NEW ZEALAND GOVERNMENT SUBMISSION TO LACA COMMITTEE HARMONISATION INQUIRY

PART ONE: INTRODUCTION AND SUMMARY

Introduction

1 The New Zealand Government welcomes this inquiry into legal harmonisation by the Standing Committee on Legal and Constitutional Affairs, and thanks the Committee for the invitation to make a submission.

2 New Zealand's closest international relationship is with Australia, as reflected in our trade, investment and people flows, depth of regulatory coordination and an array of inter-governmental trans-Tasman agreements and arrangements. The two governments have expressed a desire to deepen and broaden the economic relationship by advancing the concept of a single economic market, or seamless business environment.

3 Some of the factors that have led both Governments to give increased attention to advancing a single economic market are:

3.1 a recognition that strengthening and deepening trans-Tasman economic links supports the domestic economic aims of both countries, by improving the ability of New Zealand and Australian firms to deal with the opportunities and threats presented by the growing globalisation of business, trade, rule-making and markets;

3.2 the need to coordinate to achieve some national regulatory policy goals and a critical mass in regulatory capability for New Zealand, and in some cases, Australia;

3.3 pressure from firms operating in both economies for a more common business environment;

3.4 a growing network of institutional relationships, both public and private sector, increasing the potential gains from and awareness of closer cooperation;

3.5 a need to respond to the international convergence of rules and norms in many areas, with Australia and New Zealand able to advance our common interests more effectively by working together than separately.

4 The focus of this submission, reflecting the Committee's terms of reference, is on differences between the legal systems of Australia and New Zealand that have an impact on trade and commerce. The New Zealand Government believes that a great deal has already been done to minimise adverse effects on trade and commerce caused by differences between our legal systems. As mentioned above, Governments are working towards the concept of a single economic market. This inquiry is another important contribution to that process.

Summary

5 Differences between the legal systems of Australia and New Zealand are not a problem in themselves. The existence of such differences is the inevitable product of well-functioning democratic decision-making processes in each country, which reflect the preferences of stakeholders, and their effective voice in the law-making process.

6 But some differences between our legal systems do have an adverse impact on trade and commerce, and on the integrity and effectiveness of our countries' laws and regulatory regimes.

7 The New Zealand Government considers that it is important to identify with some precision where such issues arise, and to use appropriate mechanisms drawn from the wide range of available options to respond to these issues, in a manner that achieves the greatest net benefits for both countries.

8 Considerable progress has already been made towards addressing issues raised by differences between the two countries' legal systems, and a number of further coordination initiatives are currently being progressed by Australasian Governments.

9 The New Zealand Government does not perceive any major obstacles to continuing progress towards greater cooperation. Both countries will need to be flexible and innovative to respond to the ever-increasing connections between the two economies, and to maintain momentum towards a single economic market.

Structure of this submission

10 The submission is structured as follows:

10.1 Part Two outlines the rationale for legal coordination between Australia and New Zealand – when is it appropriate? what form should it take?

10.2 Part Three describes the many existing forms of coordination, and provides examples of these;

10.3 Part Four describes further coordination initiatives that are currently being worked on by Australian and New Zealand Governments;

10.4 Part Five discusses some of the specific issues raised by the Committee's terms of reference;

10.5 Part Six summarises the principal issues identified in this submission.

PART TWO: RATIONALE FOR LEGAL COORDINATION BETWEEN AUSTRALIA AND NEW ZEALAND

11 The similarities between the legal systems of Australia and New Zealand are far more striking than the differences, as a result of our common legal heritage and shared values. It is important, when focusing on the differences between our legal systems, to bear in mind this significant common core of substantive law and legal process, and the high degree of confidence that New Zealanders and Australians have in the courts and regulatory institutions of each others' country.

12 Inevitably, however, differences between the two legal systems have arisen over time. Differences between the legal systems of Australia and New Zealand are not inherently undesirable, and are to be expected as between two countries with their own separate legislatures, governments and judiciaries. But some of these differences can give rise to practical problems. The relative frequency with which such issues are encountered, and their practical importance, stems from the significant and increasing links between Australia and New Zealand:

12.1 New Zealand is the fourth largest export market for Australian goods and services (and Australia's fifth largest two-way trading partner).

12.2 New Zealand is Australia's number one market for elaborately transformed manufactures, and it is also the number one source of short-term visitors, with 1 million New Zealanders crossing the Tasman each year.

12.3 trans-Tasman trade has grown at an average of 6% per annum for the past decade. Around a fifth of New Zealand's exports go to Australia, up from around 13% of our exports when CER was signed in 1983.

12.4 New Zealand is the sixth largest source of overall foreign investment in Australia. Australia is the second largest destination for New Zealand investment abroad after the United States.

12.5 together, the two countries provide our businesses with easy access to a combined market of 24 million people.

12.6 as a result of CER, Australia has access to another domestic market about the size of Queensland, and the effective size of the New Zealand domestic market has been increased six-fold.

13 A 2004 study of "New Zealand-Australia Economic Interdependence"[1] confirmed that integration tends to promote further integration, at the level of particular businesses, particular sectors, and more generally; and that there are material spillover effects for other businesses and individuals from such integration. This supports the view that the linkages between the two countries are likely to

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[1] ACIL Tasman and LECG, *New Zealand-Australia Economic Interdependence*, 4 May 2004.

continue to grow and develop, and that our legal systems, in particular business-related laws, need to accommodate and support these developments.

14 But as noted above, not every difference between the laws of Australia and New Zealand has an adverse impact on trade and commerce, or on the integrity and effectiveness of the two countries' regulatory regimes. The starting point for any study of legal coordination between Australia and New Zealand must therefore be to ask: Which differences between our laws matter? Why? How can the effects of those differences best be addressed?

