

Basis and mechanisms for the harmonisation of legal systems

- 2.1 This Chapter considers the basis for the harmonisation of legal systems and provides an overview of the main mechanisms and fora for harmonisation.

Basis for the harmonisation of legal systems

Justifications for harmonisation

- 2.2 A number of broad justifications for pursuing legal harmonisation within Australia and between Australia and New Zealand were advanced in evidence to the inquiry. Major justifications include:
- Uncertainty, increased operational costs (e.g. compliance costs), or difficulties for business due to different requirements imposed by multiple regulatory regimes;¹

1 See for example the Business Council of Australia (BCA), *Submission No. 16*, section 2; Mr Steven Münchenberg, BCA, *Transcript of Evidence*, 6 April 2006, p. 67; Screenrights, *Submission No. 17*, paras. 8-12, 15; Tortoise Technologies Pty Ltd, *Submission No. 4*, p. 2; Australian Finance Conference, *Submission No. 5*, pp. 1-2; Telstra Corporation Ltd (Telstra), *Submission No. 7*, pp. 5-6; Fundraising Institute – Australia Ltd, *Submission No. 9*, pp. 8-10; Science Industry Action Agenda (SIAA), *Submission No. 14*, p. 4; Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23; Property Law Reform Alliance, *Submission No. 15*, p. 2; Australian Self-Medication Industry, *Submission No. 20*, p. 11; Department of the Treasury, *Submission No. 21.2*, p. 6; Mr Ray Steinwall, *Submission No. 22*, p. 7; New Zealand Government, *Submission No. 23*, pp. 4-5; Department of Foreign

- Impediments to economic growth both, domestically and internationally, resulting from regulatory inconsistencies among jurisdictions;²
- Difficulties or uncertainties for individuals arising from regulatory inconsistencies among jurisdictions,³ and unacceptable differences in impacts for individuals due to inconsistent treatment of the same action across jurisdictions;⁴
- Reduced competitiveness, comparative disadvantage, or lack of opportunity due to regulatory inconsistencies among jurisdictions;⁵
- Reduced effectiveness and integrity of laws due to regulatory inconsistencies among jurisdictions, for example law enforcement difficulties across international borders.⁶

2.3 A number of examples of actual costs resulting from a lack of regulatory harmonisation were provided to the Committee. In its submission the Business Council of Australia (BCA) cited three broad cost estimates relating to multiple and overlapping laws:⁷

- A total of \$20 billion as the annual cost of ‘...duplication and coordination across Australia’s multiple jurisdictions’;⁸

Affairs and Trade, *Submission No. 28*, p. 4; Mrs June McPhie, Law Society of NSW (LSNSW), *Transcript of Evidence*, 6 April 2006, p. 36.

- 2 Attorney-General’s Department, *Submission No. 26*, p. 3.
- 3 For example in the area of power of attorney (Ms Susan Cochrane, *Submission No. 12*, pp. 2-3; Mrs June McPhie, LSNSW, *Transcript of Evidence*, 6 April 2006, pp. 32-33), and real estate transactions (Property Law Reform Alliance, *Submission No. 15*, p. 2; Victorian Department of Sustainability and Environment, *Submission No. 29*, p. 3). See also Attorney-General’s Department, *Submission No. 26*, pp. 29-31.
- 4 Attorney-General’s Department, *Submission No. 26*, p. 3.
- 5 For example in the areas of copyright (Viscopy, *Submission No. 1*, pp. 3-7; Screenrights, *Submission No. 17*, paras. 12-23), real estate transactions (Realty Conveyancing Services, *Submission No. 8*, p. 1; Australian Institute of Conveyancers Vic Division Inc, *Submission No. 24*, pp. 1-2), and the science industry (Science Industry Action Agenda, *Submission No. 14*, pp. 4).
- 6 New Zealand Government, *Submission No. 23*, p. 5.
- 7 BCA, *Submission No. 16*, section 2.
- 8 BCA citing Drummond M L, ‘Costing Constitutional Change: estimating the Costs of Five Variations on Australia’s Federal System’, *Australian Journal of Public Administration* 61(4), December 2002, pp.43-56. This figure was also cited by the House of Representatives Standing Committee on Economics, Finance and Public Administration in its 2003 report *Rates and Taxes: A Fair Share for Responsible Local Government*, p. 140. This report can be accessed at:
<http://www.aph.gov.au/house/committee/efpa/localgovt/report.htm>.

