and the ACCC, as I understand it, work quite closely together already, and we would really encourage that process because there is a skill sharing and a mindset sharing—

Mrs Howard—And a shortage of skills as well.

Dr Warren—Yes, a shortage of skills. And that would be really a very useful step forward. That is just to do with the implementation of divergent regulation. The question is: how do we get that regulation converging again, as has happened at the competition policy layer—the general competition layer. I do not think Australian laws should be imposed on New Zealand, not that they ever would be, or vice versa. As we say, there is probably a nice mid-Tasman point we could get to, but how are we going to get there? The best way would be, whenever there is a change in the Australian legislation, to give the New Zealand government standing, not in the legislative process but in the inquiry process. In other words, involve them from the beginning, and vice versa. So you would have the parties constantly involved in that dialogue, and we would see if we could get some kind of convergence of view.

CHAIRMAN—That makes a lot of sense, because these days, when ministers are looking at other legislative changes, they will consult a whole range of organisations and even actually take on board what those organisations say, but there is a consultative process towards working up amendment.

Ms ROXON—Does that not happen in the telecommunications industries in the way that it does, for example, with the state and Commonwealth attorneys-general, who have a standing communication with the New Zealand Attorney-General?

Dr Warren—My understanding is that there is a dialogue between the department of communications and its counterpart in New Zealand. That is quite an interesting and informed dialogue, as I understand it, but there is not the formal standing.

Ms ROXON—There is no sort of trigger if actual legislative changes are proposed?

Dr Warren—That is right.

CHAIRMAN—I think there is a standing committee of attorneys-general within Australia and across the Tasman and I think with the six states, two territories and New Zealand.

Ms ROXON—That is why I was asking whether, at the telecommunications level—

CHAIRMAN—If there is not, I think it would be a good idea to have one, but you would only have two participants, wouldn't you?

Ms ROXON—It is true that you do not need to have the states.

Dr Warren—The next step, we believe, is this business with MOU on the CER going forward, and unfortunately telecoms have been dropped off. I suspect that there are good reasons for that, political reasons from the other side.

CHAIRMAN—Can you tell us what they are?

Mrs Howard—There has definitely been influence on the other side of the Tasman.

Dr Warren—Telecom is what percentage of the stock?

Mrs Howard—It is 28 per cent of the New Zealand Stock Exchange. So their influence in New Zealand is absolutely overwhelming when you are a competitor against them. They are well connected at every level of decision making. Last year they wrote to the New Zealand government reminding them of the amount of New Zealanders who depend on Telecom for their wealth going forward, reminding them that, if there were regulatory changes, should they make it more of a level playing field for challengers as well as Telecom's incumbent position—what that might do to the share price and so on.

Ms ROXON—It all sounds quite familiar, but maybe we should not open those debates here.

CHAIRMAN—I was going to say that your own chairman has been quite frank.

Mrs Howard—This was said before you arrived: the level of unevenness for the challengers in New Zealand versus the incumbent is so much bigger. When we were arguing in New Zealand for opening up of the regime—and this is also on the record—Optus, MCT, iiNet and other telecommunications companies here all supported what we were arguing.

CHAIRMAN—That was the question I was going to ask you.

Mrs Howard—They want to be able to provide trans-Tasman solutions as well. They, like us, would like to be able to invest in New Zealand. So it is very much everybody against Telecom New Zealand's position. Telecom New Zealand is using the differences and gaming the differences. Everyone else wants to get to a level playing field. If I can give you a statistic, about 80 per cent of the top 500 companies in Australia have investments in New Zealand, on average. That is why we need to serve that trans-Tasman market. In telecommunications, it is almost impossible for Australian companies to invest, because it is so difficult.

CHAIRMAN—Ms Howard mentioned before you came in, Ms Roxon, that for three years prior to holding her current role in Australia she was the chief executive of Telstra's New Zealand subsidiary.

Ms ROXON—Yes, my apologies. It is only Qantas and the high winds in Sydney that we can blame for my delay. I am sorry about that.

CHAIRMAN—You sold Qantas off though! We are selling Telstra.

Ms ROXON—If you have already covered this, I can read it in the *Hansard*. I am interested in key things greater parity across the Tasman might deliver to consumers. Have you explored that yet?

Mrs Howard—I would very much like to answer that question if I may. If you look at the uptake of, for example, broadband services in New Zealand, it is in the bottom quarter of the OECD. It is very far behind Australia. If you look at mobile phone call usage in New Zealand, it is way behind Australia because of the exorbitantly high prices that are charged in New Zealand, including because of the lack of regulated prices for terminating calls on to mobile networks. And now the New Zealand government agrees with this: there is no question that the

productivity and quality of life of New Zealanders is being impeded by the telecommunications regime they have at the moment in New Zealand. It is too light and therefore consumers are not getting the benefit and the economy is not getting the benefit. If you flow that through to Australasia, Australia and New Zealand together are about two per cent of the global economy. There is no question that the overall productivity and benefit to consumers, to Australasians, is being impeded by that.

Ms ROXON—So it is mostly in take-up rates that you can see the difference in at the moment, and pricing, obviously?

Mrs Howard—Yes, correct.

Ms ROXON—So the benefit of the change will be to the New Zealand consumer?

Dr Warren—No, that is where I was about to jump in.

Mrs Howard—To the lot.

Dr Warren—I think that is right. At the moment, if you again added the population of Queensland to Australia—another three million or four million consumers—our ability to purchase mobiles on the global market would go up and therefore we could get cheaper prices. That is in the sense of simply enlarging our domestic market. Of course, we have a presence in New Zealand and we have a global purchasing source. But if you can get a single market, a bigger market, you get all the synergies, all the cost-benefits of that. In Australia you would have another large player in Telecom New Zealand.

Ms ROXON—I understand it from a market point of view. What I do not understand and what I am seeking some feedback on is why the legislative differences are the ones that are causing that differential in the market. What we are looking at is the harmonisation of laws, not what any general market arguments might be about having a bigger consumer base or something.

Mrs Howard—Right. This was a big learning curve for me when I was there. When you look from the New Zealand end, Australia looks legalistic, bureaucratic and—excuse me, Mr Chairman—blokey.

CHAIRMAN—Blokey?

Mrs Howard—Blokey. New Zealanders, by comparison, are very innovative. They are highly risk-taking. It is quite a different culture. Therefore, when you look at the general competition law regime in New Zealand or the extent of legislation to protect consumers in New Zealand, before you get to the specific issue of telecommunications, it is extremely light legislation, and there is this concept of personal responsibility. Kiwis are not looking to be protected in law in the way Australians will look to be protected in law. So there is this very big difference. That, I think, has influenced strongly the structure and therefore the enactment of the telecommunications legislation in New Zealand.

Adding to what Tony said before about what could work, one other suggestion is that, if we were to look every year at the differences in the telecommunications legislation between the two

countries and what is and is not working, it would actually help us to see the best of both. Because it is clear that for New Zealanders, for the New Zealand economy and therefore, as Tony says, for the whole of the Australasian economy, the telco regime there is not working. And because it is not working for consumers, of course, it does not work for investment if you are an Australian company—or any other company—trying to invest there and to add to the choice and competition for that part of the Australasian geography.

Ms ROXON—Sure. I will not go back over the things you have covered, or we will be running late for the entire day.

Mr Kotlowitz—If I could add to that, I think there are very obvious benefits to consumers. For example, you would no longer have roaming between New Zealand and Australia on your mobile handset. You would no longer have to obtain roaming. It would be one market. It would just be very simple.

CHAIRMAN—I was in East Timor during the United Nations period and Telstra then provided a mobile service. It was as though you were in another part of Australia.

Mrs Howard—On this point of roaming, you should please watch out when you go to New Zealand, because it is three or four times more expensive for an Australian to roam in New Zealand than it is for a Kiwi to come and roam in Australia. That is the sort of imbalance that we have at the moment.

CHAIRMAN—Presumably you were referring to 'roaming' in a telecommunications sense.

Mrs Howard—Mobiles roaming, yes. Is there any other?

Ms ROXON—Beware of either Australians or New Zealanders roaming!

CHAIRMAN—If this harmonisation could be achieved, what benefits—financial or other—would you see for both countries?

Mrs Howard—You would definitely see improved productivity in the New Zealand economy. You would see improved productivity and performance in New Zealand and Australian businesses, because you would have a bigger domestic marketplace, all being done the same way and done once, and that would improve the efficiency not only of the telecommunications industry but also, therefore, of every business sector and consumer grouping that depended on telecommunications for part of their productivity.

CHAIRMAN—I might have missed one of the answers to Ms Roxon, but how achievable is it—and I know it is technically achievable but how possible is it—that Australia and New Zealand could be just one mobile market and all players could play?

Mrs Howard—Entirely.

Dr Warren—Completely.

Mrs Howard—It is like Queensland and Tasmania.

Dr Warren—Or Queensland and New South Wales. Essentially, you have two jurisdictions and hence you have a whole series of regulatory disjunctures. That means that, for example, when you go to New Zealand with your mobile phone, you have to roam onto another network. That is fine, but you do international roaming, not just domestic roaming, and so you pay these quite exorbitant prices. I think there is absolutely no reason, given political will on both sides, that you could not have a single market. This is not asking for a single currency. This is not something that fundamental.

CHAIRMAN—They have talked about a single currency.

Dr Warren—Yes, but this is not something that fundamental or that difficult.

CHAIRMAN—How would that be achieved and how would you regulate it?

Dr Warren—We are very cognisant of this. Rosemary gave me this lesson early on, while she was still in New Zealand. We have to be very careful. We are not trying to preach to and impose our position on the New Zealanders.

CHAIRMAN—You made that point.

Dr Warren—I think it is very important to keep making it. There is absolutely no reason we could not have a harmonised regulatory regime, where both sides come to a common agreement. As Rosemary says: the best of both worlds. They do some things very well and we do some things very well. If you can bring those two together, there is absolutely no reason a common telco market could not develop very quickly, because you would have quite large cross-shareholdings. Telecom currently owns the third largest telco in Australia, AAPT, and we own the second largest; their Vodafone is a major mobile player in both countries. We have a lot of cross-company ownership already. So there is absolutely no reason, if you got the regulatory harmony right, it would not act as if you were just switching states, from a telco perspective.

Mrs Howard—But the numbers of players in New Zealand also perhaps demonstrate that that regime is not working. There are only two mobile networks in New Zealand compared to six here, so consumers here are getting far better benefits from competition. Here we have about 100 fairly significant players in the telecommunications space, and they have less than 10 in New Zealand. It is very difficult to make investments work in New Zealand at the moment.

CHAIRMAN—I have one question with respect to the cost of mobile calls. I realise that is a nightmare. I believe people get conned by companies saying, 'You'll get a free phone and we'll give you X number of dollars worth of calls,' but then charging $3 a call. But, broadly, how does the cost of an ordinary mobile phone call within New Zealand today compare with a call within Australia?

Mrs Howard—I can only answer approximately because I am about nine months out of date now but it is, on average—probably, conservatively—twice as expensive. Let me give you an anecdote which again demonstrates this. When you meet fairly influential people in New Zealand—people of, perhaps, my age bracket—they will be texting, because they cannot afford to make calls. Calls are so expensive in New Zealand that they are an inhibitor to how people behave.

CHAIRMAN—They text here, don't they?

Mrs Howard—But they use that as an adjunct to voice calls. Particularly the young people text—they prefer to do that, not to talk. But if you take the total voice minutes in the market, all the voice minutes in Australia and New Zealand, and you look at the balance between fixed networks and mobile networks, in New Zealand, about 11 per cent of the total voice market is on the mobile network. Here, it is about 22 per cent. About a quarter of all the voice minutes are on the mobile network. There, it is about half that. It is just too expensive for people to use.

CHAIRMAN—As there are no more questions, I would like to thank you for attending the hearing. We will send you a copy of the transcript to check. You made some quite valuable points and we appreciate your comments. If you think of any additional information between now and when we report, feel free to convey that to the secretariat.

Mrs Howard—Mr Chairman, could I add one thing that I would like to acknowledge and really appreciate. When I was in New Zealand we saw lots of visiting MPs from Australia of Labor, National and Liberal persuasion. Everybody was supportive of Telstra being in New Zealand and supportive of providing an environment in which that would work for Telstra and for Australia in general. I really appreciated that support, but it would be fantastic if we could actually translate that into something that would work—that is, get this MOU going.

CHAIRMAN—I think that a common market for mobiles would be a positive thing, but the only way you could sell it to New Zealand would be if you could prove that whatever we are suggesting is actually of benefit to New Zealand and New Zealanders in addition to us.

Mrs Howard—Absolutely. I think the New Zealand government is starting to understand, when they look at their broadband uptake and the mobiles, that it is not okay. So it is a really good opportunity. This year they are reviewing their telco act, which has been in place for five years. It is a really good time for a conversation about this issue.

CHAIRMAN—Yes, they have just been re-elected as well. Thank you very much.

[10.17 am]

DICKINSON, Mr James Hugh, Licensing Executive, Screenrights

LAKE, Mr Simon Thomas, Chief Executive Officer, Screenrights

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission and authorised it for publication. I invite you to make a brief opening statement to highlight some of the points you would particularly like us to take note of, then we will move to questions.

Mr Lake—Thank you very much for the opportunity to address the House of Representatives Standing Committee on Legal and Constitutional Affairs on the harmonisation of legal systems relating to trade and commerce.

CHAIRMAN—We have just done a report into copyright. You no doubt read that in passing.

Mr Lake—We have. We could make some comments on that too.

CHAIRMAN—I am sure you are not too happy with that one.

Mr Lake—We try to be happy. We will not repeat our submission here, given the time constraints. But I will make some brief introductory comments and would welcome any questions that the committee may have. Screenrights has over 2,340 members and of these members 1,151 come from Australia and 166 are from New Zealand. These members are the underlying rights holders who create and invest in film and television programs. Screenrights has been declared by the Australian government since 1990 to license educational institutions to copy broadcast radio and television programs and, from 2001, to be able to communicate these programs. Screenrights has offered a similar voluntary service under the New Zealand Copyright Act since 1998. The Screenrights licence covers over 4 million students in Australia and over 430,000 students in New Zealand educational institutions.

Screenrights's motivation for making a submission to this committee is to highlight the different access and use regimes for educational copying of broadcasts in Australia and New Zealand. In short, Australian educational institutions have the right to copy programs from broadcasts of radio and television and to then communicate these programs under part 5A of the Copyright Act. In New Zealand the relevant provisions of the Copyright Act do not allow for the same flexible use of broadcast material. Section 48 of the New Zealand Copyright Act allows for the copying of broadcasts. So there is no equivalent right of communication to the public in New Zealand.

Australian teachers are able to copy a television program with absolute certainty for their educational purpose. They can then send an excerpt of this program to their students by email,

they can put this program on a central cache and they are able to reticulate it into multiple classrooms—again, with absolute certainty. The situation in New Zealand is less certain. We understand that the New Zealand government is seeking to address this as part of the digital copyright review. That review started in 2001; if we had a competition as to the pace of reviews I am not sure who would be winning.

CHAIRMAN—The bureaucrats would be.

Mr Lake—Our understanding is that the review is complete and that a copyright amendment bill is ready for introduction. Our understanding is that this bill is scheduled to be introduced this year and referred to the select committee. However, as in Australia, getting priority for bills is always a difficult task. That said, Screenrights would urge the New Zealand government to give this matter appropriate consideration.

Screenrights and the New Zealand Vice-Chancellors Committee put in a joint submission to the New Zealand Ministry of Economic Development, urging them to address this disparity. The impact of this disparity on copyright owners is that, when creators license a broadcast, they expect in part subsequent royalties from the copying and communication of these broadcasts in various markets, including educational markets. By the New Zealand act not recognising this right and not facilitating licensing of these cases, copyright owners are economically disadvantaged and copyright users have restricted ability to access this material. In terms of reducing costs, because the New Zealand act does not facilitate collective licensing of these cases, these cases highly inflate transaction costs attached to these areas, which makes them inefficient to the point that it is impossible to apply to use them.

To conclude, it is critical to our submission that New Zealand need to introduce a right of communication into their Copyright Act—as they say they intend to do—and this right should extend to the educational provisions of the Copyright Act. This will create greater clarity for new media and will put New Zealand educators in the same position as Australian educators.

CHAIRMAN—I will make a note of that, and we will consider that as a committee when we come to do our report. Is that the only downside of lack of harmonisation in this area that your organisation has been able to identify?

Mr Dickinson—There are additional disadvantages which do not directly apply to Screenrights, because our particular area of interest is in collective licensing as opposed to direct transactional licensing. But copyright owners would, I am sure, point to a more general problem with regard to the lack of certainty when it comes to making material available in new media forms in New Zealand. Because that is not clearly defined within the New Zealand act and dealt with in copyright terms, it is an uncertain and difficult process.

CHAIRMAN—What about from the Australian side of the Tasman? Are there any disadvantages to the lack of harmonisation?

Mr Dickinson—I suppose that previous comment applies to Australian copyright owners. A significant export market for Australian copyright owners is New Zealand and, when they come to make the material available in New Zealand, that same situation would apply.

Ms ROXON—That is what I was going to ask; I just wanted to make sure I had the exchanges the right way around. If an Australian educational institution, rather than a copyright owner, wants to use New Zealand authored material for distribution and use within Australia, what regime covers them?

Mr Lake—At the moment, it is the Australian copyright; it will always be within the jurisdiction in which the broadcast—

Ms ROXON—Within the jurisdiction that they are in. So there is a potential loss to the Australian author for institutions that want to use material in New Zealand. There is a benefit, or it is neutral, if there is New Zealand authored material being used in Australia. It is not as if you have to apply both regimes and that is part of the difficulty; it is more that you are advocating on behalf of the authors whose material is being used in New Zealand, which is obviously the main gap. Have I got that all the right way around?

Mr Lake—We are administering both schemes within Australia and New Zealand.

CHAIRMAN—Same role in both countries, exactly?

Mr Lake—In Australia we operate under part VA of the Copyright Act, and the Attorney-General and the parliament oversee our operations. In New Zealand, it is a voluntary, use-it-or-lose-it scheme, so we do not have that same sort of statutory backing.

CHAIRMAN—Is there an editor in New Zealand doing the same things as you?

Ms ROXON—Sorry to interrupt, Chairman, but can I just get an answer to this one or I will be completely confused. Is this a fair summary of how it works between the countries: the fact that there are different regimes does not make the job that you are doing particularly more difficult but it is just that you can see that there is an unfairness or that your members are not getting the returns that they would like?

Mr Dickinson—Probably we would say that applies not just to our members but also to the educational institutions. The submissions that we made in that area were joint submissions with the New Zealand Vice-Chancellors Committee. But that is principally the issue, yes.

Ms ROXON—Sorry, Peter, I just wanted to get clear in my head that we were talking about the same thing.

CHAIRMAN—That is okay. You said that over here you are effectively mandated under the Australian law to do this job but you do it in a voluntary sense in New Zealand. Are there are other organisations like your own doing the same thing in New Zealand on a voluntary basis?

Mr Lake—In New Zealand, as I said, it is a use-it-or-lose-it scheme. Screenrights were invited by all the main copyright representatives there, such as, for example, APRA, who represent the music industry, and AMCOS, who are also in Australia and New Zealand along with the Screen Producers Association and so forth. There is no absolute equivalent in terms of a copyright society which is able to administer all of those rights, but those rights holders invited us.

CHAIRMAN—So in practice it is the same thing?

Mr Lake—It is not quite the same thing, because having the statutory backing in Australia enables us to be confident that we have a complete repertoire—basically, anything which is broadcast is able to be covered. In New Zealand, we had to actually go to the High Court to establish our credentials, so it was a bit of a different process. But that has been done now.

