BACKGROUND BRIEF

HARMONISATION OF LEGAL SYSTEMS RELATING TO TRADE AND COMMERCE

Introduction

On 7 February 2005, the following matter was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs by the Attorney-General:

> 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:
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> - 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.

The purpose of this background paper is to set out some of the issues that the Committee will explore in the course of the inquiry, and the approach that the Committee proposes to take.

As indicated by the Terms of Reference, the Committee will examine Federal and State legal regimes within Australia and the comparative position of relevant Australian and New Zealand laws. Within these contexts the Committee will focus on the following issues:

(1) what are the existing differences among the various jurisdictions that impact adversely on trade and commerce?
(2) the extent to which greater harmonisation is desirable and achievable; and
(3) the means by which greater harmonisation might be achieved, for example the development of new models for better cooperation between jurisdictions, particularly given the difficulties inherent in the models used to date.

The Committee anticipates that there will be two different categories of difference identified: first, there will be differences which have no substantive policy content; second, there will be differences where there are substantively different views of what the law should be, based on differing policies.

The Committee will be identifying areas for possible harmonisation, including those suggested in the Terms of Reference. However, the Committee will not be seeking to reach a conclusion on the merits of those substantive policy differences, where they exist, but instead recommend that the relevant governments seek to reach common standards.

Australian Constitutional context

The starting point for any examination of legislative power in Australia is the Constitution. Some powers are vested exclusively in the Commonwealth (section 52), but by far the greater number of legislative powers vested in the Commonwealth are 'concurrent powers' ie concurrently with the States. Several sections are of particular relevance:

- Section 51 sets out the legislative powers of the federal Parliament, and lists some 36 specific 'heads of power' (e.g. *(i) trade and commerce with other countries, and among the States*; *(xvii) bankruptcy and insolvency*; *(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth* etc. In addition, the Parliament is empowered to make laws on '(*xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth*'.

- Section 51(xxxvii) states that federal Parliament's legislative powers include:

  > *Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;*

  Reference power has been used relatively sparingly since federation.[1] The two most recent examples were in relation to corporations law (2001) and terrorism (2002).

- Section 92 provides that '*trade, commerce and intercourse among the States... shall be absolutely free*'.

- Section 109 states that, *where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

[1] A list of State Acts passed to refer matters to the Commonwealth Parliament is found in note 15 to *Constitution* (as in force on 1 June 2003), Attorney-General's Department.

It is to be noted that the Commonwealth lacks a general commerce power. It has legislative power over trade and commerce with other countries and among the states, but not trade and commerce within state boundaries. Despite this, the desirability of national regulatory regimes has been recognised in a number of areas, most notably in connection with corporations law.

By its very nature, a federation allows variation in political, social and economic structures among constituent members. While many argue that uniformity and centralisation of the law bring greater commercial certainty and benefit, there is by no means universal support for such uniformity and centralisation across all policy areas.

Sectoral issues

The Terms of Reference indicate a number of areas that the Committee may wish to examine. However, these are not exhaustive, and other areas of concern may be raised in submissions made to the inquiry. Further research will need to be done to determine the degree to which differing State/Federal legislation is an impediment to commerce and trade in any one of these areas.

The Committee notes, however:

Evidence law

The Australian Law Reform Commission is currently reviewing Australia's 'uniform' Evidence Acts (currently in use by the Commonwealth, NSW, the ACT and Tasmania), which have been in operation for approximately 10 years. The ALRC is also examining how greater harmonisation with the other states and territories can be achieved. The review is scheduled to be completed in December 2005.[2]

Statutes of Limitation regarding breach of contract

A right to take action arising from a breach of contract will be lost if there is a delay in enforcing the right, with the period within which legal action must be taken defined in statute. This varies from state to state.

The Committee will not be seeking to determine what is an appropriate period during which legal action is permitted, but rather to determine if such differences hinder trade and commerce in a material way.