- An estimate by Optus that compliance with multiple workers' compensation and occupational health and safety regimes adds between five and ten per cent to the cost of its workers' compensation premiums; and
 - An estimate by the Building Products Innovation Council and the Housing Industry Association that the annual cost of compliance with multiple State and Territory building laws is between one and five per cent of company turnover (\$600 million annually at two percent of turnover).
- 2.4 The BCA also referred the Committee to Attachment A of its 2005 submission to the Taskforce on Reducing the Regulatory Burden on Business, which provides four other examples of actual costs incurred by businesses as a result of regulatory overlap.⁹
- 2.5 The Science Industry Action Agenda (SIAA), a collaboration between the science industry and the Australian Government with the aim of assisting the growth of the industry,¹⁰ provided some examples of aggregate cost imposts for small-to-medium-sized enterprises (SMEs) in the science industry resulting from regulatory duplication or overlap. These are as follows:
- Over \$1 million in compliance costs for 100 SMEs involved in the importation of ozone-depleting substances due to requirements under two separate ozone protection and product stewardship regimes;
 - Over \$71 million in compliance costs for at least 100 SMEs due to statutory requirements to provide Material Safety Data Sheets for chemicals, combined with \$1.5 million in compliance costs due to reporting requirements under the Commonwealth National Industrial Chemicals Notification and Assessment Scheme for certain classes and volumes of chemicals supplied to laboratories; and
 - An annual compliance cost of \$50 000 for one importer of diagnostic kits due to the registration requirements of five separate government agencies.¹¹

9 'Submission to the Taskforce on Reducing the Regulatory Burden on Business: Attachment A - Specific Regulatory Issues', pp. 9, 17-18, 48 and 67. This document can be accessed at: www.bca.com.au/content.asp?newsID=97547.

10 SIAA, *Submission No. 14*, p. 2.

11 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 22-23. The first two examples were originally set out in the SIAA's December 2005 'Supplementary

- 2.6 The SIAA informed the Committee that these cost imposts were measured by applying an hourly rate to time spent on compliance and that registration fees were also taken into account.¹²
- 2.7 The Fundraising Institute – Australia Ltd (FIA), the peak national body for the not-for-profit fundraising sector in Australia, indicated that its member fundraising organisations can incur compliance costs of up to a full-time staff member salary or more due to regulatory duplication.¹³
- 2.8 The Department of the Treasury (Treasury) informed the Committee that regulatory differentiation between Australia and New Zealand results in Australian companies incurring average costs of between \$10 000 and \$30 000 in providing securities prospectuses to potential investors in New Zealand. Treasury also indicated that estimated future compliance costs for Australian banks of developing stand-alone systems (particularly information technology platforms) in New Zealand may range between NZ\$15 million and NZ\$30 million per bank, with estimated ongoing annual costs of between NZ\$15 million and NZ\$20 million.¹⁴
- 2.9 The potential benefits of harmonisation entail the amelioration or removal of the adverse effects noted at paragraph 2.2 above, for example greater certainty for business along with reduced costs and difficulties; greater certainty and consistency for individuals across jurisdictions; fewer comparative disadvantages; and more effective, streamlined regulation. The Committee notes with interest some recent broad estimates of governance costs that could be saved if duplication between the Commonwealth and the States/Territories was reduced or eliminated:

Submission to the Regulation Taskforce' (accessible at: http://www.scienceindustry.com.au/pages/suppl_sub.asp). The SIAA also indicated that science industry SMEs employ in the range of 10-30 people and that the industry is '...primarily composed of SMEs': see Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, p. 22, and *Submission No. 14.1*, p. 4 of 7.