Mr Dickinson—It also leads to greater transaction costs for the copyright owners again, because in New Zealand you have to individually obtain the mandate from each creator before you are able to licence their works. In Australia, because we, as the declared society, are deemed to be their representative for the purposes of this usage, we do not have to go through that task and so the transaction costs become cheaper and it is more efficient to all.

Ms ROXON—The main irritation you have, though, is really something that the New Zealand parliament has to fix rather than something that we potentially could. Obviously we will, in making our recommendations, still take account of the things that people have raised in submissions. But, ultimately—and presumably that is why you are making submissions to them, too—that is where, in this instance, the repair work needs to be done, isn't it?

Mr Lake—That is correct. The way in which part VA works is fabulously simple for Australian educators. They can copy anything from pay TV or from free-to-air, and then they can communicate that for their educational purposes and they do not have to think about it. In New Zealand they do not have that same flexibility. This is what drew the New Zealand Vice-Chancellors Committee to make this joint submission. As I said, I was in contact with the Ministry of Economic Development yesterday in New Zealand as to the progress of this legislation and, as I reported, as I understand the cabinet has considered it and is just waiting for priority. They told me it had category 4 priority—which sounds a little bit like a tornado—but I am not quite sure what that actually means in the scheme of things.

CHAIRMAN—Do you have any idea what is in that legislation?

Mr Lake—No.

Mr Dickinson—It has been said that one of the options is to introduce a communication right, but the form of that is not clear, and whether it would then extend to the additional exceptions has not been stated.

CHAIRMAN—When I looked at your submission I was somewhat interested to see that you get income of about $17 million from licences in Australia but only $1 million in New Zealand. You would expect to get more in Australia than New Zealand, but the disparity is more than I would have thought. Why is that?

Ms ROXON—It is the fact that the system is simpler here. Does that give you a higher return?

Mr Dickinson—It does, because it creates certainty for the educational institutions. As Simon said, when we first established the scheme there was scepticism: what is the extent of your repertoire, who do you represent, what programs can I copy and what can't I copy? In Australia

those issues never arise, so educational institutions can enter into an agreement with much greater certainty and know exactly what they are getting. It is a much more difficult task in New Zealand. In terms of the coverage of the licence, in the tertiary sector it is universal in New Zealand, as it is in Australia, but in the school sector take-up is much lower in New Zealand than in Australia. That is to do with structural issues in the New Zealand school system and the differences in the nature of the school system in Australia compared with New Zealand.

Mr Lake—The New Zealand school system is very fundamentally different in the way in which it is administered. Basically, each school has a school trustee association which almost acts as a board of directors for both public and private schools.

CHAIRMAN—Quite an attractive model.

Mr Lake—In effect, the ministry gives a budget across them and has some curricula outcomes. Each school has to then make decisions about that and speak to the relevant ministry of education about the possibility of a blanket licence. They deal with such things as insurance and Microsoft licences and a whole range of different things. Basically each school at each point makes a decision about where the resources go. In terms of copyright it is quite a difficult task, because obviously those sorts of questions have been put to the P&C. Speaking personally, from the P&C I am involved with, I do not think the understanding will necessarily be very high. They have a completely deregulated system which is in fact backed up by the School Trustees Association. The School Trustees Association operates—equivalents are always difficult—a bit like a chamber of commerce whereby the individual school can say, 'I'm having difficulty with X or Y issue,' an industrial issue or whatever, and they can get advice from the School Trustees Association. Our licence is offered through the School Trustees Association.

CHAIRMAN—I had better not open the Pandora's Box of discussing the education policy any further.

Ms ROXON—I am determined not to bite, Mr Chair, on any of these things. We have a wide enough reach. But I presume it does make a huge difference—the law actually being different but also the method you would use for your collection being so different in terms of how much material is paid for when it is copied or whether it is just not copied and not used because there is not a simple system to do it.

Mr Dickinson—Possibly it is a combination of both, but certainly that structural difference in the education sector is the biggest impact in terms of the actual collections we receive.

CHAIRMAN—Given the fact that we are dealing with copyright—I suppose you are lucky and a bit like telecommunications people in that you really have an Australian system and a New Zealand system; other people have state and territory systems as well—what would you see as being the best mechanism for harmonising the approach between the two countries? What would you see as being the most desirable way to make sure that even if a level of conversion is achieved it does not then diverge as time goes on?

Mr Lake—Talking between the relevant departments is often a good starting point. But being part of a permanent agenda just as, say, with the Standing Committee of Attorneys-General,

which has permanent items on its agenda, might be one way to go in terms of the CER process: to have intellectual property as a permanent discussion point.

CHAIRMAN—Do you know if the CER and the memorandum of understanding more recently covers copyright to any great extent?

Mr Lake—I used to know this. Unfortunately, I cannot give you that answer. Certainly in the terms of reference, intellectual property was definitely covered as being one of the issues of concern.

CHAIRMAN—It would be useful for it to be included, wouldn't it?

Mr Lake—Yes, it would. There are always sensitivities, as we all know, with parliaments wanting to make these decisions. But certainly within copyright an overall international structure has been created through the various conventions, which sets the base parameters. In terms of creating better mechanisms, I would like to take that on notice if I could.

CHAIRMAN—Of course you could. If you could get that information back to the secretariat, that would be good.

Ms ROXON—I am interested because I thought that, from the perspective of Screenrights and some of the other stakeholders in the copyright debate, there is always such a sense that in making any changes to the law, even here, there is always an issue of compromise. There are always competing interests. I am surprised that there would necessarily be a view that you would want to add to all of those competing interests another factor, being what is happening in New Zealand compared to Australia. You may also want to take this on notice: is there really any particular desire for there to be a harmonised copyright system between the two countries or is your priority more about fixing some of the particular problems, like you have raised in your submission? I would be a little bit surprised. The copyright debates here are always so complex and there are so many different interests that need to be taken account of that I would have thought it would be one area where there was not necessarily a big push to harmonise at the price of having another player at the table.

Mr Lake—Maybe. We are on the boards of both the Australian and New Zealand copyright councils. In this submission we look at it a lot from the educator's perspective, and they are saying, 'Why can Australian teachers do things we can't do?' Various proposals cross our desk from people who are trying to facilitate greater access, and we have to say, 'Fortunately in Australia you can have these more flexible uses and in New Zealand there is greater doubt.' Obviously the government, having conducted this inquiry, want to move on it.

CHAIRMAN—The New Zealand government?

Mr Lake—The New Zealand government, sorry. Obviously the New Zealand government want to move on it. It is just about the priority of the copyright debates.

CHAIRMAN—That brings me to a question. I presume you put the interests of your organisation and of your stakeholders to the New Zealand government during the course of their inquiry.

Mr Lake—Yes, that is correct.

CHAIRMAN—Have you made any submissions of any sort to the Standing Committee of Attorneys-General with respect to these matters?

Mr Lake—No, we have not. As you pointed out before, copyright is a Commonwealth issue.

CHAIRMAN—The standing committee includes New Zealand.

Mr Lake—No, we have not gone through that mechanism.

CHAIRMAN—I understand it does, yes.

Ms ROXON—I do not know if they are only involved in particular matters that affect them or if they are—

CHAIRMAN—No.

Ms ROXON—I think they are a standing member, but I do not think intellectual property gets dealt with very often at SCAG because the states just do not have to—

CHAIRMAN—It would be worth making representations to them.

Mr Lake—I did not know that, so thank you.

CHAIRMAN—I hope I am not giving you wrong information. I was on a ministerial council in relation to construction and something, and a New Zealand guy was there as well.

Ms ROXON—But, Peter, it has already been going since 2001. SCAG is not known for speeding things up, so it may not be—

CHAIRMAN—A lot of these councils are not renowned for speeding things up. Do you have any further questions, Nicola?

Ms ROXON—I did have a question and now I have completely forgotten what it was. I was just thinking again about this process for the changes that you might look at in New Zealand, but I am interested in your views about copyright generally and harmonisation. Now I have remembered the question I was going to ask you. You said there are international standards. Although there are plenty of international conventions, if you used them, you would not come up with Australian law in the form that it is in. They provide some base in some areas but you could not say, 'We'll negotiate some sort of change to both New Zealand laws and Australian laws by using just those international instruments,' could you?

Mr Dickinson—I think both countries would say that they already comply fully with Berne and Tripps and so forth.

Ms ROXON—I am not suggesting that they do not comply, but they do not provide you with the detailed regimes that we have in place.

Mr Dickinson—No. That is right. You can both be complying and still have quite different regimes.

Ms ROXON—So, if your desire was to bring about harmonisation between Australia and New Zealand copyright laws, the international instruments would not provide you with a template to do that.

Mr Dickinson—Only at a very broad brush level.

Ms ROXON—It would be interesting if you could take that on notice and let us know whether it is something that is desirable or not. For my part, I would be very wary of making a recommendation about it. But Viscopy are coming in this afternoon, and we can ask them; their submission is very similar to yours on this particular aspect. We will ask them about those things as well.

Mr Lake—We know that Minister Maharey, who is both the Minister for Education and the Minister for Broadcasting, is very keen to see the audio visual copying licence work as smoothly as possible. It was in response to the inquiry to say where it is different, where our access regime is different and what are the costs?

Ms ROXON—That is good; thank you for that.

CHAIRMAN—Thank you, gentlemen, for appearing before the committee. We will send you a draft of your evidence for checking. Could you get back to us with corrections, if any, and also the additional information you have undertaken to provide the committee.

[10.40 am]

EDWARDS, Mr Stephen Mark, Legal and Market Consultant, Australian Finance Conference Ltd

CHAIRMAN—That is an impressive list of companies you represent, Mr Edwards. On behalf of the committee, I welcome you to this hearing. Is that a full-time position—

Mr Edwards—No.

CHAIRMAN—or an appointment as a part-time consultant?

Mr Edwards—I used to be employed full time with the conference but a number of years ago stepped aside and took on some other interests.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received the submission from the Australian Finance Conference and have authorised it for publication. I now invite you to make a brief, opening statement of, say, five minutes and then we will ask questions.

Mr Edwards—First of all, when we saw the inquiry's terms of reference, the AFC was really pleased, for reasons that will become apparent in a moment. The Australian Finance Conference, or the AFC, is a finance industry association. It has about 60 member companies covering finance companies, building societies, banks and service providers to the industry—those involved in credit reporting, debt collection and so forth. The Finance Conference also services a number of other industry associations that have an interest in this area: the Australian Equipment Lessors Association, the Australian Fleet Lessors Association, the Queensland Association of Permanent Building Societies, the Insurance Premium Finance Association and the Institute of Factors and Discounters Australia and New Zealand.

The differing legal systems in Australia and New Zealand impact upon the members' business operations within Australia and for those who have businesses on both sides of the Tasman. In terms of the industry association work that the AFC does, it regards itself as managing compliance regulation and developments in 10 jurisdictions—all the states, the Commonwealth and New Zealand—and it is becoming increasingly involved with New Zealand.

CHAIRMAN—Is that 10 jurisdictions?

Mr Edwards—Yes.

CHAIRMAN—Six plus two plus one, isn't it?

Mr Edwards—We have six states and two territories plus the Commonwealth plus New Zealand. Harmonisation or interaction across the Tasman is quite a growing feature. In terms of

what we would regard as the legal systems in trade and commerce, it is generally what you would call commercial law, consumer protection and fair trading law and general regulation. The AFC has been seeking harmonisation since it was established in 1958, with its first foray into attempts at uniform commercial law in this country, in some respects, with the uniform hire purchase acts, as they then were.

Where we see harmonisation as enabling us to obtain not only predictable outcomes but consistent outcomes. The overall benefits to business operations and efficiencies and to the customers of the members include obviously costs of systems, procedures, contracts, staff training, staff development and staff mobility. We have a number of areas identified in our submission, and I will not go back and refer to those at this stage. I would like to invite comment and discussion. Thank you.

CHAIRMAN—How would you suggest that the very desirable outcomes you, and I suspect the committee, would like to see should be achieved, given the fact that we have two countries and a federal system in one of them?

Mr Edwards—Obviously there is no one, simple answer to that. There are a couple of instances where the conference has experienced this in recent times. One is in the area of stamp duties. For a long time a key priority of the AFC was to remove the distortions between the stamp duties in the different states. In the mid-nineties there was a crystallisation of thought across the states and, through a collaborative process, there was a move towards a more common basis for the application of stamp duties. In the financial services area, a lot of those taxes will be gone in about three years. But we have had a window of opportunity. That came through a collaborative process rather than a formal process.

Ms ROXON—I was going to ask you about that. Do you think in your areas that there is by and large political will to obtain that consistency? I was thinking in particular about debt collection and other areas. Is it just that they have grown up as separate systems? Stamp duty is probably a different example, because there has been a strong history of states wanting to be able to set their own rates and things. But in the other areas do you sense that there is any ill will towards harmonisation or is it more that it is just a practically difficult thing to get everyone together?

Mr Edwards—It is a mix. Predominantly, it is difficult to get everyone on the same page. There is no question about that. Different states and territories et cetera have different policy priorities. Sometimes, too, it comes down to the fact that different areas—like debt collection—fall within different areas of government across the country. For instance, in New South Wales the police regulate the actual debt collection. In Victoria and Western Australia it has just moved from the police over to fair trading and consumer affairs, and in most of the other states and territories it is consumer affairs. Once you get those at least in the same portfolio, it becomes a lot easier to achieve. Yes, there are clearly ideals to get to harmonisation.

The Consumer Credit Code was born out of a formal ministerial agreement between the parties based on a template approach. That has been fairly stable for the decade that it has been in operation. In large measure, compared with comparable federations internationally in many ways the credit code is a bit of a shining light because of the degree of commitment that has gone into starting it getting it to where it is now as a national law. However, over the last five

years there have been instances of different jurisdictions having different policy priorities, and that has put tension into it. As to how that can be resolved, I do not know if there is any one happy answer. Particularly when you get one state legislating differently from another, where you have a degree of harmonisation, you end up with the de facto goalposts moving. We have a national market. Companies are not interested in having a specific contract for a specific state or territory just because the rules are different there.

Ms ROXON—What do businesses actually do? Do they have contracts that comply with each regime?

Mr Edwards—They do their best to do that.

CHAIRMAN—I think you would find that, even in the real estate industry, conveyancing is dramatically different. The form of contract is dramatically different from state to state. You have done a great job of outlining all the problems. What are some solutions?

Mr Edwards—I went back to the report of the Wallis inquiry into the financial system and I think its final recommendation, 114, recommended the establishment of a panel on commercial laws. I think that was at the suggestion of the Victorian Law Institute at the time. The government response to that particular recommendation was that it was a matter for the states and territories and that is where it has stayed. One thought is that maybe it is not a matter for the states and territories—that commercial law, broadly speaking, has a responsibility across all the jurisdictions. The idea of a panel of that nature would be to identify areas where there are problems, assist in getting it to a harmonised state and, importantly, maintaining it there.

The law institute would have been drawing upon some examples from Canada and, particularly, the US. The US has what is called a conference on uniform commercial laws, which involves academia, industry and government all working together to try and maintain things on a reasonably harmonised basis.

CHAIRMAN—One of the problems is that, as I said, with six states, two territories, the Commonwealth and New Zealand, we are a federation and we are also two countries and while all of those political entities exist there will inevitably be differences. Our job is to work out in what areas harmonisation is highly desirable. But, almost by definition, the reason you have six states is that one size does not fit all and that states can make individual decisions with respect to their local populations. Somehow we have to get away from that mindset where states want to be different for the sake of being different, and get a more cooperative approach. It seems to me that the areas you have mentioned in your submission are probably more difficult than some of the other areas we have dealt with.

Ms ROXON—It is interesting. I think it would be obvious, to anyone reading your submission or hearing your statements, why there would be a benefit to business, with the cost savings and the savings in staff training. What potential benefit is there to consumers, if you were to put on the hat of the people who are at the other end of your services?

Mr Edwards—They are like me; I am a consumer! The benefits, I guess, are twofold. Obviously, those cost savings find their way through a competitive market and are reflected in

various ways in pricing. The other part of it is, I guess, that all of us as consumers have an interest in business performing effectively, because we all have investments in those businesses.

Ms ROXON—But is there something more specific, where there is increased confidence in the terms of standard contracts for leasing arrangements?

Mr Edwards—The benefit for consumers, in that sense, is that, wherever they are in the country, they will be basically getting the same service.

Ms ROXON—It seems to me one of the reasons that there was success in getting the consumer credit code together is that there was a stronger consumer drive to have some sort of uniformity. I do not know if there is that drive in some of the other areas that you have flagged. I guess I was just curious about whether you think there is some benefit other than the general advantage of keeping costs down and that that flows on.

Mr Edwards—And when people move around the country it means that a consumer, basically, is no different, whether they are in New South Wales, Victoria or Western Australia.

Ms ROXON—So there is fairness?

Mr Edwards—Yes. One of the problems with the code at an operational level, for instance, occurs when consumers come to enforce their rights. If they happen to have moved and they want to enforce rights under the credit code they have got to go back to the state where they first entered the contract in order to exercise those rights.

Ms ROXON—Even though it was a uniform system?

Mr Edwards—The administration of it—

Ms ROXON—Yes; it is crazy.

Mr Edwards—Yes. It still could do with some improvement.

Ms ROXON—The Standing Committee of Attorneys-General has flagged that they are doing some work on personal property matters. Are you involved in that? Have you been involved in the consultations or putting in submissions?

Mr Edwards—Very definitely. It has been an issue that the AFC has been involved in for 20 to 30 years in terms of trying to get that sort of an improvement. The need for what personal property security offers is becoming sharper, partly because of costs and the way different finance products are treated differently by security law and insolvency law and also the experience in New Zealand, where they have such a register.

Ms ROXON—Is AFC attracted to the New Zealand system?

Mr Edwards—Something along those lines, yes.

Ms ROXON—Are you happy with the progress of where that SCAG review is going?

Mr Edwards—Yes. I have had recent discussions with Attorney-General's and, yes, we are happy with where that is at and with the next stage of consultation.

Ms ROXON—One of our other submissions to this inquiry proposed a model contracts code. It is like one of those things you are pushing in that it has been around for a long time but has not actually gone anywhere. Is that something that AFC would be interested in? You talked about commercial law generally, and obviously this is a significant component of it. Do you have a view about whether it would be desirable?

Mr Edwards—At the broader conceptual level, yes. I read the transcripts of the previous hearings before coming up here and I saw mention of that proposal from Professor Wright and Professor Ellinghaus. It brought back memories from reading that some time ago. Yes, at the broad conceptual level it makes a lot of sense. Whether it is worth the time and effort that would go into changing a whole range of concepts and thinking and documents to get us there, I do not know.

Ms ROXON—It is not a priority ahead of the other things you are pursuing, obviously?

Mr Edwards—Absolutely not. Contract law, in a large respect, quite frankly, is pretty much settled. It is not changing a huge amount, so people know how to effectively give themselves a contract and get on with business. The issue with that is the how and the various bits that influence it around the shape of that contract. We are seeing, however, some ongoing developments. New South Wales is the only state that has had a Contracts Review Act, which allows review of unjust contracts. There is, through the Ministerial Council on Consumer Affairs, a broader based uniform-cum-national agenda for a solution based on unfair contract terms, which focuses on the terms of the contract as opposed to the circumstances in which the contracts were made.

Ms ROXON—So does the New South Wales one deals only with the circumstances in which they are made or does it give you both? I thought it gave you both.

Mr Edwards—It gives both—it has been expressed to be both—but I think that almost all the litigation that has been around the Contracts Review Act has been focused on procedural matters.

Ms ROXON—Focused on whether duress was applied or something, rather than on—

Mr Edwards—Yes, that is right.

Ms ROXON—whether a rate of pay was unfair for the contracted amount?