"Coordination" of laws

15 This submission deliberately refers to "coordination" of laws between the two countries, rather than "harmonisation". The reason for adopting the term "coordination" (also used in the Memorandum of Understanding on Business Law Coordination between the two countries, discussed below) is that discussions of "harmonisation" tend to focus on substantive laws, rather than on the full range of forms of cooperation in making and administering business laws. Coordination more clearly embraces cooperation at the institutional level (between Governments and regulators), and in participation in regional and multilateral fora. Moreover, many people understand legal "harmonisation" as requiring the countries concerned to adopt the same laws. There are, however, many forms of legal coordination that do not require identical laws.

16 The many different forms of cooperation in relation to the making and administration of laws that already exist between the two countries, and that are the subject of the ongoing work described below, are therefore referred to in this submission by the broader term "legal coordination".

17 Another useful distinction to bear in mind when reading this submission is the distinction between proposals for changes to the laws of one or both countries to address the costs of differences between their laws, and proposals for changes to the laws of one country on the grounds that the law of that country should be improved regardless of what the law is in the other country. A suggestion that one country should change its law on a particular issue to be more like the law of the other country is not a coordination proposal, in the sense in which that term is used in this submission, if the case for change rests not on the costs or impediments caused by the existence of differences between the two regimes, but rather on an argument that the law of one country is superior, and should be adopted in the other.

Which differences between our laws matter?

18 There are three main types of concern that can arise as a result of differences between laws affecting businesses in Australia and New Zealand:

18.1 compliance cost issues: differences in laws can increase the cost of doing business across the Tasman, through increased information costs and compliance costs;

18.2 economic costs from barriers to entry; legal impediments which affect competitiveness and the efficient operation of markets. Addressing these can make consumers better off by increasing choices and reducing prices.

18.3 effectiveness of laws: differences in laws, and inadequate linkages between legal systems (eg restrictions on serving legal proceedings and enforcing judgments across the Tasman), can undermine the effectiveness and integrity of laws, in particular where enforcement of regulatory regimes is difficult or impossible against firms in the other country;

18.4 administrative costs: economies of scale in developing and administering regulatory regimes can also create incentives for a single set of rules and/or a single regulatory agency, in some areas. The proposed joint therapeutic products agency, discussed in more detail below, is a good example of a response to concerns about the need for "critical mass" in a particular field, to ensure effective and efficient regulation in the interests of public health and safety.

Costs of coordination

19 Where concerns of the kinds described above are identified, it is necessary to consider whether, and how, increased coordination could address those concerns. And it is important to bear in mind that there are also costs associated with coordination initiatives, depending on the form those take. Those costs include:

19.1 the cost of developing and implementing those initiatives;

19.2 ongoing administration and maintenance costs. In order to maintain the desired level of coordination in a particular field, continuing costs will be incurred at the policy and implementation level. Some forms of coordination, such as establishment of a single regulatory agency, involve quite significant ongoing costs in terms of joint administration, and the operation of governance and accountability mechanisms involving two or more governments;

19.3 the risk of reduced tailoring of laws to local conditions. Some (though not all) forms of coordination involve adopting common rules, or a common core of minimum mandatory standards: the process of adopting a single set of rules or standards for both countries can mean that the rules/standards may not reflect local conditions and preferences as closely as a purely domestic regime could be expected to, or may involve higher compliance and efficiency costs than would be optimal in one of the countries, if looked at in isolation.

20 Whether such costs are likely, and their significance, depends very much on the particular issue and on the form of coordination that is proposed. It is always important to focus on whether a net gain is likely to be achieved from further coordination on a particular issue, where differences in laws have been identified as raising a concern. This is necessarily an issue by issue, context-specific

judgement which depends on the costs of the relevant difference, and the particular coordination mechanism proposed to deal with it.

Summary

21 In summary, identical or unified laws are not a goal in themselves. But where differences cause significant costs, and in particular where they hinder trade and commerce or impair the effectiveness and integrity of regulatory regimes, options for coordination to address those concerns need to be considered, and the benefits weighed against the associated costs.

PART THREE: EXISTING COORDINATION MECHANISMS

Background: the CER Agreement

22 The backdrop for current work on legal coordination between New Zealand and Australia is the Australia New Zealand Closer Economic Relations Trade Agreement entered into in 1983, which provided for the elimination over time of tariffs, import licensing and quantitative restrictions, and export incentives, for all goods which comply with the specified "rules of origin". The CER agreement took a comprehensive, "everything is included unless expressly excluded" approach to trade issues.

23 The CER agreement was extended to deal with trade in services by the 1988 protocol which provided for market access, rights of establishment, national treatment of service providers and "most-favoured-nation" treatment of service providers. The 1988 protocol took the same comprehensive, overarching approach as the original 1983 agreement in relation to goods. All services were covered, unless expressly identified on a (short) negative list.

24 Another important extension of the CER agreement came in 1990, with the abolition of anti-dumping rules in the trans-Tasman context, and their replacement with the trans-Tasman misuse of market power provisions (section 46A of the Trade Practices Act 1974 (Cth) and section 36A of the Commerce Act 1986 (NZ)).

25 These agreements together establish what has been described by the World Trade Organisation as "the world's most comprehensive, effective and mutually compatible free trade agreement." The removal of these barriers to trade in goods and services has delivered significant benefits to both Australia and New Zealand.

Legal and regulatory coordination initiatives that are already in place

26 As businesses have taken advantage of the opportunities created by CER, the "next generation" of issues has emerged, including concerns about the impact of differences between our legal systems on trans-Tasman commercial activity, and on the effectiveness and integrity of regulatory arrangements in the trans-Tasman context.