12 Dr Terry Spencer, SIAA, *Transcript of Evidence*, 21 March 2006, pp. 23-24.

13 Mr Andrew Markwell, FIA, *Transcript of Evidence*, 6 April 2006, p. 47.

14 Treasury, *Submission No. 21.2*, p. 6. Treasury indicated however that recently announced legislative measures to bring about mutual support between the Australian Prudential Regulation Authority and the Reserve Bank of New Zealand will 'ameliorate costs to banks': p. 6.

- One recent academic study into reform of Australia's federal system estimated that up to \$30 billion could be saved annually if the state level of government in Australia was abolished.¹⁵
 - In evidence to another parliamentary inquiry, the Chief Executive Officer of the St Luke's Hospital Complex in Sydney estimated that Commonwealth assumption of full responsibility for the administration of the health sector in Australia would save between \$5 and \$8 billion per annum.¹⁶
- 2.10 The Committee was also informed that harmonisation can increase the potential for growth and opportunity in industry, trade and business. The Committee was informed by the SIAA, for example, that the current annual growth rate of 10 per cent of the Australian science industry:
- ...can be increased by, among other things, harmonisation of regulation in Australia (and internationally), thus freeing the innovation inherently present in the industry.¹⁷
- 2.11 The Department of Foreign Affairs and Trade (DFAT) stated that '...greater harmonisation [between Australia and New Zealand] has the potential to further increase the annual growth rate in trade' between the two countries.¹⁸

Costs and potential disadvantages of harmonisation

- 2.12 It is important to note that there are also costs and potential disadvantages of legal harmonisation. To begin with, the institution of measures to achieve legal harmonisation involves considerable costs for governments. Developing and introducing legislation, particularly national legislation covering a range of matters, is a significant undertaking requiring substantial resources, potentially over a period of years. Added to this are the ongoing costs of administration once a

15 Griffith University Federalism Project, *Reform of Australia's Federal System*, p. 23 citing Drummond M L, "Costing constitutional change: Estimating the cost of five variations on Australia's federal system." *Australian Journal of Public Administration* 61(4), December 2002, pp. 43-56. This document is available at: <http://www.griffith.edu.au/centre/slrc/federalism/>.

16 Oral evidence by Mr George Toemoe to the inquiry into Health Funding by the House of Representatives Standing Committee on Health and Ageing, *Transcript of Evidence*, 24 August 2005, p. 23. This document can be accessed at: <http://www.aph.gov.au/house/committee/haa/healthfunding/hearings.htm>.

17 SIAA, *Submission No. 14.1*, p. 3 of 7.

18 DFAT, *Submission No. 28.1*, p. 2.

new legislative regime is established, particularly if the creation of new regulatory agencies is required.¹⁹ Further, new legislative regimes designed to reduce duplication and costs can impose new compliance costs on industry and business, at least in the short term.

2.13 Some of the potential disadvantages to legal harmonisation identified in the evidence include:

- Difficulty of process and achieving desired outcomes depending upon the mechanism utilised;²⁰
- Broad adoption of lowest common denominator laws, which may not be generally desirable, due to compromise;²¹
- Broad adoption of the exacting ‘...high-water mark’ laws of one jurisdiction, which may not be desirable elsewhere due to that jurisdiction resisting modification of its existing regime;²²
- Erosion of harmonisation over time due to legislative divergence among jurisdictions;²³
- Discouragement of regulatory innovation among jurisdictions and reduced competitive pressure among jurisdictions to produce better laws;²⁴ and
- Negative impacts on regional or local areas resulting from harmonisation measures that may be broadly desirable.²⁵

2.14 One other possible disadvantage of harmonisation, identified by the Litigation Law & Practice Committee of the Law Society of New South Wales (LSNSW), was the potential for Commonwealth-led harmonisation to be perceived as an attempt to extend the Commonwealth’s regulatory reach by stealth:

The pursuit of harmonisation of laws could meet with opposition based on constitutional grounds. ...It could be

19 The New Zealand Government also noted that similar development and administration costs exist in relation to coordination mechanisms: see *Submission No. 23*, p. 5.

20 For example constitutional amendment (see Attorney-General’s Department, *Submission No. 26*, pp. 7-8; Professor George Williams, *Submission No. 2*, p. 2).