Mr Edwards—Yes, that is right. Victoria legislated a couple of years ago on the unfair contract terms area. The consumer credit code was excluded from that, because it has its own uniformity agenda. In the meantime, it has been picked up by the Ministerial Council on Consumer Affairs to see whether there is a national solution. The reality, for instance, is that in some areas, such as telecommunications and so forth, which were affected by the Victoria legislation, that has an impact on the telecommunications contracts with consumers on a national basis.

Ms ROXON—You might have seen that one of the terms of our inquiry was also to deal with partnership issues. Does AFC have a view at all about whether partnership laws should be harmonised or whether that is a—

Mr Edwards—No, it is not an issue on which we have a particular view. It would be nice, however, to get the business name registers and laws consistent.

Ms ROXON—Are you referring to what is required for the registration or recognition across jurisdictions?

Mr Edwards—Recognition across jurisdictions. Also getting the tests right. Broadly speaking, at the moment if you want to secure your business name, and you are going to operate nationally, you need to manage your business name in pretty well every jurisdiction in the country.

Ms ROXON—And you have to do that separately for all of the—

Mr Edwards—That's right. And there are typically three-year periods of registering that name, then you have to renew it. They all have slightly different rules about what you can do with that business name.

Ms ROXON—I don't think that has been raised with us elsewhere, so that is an interesting one.

Mr Edwards—We try to identify our priority operational issues. The area of business names is a more functional area, at one level, but also an important consumer protection one, obviously.

Ms ROXON—If there is anything that you want to give us further on that, do feel free to send that to the secretariat separately.

Mr Edwards—Thank you.

Ms ROXON—Thank you for that.

[11.02]

STEINWALL, Mr Ray, Private capacity

CHAIRMAN—I would like to welcome Mr Ray Steinwall, who I understand is appearing in a private capacity. Do you have any comments on the capacity in which you appear before us?

Mr Steinwall—I am general counsel at the Independent Pricing and Regulatory Tribunal of New South Wales and visiting fellow at the Faculty of Law at the University of New South Wales. But, as you indicated, I am here in a personal capacity.

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

Mr Steinwall—First, I would like to thank you for the opportunity to appear today. My submission primarily examines the area of implied warranties in consumer transactions and proposes a uniform code applying to contract law and equity. I used the example of implied warranties to highlight the inconsistencies between the Commonwealth and state laws and the laws of New Zealand, not only in this particular area but more broadly in the area of consumer protection, of which implied warranties is just a part.

The purpose of my submission is to draw attention more broadly to the need to harmonise the legislation between the Commonwealth and the states, particularly in the area of consumer law. The current inconsistencies, in my view, impose considerable transaction costs on businesses and deprive consumers of the opportunity for a consistent treatment of their rights. For example, the fundamental question of who is a consumer finds different expression in the laws between the states and the Commonwealth.

To achieve the consistency that I have suggested, I am proposing a uniform code on consumer law and contract law, extending also to equity. The template model, which is referred to in the committee's discussion brief, has been used successfully to establish a national competition law and it could be applied equally well to establish a uniform national consumer law. The referral of powers model, and the constitutional amendment, on the other hand—

CHAIRMAN—Sorry to interrupt, but are your referring to within Australia? Are you also referring to New Zealand in your comments?

Mr Steinwall—My comments relate to Australia particularly, but there are features of differences between the Australian states that are also features of differences between Australia and New Zealand. I think it is more broadly dealing with both of those issues.

I think one of the difficulties with the cooperative schemes that are being proposed in the background brief is that over time there can be a tendency for differences to emerge between jurisdictions. It is common for jurisdictions to introduce exemptions or derogations from cooperative pieces of legislation. My preference, as I indicated, is for a uniform code based on the template model that is in your background brief.

I would like to conclude by alluding to a number of reviews that I think set the policy context in which my submission is made. The Productivity Commission reports on national competition policy and on trans-Tasman competition and consumer protection regimes both recommended a national review of Australia's consumer protection policy. The Productivity Commission report on consumer product safety standards also recently recommended a single national consumer product safety regime. More recently, the Commonwealth's red tape task force, and a similar review currently being undertaken by the Independent Pricing and Regulatory Tribunal, have both received a number of submissions, which I have skimmed, that propose a consolidation of consumer protection and fair trading laws. I mention these only to suggest that there is now considerable momentum for uniform consumer laws and it would be a shame not to take up that opportunity.

CHAIRMAN—How practical do you think it is to attain that uniformity, given that we have so many jurisdictions within Australia, not taking into account New Zealand?

Mr Steinwall—Broadly, the states and the territories have adopted fair trading laws, which are intended to mirror the Commonwealth laws, particularly the Trade Practices Act. So we are starting from some area of consistency. I think that over time there has been a tendency for subtle differences to emerge in those laws. If I take the example of who is a consumer, there are differences in that test across the fair trading laws in the states and within the Commonwealth and New Zealand.

Ms ROXON—Are the differences more because you have different parliamentary counsel and other things rather than major ideological differences between the states? Is it around the edges rather than there being substantially different laws? The previous witness gave an example relating to the New South Wales unfair contracts laws, which are obviously significantly different from those that exist in other states, but other areas seem to be very close to uniformity. What is your perception on how many substantive differences there are, and therefore the amount of contentiousness there might be in trying to get a single system?

Mr Steinwall—From a policy perspective, broadly the laws are consistent. They all deal with common issues such as unfair practices and consumer protection more generally. I think historically there has been a tendency for amendments to be made without thought to a national approach. So I guess the answer to your question is yes, in a policy sense they are broadly consistent. We are talking about trying to align more specific sections with each other, both within the states and within the Commonwealth and with New Zealand.

CHAIRMAN—To what extent does judicial interpretation in different jurisdictions diverge the laws more than perhaps the parliaments had intended?

Mr Steinwall—The definitions in the various pieces of legislation are broadly adopting the same concepts—for instance, the concept of who is a consumer—and judicial interpretation has

not affected those to a great extent. It is the statutory provisions that have affected them. For instance, some of the states define a consumer by reference to the value of the goods and services that are being consumed. Other states use a combination of that plus a test of whether the goods are purchased for domestic or household use or consumption. So we need to be in a position to give the courts a clearer approach to their task.

Ms ROXON—Why would a template model not have the same problems over time of variations still being able to creep in, if you like, in each state? It is not as though your proposal is to refer the powers and have just one piece of legislation or something, where obviously you then control it. Why do you think a template model will actually protect from those differences?

Mr Steinwall—I think one of the problems with the referral of powers model is that, generally speaking, states have been reluctant to refer powers to the Commonwealth.

Ms ROXON—I understand the practical problems.

Mr Steinwall—As to the advantage of the template model, I will use the example of the competition law area. The Commonwealth drafted what they saw as a template for a competition code and the states and territories effectively applied application laws to adopt that in their jurisdictions. Those are then supported by intergovernmental agreements that ensure that, before the Commonwealth or the states tamper with those template laws, there is a period of consultation to ensure that they are not diverging from one jurisdiction to another.

Ms ROXON—So it gives a greater protection from future variations happening by accident or without sufficient consultation.

Mr Steinwall—Absolutely; that is the argument.

Ms ROXON—But the model still allows a state to go off and do its own thing, essentially, if it decides to, doesn't it?

Mr Steinwall—Again, if I can hark back to the issue of competition, which is the best example I know of the template model: states have very limited bases to go off and do their own thing. There are penalties that would apply were they to depart too significantly from what the template model is. There is a period of consultation about the sorts of amendments that states and the Commonwealth would like to make to it.

Ms ROXON—So it does build in some significant disincentives—which is probably not the right word—to going off and doing your own thing without having to go through the ambitious proposal of changing the Constitution or convincing everyone to refer their powers.

Mr Steinwall—Absolutely.

Ms ROXON—We have had a submission from others about a contract code as well. I presume that you have seen the code that was put forward some time ago by Professors Ellinghaus and Rice?

Mr Steinwall—I have read the transcript of Professor Ellinghaus's proposal. I alluded in my submission to previous proposals to have a uniform contract law. Professor Ellinghaus has gone into it in a lot more detail than I have.

CHAIRMAN—Have you seen that code?

Mr Steinwall—I have seen aspects of it.

Ms ROXON—Do you have a view about the particular model that he has put forward or just a view that it would be desirable to have some form of code?

Mr Steinwall—I cannot comment specifically on the model that Professor Ellinghaus has proposed, although the broad principle that they have put forward is something that I support. I think there is a case for a model contract law code.

Ms ROXON—Explain to me how you think that could similarly work in the equities area. Obviously, that is a complex area of law, but it is a big change when the whole equities area is designed to be based on fairness and pick up the things that might not otherwise have some sort of legislative base. So I can understand the argument very easily for why you might do it in the contracts area. I do not fully understand how you would do it in the equities area, unless you were just setting out some fairly basic principles.

Mr Steinwall—The reason I have suggested the equity area is that, of all the areas of law, it is the most subject to judicial interpretation. Our equity law is essentially the common law. There are two levels of it. At the one level you have the equitable area dealing with principles like unconscionable conduct and so on, which are reasonably well established. What is less well established are some of the other equitable principles—for instance equitable interests in land and fiduciary relationships of trust. Some of the other examples would be some of the remedies, for instance specific performance, equitable damages, innocent misrepresentation—

Ms ROXON—But isn't that generally an argument about codification? Once you do it for equity—I am not necessarily averse to the idea, but isn't it basically a proposal that you think our system of law would work better if it were a codified one rather than a common law one?

Mr Steinwall—I am suggesting that codification is probably best received in these areas because of the commonality between the Commonwealth and the states. We each have some form of consumer protection law. I see the equitable principles as very much supporting the consumer protection regime, because a lot of the equitable principles cut across the consumer protection provisions. So I am not suggesting that our laws should move holus-bolus to a codification model, but I think in this area there is ample scope to do that.

Ms ROXON—Particularly from the consumer protection side.

Mr Steinwall—Indeed.

Ms ROXON—Thank you. It is a very useful submission.

CHAIRMAN—Thank you very much for attending the hearing today and for coming in your private capacity. I realise that a lot of people come in their public capacities, but you have put a lot of work into this. Thank you very much.

Proceedings suspended from 11.16 am to 11.40 am

McPHIE, Mrs June, President, Law Society of New South Wales

TUNSTALL, Mr Ian Charles, Member, Litigation Law and Practice Committee, Law Society of New South Wales

CHAIRMAN—Welcome. 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 society's submission has been received and authorised for publication. I now invite either of you to make a brief opening statement and then we will proceed to questions.

Mrs McPhie—Thank you very much for the opportunity. I have read the submission, of which Mr Tunstall is the author. I come before this committee today representing 20,783 solicitors of New South Wales. Our committee structure comprises members of the Law Society, and the committee structure reflects the various areas of work. Why that is relevant to you is that the submission which you have considered and which Mr Tunstall authored was authored on behalf of the Litigation Law and Practice Committee, which comprises 22 members, all of whom have reviewed the submission. It comes to you with the authority and strength of that committee and was signed off by the then president.

I know what your terms of reference are and that the paper addresses that. Further to that, I would like to give you a copy of a letter that I recently sent on request to Mr Laurie Glanfield, who asked for the Law Society's views as to which pieces of legislation ought to be uniform throughout Australia. I know your terms of reference are of harmonisation in the world of trade and commerce, but I can share with you this document because it too has emerged from the deliberations of all our committees. It may be of some assistance to you when you are balancing uniformity with harmonisation. I am happy to answer any further questions. If you would like to receive this, I will table it. Otherwise, Mr Tunstall is the author, and we are quite happy to field your questions and remarks.

CHAIRMAN—Thank you, Mrs McPhie. Uniformity is probably perceived to be an ideal and harmonisation is seen to be achievable.

Mr Tunstall—I think it is the other way around; harmonisation is a dream.

CHAIRMAN—Time will tell. There is one thing you might clarify: in New South Wales people were once admitted—and I was admitted—as a barrister and had the choice of being admitted as a solicitor depending on certain circumstances. My understanding is that they are now admitting people as practitioners in New South Wales. Have they merged the profession?

Mrs McPhie—I can answer that question. The new Legal Profession Act, which is addressing the national profession project, is a good example of where harmonisation and uniformity is desirable, because we are now all Australian legal practitioners. In direct response to your inquiry, no, the profession in New South Wales has not merged with that of the bar.

CHAIRMAN—So are people in New South Wales admitted as—

Mrs McPhie—Solicitors—but they are Australian legal practitioners according to the new act.

CHAIRMAN—The certificate says that they are admitted as an attorney, solicitor and proctor of the Supreme Court of New South Wales or whatever and, similarly, that if one is admitted as a barrister that still occurs.

Mrs McPhie—That is correct.

Mr Tunstall—It is still separate.

Mrs McPhie—The differentiation mainly is the requirement for solicitors to have a further degree of education called practical legal training. They are subject to the Legal Practitioners Admission Board, having satisfactorily met the requirements set down by the Priestley 11 as to the components of practical legal training required to enable someone to set up in practice and deal with the profession. There is strong emphasis on the general areas of practice but very strong emphasis on trust accounting and practice management, which are consumer protection provisions.

CHAIRMAN—Could you outline some difficulties you see in a practical sense caused to the community as a result of lack of harmonisation of laws?

Mrs McPhie—Generally?

CHAIRMAN—Yes.

Mrs McPhie—I can address the issue on lack of equality of laws. The trade and commerce one, as far as I am concerned, is an issue. I am a practitioner from Cooma, and that is 120 kilometres from Canberra. If I were to issue a summons in New South Wales, I would have to have special provisions to serve that in the ACT. In some ways the Civil Procedure Act has addressed that.

My other area of great concern, using again the country analogy and one of practical experience, is in the area of powers of attorney. Power of attorney executed in New South Wales is not effective when a person moves into a nursing home in the ACT. They are in another jurisdiction, regardless of where the assets are. If they have lost the capacity at the time they enter the ACT, they cannot enter into and grant another power of attorney.

CHAIRMAN—That presumably would be the case in all other Australian jurisdictions, not just the ACT.

Mrs McPhie—Correct. I use that as a local example because I can speak with knowledge on it. But it is the same.

Ms ROXON—That is not included in your list, is it? Or is it included under one of the others, in the trustee acts or something?

Mrs McPhie—I think it is. If you look down under elder succession in law, we have guardianship and the family provisions act.

Ms ROXON—These powers of attorney come under those various ones for your state?

Mrs McPhie—Yes.

CHAIRMAN—That seems a bizarre situation.

Ms ROXON—It is a good example, though, of the problems, isn't it? That is a helpful, practical example for us. Can I ask this. You have in here a contracts act as one of the things. We have had a number of submissions made to us about the desirability of a contracts code. Does the society have a view about whether that would be desirable? I presume from this letter that you do.

Mr Tunstall—The society has expressed that view for quite some time, actually—that is, probably longer than it has expressed a view of uniform court procedures in New South Wales, for example.

Ms ROXON—Have you had an opportunity at all to see some of the proposal of Professors Ellinghaus and Rice. That has been around for 20 years. Do you have a view on it as a substantial proposal rather than on the general proposition of doing it?

Mr Tunstall—Their view is not terribly inconsistent with the US code for contract law, which I guess applies across the jurisdiction of all the states in the US. There is now and has been for some time consistency in contract law. Even then, like in Australian jurisdictions, there is not a great deal of difference and it is an area where a code could apply. It is like, for example, the experience of the Corporations Act. It is now a national code in the sense that it applies across all jurisdictions. What arises from that, as we are seeing with workplace relations and those sorts of issues, is more consistency across jurisdictions.

Ms ROXON—We may or may not with the IR exercise. It depends on what happens.

Mr Tunstall—Like we said in our submission, the fundamental problem we have is that we are a federation. We cannot change that unless we change to a union or something like that, where we can implement consistent laws across all jurisdictions.

CHAIRMAN—People are unlikely to vote for it, though.

Mr Tunstall—That is a political problem. The simple fact is that the federation has been around for a long time and to make change to that to fix up problems—for example, with the Federal Court's jurisdiction vis a vis the Supreme Court of the states' jurisdictions and hearing matters of the federal and state and vice versa—cannot be done other than by changing the Constitution.

CHAIRMAN—I accept that. I think the concept of the Federation in 1901 was quite different from the concept of the Federation in 2006. Who would have thought in 1901 that there would

have been all of this drawing of power to the centre? I suspect that, had the founding fathers known that, we would not have had a Federation at all.

Mr Tunstall—The founding fathers did know that. If you read the *Hansard* of the time you will see that they did know that. That is why in fact they put up the Federation: for states' rights to be pre-eminent.

CHAIRMAN—What I mean is that the states' rights have not proven to be pre-eminent over the last 100-plus years, given High Court interpretation, expansive use of Commonwealth authority, corporations powers and so on.

Ms ROXON—In any case what we are interested in is that the referral power is an existing power that can be used provided there is the political will to do it. Is that the option that you see as the most useful for seeking uniform laws?

Mr Tunstall—Given the current political state across Australia at the moment with the Commonwealth and the states, yes, it is the best time ever since Federation to bring in these sorts of processes.

Ms ROXON—You do not have a view on constitutional amendments, template legislation or using others? What is the preferred model?

Mr Tunstall—We had experience with various models in Australia in terms of trying to effect national type laws through national schemes, cooperative arrangements or whatever else. Unless it has been prescribed under the Commonwealth Constitution—and there are commissions and those sorts of processes there—then it really is up to the individual states agreeing. The territories are not a problem, because the Commonwealth can legislate for the territories; the states are the real issue. The nature of the constitutional arrangements between the Commonwealth and the states, in my view, needs to be looked at seriously.

Ms ROXON—So there would be interest in this. For example, some of the other witnesses that we have heard—and it is an issue I have talked about outside this inquiry—say there is some sort of enabling provision for constitutional amendment when you do have agreement between the levels of government.

Mr Tunstall—I have difficulty with this sort of approach. It is just a bandaid, really. What we really need to do in this country is what we did in 1891: sit down with all the states, the territories and the Commonwealth and look at our Constitution again, to get rid of redundant issues, overlaps and differences and to identify as a nation just what constitutional arrangements we wish to have.

Ms ROXON—Can I just test that a bit. Why is it a bandaid to have a provision which actually would allow changes over time once they are negotiated, which might have the constitutional authority so they are not knocked over in the court? What is bandaid about that?

Mr Tunstall—You would need a referendum to achieve that.

Ms ROXON—Of course. You need it for any change to the Constitution, as you know. That is not what I am arguing. I am just interested in whether you have a view. It is an attractive option from my personal perspective that has been put to us. It does require constitutional change, but it seems to me that it might be more lasting. You do not have to say, 'All right, we are going to negotiate now what people agree a Commonwealth should be able to do compared to the states.' It is a provision which potentially allows, in 50 years time, us to say, 'Oh, well, we never thought that these things'—any range of things which seem particularly domestic now—'would actually turn into issues that have much broader national interest.' Any effort you go to to rewrite something now will only last us for a certain period of time.

CHAIRMAN—Technically, you mentioned that for the Constitution to change there would have to be a referendum. There used to be three means of amending the Constitution. One was by legislation of the imperial parliament. Post Thatcher, the Westminster act is dead in Australia, as indeed it should be. The other way was uniform legislation with all the states and the Commonwealth. That is something that possibly could be looked at were there the political will. It seems to me that that would be a much easier path to follow—a difficult path notwithstanding, but a much easier path than the referendum path.

Mr Tunstall—Yes, but the one that carries greater risk, because at any stage any party being a jurisdiction could withdraw from it.

CHAIRMAN—From my understanding, not once the change has been made if the Constitution were amended by that.

Ms ROXON—So that is your issue with the referral and the five-year period for the referral—but ultimately it can be changed.