27 Over the last decade or so, substantial work has been done to address legal and regulatory impediments to trans-Tasman commercial activity. Some of the more important initiatives include:

27.1 the Trans-Tasman Mutual Recognition Arrangement ("TTMRA"), which provides for mutual recognition of regulatory requirements relating to sale of goods, and for mutual recognition of registered occupations. TTMRA is discussed in more detail below;

27.2 JASANZ, the Joint Accreditation System of Australia and New Zealand, which (among other functions) provides accreditation of bodies that certify quality and environment management systems, inspection services and product certification. JASANZ plays an important role in facilitating New Zealand's and Australia's bilateral and international trade;

27.3 the Memorandum of Understanding on Business Law Coordination entered into by the two governments in 2000, replacing an earlier Memorandum of Understanding on Business Law Harmonisation entered into in 1988. The MoU is discussed in more detail below;

27.4 FSANZ (formerly ANZFA), the joint food safety body established by the Australian Commonwealth and States and Territories, and New Zealand. Implementing a single set of food safety standards set by a single agency has provided an efficient means of achieving two goals: protecting public health and safety, and reducing the cost of trans-Tasman commercial activity in this very significant area;

27.5 unilateral coordination of laws with the laws of the other country. Each country's law reform process is informed by policy developments and statutory schemes in the other country. In the field of business law, the MoU on Business Law Coordination identifies as a relevant principle which Governments should take into account the question of whether there is a good reason for our laws to be different, on any particular topic: differences are appropriate where they reflect real differences in local conditions or preferences, but in the absence of factors of this kind the costs of difference will often point towards a high degree of consistency;

27.6 civil justice initiatives such as the enhanced arrangements for reciprocal enforcement of judgments (1991/1992), including each other's tax judgements, and the trans-Tasman evidence regime (1994) discussed in more detail below;

27.7 cross appointments to regulatory bodies, in place for the takeovers panels, accounting standards bodies and proposed by the Productivity Commission for the two countries' competition regulators;

27.8 increasing cooperation between regulators and enforcement agencies on both sides of the Tasman;

27.9 the enactment of legislation in Australia and New Zealand in 2003 that made it possible for Australian companies to join New Zealand's imputation credit rules and New Zealand companies to join Australian franking credit rules. Shareholders can now be allocated imputation credits representing New Zealand tax paid and franking credits representing New Zealand tax paid, in proportion to their ownership of the company. Each country's credits, however, can be claimed only by its residents.

27.10 the Trans-Tasman Accounting Standards Advisory Group, which has been established to advise the Australian and New Zealand accounting standard and oversight bodies on strategies to establish a single set of trans-Tasman accounting standards within the broader context of both jurisdictions' objective of adopting international accounting standards, and to maximise the influence of Australia and New Zealand in the development of international accounting standards and the international accounting standard setting process. The Advisory Group will also help formulate advice to the two governments on these issues. The role of TASAG in the international accounting standards process provides a good example of frameworks for cooperation in multilateral fora, in areas where our interests are closely aligned and are better served through working together rather than separately;

27.11 establishment of a Joint Trans-Tasman Council on Banking Supervision to promote a joint approach to trans-Tasman banking supervision.

TTMRA

28 In most fields of law, the principal objective of legal coordination is to reduce barriers to cross-border commercial activity, and to movement of people and assets. A very simple and effective tool to achieve this goal is mutual recognition. In essence, a mutual recognition regime provides that where a person carries on an activity in Country A, in accordance with the law of Country A, they can also engage in that activity in Country B while complying with the requirements of the law of Country A, and without needing to comply with any different or additional requirements that would otherwise apply to that activity under the law of Country B.

29 The Trans-Tasman Mutual Recognition Arrangement came into effect in 1998. A copy is attached for ease of reference as Appendix 1. The objective of the arrangement is "to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business."

30 The Arrangement gives effect to two basic principles relating to goods and occupations respectively:

"1. Goods

The basic principle in respect of Goods is that a Good that may legally be sold in the Jurisdiction of any Australian Party may be sold in New Zealand, and a Good that may legally be sold in New Zealand may be sold in the Jurisdiction of any Australian Party.

2. Occupations

The basic principle in respect of Occupations is that a person Registered to practise an Occupation in the Jurisdiction of any Australian Party is entitled to practise an Equivalent occupation in New Zealand, and a person Registered to practise an Occupation in New Zealand is entitled to practise an Equivalent occupation in the jurisdiction of any Australian Party."

31 The Arrangement provides for a review after five years of operation. At the request of Heads of Government of participating jurisdictions in 2003, the Productivity Commission carried out a research project to inform that review, in conjunction with the ten-year review of the Australian Mutual Recognition Agreement. In late 2003 the Productivity Commission released a Research Report which suggests that the mutual recognition schemes are effective overall in achieving their objectives, and should continue.[2] The Commission study also identified some areas where there is scope to improve the operation of the TTMRA. In addition to recommendations in respect of specific provisions in the Arrangement, the Commission's recommendations included:

31.1 making renewed efforts to inform regulators and business stakeholders of the broader strategic objectives of the TTMRA and the obligations it imposes on regulators;

31.2 identifying ways to ensure that TTMRA implications are taken into consideration early in the policy development process in all jurisdictions;

31.3 establishing an inter jurisdictional officials' group to identify and address frictions within the TTMRA, and new issues that may require consideration; and

31.4 improving occupational mobility by improving information flows between registration bodies.

32 Senior officials from participating jurisdictions have prepared a report and final recommendations to heads of Governments following the Productivity Commission's review, which is in the process of being finalised and forwarded to heads of governments in the near future.

