ATTORNEY-GENERAL'S DEPARTMENT SUPPLEMENTARY SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS: INQUIRY INTO HARMONISATION OF LEGAL SYSTEMS RELATING TO TRADE AND COMMERCE

This supplementary submission provides the Committee with an update in the areas that have progressed since May 2005. For ease of reference, the headings from the Department's original submission have been retained.

1 INTRODUCTION

No update required.

2 MECHANISMS FOR ACHIEVING HARMONISATION

No update required.

3 FORUMS FOR PURSUING HARMONISATION

3.1 The Standing Committee of Attorneys-General

No update required.

3.2 Trans-Tasman Working Group

The Trans-Tasman Working Group issued a discussion paper entitled 'Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group' on 1 August 2005 for comment by 4 November 2005. This discussion paper has already separately been provided by the Department to the Secretary of the Committee. The discussion paper:

- identified problems that exist with the current arrangements
- considered a more general scheme for trans-Tasman service of process, taking of evidence and recognition and enforcement of court orders and judgments
- considered a more general scheme for trans-Tasman co-operation between regulators
- undertook appropriate domestic consultation, and
- proposed options that may be pursued.

32 submissions were received in response to the discussion paper. The submissions broadly support the overall package of proposals, although some have raised issues that will require further consideration by the Working Group. Not all submissions addressed all issues raised in the discussion paper. The Working Group expects to report, with recommendations, to both governments in 2006. Further consultation with the States and Territories, and other stakeholders, will be undertaken prior to the Working Group's recommendations being finalised.

4 CIVIL PROCEDURE

4.1 Service of proceedings

No update required.

4.2 Forum non conveniens rules

No update required.

4.3 Statute of Limitations

No update required.

4.4 Evidence Law

Australia

Following the release of the Issues Paper in December 2004, the Australian Law Reform Commission (ALRC), the NSW Law Reform Commission and the Victorian Law Reform Commission released a joint Discussion Paper in July 2005. The Discussion Paper included a wide range of reform proposals on which further public comment was sought. The Commissions also consulted and worked with the various law reform agencies in other states and territories. Some of the Discussion Paper proposals were minor or technical in nature, or sought to clarify an existing rule to avoid confusion. Other proposals aimed to enhance the operation of evidence rules which otherwise work reasonably well. Some identified practical difficulties and suggested specific solutions.

The three Commissions prepared a joint final report which was submitted to their respective ministers by the due date of 5 December 2005. The report was tabled in the Australian and Victorian Parliaments on 8 February 2006 and released on the same day in New South Wales.

The Queensland Law Reform Commission (QLRC) completed its review and its report was tabled on 28 October 2005. The QLRC review focused on specific differences between Queensland law and the uniform Evidence Acts as well as the Discussion Paper's proposals for amendment, rather than recommending whether or not Queensland should adopt the uniform laws.

The Law Reform Committee of the Northern Territory has been asked by the NT Attorney General to undertake a similar review. The review will consider the Commissions' final report before reporting.

The Standing Committee of Attorneys General (SCAG) agreed in November 2005 to establish a working group of jurisdictions that wish to participate to advise ministers as soon as possible on amendments that should be made to the uniform Evidence Acts, with a view to reinstating a high level of uniformity.

4.5 Recognition and enforcement of judgments

No update required.

4.6 Miscellaneous

No update required.

5 PERSONAL PROPERTY SECURITIES LAW

At the July 2005 SCAG meeting, the SCAG officers' working group—chaired by the Attorney-General's Department—presented Ministers with a report on the current regulatory framework for personal property securities in each jurisdiction. Ministers asked the working party to develop a discussion paper canvassing options for reform, including options based on the New Zealand model of regulation. Work on the discussion paper is continuing.

The Australian Attorney-General has also met with several key stakeholders including representatives of the banking industry, small business and general industry groups. All stakeholders have indicated their support for the project.

6 INFORMATION LAW

6.1 Privacy

Commonwealth legislation

The Senate Legal and Constitutional Committee tabled their report *The Real Big Brother – Review of the Privacy Act 1988* on 23 June 2005. The Committee recommended that a wider review be undertaken of the privacy laws to effectively protect the privacy of Australians in the 21st Century and that this comprehensive review should be undertaken by the ALRC. This recommendation is similar to the recommendation in the Privacy Commissioner's report that the Government should undertake a wide ranging review of privacy laws in Australia. Consistent with the recommendations in these recent reports, the Government announced on 30 January 2006 that the ALRC will undertake a comprehensive review of the Privacy Act. The ALRC review is to be completed by 31 March 2008.