Mr Tunstall—But keep an eye on the current parliament and the future parliament as well, constitutionally. Basically, it would be a decision of a future parliament that wishes to withdraw from the arrangement. For example, a decision by a state to withdraw from the Corporations Act referral power was given subject to certain conditions, which in some states' view has been breached, hence their challenge. They still have an opportunity to withdraw.

To achieve consistency over time would require, obviously, an incentive to maintain that consistency. Hence, for something like the Corporations Act it is very important for people in trade and commerce to keep that consistency and to keep it forward—it is in those people's minds all the time. But if something else that is agreed upon is not treated that way, political differences will appear in the future. I feel that we are lucky now, politically, in this country, to have the governments that are in office prepared to work together, as we saw with COAG's decisions in February, which were very consistent across all jurisdictions.

Ms ROXON—We have not had a great deal of non-uniform law-making, but maybe that is still to come.

Mr Tunstall—No, but the direction is there.

Ms ROXON—I thought this question might be of particular interest to the Law Society. One of the noted areas in our terms of reference is in relation to partnership laws. Obviously a lot of

your members are in partnership structures and things of this sort. Do you have a view about whether it is desirable for them to be harmonised or made uniform? Are there practical problems being caused for your members by the differences in different state partnership laws?

Mrs McPhie—I cannot give you examples of the difficulties, but the partnership act is one such act that we have listed where consistency and uniformity is required. Ian, are you in a position to talk about the national professional legislation? That is a good example of how long it has taken to get uniformity of legislation throughout the states and territories to govern the legal profession. Are you aware of that?

Mr Tunstall—Current legal profession legislation across the jurisdictions, particularly on the eastern board, is picking up the idea of recognition. If you were incorporated or if your association were established in another jurisdiction, that would carry across to the other jurisdiction for practise purposes. Presently I am working with the Victorian government to follow up the national competition policy with a lot of legislation involving industry issues. For example, in the estate agents area there are moves, in Victoria for example, to have recognition of estate agents in other jurisdictions to operate in Victoria.

Ms ROXON—We have had some of them present to us separately. It is an example of how long it takes, but also each of the states has just tweaked their legislation a bit, so we are not yet at the stage where we actually have a uniform law—even to govern the legal profession.

Mrs McPhie—It started off with having model provisions and core provisions which were agreed upon. But the variation, where each state has not agreed, has a tremendous impact on the practical delivery of legal services. I am talking about the trust account provisions and about cost agreement structures and statutory requirements. Part of my role as president is to visit the large law firms. One such large law firm has set up a complete independent department to work out the trust account provisions in each of its jurisdictions and has applied millions of dollars to getting it right in each state. If we had a national legal profession act, or if all of the states were true to their word and enacted legislation which was consistent and equal to each other state, that would not be necessary. We have got to free up—

Ms ROXON—Would there be a major reduction in legal costs to the community if that were to happen?

Mrs McPhie—And the ability for them to function across Australia. If you look at the earning power and the money generated when they export their legal services, it has to have a direct impact on the economy of Australia per se. There are fringe problems for people. To go back to the Cooma example, you have me practising around Canberra, other people practising in Albury-Wodonga and the people on the Tweed mostly having to have, up to this point, joint practising certificates but different trust account regimes in Queensland and New South Wales. Now that is wrong. It ought to be unified and it ought to happen now. We are addressing a national profession where we are all going to be Australian legal practitioners. These little hiccups, where the states have not complied exactly with the momentum and the direction of the legislation, have added tremendous costs and practical problems, and not just for large law firms—though they are a good example—but for the little dweller on the coast as well and on the borders.

CHAIRMAN—In Queensland they used to have a particularly restrictive arrangement whereby you could be admitted conditionally as a solicitor or barrister but not be admitted permanently until you had resided in the state for 12 months. That was designed to lock out people from Sydney and Melbourne and it was very successful for a long time.

Mr Tunstall—That is how section 92 operates.

CHAIRMAN—I might be wrong—and I will check this—but it is my understanding that the states can refer powers for a period. Of course, there are problems when they want them back. I understand from when I was at law school—and that was quite some time ago—that one way of amending the Constitution absolutely is by uniform legislation of the state and federal parliaments. In other words, if the state and federal parliaments carried legislation seeking to amend the Australian Constitution by varying one of its clauses in a certain way, that would be varied forever and it could not be taken back. I might be wrong.

Mrs McPhie—I do not think that is right.

Mr Tunstall—Yes, you are wrong.

CHAIRMAN—I will check it, but that was my understanding.

Mr Tunstall—The change to the Constitution's provisions intended to stop that happening. If you go back to *Hansard* of the 1890s, you will see a lot of discussion about the issue of states rights and the pre-eminence of the states being very important. The Commonwealth was seen as something at the end specifying express powers and that was it. That has been the thinking all the way through. If you look at the way in which the states legislate—

Mrs McPhie—It is an effective method of change, until another state or Commonwealth parliament wants to change it. It does not change the Constitution.

Mr Tunstall—Because you cannot bind future parliaments.

CHAIRMAN—I know that as a matter of general law, but obviously—

Mr Tunstall—It works.

CHAIRMAN—it is not something that I read every night before I go to bed.

Mr Tunstall—Most people do not read it, because it is not interesting enough—and that is its major problem. On the issue of trust accounting, from my experience at work and doing work in Victoria, for example, I have found that many different rules and regulations apply to trust accounting, irrespective of the industry. I came up with the idea recently to put many of those provisions into a piece of legislation called 'trust accounting' or something like that and take those provisions out of other legislation so that you would have consistent rules applying to trust accounting in Victoria.

The other option I thought about was putting forward a provision in the crimes act, because a breach of trust is a major problem in this country, as, for example, drink driving. Whilst it is not

the same, the impact is the same and the harm is spread across much of industry, many people and whatever. Obviously that sort of thing has to be further discussed and developed in Victoria. June mentioned trying to get trust accounting provisions consistent across the states. You have to start within the states first, to make it consistent within each of the jurisdictions. That is a major problem. A lot of the work that you are doing in highlighting change that is needed for 'harmonisation' needs a lot of work done locally.

CHAIRMAN—You say that you think we should go back and basically throw all the legislative powers back into the centre and redivide them up according to needs in 2006. That might be an effective way of doing it, but it is not a practical way of doing it.

Mr Tunstall—Yes, the terminology is the problem. You are using political terms as opposed to legal terms. Centralising legislation is not the way to go. We cannot do that in this country, unless it is a national law under a power that the Commonwealth has. We are talking about cooperative arrangements.

CHAIRMAN—In your view, what are the best and most practical means of achieving harmonisation?

Mr Tunstall—To step away from harmonisation is probably the first thing and to move towards cooperation, which is achievable. Harmonisation is not achievable across jurisdictions in Australia. Looking across the Tasman, you are looking at international law and not at constitutional law. So harmonisation at an international level is difficult. I have been doing research in this area for about 12 years, particularly looking at regulation of financial markets across jurisdictions, cross border. Even with the EC, there are problems with individual countries adopting certain consistent laws across all jurisdictions and that will always be the case. In a sense, we in Australia 'suffer' the problem of Federation in that we cannot have harmonised rules across Australia either.

'Harmonisation' is not really a legally defined term; it is a bit like globalisation. In the international sense, if you talk about internationalisation, which implies treaties and other control mechanisms, you are in a better state. I compare 'harmonisation' with 'cooperation'. You need governments and politicians of consistent minds thinking. Yes, we need to look after our own individual jurisdictions because we are different around this country because of issues of climate and timing and so on. But, if we work cooperatively, we can achieve that.

As I said, what came out of February's COAG meeting, for example, was showing very strongly that the states and the Commonwealth government is looking at working very closely, cooperatively in a sense, to try to coordinate important issues like health issues—mental health, in particular. That approach is to be congratulated.

Ms ROXON—I am not sure that it takes us anywhere. 'Harmonisation' is an overarching term. You can do it via cooperation; you can do it via national legislation, if that is appropriate—all those sorts of things. The agreements at the political level obviously need to be able to achieve that but do not necessarily deliver laws that are very consistent. One of the things I did not understand in your submission—and maybe you could take me through it—is that you urge the inquiry to look at the interpretation of laws as well as the actual laws. How is that something that is at all within our remit to be able to do? I do not mean in terms of our terms of reference,

but how can parliaments ensure that the judicial interpretations are going to be consistent across the country no matter what we do with our laws? I was not really clear about what you were trying to get at in your submission in that point.

Mr Tunstall—In terms of what you are recommending, it is about getting some sort of consistency arrangement whereby you could harmonise laws, and laws are not just made by the parliament. Wherever laws are made they should be made consistently and, in my view, have what is called a regulatory impact statement or structure to it whereby the laws, or the rules, are justified in terms of their impact. So it is a policy issue, as opposed to just reacting. For example, we are having discussion within a committee I am on about how practice notes in courts are made. For example, one magistrate in a local court can make a practice note, or practice direction, on a certain matter. That is reacting to a situation, but what is the policy issue there? Often there is not one. We have to move away from just reacting to things. I know that, politically, that is not easy.

Ms ROXON—I am not arguing whether it is politically easy or hard. I do not understand how it is politically possible. I do not understand what your submission is asking us to do in terms of the interpretation of the laws.

Mr Tunstall—You make recommendations—

Ms ROXON—For good reasons, we have very limited power to tell the courts what they should do.

Mr Tunstall—Courts will listen to what you advise—and guess who pays the courts, anyway? That is the way the states are controlled to a large extent too. I think you have people at the judiciary level who are prepared to listen and to learn. In reading judgments, people now in courts are recognising things. The most recent one in relation to white collar crime—for example, the Vizard case in Victoria—really shows the change of direction and thinking in this country about white collar crime. It is no longer white collar crime versus real crime; it is becoming—

Ms ROXON—Sure, but what do you need the inquiry to do for that?

Mr Tunstall—Basically make recommendations. When we are looking at laws—and you are looking at harmonisation laws—what do you mean by laws? Are they just those made by an act of parliament? Are you looking at subordinate legislation as well? Are you looking at administrative directions? Are you looking at ordinances and local government type legal instruments of various sorts?

Ms ROXON—All those are about the creation of laws. I can understand that. I cannot understand it in terms of the interpretation.

Mr Tunstall—They are created by other bodies. They are administered and they affect us. That is the point. I thought you were looking at harmonisation of laws and their impact on the individuals who have to abide by them. In this particular case, you are looking at trade and commerce and the constraints on them. I work with people in corporations and they often just ignore them anyway and get on with the business. It is easier to do that when you go overseas

with various business activities or whatever. Who is going to police Australian law in the end? That is the criterion for laws anyway. What their impact is from an economic perspective is very important. What you are doing is a very broad spectrum. I realise it is a Commonwealth inquiry, but you are looking across jurisdictions and, if you are going to look across jurisdictions, you must look at other jurisdictional issues—for example, other tiers of government and the administrative arrangements, including the judiciary as another tier of government at both Commonwealth and state levels. To me, your terms of reference are not limiting, although, being Commonwealth, you may see that it is.

Ms ROXON—I do not find that particularly convincing, I have to say, but I will move on to give the others time to ask some of their questions.

Mrs McPhie—I have a comment there which is inscriptive and not part of the paper. If you are familiar with the functioning of the Judicial Commission of New South Wales, which is not just there to reprimand judges who sleep on the bench, you will know that they have a tremendous resource to get consistency with sentencing, judgments and penalties. I see great advantage in the creation of a federal judicial commission. Judges in all jurisdictions, if there is no case law established in their jurisdiction, look over the border to see what has happened in Victoria and in South Australia and perhaps quote and rely on the judge's decision.

CHAIRMAN—Haven't they always done that?

Mrs McPhie—They have always done that but not in a formal fashion. When Ms Roxon asked, 'What can we do; what recommendations can we have for the interpretation?' I see a federal judicial commission having an educative role, rather than just—

Ms ROXON—It could have some training capacity.

CHAIRMAN—It would be more like an Australasian judicial commission rather than something designed simply to look at federal—

Mrs McPhie—Something with an educative role for judicial education, to get consistency of sentencing. The sole role of the commission would not be to tap a judge on the shoulder who has fallen asleep too many times or has been too late in their judgments. I think the judicial commission as a function for New South Wales is very well—

Ms ROXON—Although that might be desirable too.

Mrs McPhie—It may well be, but in this context it could educate and could be a resource for judges everywhere to have consistency in delivery of judgments and services.

Ms ROXON—That is a good suggestion.

CHAIRMAN—If you are going to have something which is Australasian, something that will cover the six states—the federal situation and New Zealand—you would have to divide the function of that commission away from the discipline side, which has to be handled within the jurisdiction, and the commission could maybe look at the other important matters you have outlined, which in many respects are more important.

Mrs McPhie—Quite so. That is why I bring it up here as a suggestion as to what you can recommend.

CHAIRMAN—It should not be a federal commission. Maybe it should be an Australasian or Australia-New Zealand commission. In conclusion, allow me to congratulate the Law Society. I think it is great that the Law Society of New South Wales is clearly having non-metropolitan practitioners involved at a very high level. I think that, historically, for too long law societies have been city centric. That is changing in many places now and I think it is good.

Mr Tunstall—It is do with merit more than—

CHAIRMAN—Part of the reason is that country practitioners often come from smaller firms and to be President of the Law Society of New South Wales must just about be a full-time job.

Mrs McPhie—It is a full-time job. I certainly hope I have a practice left in Cooma when I go back, because I have not been back there for the whole three months of this year.

Mr Tunstall—A large part is around confirmation of small firms.

CHAIRMAN—I understand what you are saying.

Mrs McPhie—Without labouring the point, when I have gone around the big firms, they say, 'You're from the country; what can you do for us?' My response is, 'If you break it down to its component parts, our problems are yours and yours are mine.' They very quickly acknowledge that that is true—conflict of interest, client confidentiality, trust accounting, cost provisions, cross-jurisdictional practice. There is not a lot of difference. Their rents are higher, admittedly. Basically the problems are the same. I thank you for your time, Mr Chairman.

CHAIRMAN—On behalf of the committee, I thank both of you for your frankness and for coming today. A draft of the evidence you have given will be sent to you for checking. Would you send that back to us. If you have any further thoughts on the subject matter of the inquiry, feel free to convey them to the secretariat.

Mrs McPhie—Can I make one further offer. If there is anything on the list of the letter addressed to Mr Glanfield for which you would find it beneficial to have backup and resource material to substantiate it being on the list, we are happy to provide it.

CHAIRMAN—Thank you.

Proceedings suspended from 12.14 pm to 1.16 pm

MARKWELL, Mr Andrew, Chairman, Fundraising Institute of Australia Limited

WALLACE, Dr Sue-Anne, Chief Executive Officer, Fundraising Institute of Australia Limited

CHAIRMAN—I welcome representatives of the Fundraising Institute of Australia. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received the submission from the institute and it has been authorised for publication. Would one of you like to make a brief opening statement in relation to aspects of your evidence you would like to highlight? Then we might proceed to questions.

Dr Wallace—I will make that statement on behalf of FIA. FIA is a members organisation for people who are fundraisers. One of the things that we have is a national database of people who fundraise across Australia of some 1,500 full members of FIA and up to 3,000 subscribers to our services. Those people represent around 2,000 charitable organisations in Australia. In surveying our members, what we have found is that over 50 per cent of our members work across state borders. The disparities, the differences, the discrepancies and some of the inconsistencies between state and federal legislation make it very difficult to carry it a national campaign. This has significant importance for Australia in that, through a federal survey called Giving Australia, it was recently established that Australians give $11 billion to charitable causes per annum.

CHAIRMAN—That is a lot of money.

Dr Wallace—It is a lot of money. It supports a lot of social and civil activity in this country. Thus anything that makes that fundraising more complex and more difficult adds to the costs of fundraising and will therefore mean that some of the money that is given does not go directly to the cause, because it is absorbed through the costs in complying with different legislation and regulation in different states and also federally. One of the issues about the lack of consistency is that it is very important in fundraising that donors have confidence and trust in the fundraising sector, in the charitable sector. Sometimes those complexities in legislation do in fact impede their confidence and trust. Most charities are going to report back to their donors in a different way. In part, this is because they themselves report differently either to their states or if they are a company limited by guarantee under ASIC regulations, but also it is because there is no national reporting standard for the non-profit sector. Therefore there is no consistency in the messages that are going out to the donors in order to sustain that level of giving. Having said that, there does however remain a significantly high level of trust in the non-profit sector. Our concern is to ensure that that is maintained and that it is not impaired in any way.

It would appear to us that, because of the state legislation and the federal legislation, you could say that the non-profit sector is somewhat overregulated, because there are the duplications that happen within the regulation at federal or state level. Also, there are some inconsistencies and some holes where legislation at neither state nor federal level may capture some aspects that could probably be captured.

CHAIRMAN—So you would like some more regulation?

Dr Wallace—No, we would not like some more regulation; what we would like is actually a simplified and rational legislative framework.

Ms ROXON—Can you give us some examples, so that we can get our head around this, of either some of the gaps or some of the areas where there are contradictions?

Dr Wallace—We will go to something quite specific, because I think that probably makes it easier. If you look at some states, the way they register charitable organisations to undertake fundraising is on the basis of costs of fundraising. The determination of those costs is not a standard practice, because there is no national accounting standard. Yet it is actually used as a trigger for registration, deregistration or refusal of registration for some charities. A charity in Victoria, for example, where the registration is very strict with respect to costs of fundraising, may also fundraise nationally. It will have certain parameters that enable it be registered in Victoria but it might then fail in other parameters in New South Wales, for example. Another example would be what we call charitable gambling, if you look at the art union business. The state in which art unions happen most frequently is Queensland. It is the state where there is a significant focus on the regulation through charitable gambling and the gaming regulation—

CHAIRMAN—Why is that?

Dr Wallace—Maybe because they started it first—maybe because Queensland has resorts where they were able to package the prizes in the first place. Someone in Queensland had the idea that this would be a great fundraising idea, which it has been. But Queensland art unions can flow into New South Wales, because of the mutual recognition between those two states on charitable gambling and the sale of art union tickets. But the same liberty does not apply to New South Wales organisations, where they run art unions and want to flow them back across the border to Queensland.

CHAIRMAN—Why is that?

Dr Wallace—Because of the differences in regulation and the different way in which the mutual recognition has been framed.

CHAIRMAN—It is a wonder that New South Wales puts up with that.

Dr Wallace—It is.

Mr Markwell—There is a difficulty in that some charities that run lotteries in Victoria cannot run the same lottery in Queensland because to comply in one state means to not comply in the other.

Ms ROXON—Actually by definition, not because they have different compliance rules? Are they are actually set up to prevent the different state ones?

Mr Markwell—No, but if you tailor it to comply in Victoria, it will not comply in Queensland.

CHAIRMAN—Is a lottery the same as an art union?

Mr Markwell—Raffle, lottery, art union—they are all the same thing but at different levels.

Dr Wallace—Some terms are used in one state—

Ms ROXON—I am a Victorian and I have never of an art union.

CHAIRMAN—When you think about it, it is a term that borders on fraudulent—'art union'.

Dr Wallace—It is actually a historic term. I learnt this at one stage. It comes from the late 19th century. There is a historical reason they were called art unions. That has remained in Queensland, but other states have picked up the concept of lotteries and raffles.

CHAIRMAN—You have the National Gallery of Victoria; we only have a state gallery!

Ms ROXON—And we should fix that, too!

Mr Markwell—Another example I heard this morning is Father Chris Riley's charity Youth off the Streets, which works in New South Wales. It cannot register as a charity in Western Australia at the moment. They are not allowing them to, because they say, 'You do not comply.' The charity is trying to gain national status so they can then access national sponsorship from the corporate sector.

Ms ROXON—We know you are here as the president of the organisation, but, from your card, you are obviously an Apex person. When you are a part of a national organisation like that, what do you currently do? Do you then just comply in each state to make sure that you can be recognised in each state? Is that what you are forced to do?