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[2] Australian Productivity Commission, *Evaluation of the Mutual Recognition Schemes –Research Report*, 8 October 2003.

MoU on business law coordination

33 The New Zealand and Australian Governments entered into a Memorandum of Understanding in relation to business law coordination in August 2000 ("the MoU"), which provides for the Australian and New Zealand Governments to have regard to:

> "(a) The desirability of ensuring for each particular situation, that a firm, ideally, will only have to comply with one set of rules, and have certainty as to the application of those rules in the other jurisdiction, and with which regulator (ie Australian or New Zealand) it needs to deal;
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> (b) Whether the situation should be regulated solely through domestic rules or whether a bilateral, or multilateral solution would be more appropriate; and
>
> (c) Whether a good reason exists for the law in this area to be different between Australia and New Zealand."

34 The MoU also notes that "having taken these principles into consideration, both Governments will still need to ensure that realistic goals are set and that the benefits of coordination outweigh the costs. Globalising and localising factors also need to be considered by both Governments in this respect. (Globalising and localising factors are forces that would push law makers to take either a more multilateral or a more domestic approach to the formation of business law. An example of a globalising factor would be the reduction of compliance costs and uncertainty to businesses trading across borders. An example of a localising factor could be a unique local condition)."

35 The MoU contemplates a process of identifying candidates for coordination, where the case for coordination appears strong, and the benefits/globalising factors outweigh the associated costs and localising factors. Some specific areas of law were identified as the initial focus of coordination work. A copy of the MoU is attached for ease of reference as Appendix 2.

36 The MoU provides for a five year review, which is currently under way.

37 The policy dialogue that takes place under the MoU is an example of cooperation in policy development, and sharing of information and resources. This is achieved through a mix of regular formal meetings, and a continuing informal process of exchange of information and cooperation between officials involved in the development and administration of business laws.

Trans-Tasman evidence regime

38 Legislation enacted in Australia and New Zealand in 1994 establishes a simplified regime for taking evidence.[3] This regime provides a good example of a mechanism for reducing the costs of differences, and improving linkages between the two legal systems, without needing to introduce identical laws and procedures. In summary:

38.1 a New Zealand court can receive evidence and submissions by video or telephone link from a person in Australia, and vice versa, in any kind of proceedings;

38.2 a subpoena issued in one country can, with the leave of a Judge of a superior court, be served on a person in the other country. The subpoena can require the person to give evidence by video or telephone link from their home country, or to travel to the country in which the proceedings are being heard to give evidence in person. A subpoena can currently be issued in any proceedings other than criminal or family proceedings.

39 The 1994 evidence regime was very innovative – so far as the New Zealand Government is aware, no other countries have similar arrangements, and the regime has attracted international interest. It appears to be working well in practice. The TransTasman Court Proceedings and Regulatory Enforcement Working Group, established by the two Prime Ministers, is currently reviewing the trans-Tasman evidence regime to identify any refinements that may be appropriate, and to consider whether it should be extended to criminal proceedings. (The work of this group is discussed in more detail in Part Four below.) A legislative amendment to extend the subpoena regime to family proceedings is currently before the New Zealand Parliament, and a similar reform is under consideration in Australia.

Coordination mechanisms – an overview

40 The range of coordination mechanisms described above that have been used to address different issues reflects the context-specific approach described in Part Two of this submission, and a focus on using the most appropriate and cost-effective methods to address the costs of differences in a particular field.

41 The mechanisms that have been used to address the costs of difference include both unilateral and cooperative coordination mechanisms.

Unilateral coordination techniques

42 Unilateral coordination techniques include:

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[3] See the Evidence and Procedure (New Zealand) Act 1994 (Cth) and the Evidence Amendment Act 1994 (NZ).

42.1 regulatory convergence through "borrowing": New Zealand law reform exercises and institutional reforms are often informed by laws and practices in Australia (as well as other countries), and vice versa;

42.2 unilateral recognition of regulatory outcomes. For example, at common law certain judgments given by foreign courts can be enforced in New Zealand without any requirement for a treaty between New Zealand and the State of rendition, or any reciprocity requirement. Unilateral recognition, sometimes coupled with limited additional requirements, also operates in relation to many professional qualifications, and many technical standards for goods. Safety standards for various electrical fittings and appliances issued in Australia, as well as the United States, Europe and the UK are recognised under New Zealand law, as are test results for compliance with the standards from many overseas organisations.[4]

43 In many areas of law, concerns about differences between the laws of Australia and New Zealand can be adequately addressed through these forms of unilateral coordination. And they have the advantage of not involving significant costs in terms of developing and maintaining a common set of rules, or affecting the tailoring of laws to domestic conditions. But unilateral coordination cannot normally deliver common rules, as the process of taking legislation through both Parliaments and responding to specific concerns raised in the course of the legislative process tends to give rise to changes, at least on matters of detail, and sometimes on more significant matters. And even if rules are largely identical at a given point in time, changes to those rules or divergent applications of them can lead to increased differences over time. So where common rules are required in order to achieve the goals of coordination in a particular field, and especially where it is important to maintain that commonality over time, cooperative coordination techniques are required.

44 Unilateral coordination techniques also cannot deliver the "critical mass" or economies of scale associated with a single body responsible for developing rules, or administering and enforcing those rules where that is the objective of a co-ordination initiative. Again, this requires cooperation between the participating governments.