Existing State and Territory legislation

The Tasmanian *Personal Information and Protection Act 2004* came into effect on 5 September 2005. The legislation applies to the Tasmanian public sector.

Health Privacy

The Health Privacy Code was not considered by Ministers in 2005 and is now expected to be considered in 2006.

Workplace privacy

Workplace privacy is an area—not mentioned in the Department's original submission—where it would be desirable to have a nationally consistent workplace privacy regime to provide protection for the personal information of workers.

Private sector employee records are excluded from the protection of the *Privacy Act 1988* (Cth). This has created an opportunity for the States and Territories to legislate in the area of workplace privacy and has led to inconsistencies across jurisdictions. For example, NSW legislation governing the privacy of health information exempts employee records from the operation of the legislation whereas similar legislation in Victoria does not. NSW has recently enacted the *Workplace Surveillance Act 2005*. Victoria has indicated that, following the release of the Victorian Law Reform Commission Report on Workplace Privacy, it may also legislate in this area.

The Standing Committee of Attorneys-General is currently exploring possible policy approaches for nationally consistent workplace privacy laws.

6.2 Copyright

Reflecting the dynamic nature of copyright law, a number of reviews of the Australian *Copyright Act 1968* commenced in 2005. Aspects of New Zealand's *Copyright Act 1994* are also under review. It will be difficult to predict whether the laws will become more harmonised until the reviews in Australia and New Zealand are completed.

Exceptions

As outlined in the original submission, the Australian Government released an Issues Paper in May 2005 considering the copyright exceptions which are currently in the Copyright Act and whether they should be extended. The Government has not yet made decisions concerning this review. As New Zealand is also considering the scope of exceptions in its Copyright Act, it is unclear how the scope of exceptions in each country will develop and whether it will result in greater harmonisation.

Pay TV

The Australian Government also undertook a review into whether certain unauthorised activities involving access to and use of subscription broadcasts should be criminalised. In June 2005 it was announced that the Government would be amending its law to make it a criminal offence to access subscription broadcasts without authorisation and without paying a subscription fee, including

dishonestly accessing pay TV in a private home as well as for commercial purposes. These amendments are currently being drafted.

New Zealand's Copyright Act includes an offence of fraudulently receiving programmes. The offence applies where a person receives a broadcast service or cable programme, for which payment is required, and they intentionally avoid payment[1]. While the elements of the offence under Australian law may differ to that in the New Zealand law, the Australian amendments should result in greater harmonisation of the law on this issue.

Enforcement

Copyright enforcement became an increasingly strong focus for the Australian Government in 2005. The Australian Copyright Act contains a large number of criminal provisions. For example, the Act criminalises conduct done on a commercial scale which significantly prejudices a copyright owner, even where there is no profit motive. This is not replicated in New Zealand's copyright law.

A technical review of the criminal provisions in the Australian Act is also currently underway. This may result in further differences between Australian and New Zealand copyright law and enforcement policy.

In 2005, representatives of the Attorney-General's Department engaged in a discussion with New Zealand Government representatives about copyright enforcement policy and strategy.

Digital Technology

As noted in the original submission, Australia has already amended its copyright law to bring it into compliance with the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT), while New Zealand is still in the process of amending its law in relation to digital technology. This means that there is currently some divergence between our laws in relation to digital technology. This may change further as Australia is currently undertaking a number of reviews in this area, including:

- an inquiry by the House of Representative Committee Standing Committee on Legal and Constitutional Affairs into technological protection measure exceptions
- an Issue Paper released on whether the scope of the scheme which limits remedies against Carriage Service Providers needs to be expanded
- a review by the Attorney-General's Department of the Copyright Act to ensure compliance with Article 17.4.7 of the Australian-United States Free Trade Agreement (AUSFTA) in relation to technological protection measures, and
- completion of the review of the Digital Agenda Amendments to the Copyright Act.

The outcomes of these reviews may impact on the harmonisation of Australian and New Zealand copyright law.

[1] Section 227 *Copyright Act 1994* (NZ)

Crown Copyright

In April 2005 the Australian Copyright Law Review Committee (CLRC) published its report on Crown copyright. The report recommended that the special Crown subsistence and ownership provisions in Pt VII of the Copyright Act be repealed, so that Governments would then rely on the general provisions to claim copyright ownership. The report made several other recommendations including abolishing copyright in certain materials produced by the judicial, legislative and executive arms of the government, duration of Crown copyright and management of Crown copyright. The Commonwealth and State Governments are jointly considering their response to the report.

