New Zealand Government replies to questions submitted by the LACA committee subsequent to the hearing on 21 March

1 Concerns have been expressed to the Committee that, in pursuit of greater harmonisation, there might either be detrimental effects, with the adoption of lowest common denominator standards between the two countries. In its own submission the Government identifies the possible risk of reduced tailoring of laws to local conditions as a possible consequence in reaching common rules or standards (para 19.3).

What would be the Government's response to these concerns regarding the adoption of lowest common denominator standards?

The establishment of a trans-Tasman regulatory environment that aspires to best practice is in the interests of both Australia and New Zealand, that is both countries are striving for the highest common denominator. Perhaps it is not realistic to expect to achieve this uniformly and in one instant. But the evolution of best practice trans-Tasman regulatory instruments is the "win-win" goal that we should all be working towards.

Has the Government identified any other risks or potential disadvantages from greater legal harmonisation between the two countries?

We spoke in the public hearing about the risk that regulations might be less tailored to local conditions. Linked to that is a concern about how to ensure New Zealand's interests are reflected in an appropriate way in any arrangements for closer coordination. As well as the inherent costs of harmonisation, there is always the potential for delay in implementing a harmonised regime. All of these general risks must be carefully evaluated and mitigated before embarking on any cooperation exercises.

2 In its submission the Government indicates a number of concerns about the differences of laws affecting businesses operating in the two countries - compliance cost issues, economic costs from barriers to entry; the effectiveness of laws, and administrative costs (para 18).

Can the Government provide the Committee with some examples of each of these areas?

Compliance costs were acute before the introduction of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) – and remain so in areas outside of its scope, such as in the trans-Tasman provision of some services or the temporary movement of service providers. For example, an engineer or architect practising in Sydney providing work for a company based in Auckland (or vice versa) currently has to register in both jurisdictions and meet the insurance

requirements of both.

Work on the effectiveness of laws is being undertaken in the Trans-Tasman Court Proceedings and Regulatory Enforcement (TTCPRE) to improve the effectiveness of consumer protection laws and securities law where a person is operating in one jurisdiction while targeting potential consumers in the other.

How has the Government approached quantifying the actual impact of such differences on business?

The Government has not sought to put a number on the impact – indeed it would be very difficult to do so.

3 The Government also points out that there are costs associated with increased coordination (para 19).

Have the increased costs of coordination been an issue for business in New Zealand? Or are the majority of costs associated with developing and implementing coordination initiatives borne by the Government?

The costs that were being contemplated in the relevant part of our submission were those incurred by Government, including regulators.

4 In its submission the Government lists an impressive number of areas where work has been done over the last decade or so to address legal and regulatory impediments across a wide range of matters (para 27). One of these is in the area of mutual recognition (para 28-32). The submission indicates there was to be a report to heads of Governments following a review by the Productivity Commission.

Can the Government provide an update for the Committee on progress in this area?

The Cross-Jurisdictional Review Forum (CJR Forum), which consists of Australian Federal, State and New Zealand senior officials, prepared final recommendations on the Productivity Commission research study and findings for both Governments. The New Zealand and Australian Prime Ministers endorsed the CJR Forum's final report and recommendations in 2005.

Overall, the review confirmed that the TTMRA has facilitated the objective of a seamless trans-Tasman single economic market. The TTMRA has been successful in achieving its objective of removing unnecessary regulatory barriers to trade and movement of registered professionals. Good progress has been made in progressing the special exemption co-operation programmes established under the TTMRA, with the removal of many barriers to trade.

The review also made recommendations to improve the operation of the TTMRA, which the CJR Forum is now working to implement. These recommendations include:

- the development of an information/education campaign to remind regulators and the respective policy machineries of the strategic objectives and obligations of the TTMRA;

- the development of explicit mechanisms to ensure TTMRA integration objectives are factored in at an early stage of policy and regulatory design on both sides of the Tasman;

- the establishment of the CJR Forum, under new terms of reference, to implement the review recommendations as well as to act as a "ginger group" to consider and promote discussion around the next set of regulatory integration issues; and

- a streamlined approach to the annual rollover of the Special Exemptions, whereby the reporting requirements associated with Co-operation Reports would be simplified.

5 **As the Government would be aware, mutual recognition extends to occupations as well as to the flow of goods.**

Is the Government satisfied with the level of mutual recognition given to people registered to practice in a particular occupation in New Zealand so that they may work in an equivalent occupation in Australia?

The TTMRA has made a strong contribution to the establishment of a Single Economic Market in occupational services. The challenge for the future is, as the Productivity Commission has identified, to find a way to take fuller advantage of the opportunities that arise as technology makes it easier and more economic to provide services trans-Tasman – such as in the examples from architecture and engineering that I referred to previously.

6 In its submission, the Government lists a number of techniques for cooperative coordination, eg mutual recognition, the adoption of common rules while retaining separate institutions, establishing a single trans-Tasman institution (para 45).