Consumer contract legislation

Because of constitutional limitations applying to Commonwealth legislation, the operation of the *Trade Practices Act* in the area of implied conditions and

[2] Australian Law Reform Commission, media release, 27 July 2004.

warranties is restricted to the supply of consumer goods and services by a corporation. Such restrictions do not apply to State legislation which can be relied on by consumers for protection when Commonwealth legislation does not apply. State legislation in this area is not uniform and differs in its application.[3]

The Committee's intention is to focus on issues directly related to uniformity of laws rather than ranging more broadly into areas already the subject of separate inquiry.[4]

How might greater harmonisation be achieved?

The Terms of Reference ask the Committee to also examine 'legal obstacles to greater federal/state and Australian/New Zealand cooperation'. In other words, should the Committee determine that greater harmonisation is desirable, how might this be achieved and are there any legal obstacles that must be addressed?

There are four main mechanisms by which greater harmonisation of laws have been achieved in the past. In brief, these are:

The template model

Under this model, one jurisdiction creates a 'template' law, which is subsequently adopted and applied by other jurisdictions. Uniform legislation through adoption of a template law is the basis of regulatory harmonisation in the areas of food standards, road transport and non-bank financial institutions among others.

Cooperative or complementary schemes

Under schemes of this sort, each participating jurisdiction enacts legislation that implements a particular policy initiative in that particular jurisdiction. Complementary legislation has been used to implement national schemes in the areas of environmental protection, vocational training and disability services.

Referral of powers model

This involves the referral of powers by states to the Commonwealth, as envisaged by Section 51 (xxxvii) of the Constitution. This occurred with states referring their legislative power over corporations and securities to overcome difficulties arising from the High Court decisions in *Re Wakim* and *R v Hughes*.[5] The final result saw two

[3] For more details, see Vermeesch and Lindgren, *Business Law of Australia*, pp. 692-694.
[4] See for example the Ministerial Council on Consumer Affairs' Product Safety system review, currently underway.
[5] The decision in *Re Wakim* invalidated significant aspects of the 'cross-vesting' provisions in the old *Corporations Law* scheme – in brief, the High Court concluded that States could not confer State jurisdiction on federal courts, since chapter III of the *Constitution* constitutes an exhaustive statement of the manner in which the judicial power of the Commonwealth may be vested. In *Hughes*, a challenge was mounted to the power granted to Commonwealth authorities to prosecute breaches of the Corporations

Commonwealth laws enacted: the *Corporations Act 2001*, and the *Australian Securities and Investments Commission Act 2001*. The referral of powers, however, is not without its critics:

> The referral of power by the states to the Commonwealth has the potential, if extended to other areas, to undermine the long-term position of the States as partners in the Australian Federation. They should not be required to bestow large sections of their law-making power upon the Commonwealth in order to overcome the inability of the Constitution to give effect to co-operative arrangements. So long as Australia remains a federal system with a division of powers between the two tiers of government, it is not realistic to expect the States to refer power over every issue for which a national scheme is needed.[6]

The referral of powers mechanism also has the potential to generate difficulties. Referrals are generally for a specified period of time (e.g. with the Commonwealth *Corporations Act 2001* the referral is for a 5 year period). This can have the effect of placing legislation on a somewhat precarious footing, given that agreement to extend a referral may not be reached at the end of the referral period.

Constitutional amendment

The most radical proposal envisages Constitutional amendment, in order to set out a framework within which cooperative schemes aimed at uniformity of legislation would be authorised. Professor George Williams has argued that the amendment 'need not grant the Commonwealth more power, but rather ensure that the Constitution enables the Commonwealth and the States to work co-operatively in corporate law and other fields with the legislative powers they already possess'.[7]

Amendments to the Constitution are difficult to achieve (only 8 out of 44 proposals put to referendum have been successful). However,

> ...the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible and the associated cost for parties. Less quantifiable costs include a further loss of confidence in the stability of the corporate law regime if any of the referrals terminate and an ability to achieve appropriate policy outcomes in other fields because co-operative schemes are based upon a referral of power are not politically achievable.[8]

Law. The High Court unanimously held that the Commonwealth authorities could only enforce those parts of the Corporations Law enacted by the States that impose a duty that could have been enacted independently by the Commonwealth under one of its heads of legislative power in the *Constitution*. Therefore, prosecution might not be sustainable in other areas of the national scheme that did not fall under a federal head of power. As George Williams has noted: 'The combined effect of the High Court's decision in *Re Wakim* and *R v Hughes* was to undermine the viability of the Corporations Law. ... the Federal Government soon pressed for its preferred solution of a referral by the States to the Commonwealth of their legislative power over corporations and securities'.