New Zealand copyright law also specifically states that the Crown owns copyright in a work made by a person employed, engaged or contracted by the Crown[2]. Unlike the current Australian provisions, the New Zealand Act specifically outlines that copyright does not subsist in various legal and parliamentary material[3]. Again the response by the Australian Government to the CLRC report will determine the degree of harmonisation on this aspect of copyright law between the two countries.

International Treaties

Australia has committed to acceding to both the WCT and WIPO Performances and Phonograms Treaty (WPPT). While New Zealand has undertaken a review into the adoption of digital technology provisions, it has not made any firm commitment to acceding to the WCT[4]. The review acknowledged that many of the changes that New Zealand would make to its Act in relation to digital technology would be consistent with the WCT, but no specific recommendation was made about acceding to the WCT.

Similarly, a review of performers' rights recommended that New Zealand not accede to the WPPT as extension to performers' rights in the Act was considered unnecessary[5]. Therefore, while both Australia and New Zealand adhere to the obligations in relation to performers' rights under the World Trade Organisation Trade Related Aspects of Intellectual Property Rights agreement, Australia will provide for greater scope of protection of performers' rights in accordance with the WPPT. This includes providing moral rights for performers.

Other issues

There are also other differences in the policy and administration of Australian and New Zealand copyright law. For example, statutory licences in the Australian Copyright Act allow educational institutions and governments to copy material providing they pay equitable remuneration to a declared collecting society. The New Zealand Act creates broad exceptions which allow educational establishments to copy material for educational purposes and these exceptions are only limited to the extent that a licensing scheme is available to cover the copying.

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[2] Section 26 *copyright Act 1994* (NZ)

[3] Section 27

[4] Cabinet Paper, Digital Technology and the Copyright Act 1994, 18 June 2003 available at http://www.med.govt.nz/buslt/int_prop/digital/index.html

[5] Cabinet Paper, Performers' rights Review, 3 December 2003 available at http://www.med.govt.nz/buslt/int_prop/performers/cabinet/index.html

The Australian Act provides that collecting societies which administer statutory licences must be declared. New Zealand does not have this process in place for educational and government use of copyright material. Collecting societies have highlighted that this creates greater administrative hurdles in gaining remuneration for educational and government copying in New Zealand. The Department does not have a view on this.

7 REGULATION OF THE LEGAL PROFESSION

Since the Department's original submission, there has been some progress in implementing the national legal profession project. New South Wales commenced its implementing legislation on 1 October 2005 and Victoria's legislation commenced on 12 December 2005. Queensland is expected to amend its legislation in 2006, bringing it in line with the national model. While all other States and Territories are expected to introduce implementing legislation in 2006. It is fundamental to the success of the project that all jurisdictions implement the model bill as soon as possible. Otherwise, the regulation of the legal profession will remain a mix of contradictory laws.

In July 2005, SCAG Ministers approved the model regulations which support the model bill. These have been implemented by New South Wales and Victoria.

The working group established by SCAG under the Memorandum of Understanding has met regularly and is considering possible changes to the model bill. It has proposed numerous amendments to the model bill which Ministers approved in November 2005. Further amendments are expected to be put to Ministers at the April 2006 SCAG meeting. The working group is also finalising a consolidated version of the model bill which will be publicly released.

As noted in the Department's original submission, the implementation of the model bill will still result in significant areas of divergence in regulation. The Australian Government continues to press for uniformity to the greatest possible extent, so as to minimise contrary or conflicting regulation between the jurisdictions. However, there is an increasing concern that the divergence in regulation may undermine the ultimate goals of the national legal project to facilitate the inter-jurisdictional trade of legal services.

8 DEFAMATION

In the second half of 2005, each of the States enacted substantially uniform defamation laws based on the model provisions put forward in the State and Territory proposal. In early 2006, the ACT enacted laws based on the model provisions. The Northern Territory is expected to enact laws during 2006.

The Australian Government has been encouraged by the progress that has been made. It remains regrettable, however, that differences remain between the jurisdictions in relation to the provision of juries. The Australian Government will continue to support reform in relation to the provision of alternative remedies and the rights of corporations to sue.

9 LAWS IMPACTING ON INDIVIDUALS

9.1 Conveyancing

No update required.

9.2 Succession Law

The Queensland Law Reform Commission is expected to finalise its reports on Intestacy and the Administration of Estates early in 2006.

In regards to the Report on Wills, Victoria and the Northern Territory have implemented the report and Queensland has a bill before Parliament. However, while the legislation is largely consistent with the QLRC's recommendations there are areas where there is substantial policy departure. Considering the time taken to develop the proposals, it is disappointing that already there is divergence in the implementation of the proposals by the States and Territories.

9.3 Powers of Attorney

No update required.

9.4 Statutory Declarations

No update required