Cooperative coordination techniques

45 Cooperative coordination techniques include:

45.1 cooperation between regulators (eg information sharing, assistance in gathering evidence, cross-appointment of members of regulatory bodies);

45.2 mutual recognition, or "passport regulation". Under a mutual recognition arrangement, each participating country retains its own rules and its own separate regulatory institutions. However the regulatory outcomes reached

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[4] NZECP 3:2000, approved under s 38 of the Electricity Act 1992.

in one country by that country's institutions, applying that country's rules, are recognised in other participating countries. This approach underpins the most extensive trans-Tasman business law coordination regime, TTMRA;

45.3 joint policy development, and cooperation in research and analysis to support policy development. The dialogue that takes place under the MoU on Business Law Coordination is one illustration of this sort of policy dialogue, but there are many others in the trans-Tasman context;

45.4 adopting common rules, while retaining separate institutions for application/enforcement purposes: this is essentially the current approach in relation to food standards;

45.5 establishing a single trans-Tasman institution, while retaining separate rules. This technique has not been widely used to date in the trans-Tasman context, but examples from within Australia include the role of the High Court of Australia as a final court of appeal on state law issues;

45.6 adopting common rules, and establishing a single trans-Tasman institution eg JTPA;

45.7 working together to maximise our joint influence in regional and multilateral fora (where an increasing amount of law-making and regulatory activity takes place).

Making common rules in the trans-Tasman context

46 The background paper prepared for the Committee discusses a number of techniques that have been used to adopt common rules for the Australian states and territories. Some of these have parallels in the trans-Tasman context, while others (such as references of powers to the Commonwealth) plainly are not relevant. The mechanisms that have been used to adopt trans-Tasman common rules include:

46.1 entering into an intergovernmental treaty or arrangement, and passing implementing legislation to give effect to that instrument (which may include model legislation). This is the approach used to give effect to TTMRA, and the approach contemplated by the JTPA treaty for establishing rules in respect of the supply of therapeutic products;

46.2 enacting mirror legislation without an overarching treaty or arrangement, as with the 1994 evidence regime;

46.3 giving legal effect through legislation in each country to a single set of rules made by a joint body. Thus for example each participating jurisdiction adopts food standards made by FSANZ by incorporating those food standards in subordinate legislation made in that jurisdiction, and is required to do so by the arrangements entered into by those jurisdictions, with some limited exceptions. The JTPA treaty provides for the making of Rules by a

Ministerial Council consisting of the Australian and New Zealand Ministers of Health. Those Rules will have direct effect in both countries by virtue of the implementing legislation enacted in each country. The power to make the Rules is conferred by the treaty, but their domestic legal effect will stem from the references to them in domestic legislation;

46.4 legislation by one jurisdiction to establish a joint body, or common scheme, with the relevant body/scheme being adopted by reference to the relevant body/scheme in the legislation of the other country. For example, FSANZ is established by an Act of the Commonwealth Parliament.

47 The first and second of these mechanisms (treaty/arrangement plus domestic legislation, and mirror legislation) tend to result in very similar but not identical rules, as differences in language result from different drafting/legislative styles, and of course from differences in constitutional arrangements. The parliamentary process in each country can also lead to divergence, either when legislation is first enacted or at a later stage when it is amended. Such divergences would not normally be likely to result in inconsistency with the substantive commitments governments have entered into. But where those commitments are relatively high level, it is not uncommon for there to be differences in the more detailed implementation provisions in each country. These differences are not usually material, but have on occasion given rise to some practical issues.

48 The third mechanism (giving legal effect in each country to rules made by a joint body) results in a single set of rules, and input into the making of those rules by both Governments. It is important for mechanisms of this kind to be coupled with effective procedures for prior consultation in both countries, and for Parliamentary scrutiny of rules that are made by the joint body. So far as food standards are concerned, FSANZ consults in both countries, and the standards are then incorporated in subordinate legislation in each jurisdiction which is subject to the usual Parliamentary scrutiny and disallowance process in that jurisdiction. For Ministerial Council Rules in respect of therapeutic products, the JTPA treaty contemplates that the Rules will be subject to Parliamentary scrutiny, and disallowable, in both jurisdictions: if they are disallowed in either, they would cease to have effect in both.

49 Provided that this third mechanism is coupled with appropriate arrangements for prior consultation and for Parliamentary scrutiny of joint rules, it is an effective process for adopting common rules in areas where the integrity and effectiveness of the scheme requires the rules in each country to be identical, and to be applied and interpreted consistently. Adopting identical rules is not generally necessary in order to facilitate cross-border trade in goods and services, but may be necessary if for example a single regulatory regime administered by a single regulator is to operate effectively and efficiently, without distortions caused by inconsistencies in how the regime operates in each country. Because such rules would necessarily be secondary legislation, each parliament would have to be satisfied that either the subject did not require primary legislation, or that an exception could be made in the circumstances.

50 The fourth mechanism (reference in one country's laws to the regulatory scheme established by the other) also results in a single set of rules. But there can be significant concerns, both practical and at a level of principle, in relation to this mechanism. Neither country's businesses and citizens are likely to be comfortable with simply adopting, without equal and effective voice and accountability, laws made in the other. Australians would be likely to have concerns about being subject to a regulatory regime established by New Zealand legislation and administered by a New Zealand agency, on the grounds that they may have a lesser voice in the making of the rules, and the agency's accountability to them would be more indirect. Likewise where (as with FSANZ) it is Australia that legislates to establish a joint body or scheme, this can raise real concerns from a New Zealand perspective in terms of voice for New Zealand stakeholders in the law-making process, and accountability to New Zealand stakeholders. Those concerns are somewhat reduced where a treaty governs key aspects of the joint arrangement, but still remain in respect of more detailed issues that are addressed in the relevant legislation but not in the treaty. This is the least satisfactory mechanism for making joint rules or establishing joint bodies, from a New Zealand perspective, and the issues it raises appear to be symmetric for Australia.