[6] Williams, G *Co-operative Federalism and the Revival of the Corporations Law: Wakim and Beyond*, paper delivered at 32nd Australian Legal Convention, Canberra, October 2001.

[7] Ibid., p. 21.

[8] Ibid., p. 20

Other models?

In addition to the above mechanisms, the Committee is interested in innovative models enabling better Commonwealth-State cooperation.

Australia-New Zealand trade and commerce

The Terms of Reference also ask the Committee to examine whether further harmonisation of the legal systems of Australia and New Zealand could assist in reducing costs and enhancing trade opportunities between the two countries. In considering this question, the Committee should examine the significant reforms that have already taken place in bringing the two legal systems into greater harmony.

In 2003-4, trans-Tasman trade amounted to A$17.3 billion. New Zealand is Australia's fifth-largest market, taking 7.4% of Australia's exports. Australia is New Zealand's principal trading partner, taking 22% of its exports and providing 22% of its imports. Australian total investment in New Zealand was A$51.3 billion at 31 March 2004; New Zealand total investment in Australia for the same period was A$20.8 billion.

The Australia-New Zealand Closer Economic Relations Trade Agreement (CER Treaty) took effect on 1 January 1983. In addition to being a free trade agreement between Australia and New Zealand, it is also an umbrella agreement for a range of agreements and other documents aimed at implementing aspects of the CER Treaty. One of those documents, the Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, was signed on 31 August 2000 (updating an earlier MOU signed in 1988). Under the 1988 MOU achievements included '...legislation to abolish antidumping measures in favour of competition laws to cover anti-competitive conduct affecting trans-Tasman trade in goods, other amendments to competition law, innovations in litigation procedure, reciprocal enforcement of judgements and the like'.[9]

The 2000 MOU noted that 'Both Governments are aware that existing laws and regulatory practices relating to business within each economy may impede the development of trans-Tasman activity'. The 2000 MOU set a considerable work program, for coordination of business law, including:

- Cross-recognition of companies
- Greater compatibility in disclosure regimes in relation to financial products
- Cross-border insolvency
- Mutual recognition of stock markets
- Intellectual property
- Information sharing
- Electronic transactions

[9] Walker, Gordon, *The CER Agreement and Trans-Tasman Business Law Coordination: From 'Soft law' Approach to 'Hard Law'* Outcome, from Law in Context p. 85.

- Competition law.

With New Zealand, the process of business law harmonisation to date 'has not been aimed at producing identical Australian and New Zealand business laws, but rather at identifying the differences that increase the transaction and compliance costs faced by companies operating in both markets, and areas where harmonisation would significantly reduce those transaction costs.'[10] Much activity has been aimed at better coordination through mutual recognition schemes as a useful alternative to the adoption of common (harmonised) standards. 'Each country retains its own standards but mutual recognition removes barriers to trade between them.'[11] The 2000 MOU states:

> ...An array of approaches exists to achieve the goal of increased coordination in business law. Both governments recognise that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.[12]

Related inquiry

On June 2004 the Productivity Commission was asked to undertake a study of Australian/New Zealand competition and consumer protection regimes.

Its report was released in December 2004 (a copy of the report is available electronically at:

http://www.pc.gov.au/study/transtasman/finalreport/index.html

Among the key findings, the Productivity Commission concluded that there has already been significant convergence of competition and consumer protection regimes of both countries, and that consequently the regimes are not impeding businesses operating in Australasian markets. While not recommending major changes to the two regimes at present, the PC did note that the 'long-term objective of a single economic market for Australia and New Zealand would be assisted by a package of measures involving a transitional approach to integration of the two regimes.'

Legal and Constitutional Affairs Committee
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[10] Department of Foreign Affairs and Trade, *Closer Economic Relations: Background guide to the Australia New Zealand Relationship*, February 1997, p. 18.
[11] Walker, Gordon, op cit., p. 86.
[12] MOU, quoted in Walker, Gordon, op cit., p. 90.