With the developments over the past decade or so in mind, is the Government of the view that there are some mechanisms which are more effective over time? For example, has the establishment of single trans-Tasman institutions been shown to be desirable or is retaining separate institutions for application/enforcement purposes more effective provided that there are common rules?

The type of mechanism that will give the best results will depend on the policy objective that is being pursued. In general, joint institutions are best suited to cases where the objective is to create economies of scale. But negotiating joint institutions will always be complex and a resource intensive means of achieving coordination. As the Committee will be aware there is currently only one joint standards setting body, Food Standards Australia New Zealand (FSANZ), while negotiations to finalise a joint regulator for therapeutics are now almost complete.

In banking, for example, we have found an alternative approach to a joint institution has been to make legislative changes that require the banking supervisors to support and consult each other and to consider the impact of their actions on financial system stability in the other country.

7 The Government details some 'significant concerns' regarding the mechanism of including references in one country's laws to the regulatory scheme established by the other (p.50) and notes that 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. The Committee acknowledges that national sovereignty is a key issue and has the potential to be an impediment to greater economic and regulatory coordination.

Could the Government comment on the issue of national sovereignty from its perspective?

Where it judges there is a national interest in negotiating on regulatory matters, the Government accepts that in any set of negotiations, even those aimed at producing 'win-win' outcomes, there will be trade-offs to make in meeting the differing priorities of the parties. Any pressure that arises in these circumstances is a normal consequence of the negotiating process. The New Zealand Government, like any other, carefully considers what trade-offs it might have to make before making decisions about whether to enter into any negotiations.

In the Government's view, does more need to be done to inform and educate the public and stakeholders what greater coordination/harmonisation is meant to achieve?

The priority is to identify those stakeholders most directly affected. As the Committee is aware, one of the recommendations of the research report produced by the Productivity Commission in conjunction with the ten year review of the Australian Mutual Recognition Agreement was that Governments could make renewed efforts to inform regulators and business stakeholders of the broader strategic objectives of the TTMRA and the obligations it imposes on regulators. We are currently working with Australian officials in the production of their revised "User's Guide" to both the Australian MRA and the TTMRA which we hope will be both comprehensive and user friendly.

8 The Government's submission notes the achievements under the Australia New Zealand Closer Economic Relations Trade Agreement (CER) and details the various areas where progress has been made towards greater harmonisation.

Can the Government inform the Committee of any areas where attempts have been made to improve coordination between the two countries but where it has proved not to be possible for either practical or policy reasons?

Trans-Tasman cooperation has been remarkably successful. Occasionally, as has been the case with the creation of our therapeutics regulator, deadlines have been missed and processes have taken longer than had initially been anticipated. But what has been established has been a continuing process for identifying and exploring opportunities between the two countries. This has been conspicuously successful and long may it continue.

INQUIRY INTO THE HARMONISATION OF LEGAL SYSTEMS: ADDITIONAL QUESTIONS TAKEN ON NOTICE

1. Is New Zealand aware of any problems relating to the mutual recognition of occupations, in particular in relation to medical practitioners as regards the medical profession and medical specialists

Currently, medical practitioners are subject to a permanent exemption under the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Medical schools in Australia and New Zealand and Australasian medical colleges are, however, mutually accredited by both the Australian and the New Zealand Medical Councils. This means that graduates from these schools can work in both Australia and New Zealand. The impact relates to its effectiveness for third country trained medical practitioners.

As part of the 2003 review of the TTMRA, the issue of whether the current permanent exemption should be removed was examined. It was decided that there were public health grounds to retain the exemption at this time. However, the Australian and New Zealand Medical Councils were asked to work together to harmonise competency standards for overseas-trained medical practitioners, with a view to enabling the removal of this exemption at the next review.

The Australian Medical Council and the Canadian Medical Council are in the process of finalising a joint screening examination for overseas trained medical practitioners. It is expected that this will come into force in June 2006. The New Zealand Medical Council is also looking at linking in with this process to establish

a common approach to competency standards. It is also keeping a watching brief on development in Australia in terms of the potential establishment of a national register and the implications this may have for New Zealanders

2. Would there be any constitutional impediment to New Zealand referring power to legislate to the Australian parliament or vice versa

Like Australia, New Zealand is a constitutional monarchy based on the Westminster system of government with the executive, legislative, and judicial branches of government. Unlike Australia, New Zealand's constitution is found not in one instrument alone, but in a range of enactments and constitutional conventions.

One of the major constitutional enactments is the Constitution Act 1986 which consolidated the more important statutory rules regulating the structure and functioning of New Zealand government.

Section 14 provides:

(1) There shall be a Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives.
(2) The Parliament of New Zealand is the same body as that which before the commencement of this Act was called the General Assembly ...and which consisted of the Governor-General and the House of Representatives

Section 15 provides:

(1) The Parliament of New Zealand continues to have full power to make laws.

These provisions confirm both the sovereign legislative competence of the New Zealand Parliament and its continuity stemming from long standing constitutional conventions, including the fundamental convention regarding the sovereignty of Parliament.