Coordination processes

51 A wide range of processes supports the various coordination mechanisms described above, including:

51.1 informal discussions between Ministers and officials in the context of unilateral reforms;

51.2 formalised arrangements for discussion of policy proposals and implementation issues, for example the MoU on Business Law Coordination;

51.3 joint fora such as Ministerial Councils, and joint officials working groups;

51.4 joint development/negotiation of joint arrangements eg the JTPA;

51.5 joint research to inform policy development;

51.6 cooperation in regional and multilateral fora eg the role of TASAG in facilitating joint participation in international accounting standards processes.

52 More detail in relation to the examples referred to above, and further examples, are provided in parts four and five of this submission.

PART FOUR: CURRENT COORDINATION WORK PROGRAMME

Overview of current work programme

53 There is a substantial current work programme on trans-Tasman coordination issues, including:

53.1 the Trans-Tasman Court Proceedings and Regulatory Enforcement Working Group – the work of this group, which is of particular relevance to the Committee's terms of reference, is discussed in more detail below;

53.2 mutual recognition of trans-Tasman securities offerings, to enable an issuer making an offer to the public in one country to extend that offer to investors in the other country using the same offer documents, and the same offer structure – this project is also discussed in more detail below;

53.3 financial reporting: a trans-Tasman Accounting Standards Advisory Group has been established to work towards a single set of accounting standards, to explore options for institutional coordination, and to facilitate joint participation in international accounting standards setting processes;

53.4 a work programme has been put in place in the competition and consumer policy areas following the Australian Productivity Commission study on Australian and New Zealand Competition and Consumer Protection Regimes. This includes providing for information sharing and cross appointments between the ACCC and NZ Commerce Commission. Other elements of the work programme include improved coordination of processes for merger clearances and authorisations, particularly where transactions take place on both sides of the Tasman. This could require each country to work on the "national interest" provisions of their legislation and discussions on this are underway. In addition, the ACCC and NZ CC will be invited to contribute to the work programme;

53.5 further work on options for seamless regulation of banking markets, to be carried out by the newly established Joint Trans-Tasman Council on Banking Supervision;

53.6 trans-Tasman insolvencies: both countries are in the process of implementing the UNCITRAL Model Law on Cross-border Insolvency, and there is potential for streamlining the operation of this Model Law in the trans-Tasman context;

53.7 the proposed joint therapeutics agency, which will regulate medicines, medical devices and complementary healthcare products – discussed in more detail below;

53.8 implementation of TTMRA review outcomes agreed by participating governments, following the recent five-year review of the mutual recognition schemes by the Productivity Commission. As mentioned in Part

3 above, a joint group of senior officials from all participating jurisdictions is currently in the process of reporting to heads of Governments on the review;

53.9 the five year review of the MoU on Business Law Coordination.

53.10 MED and IP Australia are currently examining improved coordination in the area of patents, trademarks and plant variety rights. The prospects for coordination in the granting of patents look to be particularly promising and could help New Zealand with the challenges of examining patents under the new more stringent test contained in the draft Patents Bill.

54 The current work programme is both broad (it spans many areas of economic activity) and deep (in many areas, a high level of coordination is being actively pursued, or contemplated as a future possibility). The range of different approaches to different issues reflects the context-specific approach described in Part Two above.

Trans-Tasman Court Proceedings and Regulatory Enforcement Working Group

55 The Trans-Tasman Court Proceedings and Regulatory Enforcement Working Group ("TTCPRE Group") was established by the Prime Ministers of Australia and New Zealand to review the effectiveness and appropriateness of various procedural and regulatory arrangements. The Group's work aims to "reduce barriers to trans-Tasman commercial activity and support effective and efficient dispute resolution by enhancing legal co-operation in areas such as service of process, the taking of evidence, the recognition of judgments in civil and regulatory matters and regulatory enforcement."[5] A copy of the Working Group's terms of reference is attached as Appendix 3.

56 The issues that this Group is working on underpin a wide range of other legal coordination issues. For example, courts in both countries can impose civil pecuniary penalties for breach of certain regulatory requirements. However, a civil pecuniary penalty order imposed by a court in one country is not currently enforceable in the other on the grounds that it is a penalty. This reflects a long-standing common law rule. Increased cooperation in areas such as consumer protection, competition law, securities regulation and therapeutics regulation will all be supported by improved enforcement of regulatory regimes across the Tasman, such as measures to enable the more effective enforcement of civil pecuniary penalties where a person in one country targets consumers or investors in the other country.

57 The TTCPRE Group is expected to report to Ministers in mid-2005, seeking their approval for release of a discussion paper outlining proposals for reforms of the

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[5] News Release, Australian Attorney-General, The Hon Philip Ruddock MP, 9 June 2004.

law relating to trans-Tasman service of civil process, enforcement of judgments, and other procedural matters.

Mutual recognition of securities offerings

58 In May 2004 the Australian and New Zealand Governments published a discussion paper proposing the establishment of a trans-Tasman mutual recognition regime for offers of securities to the public. The proposal is that an offer that is a regulated offer in one country will be able to be made in the other country using the home country offer documents and complying with the home country securities laws, if certain initial and continuing requirements are met under the law of the other (host) country. A copy of the discussion paper is attached as Appendix 4.

59 It is anticipated that officials will report to Ministers on both sides of the Tasman in the next 3 months seeking agreement to the signing of a Treaty outlining the principles of the mutual recognition regime. Both countries will then need to implement legislation to bring the regime into effect. The enabling framework is already in primary regulation in New Zealand so only the passing of regulations is required.

Joint Therapeutic Products Agency

60 Another current project with significant legal coordination implications is the proposed Australia-New Zealand Joint Therapeutic Products Agency. The Australian and New Zealand Governments signed a treaty providing for the establishment of the joint agency in December 2003, a copy of which is attached as Appendix 5. Implementing legislation is currently being drafted in both countries, with a view to introduction of Bills in both Parliaments in the course of 2005.