21 BCA, *Submission No. 16*, section 4; Justice Kevin Lindgren, *Exhibit 33*, p. 4.

22 BCA, *Submission No. 16*, section 4.

23 Mr Ray Steinwall, *Transcript of Evidence*, 6 April 2006, p. 27; New Zealand Government, *Submission No. 23*, p. 14.

24 BCA, *Submission No. 16*, section 4.

25 Mr Michael Ferguson MP and the Hon Duncan Kerr SC MP, *Transcript of Evidence*, 21 March 2006, p. 19. See also New Zealand Government, *Submission No. 23*, p. 5.

seen as a process to “federalise” laws across Australia where those laws affect trade and commerce matters. This would be seen as a subtle mechanism to obviate the resort to section 51(xxxvii) of the Commonwealth Constitution. ...It could be argued that harmonising laws would deny the opportunity of citizens to the security presented by the two levels of government...²⁶

The Committee’s view

- 2.15 It is clear that, as a general proposition, regulatory inconsistency, multiple layers of regulation, regulatory duplication, or regulatory complexity can add to the operational costs of businesses and other organisations. This impact was routinely cited in evidence to the inquiry, and the Committee is aware that cost imposts cannot always be precisely quantified (or necessarily expressed in dollar terms). It was also clear to the Committee from the evidence – particularly from the examples of absurd situations noted at the beginning of this report²⁷ – that the range of other adverse effects set out at paragraph 2.2 above can also result from a lack of harmonisation.
- 2.16 The Committee also accepts the general proposition that legal harmonisation can result in significant benefits such as the easing of compliance cost imposts and more effective regulation. The Committee is conscious too that, just as the costs resulting from a lack of harmonisation cannot always be precisely quantified, the benefits may not always be exactly measurable or immediate.²⁸
- 2.17 These propositions aside, however, the Committee acknowledges that legal harmonisation measures involve significant costs, and that there are a number of potential drawbacks to going down the harmonisation path. It is also worthwhile to make what is perhaps an obvious point: the mere existence of differences between laws will not

26 LSNSW, *Submission No. 10*, p. 4. The Western Australian and Queensland Attorneys-General raised the issue of the Commonwealth overriding State laws: see Western Australian Attorney-General, the Hon Jim McGinty MLA, *Submission No. 18*, p. 2; Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 1 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2.

27 See pp. vii-viii above.

28 Treasury, for example, indicated that ‘Initiatives which extend harmonisation may not always translate directly into increased flows of trade in goods between Australia and NZ’, but also that ‘...reducing costs through harmonisation can increase cross-border investment flows – which have the potential to enhance capital deepening and domestic growth’: *Submission No. 21.2*, p. 7.

always mean that harmonisation of those laws is necessary or even desirable. In its submission, the New Zealand Government (NZG) noted that:

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.

...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 of regulatory regimes, options for coordination to address those concerns need to be considered, and the benefits weighed against the associated costs.²⁹

- 2.18 The Committee agrees with this, not only in the context of the Australia-New Zealand relationship, but also in the context of the relationships among the governments of the Australian federation. Ultimately, the question of whether to harmonise or not to harmonise should be approached on a case-by-case basis and will always require a careful evaluation of the need, potential benefits, costs, and potential disadvantages. No single formula seeking to prescribe the appropriate conditions for legal harmonisation will be adequate for all situations, and the mechanism of harmonisation to be employed will also depend upon the particular circumstances at hand.

Mechanisms for achieving harmonisation of legal systems

Harmonisation within Australia

- 2.19 The main mechanisms by which legal harmonisation can be facilitated or achieved within Australia include:
- High Court judicial interpretation;
 - High Court declaration of a single Australian common law;

²⁹ NZG, *Submission No. 23*, pp. 2, 6.

- Model legislation;
- Referral of powers to the Commonwealth by the States;
- Cooperative legislative schemes; and
- Constitutional amendment.