Mr Markwell—Apex is an interesting example, because we have the Apex Foundation, which is a company limited by guarantee—therefore it reports through ASIC and it is a national organisation—and we have the clubs, which form the Association of Apex Clubs of Australia, which is an incorporated association, incorporated in New South Wales, but we do operate in every state. So we have been allowed to register in every state to get a charitable fundraising number in every state.

Ms ROXON—But, essentially, is that because it would just be too difficult to refuse you rather than there being a proper system for it?

Mr Markwell—With Youth off the Streets it comes down to the level of work that they do in Western Australia; and the relevant department in Western Australia is refusing to recognise that as sufficient work. If we had harmonisation or national legislation/regulation or a combination of the two, that is one example where one charity would certainly be enhanced in its operation.

CHAIRMAN—I know that you talk about referral of powers as one option, but what do you see as being the most desirable and practical way of getting around what to all of us, I suspect, seems to be a ridiculous situation?

Dr Wallace—To our members as well it seems to be a ridiculous situation. One of the things we have put forward and have been, I suppose, heavily influenced by is some of the research undertaken by Woodward and Marshall in Victoria, though that looks at a national picture. We are interested in looking at whether there can be a national regulator for the non-profit sector. Currently, a large number of charitable organisations are registered as companies limited by guarantee, and we fall under ASIC requirements. ASIC was set up for the commercial world—for the for-profit sector—and a number of their regulations are not really appropriate for the not-for-profit sector. As Andrew Markwell has said, a number of other organisations are incorporated; they have state incorporation. It would be useful if there were one regulator. The next thing is that if—

Ms ROXON—Does that mean that your member bodies would agree to take on some different structure? If there were to be one national system does that mean they would all say, 'All right, we will use the unincorporated association system because all the states in the Commonwealth can have some sort of cooperative agreement to deal with that,' rather than use the limited by guarantee companies? Is there are a wide enough interest that people would be prepared to restructure if some sort of national system were set up?

Dr Wallace—I think, in the same way that the corporate sector fell into the Commonwealth legislation in 2001, yes, there is a wide interest, because it is costing the charitable sector a lot to try to comply with these different regulations.

Ms ROXON—But it would cost them a fair bit to change; that is one of the problems. The regulatory process changed for corporations but bodies stayed as corporations, so they did not have to redo their whole structure. I imagine that that is very difficult for a number of your organisations because so many of them are federal structures and there is a complicated range of others. Do you still think there would be an interest in it if that change were made or that option were open?

Dr Wallace—Yes. Our sector and the broader sector, which is represented by the National Roundtable of Nonprofit Organisations, is absolutely emphatic about the need for one regulatory system for the non-profit sector, but that that regulatory system is also the regulator; because currently the regulation and registration happens at a state level, sometimes for an individual as a fundraiser and in other states for an organisation as a fundraising organisation. And there are at least two pieces of legislation in every state: one for fundraising and the other for what is called charitable gambling, which is where the raffles, art unions and so on sit.

CHAIRMAN—So how are we going to achieve this?

Dr Wallace—We cannot achieve this. We can put—

CHAIRMAN—How would you suggest that governments achieve this?

Dr Wallace—There really needs to be close consultation with the sector to actually bring the right group of people around the table to ensure that there is discussion about what is the most appropriate mechanism to establish for the sector. One of the things we have suggested in our submission is that it could look at the best of what is in Corporations Law in different states—and even that varies enormously from one state to another—and also what is in Commonwealth

law in terms of the Corporations Act. So we are wanting the federal government to take the lead because the other challenge that we have in our sector is that there is no ministerial table for fundraising legislation and regulation.

Ms ROXON—Why would you not, in a theory of the world being changed by increment, want to be lobbying the states to at least get the two separate pieces of legislation that govern your organisations in each state brought together as your first step before you—

Dr Wallace—We are lobbying the states on a number of issues: one is to get some more consistency in their legislation and some mutual recognition between states and the second is then to try to bring together the aspects of fundraising legislation and charitable gambling. The state that is looking most closely at this is Victoria, and we have done quite a lot of work with the Victorian government in this regard. There are some states that are attempting to look at it, and you are probably aware that the ministers for consumer affairs in Victoria and in New South Wales were looking at the harmonisation of legislation for telemarketing. They recently called for submissions on that. In fact, the appropriate departments in every state came together a number of years ago to look at a model code for telemarketing. They did develop a model code, which in the end did not get up. The states at the end decided not to adopt the model code; but to go back to making amendments in their own codes which just amplified some of the differences that exist.

CHAIRMAN—The federal government made some announcements in relation to telemarketing and unsolicited calls only in the last 24-48 hours.

Dr Wallace—Yes, the federal government has made that announcement. However, telemarketing and the registration for telemarketing happens at a state level. The do not call register will be administered federally through the department—

Ms ROXON—What the government is intending to do does not cover your members anyway—does it?

Dr Wallace—Yes, it does; absolutely. Charitable fundraising by telemarketing is significant.

Ms ROXON—No, I understand that. My understanding of the minister's release is that it was only the for profits that were going to have to respect the requirements—

Dr Wallace—That is true.

Ms ROXON—although I would have thought it was your interests to respect it as well.

Dr Wallace—And we do and we will continue to do so. Yes, you are right there are—

Ms ROXON—Is that on a voluntary basis or something?

Dr Wallace—On a voluntary basis. There are exemptions for charities from that, although a number of charitable organisations do run their own do not call registers. It is not in their interests to call people who are not going to make donations.

Ms ROXON—Or who might but not if you call them at home.

Dr Wallace—Yes, that is right. We have our own code of conduct with regard to telemarketing and practices within telemarketing. All of our members are obliged to adhere to that code.

CHAIRMAN—You mentioned that under ASIC there were some provisions that were more suitable for the for profit sector rather than the not for profit sector. Would you agree that not for profit organisations are really for profit organisations and that it is more a question as to how the profit is dispensed? Basically and obviously in all your activities you try and make a profit because once you make that profit you have more money to carry out the desirable social objectives that your member organisations are formed to carry out.

Mr Markwell—We have a really basic distinction: it is a surplus not a profit, and there is a very good reason for that. Our business is to fulfil our mission statement. The corporate sector has a business of returning a yield on investment to the shareholder. It is very different.

CHAIRMAN—Your shareholders are communities, surely.

Mr Markwell—I can see why you say that, but, no, that is not it. We do not return a yield on the investment of the community. We fulfil our mission statement, which is to meet a need in most cases. When it comes right down to the wire, we would forgo our surplus to meet the mission statement, whereas the corporate sector is quite different in its attitude.

CHAIRMAN—I would have thought they needed to make a profit to meet the need.

Mr Markwell—You need to make a surplus to meet the need in the long term, but you would make a deficit to meet the need in the short term.

Ms ROXON—You say that the differing regulatory schemes obviously are a cost to your member organisations. I imagine that because you are not for profits, a lot of your groups would say, 'Our administrative costs are 10 per cent of any money that we raise' et cetera. Do you have an estimate of the cost of the duplicated regulation for your particular organisation or the sector?

Mr Markwell—Yes. In terms of dollars per organisation—I know that is impossible—I think you are looking at a proportion of one full salary, if not a full salary or one and a half salaries, in small organisations through to bigger organisations just to administer—

Ms ROXON—The percentage cost is different, obviously. It is heavier for the smaller organisations than it is for the larger ones.

Dr Wallace—It is heavier for the smaller ones, for the newer ones and for those that are dealing with causes that are less popular.

Ms ROXON—Why is the regulation more of a burden on them?

Dr Wallace—Because they have to spend more of their time in public education. I will give you a very good example—

Ms ROXON—But the regulation does not affect that. That just means it is a harder cause to raise money for, doesn't it? What I am trying to get is some estimate of what you think—I do not mean in terms of dollars. Does it add, say, a 10 per cent margin?

Dr Wallace—I will give you an estimate, but I would like to also say that those costs of fundraising are actually important for regulation, because in some states that is what is regulated. That is why it is very important.

Ms ROXON—Of course; you said that at the start, sorry.

Dr Wallace—The average—and it is an international average—is about 20 per cent costs of fundraising. To raise money costs money, and the average costs of fundraising are around 20 per cent.

Ms ROXON—And what margin of that is the duplicated regulation?

Dr Wallace—That I cannot tell you. You see, because there is no national accounting standard there is a lack of benchmarking in our sector. The first real survey of the sector is the Giving Australia survey that was completed in November last year.

Ms ROXON—I imagine that although it would be significant it would not be half of the cost or something like that. As you say, if there is one person in an organisation then that is a big cost if you are not making a lot of money. But it is not as though it is five per cent or 10 per cent of the costs—not that I am downplaying its significance.

Dr Wallace—No. One of the big costs in percentage terms—and this is also reflected in what is happening internationally—is auditing costs. If you are a company limited by guarantee, there are certain auditing requirements that you are required to fulfil. There are about 35,000 not-for-profits that employ staff and about 20,000 in Australia that are deductible gift recipient organisations. Not all of those can get pro bono audit. The costs of audit are a significant burden on a number of organisations.

CHAIRMAN—In your submission the association notes that there are myriad possible legal structures for not-for-profit organisations—that was from page 9—and recommends that the government consider the introduction of a single specialist not-for-profit legal structure, perhaps by combining the best aspects of the Corporations Law and the incorporated associations law—that was from page 10. What is the most common legal structure adopted by not-for-profit organisations?

Dr Wallace—It is very difficult to answer that question, again because of the lack of analysis of our sector. Most of that analysis has been undertaken by a professor from the University of Technology in Sydney, Professor Mark Lyons, whose publication, the *Third Sector*, really starts to quantify the sector. In addition, there is some information that has come out through the Giving Australia survey, but those are statistics in terms of the differentiations between the companies and the incorporated associations. I do not have those figures.

CHAIRMAN—Can the association provide some examples of legal structures that are unsuitable or disadvantageous for not-for-profit organisations? Is there no existing legal structure which satisfies the particular requirements of your organisations?

Dr Wallace—The ones that are unsuitable, I would say, are those organisations that are incorporated associations under the state incorporations act. That is a less satisfactory structure for a not-for-profit organisation that is active in fundraising. It does provide for some protection for the board of directors—the governance model—and it does provide for some protection for donors and for public trust and confidence. But it is not as good a structure as the company structure is, which is why, when the GST came in, a number of organisations transferred to become companies limited by guarantee and therefore under the Commonwealth legislation. Their regulator therefore is ASIC.

Ms ROXON—It is frustrating, obviously—and this will happen, I guess, with the IR changes too. Incorporating is valuable for lots of reasons and people find that, once they have done it, there are also disadvantages. It seems that that is becoming a bigger problem.

CHAIRMAN—It is not necessarily a disadvantage, being incorporated to be roped in under—

Ms ROXON—What I am saying is that there are other implications, and you incorporate for, say, the reason with the GST, then you have the implications of your reporting structure. I was just using that as an example. But it seems to me that your original comments that the structures are not exactly designed for the sector that you are in.

Dr Wallace—No. And this is nothing new. This reiterates the finding of the Industry Commission in 1995, where they found that the regulatory framework was burdensome and that it was also contradictory in some places.

I would like to go back to a point that you made about the regulatory environment. One of the things that we feel very strongly about, as a member body for those who are professional fundraisers, is the importance of principles and standards of professional practice. It is part and parcel of being a member of FIA that our members are required to adhere to, to sign up, to a mandatory code of conduct. We are actually in the process of reviewing our codes of conduct, which include a code of ethics, a donors bill of rights, acceptance and refusal of donations, as well as a series of codes of best practice in various different forms of fundraising. We feel that, in a regulatory environment, if there is some acknowledgment of the importance of industry codes, it adds another dimension to the regulatory environment and will enhance the way that fundraising practice is undertaken.

CHAIRMAN—Thank you very much for that, and thank you for appearing. The secretariat will send you a copy of the transcript of your evidence for you to check. If you have any other ideas you would like us to consider, we would appreciate your passing those on to the secretariat as well.

Mr Markwell—Could I add one thing?

CHAIRMAN—Sure.

Mr Markwell—We have seen demonstrated in the last couple of years a very strong philanthropic streak through the Australian population—

CHAIRMAN—The Prime Minister has tried to encourage that.

Mr Markwell—Indeed. I think we saw a remarkable outpouring of help and concern from the Australian public in general after the tsunami, and I think that forms a very valuable and important part of the community collateral. It is very important that that is maintained and stewarded. Fundraisers are all about being accountable and transparent. We would like to see a framework where we can deliver that accountability and transparency to the donating public, but we would like to see it in such a way that we could do it easily and cheaply. While we can comply with corporate regulations, I do not know that that is the cheapest and easiest way to do that at the moment.

Ms ROXON—No, I am sure it is better for your association if it is done through codes of conduct, where you promote it and your member organisations are bound to it, but that is not necessarily the most effective way of ensuring that some of the more difficult of your members—or those who should be your members but are not and are not adhering to those codes—stick to it. It is always a problem if you are looking to legislate. But I am not sure that we are intending to make that sort of detailed recommendation.

CHAIRMAN—I think that, as time has gone on, some fundraising organisations are now more favoured than they once were, and the community giving habit must change. I think that when there is a perception that an organisation is bloated, full of bureaucracy, squandering 50c of every dollar raised, there will be a flight of philanthropic support from that sort of organisation to people who are seen to be delivering at the coalface with just about every dollar raised put into good works.

Dr Wallace—I think that is true, but I must say, in defence of the sector that 50 per cent, in terms of cost of fundraising, is not where the sector is at. However, I would also say that we really do not accept any reports from organisations that claim to have no costs of fundraising. It is absolutely inevitable for professional fundraising to have costs of fundraising. To raise $11 billion is not a volunteer-led sector. It has to be professional in the way that it is run, and we have gone well and truly beyond the original charitable organisation that was run by good and well-meaning volunteers.

CHAIRMAN—There are still some of those out there.

Dr Wallace—There are 1.4 million of them who contribute to the voluntary sector. It is significant.

CHAIRMAN—Thank you very much again.

[1.45 pm]

McCUTCHEON, Mr Murray, Chairman, Property Law Reform Alliance

WATERHOUSE, Mr Paul Alexander, Joint Secretary, Property Law Reform Alliance

CHAIRMAN—Welcome. Do you have any additional information about the capacity in which you appear?

Mr Waterhouse—I represent the Property Council as well on the alliance.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Your submission has been received and authorised for publication. Would one of you like to make a brief opening statement of, say, five minutes and then we will proceed to some questions?

Mr McCutcheon—The Property Law Reform Alliance is an alliance of peak property bodies which has been brought together for the obvious purpose set out in our name. We have a number of members, I think, in our submission. That has been added to. Mr Waterhouse might like to add the new members to that list.

CHAIRMAN—Maybe you could forward them to us.

Mr Waterhouse—I can table this document if you like.

CHAIRMAN—Thank you.

Mr McCutcheon—It arose out of a desire by the Law Council's property group at the time which was pursuing a project of property law reform and it held a number of conferences with a number of diverse bodies over a period of time. That generated some momentum and, around 2002, it resulted in, with the assistance of the Property Council of Australia, forming what our alliance is at present.

We see property law as being an important segment in the economy, and the World Bank has identified that security of land title is one of the fundamental elements to a wealthy society. In Australia, it is a national issue but it is a state responsibility. That is where the inefficiencies creep in and I guess was the impetus for trying to do something about it.

CHAIRMAN—You would not want to adopt the New South Wales model.

Mr McCutcheon—I am not sure there is any particular jurisdiction's you would want to adopt on its own. Best practice, I think, is found with bits and pieces everywhere and not necessarily in any jurisdiction, but there is a way to go. We decided to do something about it and with the Property Council of Australia decided that our objective would be uniform practices,

procedures and statutory instruments in property law delivery in a cost-effective, efficient manner for property transactions. It sounds very simple but it proves quite difficult. We set some outcomes that we would like to see achieved, and we have gone a fair way down the track of doing some of those but we still have a long way to go. The seven we identified were efficient land titling, and to that extent, it was catalyst to starting a look, particularly by the registrars of title, at a uniform Torrens system. They have now adopted that as a matter of principle that they should seek to go down that path.

The alliance is part of that in that we addressed the registrars, I think as a consequence of that, with an initiative originally coming from the Victorian Registrar of Titles. The rest of the registrars have adopted that and, after a couple of conferences, that seems to be embedded as a project for them. It is a more difficult one for them than the electronic conveyancing, which is another project that I will mention in a moment; but, nevertheless, that seems to be under way and, again, the Law Council's property group has met and tried to identify what the differences are with the Torrens system between the different jurisdictions.

CHAIRMAN—All jurisdictions, barring the ACT, have the Torrens system, don't they?

Mr McCutcheon—The ACT has a Torrens system, as I understand it, as well.

CHAIRMAN—Even though there is no freehold?

Mr McCutcheon—It is all leasehold but it is still a registered-title system.

CHAIRMAN—I see.

Mr McCutcheon—That is what distinguishes it from some of the systems overseas and what still applies in some jurisdictions, where you had the original grant from the Crown—

CHAIRMAN—The old system.

Mr McCutcheon—and you had to follow through the title 150 or 200 years.

CHAIRMAN—And you never had absolute title; you had the best claim to title.

Mr McCutcheon—That is correct—which is not a good system. But, nevertheless, it applies in many jurisdictions in the world and to back it up, of course, you need an insurance system. That is generally what the Americans have. So they have a different way of going about it.

The other thing that we identified is streamlining of conveyancing. Electronic conveyancing was a project that the Victorian titles office had. I think we have been successful in influencing that to become very much now a national project; all the Australian registrars are joining in that as a project. At present, they have set up an office in Melbourne called the National Electronic Conveyancing Office, with the objective of making the system national so that anyone in any jurisdiction will be able to operate the system in another jurisdiction. That is presently being funded by, on an interim basis, the New South Wales titles office. It is intended that all the offices, as soon as they get their budget allocations, will contribute to make up for the funding that has come from New South Wales.

Mr Waterhouse—If I can just add to that, there was a danger at one point where there were, I think, four different jurisdictions looking at electronic conveyancing. We had a big concern that there would be four different systems set up. So it is quite a big leap that now there is that discussion between the states, because it will help in terms of greater uniformity of process.

Ms ROXON—It does not really need any national legislation or anything particularly to make it happen. It seems to me that, although the steps have been slow, essentially it can be delivered through the state systems that you have; you just want those state systems to talk to each other a bit more. I have a bit of trouble getting my head around not the reforms that you are interested in but why it is one of the areas that we would prioritise in an inquiry like this when, by its nature, with the sort of property that you are talking about, we know where it is and we know which state it is in. There are not the same sort of interstate problems. Of course I know that there are businesses that operate in all states that would like to be able to have one system in place. But what is the driver for reform other than reform that obviously makes the systems work better within each of the states? I do not appreciate that in the same way that maybe some of the submissions we have had in other areas do.

Mr Waterhouse—It is a bit like the Corporations Law reforms in that the current system, with eight different approaches to property, means that there is quite a significant impediment to international and national investment processes. Our concern is that unless there is federal involvement in that, not necessarily through legislative reform but through working with the states and territories and encouraging greater communication between them, there is a danger that we could end up entrenching further the eight different systems.

Ms ROXON—But I do not understand how it is at all like the corporations reform when the key driver for that was corporations that were operating between states.

Mr Waterhouse—But, again, a lot of the property transactions are occurring with bodies that may be headquartered in Sydney, Melbourne, Perth or wherever that are operating across borders. The process of operating across borders means that they could require a different legal team, who they may not have a relationship with, in each jurisdiction.

Ms ROXON—Yes, I understand that.