61 The key objectives in establishing the Agency are to:

61.1 establish a trans Tasman regulatory scheme for therapeutic products that will safeguard public health and safety in Australia and New Zealand by regulating therapeutic products and maintain an effective and sustainable regulatory capacity in both countries; and

61.2 resolve the special exemption for therapeutic products under the Trans Tasman Mutual Recognition Arrangement (TTMRA) in a manner that facilitates trans-Tasman trade and enhances Closer Economic Relations between Australia and New Zealand.

62 The Agency will be overseen by a two-member Ministerial Council comprising the New Zealand Minister of Health and the Australian Health Minister. The Agency will also have a five member Board. The Treaty establishes the Ministerial Council and the Board of the agency. The Board will be responsible for the strategic direction and financial management of the Agency. One of the Board members, the Managing Director, will be responsible for regulatory decisions about therapeutic products and for the day to day management of the

Agency. The Board and the Managing Director will be appointed by the Ministerial Council.

63 The framework for the regulatory scheme administered by the Agency will be set up under the Treaty and implemented through Acts of Parliament in both countries, and will include a single set of Rules made by the Ministerial Council, and technical Orders made by the Managing Director.

64 Aspects of the proposal that are of particular relevance to the Committee's inquiry include:

64.1 a joint regulatory agency will be established, accountable to both Governments, with responsibility for administering the therapeutic product regulatory scheme in both countries;

64.2 implementing legislation in both countries will be needed to give effect to the Treaty. That legislation is expected to be similar, but not identical. Both Acts will include the same core provisions, for example prohibiting the supply of a therapeutic product without an approval from the agency, if an approval is required by Rules made by the Ministerial Council, and prohibiting the manufacture of therapeutic products other than in accordance with those Rules;

64.3 a single set of rules will govern matters such as the pre-market assessment and evaluation of therapeutic products, and requirements for the manufacture of therapeutic products. Rules made by the Ministerial Council and Orders made by the Managing Director of the agency will apply directly in both countries, pursuant to the implementing legislation. Those Rules and Orders will be subject to Parliamentary scrutiny, and disallowance, in a similar manner to domestic subordinate legislation;

64.4 a single approval from the joint agency will be effective in both countries in respect of the supply, manufacture etc of therapeutic products;

64.5 implementing legislation will provide for a coordinated system of merits reviews of decisions of the Agency. A merits review will be able to be brought in either country, with the outcome being effective in both.

PART FIVE: SPECIFIC ISSUES RAISED IN THE COMMITTEE'S TERMS OF REFERENCE

65 This part of the submission comments briefly on each of the specific issues raised in the Committee's terms of reference.

Statutes of limitation

66 There are differences between limitation rules in New Zealand and in Australian jurisdictions. Indeed this is inevitable, since even within Australia there are such differences. However the New Zealand Government is not aware of these

differences giving rise to material costs in the trans-Tasman context, and it is not easy to identify circumstances in which significant costs are likely to result from such differences.

67 There were previously some concerns in relation to the manner in which limitation rules applied in the context of cross-border proceedings, including in the trans-Tasman context. At common law, limitation rules were classified as procedural, with the result that where proceedings were brought in New Zealand, New Zealand limitation rules would apply even if the substantive claim was governed by foreign law – for example, a claim in respect of a contract governed by New South Wales law. It is undesirable, from a policy perspective, for the time at which a claim governed by the law of one Australasian jurisdiction becomes time barred to depend on where proceedings are brought. However this issue, which was common to New Zealand and the Australian states and territories, has been addressed by New Zealand legislation modelled on the New South Wales Choice of Law (Limitation Periods) Act 1993.[6] This reform, itself an example of unilateral legal coordination, has substantially resolved these issues as between New Zealand and Australia.

Legal procedures

68 There are some differences in legal procedures between the two countries. That is to be expected given the separate development of our court systems over more than a hundred years. But the basic structure and operation of the New Zealand and Australian court systems are very similar, as a result of our common legal heritage, and parallel procedural and administrative reforms. There are unlikely to be material additional costs for a party from one country in participating in proceedings in the other country, as a result of differences in legal procedures. Nor is it realistic to expect that the existing differences in procedures would be eliminated. (The question of coordination of procedures for trans-Tasman service of proceedings is however an important one, and is discussed separately below.)

Partnership laws

69 The partnership laws of New Zealand and the Australian states and territories have a common origin in the UK partnership legislation of the late 19th and early 20th century. Reforms in the different jurisdictions have given rise to differences across the Tasman, as well of course as within Australia. In recent years there have been some significant reforms in Australia in particular, to provide for limited partnerships with separate legal personality in order to facilitate investment by venture capital funds.

70 The New Zealand Government has recently announced that it intends to develop a limited partnership regime for the facilitation of venture capital investment into New Zealand. This regime will be similar in many aspects to the recent Victoria, Australian Capital Territory, and New South Wales reforms (incoporated limited partnerships). While it has been agreed that limited partnerships will have flow

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[6] Part 2A of the Limitation Act 1950, inserted by the Limitation Amendment Act 1996.

through tax treatment, further work on the tax design of the Limited Partnerships still needs to be undertaken on the details. It is anticipated that a Bill implementing the new regime will be introduced to Parliament in mid 2006.

71 Provided it is clear that the law in each jurisdiction recognises the existence of partnerships established in other Australasian jurisdictions, and recognises that the law under which the partnership is established governs core issues such as limits on partners' liability, differences in partnership law should not give rise to material costs in the trans-Tasman context, any more than differences in company law.