High Court judicial interpretation

2.20 The Committee notes that harmonisation or standardisation of laws has been facilitated in Australia by High Court interpretation of the Constitution. In a number of landmark decisions since Federation, the High Court has affirmed and/or augmented the scope of Commonwealth legislative competence, thus legitimising Commonwealth establishment of national legislative regimes. While of course there have also been High Court cases tending in the other direction, it has been suggested that '...the High Court is more or less consistently pro-Commonwealth'.³⁰

2.21 One of the most significant cases in this context is *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (the Engineers case). The Engineers case concerned industrial proceedings brought by a union against a collection of employers (including the Western Australian Government). In its decision the High Court indicated that the Commonwealth's legislative competence as set out in the Constitution was binding on the States and subject only to limitations also expressed in the Constitution:

...the nature of dominion self-government and the decisions just cited entirely preclude, in our opinion, an *à priori* contention that the grant of legislative power to the Commonwealth Parliament as representing the will of the whole of the people of all the States of Australia should not bind within the geographical area of the Commonwealth and within the limits of the enumerated powers, ascertained by the ordinary process of construction, the States and their agencies as representing separate sections of the territory.

...It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the

30 Craven G, 'The States—Decline, Fall or What?' in Gregory Craven (ed), *Australian Federation: Towards the Second Century*, 1992, p. 56.

affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution.³¹

2.22 In applying these principles to the section of the Constitution in issue (s. 51(xxxv)), the Court held that:

Sec. 51 (XXXV.) is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned: but subject to any special provision to the contrary elsewhere in the Constitution.³²

2.23 The Engineers case affirmed the ability of the Commonwealth to bind the States and impose national laws where the Constitution so provided, subject to constitutional limitations. Other landmark High Court cases that have affirmed and/or augmented the scope of Commonwealth legislative competence include:

- *South Australia and Another v The Commonwealth and Another* (1942) 65 CLR 373 (the First Uniform Tax case) – the Court upheld Commonwealth legislation giving the Commonwealth exclusive control over the collection of income tax.
- *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468 (the Concrete Pipes case) – the Court was reluctant to define the limits of the Commonwealth corporations power in s. 51(xx) of the Constitution. Barwick CJ stated that:

No doubt, laws which may be validly made under s. 51 (xx.) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities. I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner.³³

31 Per Isaacs J. The text of the Engineers case can be accessed at:
<http://www.austlii.edu.au/au/cases/cth/HCA/1920/54.html>.

32 Per Isaacs J.

33 Per Barwick CJ. The text of the Concrete Pipes case can be accessed at:
<http://www.austlii.edu.au/au/cases/cth/HCA/1971/40.html>.

- *The Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams case) – the Court upheld Commonwealth legislation enacted under the external affairs power in s. 51(xxix) of the Constitution that sought to prevent the construction of a dam on the Franklin River in Tasmania.
- *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 – in this recent case the Court upheld Commonwealth legislation enacted under the corporations power in s. 51(xx) of the Constitution to regulate the relationship between corporations and their employees.

High Court declaration of a single Australian common law

2.24 The Committee also notes that the High Court has clearly indicated that the common law in Australia is harmonised, in the sense that there is a single Australian common law as opposed to separate systems of common law according to jurisdictional boundaries. In *David Russell Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the Court stated that:

There is but one common law in Australia which is declared by this Court as the final court of appeal. ...the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.³⁴

2.25 The Court has affirmed this position in subsequent judgments, for example in *Lipohar v The Queen; Winfield v The Queen* (1999) 200 CLR 485 where the Court stated that ‘...there is but one common law, not as many as there are bodies politic’,³⁵ and in *Roberts v Bass* (2002) 212 CLR 1 where Kirby J stated that ‘...there is but one common law in Australia’.³⁶

34 The text of the case can be accessed at:

<http://www.austlii.edu.au/au/cases/cth/HCA/1997/25.html>.

35 Per Gaudron, Gummow and Hayne JJ. The text of the case can be accessed at:

<http://www.austlii.edu.au/au/cases/cth/HCA/1999/65.html>.