Mr Waterhouse—There could be pitfalls that they have not come across. They may have to hire completely new staff to deal with the process. So, from an efficiency perspective, it ends up being quite a headache for a lot of property companies, and for companies that have property holdings—it may not be their main focus but they end up having to get a lot of advice just to get transactions through.

Mr McCutcheon—Increasingly, because the clients are national, they are looking for a national solution, and that is what is driving it. Even the individuals have difficulties when they are moving from one state to another. They have to line up settlements and whatever, and they are dealing with financiers who have different requirements in different jurisdictions which do not match up.

CHAIRMAN—It seems to me that you are in fact moving in the direction of, in a practical way, eliminating some of the differences. What would you like to see us incorporate in our report with respect to helping you achieve what seems to me to be quite desirable objectives?

Mr McCutcheon—I think the endgame for us would be a single legislative instrument which dealt with property law. That is a big ask for all sorts of constitutional and other issues, but at the end of the day that would be the best outcome, I think, from a consumer's perspective.

CHAIRMAN—The abolition of the states.

Mr McCutcheon—No.

Ms ROXON—He tries to get that in every time.

Mr McCutcheon—I think the states actually have quite a role because, in many ways, they are more accessible than the federal system via Canberra. The difficulty is that they all tend to go off in different directions. I am not sure what the balance is but, for the time being at least, most people would say that the idea of having a centralised system is not ideal in terms of communication, but it is in terms of having the final rules.

Mr MURPHY—Given that property law is regulated by the state and territory governments, I presume you see there is a major role for the Commonwealth government in achievement of uniform property laws in Australia.

Mr McCutcheon—We do. Given the current constitutional and political environment, it is one in which the Commonwealth needs to tread fairly carefully, of course.

Mr MURPHY—Why?

Mr McCutcheon—Unless you get a constitutional change—and, of course, that is always an option that is open and is mentioned in your background paper—I think that a cooperative approach is more likely to bring an outcome in the short to medium term.

Ms ROXON—In your submission you said you are doing some work on a model real property act. Can you give us an update? How far advanced is that?

Mr McCutcheon—We have gone in terms of the Torrens systems—

Ms ROXON—Was that what you were referring to in the work?

Mr McCutcheon—Yes, but our objective is to go further than that. The title is the end part of the process. There is all the upstream part dealing with the negotiations, contract, transaction, settlement and those sorts of transactions which also need to be fixed up. Leasing is another area that, again, is part of that background.

Ms ROXON—Would the model act that you are working on encompass all those stages?

Mr McCutcheon—It would attempt to.

Ms ROXON—Is it at a fairly preliminary stage?

Mr McCutcheon—Very.

Ms ROXON—Do you have a draft?

Mr McCutcheon—I cannot give you a draft as we speak.

Mr Waterhouse—We have a number of working groups that are working on key aspects of it—some of which would be part of a model act; some of which would be part of other reform initiatives. I guess to some degree we have put it onto the backburner in order to encourage a couple of the state jurisdictions to reform their processes. It is certainly not a project we have backed away from. It is just that it takes time, effort and resources, and we are trying to source those.

CHAIRMAN—Thank you very much for appearing before us today.

Mr McCutcheon—Thank you very much.

[2.00 pm]

TINTNER, Ms Chrysothemis Magdalena (Chryssy), Chief Executive Officer, Viscopy Ltd

CHAIRMAN—Welcome and thank you for varying the time you are appearing. We greatly appreciate it. Do you have any comments to make on the capacity in which you appear?

Ms Tintner—Viscopy is the visual arts copyright collecting society for Australia and New Zealand.

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

Ms Tintner—The perspective of Viscopy is that we represent creators, visual artists and we have, through our own members and our 43 international affiliates, about 250,000 visual artists worldwide. Our 43 affiliates would include visual arts similar organisations in France, Germany et cetera. Essentially, we licence the visual arts works of their members in Australia and New Zealand, and they licence our members' works in their territories and then twice a year we exchange royalties is how the system works. We have a global body called CISAC, and there are a number of other collecting societies that are members of CISAC such as APRA, the Australasian Performing Rights Association.

The issue that comes to bear with New Zealand is that the copyright law there has a rule in it called the commissioning rule, which in practice favours copyright owners and licensees over copyright creators. This rule means that if a work is commissioned the copyright has always belonged to the commissioner instead of the creator, whereas in most common law countries, the creator owns the right initially and then negotiates a contract with the commissioner, which gives them more bargaining power because they then have something to sell. In the case of visual artists, most of them do not actually ever sell their copyright; they just keep it and they licence it for income for works. As an example, Viscopy's tariff which is about 60 pages long has licensing rates for use in documentaries, manufacturing, publications and any manner of use to which you might reproduce an image. All of those uses are lost to the artist if they never own the copyright and the work.

We have also had a lot of difficulties because we also have responsibility for our members in following up infringements where, say, a Maori artist does a lot of work under commission for a commissioner. They do not ever own the copyright of that work in New Zealand. It always belongs to the commissioner. The commissioner then takes that work to America and sells it where it is duly infringed and the artist has no power to follow up the infringement or enforce their copyright powers, because they never had any copyright to begin with.

CHAIRMAN—You are saying that it is not a problem in this country but it is a problem in New Zealand.

Ms Tintner—It is a major problem in New Zealand. We are unaware of any other country in a common law system that has these provisions. CISAC feels that they are against the Berne Convention because the artist has the right to exclusively reproduce their works under the Berne Convention. It is the opinion of our United Kingdom affiliate that the provision is more onerous than the 19th century British provision.

CHAIRMAN—That is a matter that should be taken up with the New Zealand government because only the New Zealand government has the capacity to vary New Zealand law.

Ms Tintner—Absolutely. We have indeed been campaigning for this provision to be removed for some years. I believe the photographers in New Zealand have been doing that for over 10 years, and there does not appear to be much movement. The reason we are interested in bringing it up with this committee is that there are a number of differences between the copyright legislations such as, for instance, Crown law in Australia and Crown law being in the public domain in New Zealand, where there are very real impacts for our members in terms of how their works can be licensed and are commissioned by public sources.

But the main issue for us is a trade issue because we represent the rights of 250,000 international artists who cannot be appropriately licensed in New Zealand; it is called the 'black hole of the Pacific' by our affiliates. We definitely have an interest that is trade based where we want to be able to license our New Zealand members' works in Australia and we want to be able to license our Australian members' works in New Zealand.

CHAIRMAN—Thank you for that. You mention in your submission that the combined visual artist derived component of the economies of Australia and New Zealand is in excess of $400 million. How did you calculate that figure? What is the break-up between Australia on the one hand and New Zealand on the other?

Ms Tintner—For the break down I would have to refer to other figures and come back to you. It is significantly in favour of Australia, of course. Much of that figure is to do with architecture. There is also a large figure that is to do with fine art in Australia. I think the fine art resale market alone is worth over $300 million a year. We also have a significant Indigenous art market in addition to that—a tourism art market. We have illustrations, cartoons, publications—all of those things went into that figure. I would have to come back to you with a break down.

CHAIRMAN—With a membership of a bit over 5,000—I think it is 5,024—presumably that membership is broken up in accordance with the pro rata populations of the two countries?

Ms Tintner—It is about 6,000 now. But that is not quite accurate, because we have not been in New Zealand for very long—only a couple of years. Altogether we would have, I think, 1,000 New Zealand members, it would be fair to say. We are currently in negotiation with Toi Maori Aotearoa, which is the Maori arts organisation, in regard to joining, and about six other organisations as well. The difficulty is that, while the commissioning rule is there, it is so difficult to earn reprographic income that a large number of artists have just said, 'We will join Viscopy when the commissioning rule is changed and therefore we can earn income from our

copyright reprography.' So that has been an issue there and until that is the case we will probably have to do a lot of lobbying.

Mr MURPHY—Can Viscopy provide some specific examples of adverse impacts on its New Zealand members as a result of the situation facing visual authors in New Zealand?

Ms Tintner—There is the one that I just mentioned of the Indigenous Maori artists' artworks. I can provide specific examples of how they were infringed in the United States. The artist was unable to pursue the infringement—or we were unable to do it on their behalf—because they had never controlled the copyright in the first instance. Therefore it was not possible for them to protect their moral rights in the work and how it was used in the United States. It is not just a question of financial income to our members but also a question of the loss of control over how their work is used.

As an example, the worst infringement on a moral rights count that I have ever resolved in Australia involved a toilet paper manufacturer that printed a sacred Indigenous work on toilet paper. There is no law to prevent such a thing occurring, so one of our functions is to make sure that when there is a moral rights implication we follow up the licensing use and check that the artist is happy with that use. It is not possible to do that if the artist does not control the copyright, because there is no licensing process; it is all going through the commissioner. That would be the type of example.

The biggest ones are just the financial ones. If you do not control the copyright, then you have nothing to negotiate or bargain with when you come up with your contract with your commissioner. The New Zealand act does not even require payment to change hands. Somebody can 'commission' a work without paying the creator one cent, and there is nothing to stop them from doing that at the moment.

Mr MURPHY—Has Viscopy brought any of its concerns to the New Zealand government?

Ms Tintner—We have. We have been to see the Ministry of Economic Development three times. We have been to see Minister Tizard. We are in the process of writing a submission, which is due in May, to the Ministry of Economic Development on this very subject, and we will continue to agitate on levels with a number of small visual arts groups in New Zealand who have been doing so for some time.

Mr MURPHY—Do you think that harmonisation of New Zealand copyright law in line with Australian copyright law in the relevant areas would ameliorate some of the issues raised in your submission?

Ms Tintner—I think it would be extremely important, in terms of our particular creative industries, yes. The other thing that comes to mind is that both governments are considering the resale royalty for visual artists, which is where, if a work is resold, a proportion of the payment would go back to the artist in the form of a royalty. Let us say the New Zealand government were to bring that in. The economy in terms of art sales is so small that it might not be possible to make it viable, unless the Australian government were to do the same thing. They are very interrelated because of the size of the New Zealand economy, They cannot really justify policies

that are so very different from the rest of the common-law system, given the size of the economy they have. That is my personal view.

I think it is very important that we support each other in terms of copyright, and I think that there should not be the capacity that there currently is to infringe widely in New Zealand where those things would not be possible in Australia. I am aware of several licensees who have set up shop in New Zealand precisely because they do not have to pay visual artists there. There are definite repercussions to that.

Mr MURPHY—Thank you for your responses.

CHAIRMAN—You mentioned that you were dealing with a Maori organisation and some other organisations. Does that mean that there would be in New Zealand a number of other organisations doing the role that Viscopy does? Also, do you have any competition over here?

Ms Tintner—The answer to both questions is no. I think other organisations would be extremely stupid if they felt there was money in the area in which we operate. It is definitely a labour of love that we do on behalf of the artists, and it is very difficult for us to keep above water, because we are supported only by commission on the royalties that we pay to the artists. That is why we have five staff. APRA has 70 staff.

The situation in New Zealand is that there are a number of arts advocacy organisations for particular groups. They tend to be professional bodies; for instance, there is the Designers Institute of New Zealand, Artists Alliance, the photographers institute and that sort of thing. We have those equivalents here—the cartoonists, illustrators and what have you, and they are all members as an association rather than as individuals.

In terms of competition, even Australia's economy is not that big in terms of reprographic royalties. We have one collecting society to represent creators in each field. So there is one for music, one for authors, one for screen rights, and we are there for the visual arts. That is basically what is here.

CHAIRMAN—Thank you very much for appearing us. We will send you a draft copy of your evidence. Would you please check it as soon as possible and, if there is anything else you would like to convey to us, please contact us and we can send that information on to the secretariat.

Proceedings suspended from 2.15 pm to 2.33 pm

LINDGREN, The Hon. Justice Kevin Edmund, Judge, Federal Court of Australia; President, Copyright Tribunal of Australia; and Convenor, Committees on Harmonisation of Court Rules of the Council of Chief Justices of Australia and New Zealand

CHAIRMAN—Welcome. Although we no longer require you to give evidence under oath—I hope you forgive me for reading what I have to read to all witnesses—I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Your submission has been received and authorised for publication. Would you like to give us a brief opening statement of five minutes and then we can take questions from there?

Justice Lindgren—Yes. The idea of making the submission was to provide you with information. The background to these various harmonisation exercises is found in an event quite some time ago. The late Justice Lockhart of the Federal Court and Justice McLelland of the Supreme Court of New South Wales thought it would be a good idea if the two courts had similar rules and forms in relation to the winding up of companies. Those two judges worked on producing harmonised rules and forms as between those two courts, so that a practitioner would not have to comply with different rules and complete different forms according to which court in Sydney he or she was filing in. That was done.

Then the Council of Chief Justices thought it would be a good idea to appoint a committee to get harmonised rules between all Australian courts in relation to company matters generally, not just winding up—after all, there was a single act at the Commonwealth level governing corporations throughout the country. That is where I came in. I was appointed not only as the representative of the Federal Court but as convenor. That committee over a period from 1996 to 1999 produced harmonised rules and forms relating to all corporations matters, not just winding up, throughout the country. That involved judges from all around the country meeting in Sydney—once in Melbourne. It involved a great deal of intense drafting and so on.

CHAIRMAN—For obvious reasons, because of the different law between here and New Zealand, New Zealand was not involved in this exercise.

Justice Lindgren—New Zealand was not involved. I suppose, looking back on it, whether that was inevitable I am not so sure but, in fact, they did not get involved in that. They have become recently involved in something that I will mention. It took about three years to produce those harmonised rules. I then got the idea that it would be good to have a conference on harmonisation of court rules to see what support there was for it from the profession.

CHAIRMAN—That was a good idea.

Justice Lindgren—That conference was held on 20 May 2000 in Sydney at the Federal Court. People came from around the country—practitioners, judges and so on who were interested enough. We had a video speaker from the US—that is rather by the way. It was opened by Chief Justice Gleeson. Those attending agreed to recommend to the Council of Chief Justices that harmonisation of court rules should be explored further—that is, outside the corporations

area. Indeed, the conference nominated a number of subject areas. In October 2000, the Council of Chief Justices decided to give to a committee—which I, for my sins, convened—the task of getting harmonisation in the areas of subpoenas as the first cab off the rank. That and service of documents outside the jurisdiction and discovery of documents were the three discrete subject areas chosen to have priority. We worked on the subpoenas one, and fortunately we did achieve harmonised rules.

CHAIRMAN—Except for Queensland.

Justice Lindgren—Except that Queensland did not participate. Of course, no court is bound either to participate initially or to continue to participate. You tend to find that, even after courts have participated and harmonisation has been reached, often there is a time lag before the rules are made right throughout the country. Some courts are faster and some are slower, and the rule-making procedures differ. Putting that to one side, so far as subpoenas are concerned, Queensland said right at the beginning, 'Count us out.' The reason was that they had just then made uniform rules in Queensland as between the Supreme Court, the District Court and the local court in Queensland. My understanding is that they just felt they could not bring themselves to visit yet again the subject of subpoenas and then introduce it into the other courts. You would have to speak to Queenslanders—to the judges—to see if I am representing the position correctly, but that is what I understand was the reason. In any event, they did not participate.

So that was the subpoenas exercise. The third one was discovery of documents and that had a curious history in a way. At about the time when we began working on that, a book had just been written by Mr Biscoe QC in Sydney on the subject of freezing orders and search orders. Without going into the detail of that, they are orders that freeze a person or company's assets in contemplation of a judgment and search orders to prevent destruction of documents and provide for the taking of documents into custody. I thought it would be a good idea if one of these harmonisation exercises was undertaken in relation to those two topics. South Australia had some rules dealing with it and Queensland had some rules dealing with it; no other court in Australia had any rules dealing with it.

At the first meeting of the committee set up on discovery, I raised this and the judges attending thought that discovery was extremely difficult anyway. There are wide divergences of views about discovery. It is one of the most time consuming and costly of litigious exercises but there are different philosophical approaches to it. Quite frankly, when the subject of freezing orders and search orders was raised, I think we all jumped at it so we asked the Council of Chief Justices if we could, under their auspices, look into those two topics and put discovery on the shelf for the time being. They said, 'Okay,' so we did that and we have achieved harmonisation. As from two weeks ago, the first court to adopt those rules was the Federal Court. In addition to the rules, there are two very lengthy practice notes which each chief justice will sign off on and which supplements the rules. We have achieved harmonisation of those practice notes and in fact they should be made in the Federal Court, I think, next week—I expect within the next week or a fortnight—but one cannot really commit any court. As I said earlier, you will find there are different periods involved. We will have harmonised rules on discovery and search orders and also harmonised practice notes. That I regard as quite a big achievement.

CHAIRMAN—In Australia, not New Zealand?

Justice Lindgren—In this exercise—thanks for mentioning that—Justice Baragwanath of the High Court of New Zealand was made a member of the committee by the Chief Justice of New Zealand. I got a letter from him in the last week saying that he was delighted to have been involved and to have participated, and he believes that the High Court of New Zealand will also adopt them.

CHAIRMAN—That is good.

Justice Lindgren—I mentioned earlier that there is often a timelag, and sometimes it is a little disappointing. One will reach the stage of achieving harmonisation and all the judges on the committee having invested quite a lot of time will reach agreement within their own courts. Presumably, and certainly this happens in the Federal Court, other judges are given an opportunity to comment and one would hope that having achieved harmonisation, all the courts would then fall into place and make the harmonised rules. What has been the experience—and I do not think there is anything anyone can do about it—is that some judge in some court will come up with a bright idea after harmonisation has been reached and will say, 'But what about so and so?'

Ms ROXON—It sounds like the state parliament.

Justice Lindgren—And it is a good point. There is nothing particularly wrong in the point, but if you delay implementation until every judge has raised these points and they have all been dealt with, you would never get them made. So my own approach is that it is best to make the rules and then deal with any further ideas by way of amendment. I hope I have not taken too long, but that gives you the background.

CHAIRMAN—Is discovery next cab off the rank?

Justice Lindgren—What happened on discovery—and you are probably familiar with the general nature of the problem—is that there are two divergent approaches or philosophies. They seemed, in the meeting and the broad discussion that we had, almost irreconcilable. First of all, you have the approach that a litigant has a right to full discovery with no constraints; that is, a litigant is entitled to give a notice requiring the other party to discover, which means to list, every single document. The test, the old Peruvian Guano test, is 'every document which has potential relevance, could be relevant or could put the giver of the notice on a course of inquiry'. That is one philosophy and, of course, that is the Rolls-Royce approach. It is very expensive in the sense that in a large commercial case you can have people, usually young solicitors, spending the first two or three months of their careers in overalls going through warehouses of boxes looking for the documents that are all to be listed. One of my former associates told me he spent the first three months of his career doing exactly that.

Ms ROXON—Three months is quite a short time for a lot of solicitors now.

Justice Lindgren—Three months might be quite short for some.

CHAIRMAN—Is that why you ceased to be a solicitor?

Justice Lindgren—So that is one approach, and at least one judge on the committee takes that approach—there is more than one, I think. The other approach is to say, 'Let's not throw up our hands; surely we can do better than this.' The attempts to do better have not been terribly successful. In the Federal Court, for example, firstly there is no discovery as of right. In each case, the litigant has to seek a direction from the judge that discovery shall take place, so there is no discovery as of right.

Secondly, when discovery is ordered it is not of that full kind that I mentioned. Rather, what we try to do is to order discovery in categories. We try to get the parties to agree upon the issues in respect of which discovery is to be given. My own view is that that has not been successful, because you merely relocate the argument to the level of what the categories are. So you have the parties coming up having fights about the categories saying, 'We say they should discover such and such a category,' and so on

Ms ROXON—In terms of what our inquiry is looking at, the chief justices committee is working through the court rules as and when they can in terms of harmonisation. We have had put to us in a number of other submissions—you probably will not be surprised by this—that people would like us to direct that not only should the court rules all be the same everywhere but also judicial interpretation should be as well. Some of the submissions are quite ambitious, but I guess you would understand, from a consumer's or a litigant's point of view, why they would want that. Is this process going ahead to your satisfaction? Do you see anything in a legislative framework that we should consider in the course of our inquiry that would either assist or have an impact on this process one way or another?