Service of legal proceedings – and enforcement of judgements

72 Some significant issues have been identified in relation to the service of proceedings between Australia and New Zealand, and the enforcement of proceedings resulting from trans-Tasman service. These issues are, as noted above, currently being addressed by the TTCPRE Group.

73 This issue is important in its own right, because addressing these issues will reduce uncertainty and the cost of resolving disputes in the trans-Tasman context. It is also important because an effective regime for service and enforcement of proceedings is an important building block for enhanced effectiveness of regulatory regimes in the trans-Tasman environment.

Evidence law

74 There are some differences, mainly on issues of detail, between the evidence laws of New Zealand and the evidence laws of the Australian jurisdictions. Such differences are to be expected as between the two countries, as a result of having separate court systems and separate legislatures and rule making bodies. The New Zealand Law Commission's proposals for a new evidence code for New Zealand, which are generally reflected in a new Evidence Bill introduced into Parliament on 3 May 2005, are based on the Australian Law Commission's evidence code, which has formed the basis for reforms in the Australian jurisdictions. The proposed New Zealand reforms – another example of unilateral coordination - would reduce further still, but would not eliminate, the current differences.

75 Such differences as do exist in this field seem unlikely to give rise to material costs in the trans-Tasman context, provided there are appropriate arrangements for obtaining evidence across the Tasman. The 1994 evidence regime appears to be working well, and as noted above is being reviewed by the TTCPRE working group to identify any further refinements or extensions of the regime that may be appropriate.

Standards of products and conformity assessment

76 Product standards and conformity assessment are very important issues in the trans-Tasman context. These issues have been addressed by a number of initiatives including TTMRA, JASANZ, cooperation between Australian and New

Zealand standard-setters, and specific joint mechanisms for setting food standards and (in the future) standards for therapeutic products.

77 TTMRA is of particular importance in this context. It is intended to ensure that differences in standards between the two countries do not prevent the trans-Tasman supply of goods: goods that meet the requirements for sale in one country can lawfully be sold in the other without needing to comply with any different local requirements.

78 In practice, however, there remain areas where differences in standards can be problematic. For example, TTMRA does not apply to requirements in respect of the use of goods (eg standards that must be met before a washing machine is connected to a local plumbing system), or to non-legal requirements set by industry associations or major purchasers. And it does not enable a business with manufacturing plants in both countries supplying domestic markets to operate to a single common set of standards.

79 This reinforces the importance of working towards common standards where appropriate, and exploring options for extending TTMRA to other requirements relating to goods which affect trans-Tasman supply of goods (eg use requirements), or which affect the efficient operation of trans-Tasman businesses.

80 The New Zealand Government supports continuing the momentum of the current work programme on these issues.

Legal obstacles to greater federal/state and Australia/New Zealand cooperation

81 This submission does not address the question of obstacles to federal/state cooperation within Australia. Improved mechanisms for cooperation within Australia would have the potential to significantly facilitate increased cooperation between Australia and New Zealand.

82 Turning to cooperation between Australia and New Zealand, this submission has identified a wide range of coordination mechanisms that have been put into practice, often with considerable success. Most of the issues that result from differences in laws between the two countries can be effectively addressed using mechanisms that have already been developed, or that are being developed on as part of the current work programme. Stepping back from the detail of these mechanisms, however, some general themes emerge which are relevant to greater cooperation in the future.

83 Perhaps the most important general lesson from the experience of trans-Tasman legal cooperation to date is that it is necessary to be flexible and innovative to ensure that our legal systems can respond to the challenges that already exist, and that will increase with increasing linkages between the two economies. For example, Australia and New Zealand have found innovative solutions to issues such as taking evidence across the Tasman, and enforcement of each other's tax judgments. Flexibility and innovation are required to respond to new challenges as they emerge – for example, we need to find new ways to ensure that regulatory

sanctions such as fines for breaching consumer protection laws are effective in the trans-Tasman context. .

84 Some complex issues which will require a flexible and innovative approach in both countries arise in the context of mechanisms for making common rules, in particular in the context of joint regulatory initiatives such as the JTPA. The various options for making common rules were outlined in Part Four above. These will need to be developed further, and decisions made on which approach to adopt in particular circumstances, as and when proposals for common rules are identified as an appropriate response to differences between legal and regulatory regimes in specific fields.

85 Some important general issues for the future also arise in the context of governance and accountability arrangements for joint institutions such as JTPA.

PART SIX: CONCLUSIONS

86 Differences between the legal systems of Australia and New Zealand are not a problem in themselves. The existence of such differences is the inevitable product of well-functioning democratic decision-making processes in each country, which reflect the preferences of stakeholders, and their effective voice in the law-making process.

87 But some differences between our legal systems do have an adverse impact on trade and commerce, and on the integrity and effectiveness of our countries' laws and regulatory regimes.

88 The New Zealand Government considers that it is important to identify with some precision where such issues arise, and to use appropriate mechanisms drawn from the wide range of available options to respond to these issues, in a manner that achieves the greatest net benefits for both countries.

89 Considerable progress has already been made towards addressing issues raised by differences between the two countries' legal systems, and a number of further coordination initiatives are currently being progressed by Australasian Governments.

90 The New Zealand Government does not perceive any major obstacles to greater cooperation, but considers that both countries will need to be flexible and innovative to respond to the ever-increasing interconnectedness of the two economies, and to maintain momentum towards a single economic market.

91 The breadth of the issues raised by the Committee's inquiry means that this submission is of necessity only a brief summary of existing coordination initiatives, the further coordination work that is currently under way, and the issues raised by proposals for further legal coordination between Australia and New Zealand. The New Zealand Government would be happy to provide further

information on any of the topics discussed in this submission, if that would be of assistance to the Committee.