The doctrine of parliamentary sovereignty means that there are no legal constraints which control the content of legislation. For the purposes of New Zealand law, statutes also prevail over judicial precedent, common law principles, international treaties, and customary international law. As Parliament has legislative supremacy, constitutionally there would be no apparent legal impediment to Parliament taking a legislative step to cede sovereignty to another body. However, Parliamentary sovereignty also means that one Parliament cannot fetter the legislative competence of a subsequent Parliament. Delegating law making powers to another body would be regarded as amounting to such a fetter. Even if it purported to do so, a subsequent Parliament could reassert its sovereignty at any time.

There are examples where sovereign Parliaments have effectively ceded an element of legislative supremacy. The notable example of a legislature similar to those of New Zealand and Australia doing so is the UK Parliament which has accepted that in certain matters of exclusive EU competence, UK law is subject to EU law.

What is suggested in this case, however, is rather different: one sovereign national legislature ceding legislative competence to another sovereign national legislature. That would be highly unusual and could be regarded as calling into question a key hallmark of independence. It would seem unlikely that the New Zealand Parliament would take such a step, just as it would seem unlikely that the Australian Parliament would cede legislative competence to the New Zealand Parliament.

3 Is there are there any potential for friction under CER as a consequence of New Zealand's participation in the Kyoto protocol and Australia's decision not to participate, particularly given that New Zealand now has the potential to enter into arrangements which provide trading rights in carbon credits?

New Zealand is yet to finalise its domestic policies to meet its Kyoto protocol[1] commitments. We do not, however, envisage any problems arising under CER as a consequence of our countries' different positions on the Kyoto Protocol.

New Zealand and Australia already cooperate closely to achieve our climate change objectives via the Australia New Zealand Climate Change Partnership. There are regulatory areas where we have harmonised standards to prevent a misalignment of standards creating any trade problems between our countries. For example, the New Zealand Energy Efficiency Conservation Authority, the Ministry for the Environment and the Australian Greenhouse Office have a trans-Tasman energy efficiency forward programme to ensure harmonised energy labelling and minimum energy performance standards (MEPS).

It has not yet been confirmed how the global emissions trading system will operate, but both Australia and New Zealand will be working actively to reduce their emissions. While Australia may not be required to participate in trading in Kyoto units, it is still free to participate in the emissions market if it chooses.

New Zealand is interested in maintaining a close dialogue with Australia on climate change issues, including the Kyoto Protocol and the Asia Pacific Partnership on Clean Development and Climate.

[1] The Kyoto Protocol to the United Nations Framework Convention on Climate Change, which entered into force on 16 February 2005.

4 Have there been any discussions between the Australian and New Zealand governments on intellectual property policy issues, particularly on the changes to the Australian system arising from the intellectual property component of the Australia/US Free Trade Agreement?

New Zealand is in the process of reviewing and updating its main intellectual property statutes:

- The Trade Marks Act and associated Regulations came into effect in 2003;
- The Geographical Indications (Wine and Spirits) Registration Bill is currently before the New Zealand Parliament;
- The Copyright (New Technologies and Performers' Rights) Amendment Bill, which will update the Copyright Act 1994 to take account of developments in digital technology, is current awaiting introduction; and
- Legislation to amend and update the Patents Act 1953 and the Plant Variety Rights Act 1987 is currently being drafted.

During this review process, New Zealand officials have been fully cognisant of the developments in intellectual property in Australia, including those arising from the Australia/US FTA, and have engaged in dialogue on these issues with their Australian counterparts. New Zealand has also closely followed the changes to Australia's intellectual property legislation arising out of the FTA. There have also been ongoing discussions between New Zealand and Australian officials regarding possible coordination of processing of registered intellectual property rights.

5 Is quarantine an area that is particularly outside of the CER type arrangement (in particular, apples and fireblight)

Quarantine issues were not covered in the original CER Agreement, other than in an exception to allow for reasonable, scientifically justified quarantine measures to protect human, animal or plant life or health. The 1988 Protocol on the Harmonisation of Quarantine Administrative Procedures sought to improve the efficiency and speed of the flow of goods between the two countries by harmonising quarantine administrative procedures. Under the Protocol, New Zealand and Australia reaffirmed their commitment to the principle that quarantine requirements should not be deliberately used as a means of creating a technical barrier to trade where this is not scientifically justified. The Protocol also placed some rules or disciplines around harmonising technical measures with international standards where they exist, and promoted bilateral harmonisation of quarantine and inspection standards and procedures, notwithstanding the fact that the exception in the original agreement continues to apply. The Protocol also provided for the establishment of a bilateral consultative group to drive quarantine harmonisation, coordinate technical committees and help resolve technical differences relating to quarantine. Under the Protocol,

Australia and New Zealand agreed to work toward the speedy resolution of quarantine issues hindering the trans-Tasman trade in goods annexed to the Protocol. The overwhelming majority of these issues have now been resolved, with only one or two remaining. Access of New Zealand apples to the Australian market remains very prominent in this regard and New Zealand looks forward to the expeditious resolution of this issue.