Justice Lindgren—It is a good question. My view, as you may guess, being a judge, is that judges, being very familiar with all of this, are the best people to make the rules of court. One thing that could be done, although this may not sound terribly ambitious, is for you to encourage harmonisation and urge the courts to support it. There are different levels of support amongst the Australian courts for all of this.

Ms ROXON—So even making a statement about the desirability of it helps provide some impetus?

Justice Lindgren—I would think so.

Ms ROXON—We certainly have had a lot of people making submissions about various court related issues. I must say I was having trouble getting my head around what role it would be appropriate for us to play. But, if there is such a varying degree of support for it, I can understand that it might be useful for us to consider whether some sort of recommendation about the value of it to the public and all those sorts of things might actually be worthwhile.

Justice Lindgren—Yes. Even to record that submissions were made, if they were made in relation to harmonisation, would be helpful to the harmonisation aim. I do think that it is possible to make too much out of harmonisation. If you pause and ask yourself, 'Why harmonise?', it is quite an interesting question to consider. At the moment in Australia, the legal profession is organised on a state basis. The local solicitors, say, in South Australia—to select any state, but it could be any particular jurisdiction—are presumably familiar with the rules of

court there and the forms used in that court. Why should it count for anything that Victoria and the Federal Court and so on have the same rules and the same forms?

Ms ROXON—Practitioners are some of the most ardent advocates of these changes and want harmonisation. I guess as practices are growing more are across state borders and those sorts of things. They are actually the groups that put it to us, which I am sure are the groups that you deal with in terms of law societies.

CHAIRMAN—Maybe it is the larger Sydney and Melbourne lawyers who are very keen on it, but the Adelaide lawyers who are feeling a threat from other capitals might not be.

Justice Lindgren—You are right in that it tends to be the large firms that like it most because they practise nationally.

Ms ROXON—They practise across the jurisdictions.

Justice Lindgren—So they know that they will have the same set of forms and so on and their computers will be set up in the same way, irrespective of which jurisdiction they are in. Another point that was made at that conference is that it helps them with their training of young lawyers because their training booklets and so on need only have one set of forms rather than separate ones, though in my view is that this is probably the weakest of all reasons. My own view is that the reasons to support it are rather different. One of the main reasons why I think that it is a good thing is that you are more likely to get a better model set of rules if you pool together the experience of the judges all around the country.

Ms ROXON—Your experience has not been that it has led you to the lowest common denominator.

Justice Lindgren—No. The harmonisation committees have worked astonishingly well. Some of them have tended to start off with the notion, 'This is hopeless.' It may even be with the discovery one that we may still achieve something. But once you put a group of judges together in a room—and we have had to spend whole Saturdays doing this—you tend to find it is the same sort of problem that crops up in each court. A particular benefit of the exercise is that you will have a Western Australian judge who will say, 'We've had such and such a problem in the court, so we made a rule to say so and so.' Then I will think, as a Federal Court judge, 'It hasn't happened in the Federal Court yet, but that very problem I can see could arise, so we ought to have a rule providing for it.' So if you get the judges from around the country pooling their experience, you will come up with a good model set of rules. I think that is probably the strongest argument in favour of it.

You can find arguments against it. One is that while courts are not bound by the final harmonised product, they will be very reluctant to amend without going back through the harmonisation committee. So it slows down the process of amendment. In all of these exercises, the Council of Chief Justices has appointed basically the same committee again, with me as convenor, as a monitoring committee to keep, say, the subpoena rules under review. There is no point in just making harmonised rules at a moment of time and then just forgetting about them. You have to keep their operation under review. If one court comes up with an idea for an amendment, that then can be dealt with by the monitoring committee.

CHAIRMAN—Could you clarify one thing for me about the making of court rules. They are made by the judges or, more specifically, the Chief Justice, aren't they?

Justice Lindgren—The way they are made varies from court to court. In the Federal Court they are made by the judges—which does mean the total body of judges of the court. The Chief Justice ranks as only one judge for that purpose. Practice notes, however, are made by the Chief Justice. In the Supreme Court of New South Wales, they have now got the committee on uniform court rules, between the Supreme Court, the District Court and the Local Court. Going back prior to that, there was a statutory committee of a small number of judges plus a representative of the law society, a representative of the bar association, and maybe the Chief Justice. They actually made the rules. Other courts such as the Federal Court have a non-statutory rules committee which will recommend changes to the rules, but it is the total body of judges who make them. So it varies from court to court.

CHAIRMAN—What about the High Court?

Justice Lindgren—Those rules are made by the total body of judges, which of course is only a small number.

Ms ROXON—Could I ask a question, Mr Chairman—I know we are going to be tight for time—that is not to do with court rules but with some submissions that others have made. Tell me if you are not comfortable in commenting on this, but it seems like an area in which you would obviously have some expertise.

CHAIRMAN—I am sure the judge would be comfortable.

Ms ROXON—I am sure he will tell us if he is not. Some of the submissions did go to the frustration about even if you harmonise laws you could have different interpretations. Whilst that is a common complaint, what we might be able to do about that is possibly limited. But one of the witnesses this morning said that she was of the view that having a judicial commission that involved a capacity for sharing information and education between courts and judges, training, and those sorts of things would actually be a constructive thing that would assist in getting greater harmonisation or consistency in various judgments. I think the particular example she was using was sentencing.

Does the court have a view—whether personally or just from your experience—about whether that is a desirable way of trying to get increased consistency in interpretation? So we go through the legislative process of getting harmonised legislation and then there is, of course, the process of those laws being applied across all different courts. Do you have a view about whether that is a constructive proposal?

Justice Lindgren—I am not sure that I should comment on it. First of all, I am only here as convenor of these various—

Ms ROXON—That is why I was conscious to say 'please don't if you do not feel you should.' But if you have a personal view—

Justice Lindgren—A relevant point—it is not the same point—is: one advantage of having harmonised rules is that the judges of the various courts would be interpreting the same text. So you get a body of judge-made law, by way of interpretation, whereas if you have different rules in the various jurisdictions you have got different texts to construe. That is a different point from the one you were making. The pooling of experience which has occurred on these harmonisation committees has been very good, and that is relevant to your question. But I do not think I should comment. Apart from any other reason, there are, I am sure, already various organisations—such as the Australian Institute of Judicial Administration, the Australian Judicial College and the annual conference of federal and supreme court judges—through which judges from the various jurisdictions are in communication with each other. Whether they are adequate for the purpose, I do not think I should venture an opinion on that.

Ms ROXON—We could obviously ask them too, if we want to. It is just that it was a matter that was raised this morning and I thought that if you happened to have a view on it, I would at least put to you. Anyway, I understand that that is not the sort of hat that you are wearing today, so I appreciate that.

CHAIRMAN—Thank you very much, Judge, for appearing before us, and we thank your associate for accompanying you. We will send you a draft of your evidence for you to check. If you could send it back to us as soon as possible, that would be good. If you do have any other thoughts before we report, please feel free to convey those to us as well.

Justice Lindgren—All right. I did present two or three years ago a short talk to a conference on harmonisation of rules. I could update that and provide it to you—it is only four pages just giving the historical background, the sort of thing I said initially.

CHAIRMAN—We would appreciate that greatly. Thank you.

Ms ROXON—It might save the judge time even if it is not updated, it may be useful for us in the form that it is in. It still gives us that background.

Justice Lindgren—It does not include the latest exercise.

CHAIRMAN—Thank you very much.

[3.00 pm]

MUNCHENBERG, Mr Steven John, Deputy Chief Executive, Business Council of Australia

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

Mr Munchenberg—I should point out from the outset that the Business Council's main interest in this area is a general rather than a specific one. We have not involved ourselves in the specifics of harmonisation of the legal system or the matters that the committee is considering specifically but we have a very strong interest in the broader question of multiple legal systems or multiple regulatory systems around the country and the implications that has. We are an advocate of harmonisation, which I will explain in a bit more detail in a moment. Our main interest in seeing greater harmonisation in Australia is that for many of our businesses—and the Business Council represents the large corporations; basically, the top 100 companies—operating under multiple jurisdictions around Australia is a major if not the major component of excessive regulatory compliance costs. So we have got a keen interest to see what can be done to try and harmonise in those areas.

We believe that there are a number of ways in which these issues can be approached. We see harmonisation as one way of dealing with that. There are another seven that we have suggested in very brief terms in our submission to the committee. Which of these is applicable in any particular case will be determined on the circumstances of that case. We do not see harmonisation as a panacea and nor do we see harmonisation or any of the other solutions as easy or without some challenges and problems associated with them. Nonetheless, we feel strongly that Australia does need to be trying to rationalise a lot of its regulatory systems, including the legal systems that you are looking at.

I note before finishing that since we made the submission to the committee back in April of last year the Business Council has released two major reports which touch on this area, the first one being our regulation action plan. It came out in May of last year and includes a much more detailed discussion of some of the approaches that we think could be considered to help rationalise the regulatory systems in Australia. The second one which I urge the committee to look to, particularly if you are looking for specific examples of where there are problems, is our submission to the federal government's regulation task force, the so-called bank's task force, at the end of last year. Again, that sets out both the broad arguments as to why we feel rationalisation in this area is necessary and there are quite a few pages of examples of the problems that some of our companies face.

Ms ROXON—Are those ones you can make available to us—

Mr Munchenberg—Most certainly.

Ms ROXON—because, obviously, the first one is public but the second I do not think is, so—

Mr Munchenberg—They are both public but we can certainly—

Ms ROXON—You have released them, have you?

Mr Munchenberg—Yes.

Ms ROXON—We do not automatically get everything that is made to the government's internal task force released to opposition or others.

Mr Munchenberg—They are both on our web site, and I am more than happy to send them through to the secretariat.

CHAIRMAN—In your opening statement, you did not mention New Zealand. Presumably, a lot of your members would operate across the Tasman.

Mr Munchenberg—They do.

CHAIRMAN—Do you have any New Zealand membership or are you purely—

Mr Munchenberg—We do.

CHAIRMAN—So you are really the Business Council of Australasia.

Mr Munchenberg—That is probably putting it too high. Off the top of my head, I think we have one New Zealand member at the moment.

CHAIRMAN—I think that would be putting it too high! But, clearly, your membership must be frustrated by different regulatory systems over there.

Mr Munchenberg—Exactly the same situations arise between New Zealand and Australia as arise between New South Wales and Victoria. Obviously, in some areas we have greater harmonisation; for example, corporations law is, I suppose, the standout example of where we have managed to harmonise and move to a single national system very successfully, albeit with some legal questions still unresolved. It is the same case, as you mention, with New Zealand. Companies in Australia, or even international companies, tend to see Australia and New Zealand as being largely the one market face—if you like, a tenth jurisdiction—in terms of dealing with New Zealand.

CHAIRMAN—You outlined a number of possible means of achieving harmonisation. Could you rank them to give us some idea as to what you see as being the most practical and possible way of achieving as much harmonisation as we can.

Mr Munchenberg—I would not rank them in the sense of there being some that are better than others. We would see that in certain circumstances a particular approach is going to be more appropriate. In some cases, you may want to move down the harmonisation path; in another case, you may want to go for mutual recognition. Within Australia there is always the option of shifting relative responsibility and powers backwards and forwards between the Commonwealth and the states. We have tended to rank them in terms of the extent to which they require major change in the existing system. So, theoretically, a mutual recognition scheme can be done quite easily because you can merely say, 'We will accept compliance with the legislation in one jurisdiction as being acceptable within our jurisdiction.'

Harmonisation is probably about the second easiest and, although I am happy to discuss this, it is fraught with difficulties and challenges nonetheless. But you can also do things such as something that is of interest to our membership—perhaps not so much to the federal government—which is the idea of Commonwealth opt-in schemes. So, where you do have corporations that are operating nationally, it might be appropriate in a particular area for the Commonwealth to regulate nationally operating corporations while small businesses operating within state boundaries are more appropriately regulated at the state level. So, there is no real hierarchy, if you like. Our point is more that there is in fact a suite of things that can be done to address these issues.

Ms ROXON—I noticed that you put constitutional amendment as one of things that is a mechanism and a difficulty.

Mr Munchenberg—A small toe in the water in that direction, yes.

Ms ROXON—I am interested because although it is not unheard of it is unusual for the business community to get behind a constitutional amendment. In fact, our next witness has proposed an amendment which goes to the type of thing you have been talking about: how you make sure, if there is a cooperative scheme, it gets the protected status that it deserves so that it cannot get knocked over in the High Court. Is it conceivable—and we are not asking you to sign a cheque on behalf of the business community on this—that some of these problems matter enough to the businesses that you represent that they would actually engage in the public debate that there has to be to change our constitution?

Mr Munchenberg—Certainly in this area I think there is every chance of that. In our constituency it is obviously more pressing, if you like, for our nationally focused companies than for some SMEs. Certainly, were we, the Business Council, and other associations to go through an education process with our constituencies as to why this is an appropriate change and the benefits it is going to deliver to them—in this case, if cooperative schemes were more realistically put back on the table as an option for dealing with these multi-jurisdictional problems—then I think it is quite conceivable that the business community would be highly supportive of it.

Ms ROXON—I think one of the reasons that, through all of the submissions that people have put in, everyone always shies away from constitutional amendment is how difficult it is to convince the community to vote for it. Obviously that involves whoever else within the community are the advocates of this change. I am interested because it seems that in a lot of the regulatory area business has a huge investment in what the future structure is going to be.

Mr Munchenberg—Absolutely. We would need to be careful, of course, because it will surprise you to know that sometimes when the Business Council backs things the community is a little suspicious of them.

Ms ROXON—No, that does not surprise me. It has also been a good example of the fact that, if the Business Council want to, they are quite prepared to put money into campaigning for issues that they care about.

Mr Munchenberg—The Business Council are prepared to work very hard for issues that they care about across a whole range of areas. If it were seen that the business community was supportive, it does give it a degree of credibility in the sense of it being in the national economic good, which is where business is seen to have a credible voice, if you like.

Ms ROXON—That was the main one that I was interested in, Mr Chairman. Some of the things that I was going to follow up on are clearly going to be in the reports that you have since released, Mr Munchenberg, so I am happy just to—

Mr Munchenberg—I am happy to discuss that with you, if you like, but I am in your hands.

CHAIRMAN—What lobbying of governments has the Business Council done more recently with respect to some of the matters in your submission?

Mr Munchenberg—The two documents that I referred to were very much about lobbying governments. You may be aware that throughout last year the Business Council brought out a number of these action plans on a range of areas—there is one on business regulation, one on infrastructure, one on tax and one on workplace relations. In those documents we provide the detailed research and background as to why these are issues and point towards some of the solutions. The submission to the banks committee was a bit more specific in its terms of reference.

We have been putting pressure on both the federal and state governments. We have been meeting with premiers about these issues as well, because we see that the answer lies in collaboration between jurisdictions, not just in getting one jurisdiction on board. And we have had some success in that regard. The committee would no doubt be aware that COAG agreed to a number of changes. Perhaps that is putting it too strongly. They have at least identified some hot spots, as they refer to them, where they think that work does need to be done to harmonise or rationalise legislation.

Ms ROXON—From the BCA's point of view, were they the right hot spots to start with? Are they the areas that you also think need—

Mr Munchenberg—Some of them reflected our view; some of them were more specific, like road and rail freight issues and things, which we have tended to get involved in only incidentally to our work on infrastructure more broadly. Our primary one was occupational health and safety. We see it as an anachronism that, here in the beginning of the second century of our federation, we are dealing with eight—some would say even nine—OH&S systems around the country, all of which are trying to achieve the same objective, which is providing safe workplaces, but all of which seem to feel the need to do it in a slightly different way.

I am sure the committee is aware of, for example, David Morgan, the CEO of Westpac, and his nice little story about first aid kits. Every jurisdiction requires you to have a first aid kit in the office, which is fine. Every jurisdiction then legislates differently as to the contents of that first aid kit down to the different widths of the bandages that have to be provided. We are a geographically big country, but presumably there is not that much difference between Australians that the bandages need to be different around the country. At one level it is a frivolous example; at another level it is a good indication of the problems that business faces, because having to have eight different types of first aid kits means that Westpac is not able to bulk buy first aid kits and distribute them to all of its offices. It has to buy localised ones, which adds to the general cost of doing business without any perceivable benefit.

CHAIRMAN—At a state level in particular, because often state politicians determine to jealously safeguard their constitutional responsibilities, do you think that in 2006 there is a higher level of cooperation and a preparedness to look at the stupidities of the sorts of situations that you have just outlined?

Mr Munchenberg—I oscillate between optimism and pessimism. When I am being pessimistic, I look back at the original constitutional debates and convention proceedings where they were talking about these very issues as the rationale for federalism. Going back to the 1890s, it was these issues that were driving federalism, and we are still debating them here in the first decade of the 21st century. To be optimistic, though, I think that we are seeing a gradual breakdown of parochialism—the argument that somehow things are different in whichever state or territory.

Having said that—and I think it is very relevant to the issues that the committee is looking at—one of the things that we have seen, and why we put some degree of a question mark over harmonisation while we support it in principle, is that you will invest a great deal of effort into getting an agreed set of laws. One of the problems that then happen is that, as those laws go back to the sovereign parliaments of each of the states and territories, the government or its officials or the parliament feel that they can make it a little better in some regard. And so instantly you are starting to get divergence. It may be trivial to start with but it is the beginning of a process that happens. The question that we have asked ourselves, and which we do not yet have a clear answer to, is: having gone through the effort of achieving a harmonised or agreed set of regulations, how do you keep it harmonised? I notice that you had a Federal Court justice here beforehand. Obviously, the issue with even legal interpretation of the words is a problem as well; a court in Western Australia may interpret a set of words differently from a court in Queensland, for example.

Ms ROXON—One of the witnesses this morning—I think it was the Law Society but someone will tell me if I am wrong—suggested that their preference is to use a template model where the Commonwealth drafts and implements the law and the state parliaments simply pass a legislative instrument which adopts it. Then there is a set process if you want to change that template. Do you think, because you see the risk of minor changes turning into more major changes across time, that that is more desirable than a harmonisation process?

Mr Munchenberg—Where the states are amenable to that approach, and I do not think that it should be assumed that on any particular issue they will be, I think it is a preferred way to go. I am no expert in the area—I am sure there are experts appearing before you that can answer this

better than I—but my understanding would be that that is not dissimilar to what the cooperative scheme was with the Corporations Law, where it was a law of the ACT, I think, that was adopted around the country. That would definitely be a better mechanism if you were able to achieve it.

While I am thinking of some of the issues that we have identified with harmonisation, the other one—and I think it is touched upon in our submission briefly—is the question: do you harmonise up or down? By that I mean that for a long time there was concern that by harmonising you would somehow pick up the lowest common denominator—that you would in fact move backwards to wherever the least progressive state was on a particular issue as a way of getting concession consensus around it.

The other issue, which we have seen recently—I will explain the example in a moment—is that you can in fact harmonise upward. That is, each state and territory refuses to give up some of the peculiarities of their legislation in the interests of harmonisation, so you end up with all the peculiarities being cobbled into a particular piece of harmonised legislation. The experience we have had, and I know that people will dispute whether this is a peculiarity or not, is with the defamation laws. The states have moved to harmonise their defamation laws. We support that; we think it is an appropriate thing that removes forum shopping and various other problems that were identified in the past. But one state had precluded corporations from suing in defamation some time ago; that was New South Wales. None of the other states had previously sought to pick that up but New South Wales, through the harmonisation process, was not prepared to let it go either. So we now have a situation where all of the states have excluded corporations in the interests of harmonisation.

Ms ROXON—Well, it is consistent.

Mr Munchenberg—It is certainly consistent and it demonstrates that harmonisation can be a two-edged sword. Whether it is a better outcome or not will always depend on the actual content; that, I suppose, is the key point I was wanting to make.

CHAIRMAN—You said that when the proposals get back to sovereign parliaments certain things happen to them. Firstly, would you say that in a federation there is such a thing as a sovereign parliament? When you look at the world situation today, with national sovereignty being less important than it once was, is there a sovereign parliament anywhere?

Ms ROXON—Just a quick 30-second answer on that.

Mr Munchenberg—Constitutional fairness.

CHAIRMAN—It is more observation.

Mr Munchenberg—It is a good point, and I wish we had more time to discuss it and a nice bottle of red wine to go with it. The point, I suppose, I was trying to make by using the word ‘sovereign’ was to recognise the fact that state parliaments are able to legislate pretty much as they like subject to, obviously, the Constitution and any inconsistent federal laws. We have to factor into this process the fact that they have that right and they will be, at times, inclined to exercise it. Even if all the premiers agree that a particular piece of legislation should be in a particular way, each of those premiers still has to be able to pass that legislation. If you go

through the model—and Ms Roxon has pointed out an alternative one that there are a number of other ways of doing it—where each parliament passes their own legislation, we have to recognise the danger that as sovereign parliaments they are well within their rights to say, 'No, the people of our state want it differently.'

CHAIRMAN—And also draughtsmen have different interpretations. I think the template way is a good way to go.

Ms ROXON—We have had a number of submissions about a model contracts code and it has been put forward that it would be advantageous, particularly to business. It is an idea that has been around for 20-plus years but it has not had a lot of momentum since the time it was first being discussed. Does the BCA have a view about whether it would be helpful, not helpful? Obviously, it would have a major impact on business if you were to change it and the argument is that contract law is pretty well established now in Australia. You could simplify it into 25 provisions or whatever—I do not remember what the exact number was—and that would assist the legal processes at least for commercial disputes. Do you have a view at all about that?

Mr Munchenberg—I suppose I can see some merit in it although I suspect that at the end of the day many of the contracting parties—and it would not necessarily be the corporations—are going to want to do whatever it is they want to do for their particular circumstances. It would have merit as perhaps a starting point, and many organisations already use standard contracts. I know from our own point of view of the Business Council, if we get a consultant on board we have a standard form contract.

Ms ROXON—This is more a proposal to codify the rules that govern contracts if you have arguments that then get to court about it. So rather than relying on case law to put it all into—

Mr Munchenberg—So sort of a quantification rather than a pro forma contract.

Ms ROXON—Yes.

Mr Munchenberg—We do not have a position on it, because it is not something that we have turned our minds to. There can be some advantages with codification in that you may allow yourself to move beyond things that are largely set and just get on with business or with whatever is in dispute in a particular case. The problems with codification and to some extent the strengths of the common law system are that it is ever changing, flexible, adaptive and all those sorts of things. It is a question about: if you entrench principles in black letter, even if it is a code at a particular point in time, how flexible is that going to be to changing circumstances? It may well be that there is—I am sure there is—a set of principles that are so universal and slow changing that they are not going to face that problem, but then I ask the question: what is the advantage if they are that settled in actually trying to codify? It is a bit of a non answer.

Ms ROXON—That is fine.

CHAIRMAN—In your submission, the BCA cites duplication and coordination costs due to our multiple jurisdictions to be $20 billion in 2002—

Mr Munchenberg—Cites in that particular reference.

CHAIRMAN—which is four years ago. Is that figure still broadly accurate or is it now higher? Are there some sort of costings you could give us with respect to lack of harmonisation between Australia and New Zealand?

Mr Munchenberg—We do not have anything specific to Australia and New Zealand, and it is very difficult to get costs of the whole problem, if you like. The two reports I referred to provide a lot more cost information. In fact, the first report, the action plan, has quite a detailed appendix to it which is more about the cost of regulation but a lot of that does touch on inconsistencies between jurisdictions.

The $20 billion figure is one that a particular academic at ANU put forward and, from recollection, that figure is the total cost of the federation, if you like. He argued that that was the additional cost of having a federal system over having a single centralised system. We provide that figure as an upper limit. While we cannot precisely measure the costs, all of the evidence of the measurements that are available—and, as I say, they are much more extensively dealt with in the other two reports—indicates that they are very large, and therefore it merits us looking at ways of reducing that cost and improving efficiency and everything in those sorts of areas. That is more the argument that we have been running. It is incredibly hard—we were unable to do it, and I do not think anyone has done it—to say that overlap between the states, even in a particular area like OH&S, costs a certain amount.

CHAIRMAN—So you are implying that by abolishing the states we could cut taxes?

Mr Munchenberg—I am not implying that, because we are not advocating that. We are just saying that—

Ms ROXON—You have not missed a witness with that today, have you, Mr Chairman!

Mr Munchenberg—One might even cynically say that the Federation having nine sets of politicians is a high cost. And I do not mean that in any disrespectful way—

Ms ROXON—I think he was asking for that.

CHAIRMAN—I think it is a perfectly accurate comment.

Mr Munchenberg—I think at last count there were 731 governments in this country when you take into account all the local governments as well, and increasingly we have an international government in that many things are being dealt with internationally and Australia has to be part of that, so you can add one more. So you would save, but I would not want to dismiss the benefits of the federal system either. The question we ask is: are we making sure that the costs in any particular area do not outweigh the benefits. Certainly, the states will argue passionately about competitive competition between the states or about the fact that a particular state might try and experiment in a particular area and if it succeeds then the other states can follow their example and if it fails miserably then only the poor citizens of one state suffer as a consequence rather than the whole country. Those arguments are there. Our point is merely that if the costs outweigh the benefits then we need to move to a single system through some mechanism.

CHAIRMAN—Thank you very much for appearing today. The transcript of your evidence will be sent to you. If you could check it and send it back. If there is anything else you would like to tell us, feel free to contact the secretariat.

[3.28 pm]

WILLIAMS, Professor George John, Private capacity

CHAIRMAN—Welcome. At the outset, Professor, I congratulate you on your impending paternity.

Prof. Williams—Thank you. It certainly is impending.

Ms ROXON—We will understand if you need to leave your phone on.

CHAIRMAN—Honestly, you can do that.

Prof. Williams—Thanks.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I 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. Your submission has been received and authorised for publication. I invite you to make a brief opening statement.

Prof. Williams—As you have seen, my submission focuses on the processes and capacity for harmonisation in Australia. The starting point in my submission, which I do not articulate clearly but I think is there implicitly, is that, where harmonisation is required and where there is the political will to achieve it, the barriers should be as low as possible to bringing about harmonisation. Indeed, it is also implicit in my submission that I have a real concern that the barriers are not as low as possible at the moment in Australia and that there are a number of barriers which pose quite important impediments to best practice within this area.

If we look at the sorts of models that people have talked about in their submissions, there certainly has been a lot of support for template models for harmonisation, which I also support. They do make a lot of sense. Nonetheless, there are still some grave problems with those approaches. The idea of states re-enacting a federal law as a state template model tended not to work well with a law such as the company code, where divergence over a period of time led to an undermining in that law. If we also look at the other approach with the Commonwealth enacting a territories law and that then being adopted by other states, as we know the High Court undermined that scheme which meant that it could not be sustained.

The problem more generally with any of the template models is that the result of High Court decisions is that we cannot have one dispute resolution process applying to this area. That is because the High Court has found that no state laws can be resolved, as a matter of law, within federal courts, and any template model is going to suffer from the constitutional defects identified by the High Court. What that means is that if we are looking at harmonisation there are really only two possibilities on the table that avoid all of the important defects.

Firstly, there is a referral of power; of course, that has been successfully achieved now in the Corporations Law. But the problem with the referral of power is that it is often very difficult politically to achieve. It is often seen by the states as an abdication of their power to the Commonwealth. It is also subject to continuing uncertainty, and I note the media comments just a couple of months ago when states indicated perhaps a willingness to depart from their referral of power with regard to the Corporations Law. That sort of thing is very much unfortunate when business confidence is so important. The other area where you might get referrals is where the political imperatives are very high, such as with regard to criminal offences relating to terrorism. But, I suppose, the point I would make about referrals is that they are not a sustainable or effective way of dealing with this problem, because the barriers politically are often too high to bring about the change.

The other model that clearly does work in some circumstances is simply the Commonwealth going it alone. But that depends on Commonwealth having the constitutional power in the first place. The IR legislation is a good example of how it is a very imperfect way of moving forward. The fact that the workplace relations legislation is meant to harmonise the law but can only cover up 85 per cent of employees is a good example of how an imperfect, if you like, source of power can lead not to a harmonised system but, again, to a degree of graduation as to who fits within which model and continuing jurisdictional uncertainty. The go-it-alone model also suffers from great cost and potential uncertainty when we look at the possibilities of High Court challenges.

What that means, in my view, is that there is clearly a flaw in the system as it currently stands, which is and must be traced, ultimately, to the Commonwealth Constitution, and that we need to get back to what would be the key objective of any form of harmonisation—that is, having the barriers to harmonisation as low as possible so political and community will can be harnessed in actually bring about change. We do not want a system where that sort of change continues to be stymied. As you know, in my submission I put forward the proposal for a constitutional amendment which I see as very modest but necessary. This morning I have read through all of the submissions that the committee has received and read through transcripts, and I note there is no dissent, as far as I can determine, from anyone who has appeared or made a submission from the basic idea that this change would be sensible. That includes the submissions and evidence from the federal Attorney-General's Department, state attorney-generals, and the University of Melbourne's Simon Evans, a very well-known constitutional scholar who has obviously scrutinised it quite carefully. Even the Business Council of Australia's submission and oral evidence recognise the basic commonsense of the change. I think what those submissions recognise is that ultimately, if we are serious about the issue of harmonisation, we must come to grips with the underlying problem that continues to stymie effective progress.

If there is a concern in those submissions it is that it is just too hard to bring about constitutional change. But I would say that, equally, the costs of not acting are very high. Do we really want to go through the next century of the Australian federation without an effective means of fostering cooperation between the federal and state governments in some of the most important areas of public policy today facing the nation? The Attorney-General's Department has also said that this would be a very technical amendment and that it might be difficult to convince Australians of its worth. But my view is that, in fact, this is exactly the type of amendment which is more likely to succeed at a referendum. That is because it is very different to some of the big ticket items that sometimes polarise people in the Australian community. This

is an item like some of the successful changes by referendum to the New South Wales constitution that have been effective in getting very high levels of public support because they are seen as technically necessary and as commonsense to remedy a defect in the constitutional system.

I also note that the last two successful referendums also fit into categories that may well match this proposal. The 1967 referendum was a proposal that had no significant disagreement across the state or federal governments, business or other communities. If that level of support was also tailored to this particular proposal, there would be no reason why we should not expect very high levels of support in the populace. That referendum had over 90 per cent popular support. The last time the Constitution was changed was in 1977. Very modest proposals for things such as retirement age for High Court judges certainly did not excite the imagination then or subsequently. But, in fact, that was a key reason why those referendums succeeded: they did not lead to the polarisation of the community and they did not lead to significant opposition. Like the New South Wales referendum changes, they were seen as sensible, appropriate changes that did not get people excited enough to vigorously oppose them.

I think the failures we have often had are from going for too large a change in circumstances where the proper coalition has not been built. The last thing in my view is the change is necessary. We should do it now rather than waiting for another century and simply limping along with our current problems. My view is that any change should be as part of a referendum at a federal election, perhaps the next federal election, to minimise cost and also to indicate that this is not an issue that deserves such sustained and expensive attention as a separate referendum. My view is that if it did get the support prior to the referendum of the business community, unions, state and federal governments and a broad section of the community then that would be a sufficient reason to spend the money to put it to the people, given the sorts of figures we are looking at from the business and other community of exactly the sort of money that Australia is wasting with its inability to bring about properly harmonised laws.

CHAIRMAN—Thank you for that. I think there is a lot of sense in what you suggest. The only referenda that get through are those which do not have significant opposition; those that are highly controversial do not get through. The two that you mentioned are interesting. I often wonder whether the one involving Indigenous people would get through in 2006 when one sees that referendum change, that change to the Constitution, proved to be much more widespread than people thought at the time. I remember reading something that the argument was put that Aboriginals should not be able to be counted in the census as Australians. I do not think that people fully understood that there was going to be a wholesale transfer of an area of power to the Commonwealth.

The other one in 1977—I am not suggesting, of course, that we have ever had geriatric senile judges in Australia—was a compelling argument to say that judges should retire at a reasonable age. When you look at the inflexibility that that has now brought into our Constitution, given the fact that people are living longer and they are much healthier than they were—

Ms ROXON—Seventy is the new 50. I think 40 is the new 30—I am not sure if it goes quite that far up.

CHAIRMAN—The point that I am making is that to force judges to retire at 70 I think most people would now say is a nonsense. In New South Wales I think it is 72 and in other places, as health improves, you have lost that flexibility. Maybe 75 would be a better age, but I take your point. What you are really saying is: if it is not controversial and there is not a lot of opposition, it is more likely to get through. I think what you suggest is sensible but I do not know how easy it would be to persuade the government of that.

Prof. Williams—All I can go from, for example, is the Attorney-General's Department, which is on record as recognising a sense of this particular proposal. There is nothing in any of the submissions that says anything against it. You can simply do a cost benefit analysis on something like this. What are the costs of not doing it? They are very high—extremely high.

Ms ROXON—I have a question which I think goes to the argument you might build in trying to convince any government to do it. I understand in your submission why the two particular problems that you are saying the amendment has to deal with are that the federal courts and federal agencies are administering state laws. My interest—and I know that you have heard me speak about this—is covering those things but being broader than that. It seems to me there are a whole lot of constitutional question marks over national problems that do not deal with cross-vesting issues and do not deal with the administration of law.

Using the mental health debate that is on at the moment, agreement between the states and Commonwealth to invest more in it is not necessarily something that needs a legislative base for more funding to be put in but there might be all sorts of accreditation standards and other things that you might want to put in place. There are a thousand different options for areas where there is mixed constitutional power where you might want to agree to a national scheme of some sort and be sure that it is beyond challenge—that is not a particularly good example. Is your submission that any enabling provision has to cover these things but does not have to be limited to that, or do you think that the only key problems are the cross-vesting and the federal agencies administering the laws? Is that a clear question?

Prof. Williams—There are a couple of things to say there, and of course there are many other examples. Water is another very important example at the moment: we have the parliamentary secretary and state governments increasingly at loggerheads on basic issues as to who is responsible and who has the power. We are dealing here with one of the fundamental problems that are going to face this nation over the next century yet our framework is quite inadequate for dealing with it.

I think there is a deeper and more systemic problem—that is, the federal system, which was designed 100 years ago, suited very well a fragmented federal system operating, essentially, within a national economy, but is very ill suited to a far more cooperative, cohesive federal system that instead operates within an international economy. High Court interpretations have really locked us into that fragmented approach. I think the sort of system that was designed 100 years ago is now quite dysfunctional for what we need today. There is a range of things that I am very interested in seeing tackled, but I think they do go beyond this problem. In fact, I identify this because I think this is a modest start to dealing with some of those things. I probably would not load them all up in the one proposal simply because I also recognise the difficulties of constitutional change.

Ms ROXON—But is it not still consistent with the modest proposal to have some not-content-related mechanism for being able—this is my interest particularly—to give force to agreements that are struck between the states and the Commonwealth? I do not want to try to determine now which categories of issues are going to be the important ones for the next 100 years, whether it is water or something else, because in another 25 years it might be foreign aid—although I guess that is an easy one to do—or 10,000 other things. Do you think that it is an ambitious proposal to look at some sort of more general enabling provision, provided it picks up these two points?

Prof. Williams—No, I do not. I think that does fit squarely within the sort of area that I would propose, in that the focus of the sort of thing that you are putting forward additionally, again, relates to the consent of the parties. That is the key element here: a commonsense initiative that simply recognises that where the parties consent to do something they should be able to achieve that without the sort of jurisdictional impediments that currently exist.

Ms ROXON—If you have all the jurisdictions that between them have coverage agreeing, why should you leave yourself exposed to the court then being able to knock it off?

Prof. Williams—Particularly where these things, at most instances, go through parliament in any event, so they are subject to the sort of transparency and scrutiny they ought to be. When the people's representatives have decided something is a good initiative and where every state and territory and the federal parliament have also done so, it really makes no sense that for reasons that can only be traced back to the 1890s it is essentially unachievable. I think you make some good points about intergovernmental agreements in other areas. Personally, I see this as building in, if you like, the two aspects that relate to those High Court decisions. But, so long as the tenor was the same in terms of the modest nature of it dealing with consent—that is, no power to Canberra, which I think is particularly important, but simply enabling the states and the Commonwealth to agree collectively—then I think it could easily fit in to the same vote.

Ms ROXON—My problem is: I do not want us to fix the problem of the last 20 years but not give us any tool to fix whatever the problems are going to be for the next 100 years. That does have to be fixed, but are we being too modest in our requests?

Prof. Williams—No. I think that makes a lot of sense. Indeed, even though I would support a recommendation from this committee along the lines, obviously, I am putting, I would say that if there were to be movement the next thing would be to pry into the detail of this to work out what fits within the package and to talk broadly to people in the community and elsewhere. That ought to involve its own dedicated process because a lot of money is invested in a referendum. Most of them fail because the process to get there is itself a failure and the model is not thought out carefully. There has to be a sense of confidence that we are not just dealing with those past but continuing problems but also that we are anticipating the forthcoming ones. So I would support that.

CHAIRMAN—Have you put this proposal to the states?

Prof. Williams—I have in the sense that the states have over a long term supported this type of proposal. I note the submissions from Queensland and Western Australia. The states are on record, particularly after the High Court decisions, as pushing very strongly for this type of

change. I also note it has been on the agenda as an item at SCAG since 2002; it just has not moved anywhere. The states see this as a sensible initiative because they do not want to refer power. They often do not refer power. They want to cooperate; they simply cannot do so because of this impediment. I am not aware of any state that has been on record as not supporting this. The federal government has supported it. It simply comes down to political will and working a process forward. Daryl Williams, the former Attorney-General, also supported it at the time, but simply said, 'It is too difficult.' My view is that is wrong. It is not too difficult. In fact, if we are going to consider a change, let us do this before we think of something even bigger and more difficult, because this, I think, is likely to be more achievable.

CHAIRMAN—I think there is a lot of merit in that. It is not for me to commit the committee but, certainly, we will look at that when we consider our report.

Ms ROXON—I think yours is a really useful submission, so thank you, Mr Williams; and thank you especially for talking to us at the start of this process as well as at the end of it. It has been helpful to have your expertise.

Prof. Williams—Can I perhaps finish by saying one thing: it has been immensely helpful to be here at the beginning and the end and having the chance of reading all of the submissions. As a package, the submissions reveal just how difficult the situation is. There is almost a level of acceptance that the system just cannot work properly. That is just not good enough in Australia. We ought to be saying that we can make the system better instead of accepting that problems cannot be dealt or that we cannot have cooperation. It is particularly important that we recognise that as a nation we can actually change the rules. Other nations do. Australia has had this blockage for a long time. Personally, I think the submissions reveal the need to move beyond the very closed thinking we have on these matters because otherwise we are going to miss out on what would be good and harmonised laws in areas where they are desperately needed.

CHAIRMAN—Thank you very much, Professor. The secretary will send you a copy of the transcript of your evidence for checking; you can send any changes back. If you think of any additional material, please let us have it.

Resolved (on motion by **Ms Roxon**):

That this committee authorises for publication the transcript of the evidence taken by it at the public hearing this day.

Committee adjourned at 3.46 pm