36 The text of *Roberts v Bass* can be accessed at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2002/57.html>.

Model legislation

2.26 The model – or template – legislation mechanism of harmonisation involves the enactment of identical legislation on a given matter by each of the various jurisdictions, resulting in separate but consistent regimes. The model legislation can be developed by one jurisdiction or cooperatively by a number of jurisdictions. One example of the mechanism is the current National Legal Profession project, developed by the Standing Committee of Attorneys-General (SCAG) and expected to be fully implemented in all States and Territories in 2006.³⁷ The Attorney-General's Department (AGD) indicated that the National Legal Profession project involves a set of model laws supported by a Memorandum of Understanding (MoU) agreed to by every Australian jurisdiction:

The MOU commits jurisdictions to introducing the provisions and maintaining uniformity in certain key provisions and establishes a working group to monitor the implementation of the model provisions and ensure future consistency.³⁸

2.27 Another example of the model legislation mechanism is the final version of the uniform defamation laws project. In late 2004 the States and Territories advanced a proposal for uniform defamation laws involving the introduction of model legislation throughout Australia. The model laws are underpinned by an intergovernmental agreement and full implementation of the project is expected in 2006.³⁹

Advantages and disadvantages

2.28 One advantage of the model legislation mechanism of legal harmonisation is that it avoids certain limitations of cooperative legislative schemes (noted at paragraphs 2.41 – 2.45 below). It can also theoretically achieve a high level of consistency due to the adoption of identical legislation across the board. The main weakness of the mechanism, however, is the potential for divergence due to amendment of the model legislation by individual jurisdictions, both at the initial enactment stage and over time.⁴⁰ The AGD stated that:

37 See Attorney-General's Department, *Submission No. 26*, pp. 6, 27-28 and *Submission No. 26.1*, p. 7.

38 AGD, *Submission No. 26*, p. 27. The National Legal Profession project is considered further in Chapter 4.

39 AGD, *Submission No. 26*, pp. 28-29 and *Submission No. 26.1*, p. 7. The uniform defamation laws project is considered further in Chapter 4.

40 Professor George Williams, *Submission No. 2*, p. 2; Dr Simon Evans, *Submission No. 31*, p. 2.

...one of the limits on this type of scheme is the risk of the scheme unravelling with the lapse of time. Even if underpinned by an intergovernmental agreement and with Ministers committed to introducing a model bill in their own State, by the time the provisions have been through State and Territory Cabinets and Parliaments differences are likely to emerge and the legislation is likely to diverge.⁴¹

- 2.29 One other disadvantage of the model legislation mechanism that was noted in the evidence is '...costly duplication of administering bodies'⁴² due to the processes associated with multiple regimes.

Referral of powers to the Commonwealth by the States

- 2.30 The referral of powers mechanism of harmonisation involves a State or States referring a matter to the Commonwealth for Commonwealth legislation according to subsection 51(xxxvii) of the Constitution. Subsection 51(xxxvii) provides as follows:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

- 2.31 Once referral of a matter has taken place, the Commonwealth can proceed to enact legislation on that matter which then applies to the referring jurisdictions and to those which subsequently adopt it. One example of the referral of powers mechanism is the current corporations law scheme as embodied by the Commonwealth *Corporations Act 2001* and *Australian Securities and Investments Commission Act 2001*. This scheme involved an initial referral from the States providing the Commonwealth with the power to enact the legislation, and a second referral enabling Commonwealth amendment of the legislation in certain areas.⁴³ The referral was

41 AGD, *Submission No. 26*, p. 6.

42 Dr Simon Evans, *Submission No. 31*, p. 2.

43 The formation of corporations, corporate regulation, and the regulation of financial products and services. The referral is supported by an intergovernmental agreement (the Corporations Agreement) which requires the agreement of the States for certain types of

self-limited, being specified to end after five years unless extended; in 2005 an extension of the referral for a further five years was agreed by the Commonwealth and the States.⁴⁴

Advantages and disadvantages

2.32 Perhaps the main advantage of the referral of powers mechanism of legal harmonisation is its simplicity. Once a referral has been made by the jurisdictions, the Commonwealth is able to enact legislation on the referred matter with wide application, thus eliminating the need for multiple regulatory regimes. The AGD noted that:

[Referral of powers] is a much simpler mechanism for harmonising laws. It does not rely on a complex patchwork of complementary Commonwealth, State and Territory laws and has significant advantages of administrative efficiency. It is also easier for those to whom the law applies.⁴⁵

2.33 Another advantage of the referral of powers mechanism is that, as with model legislation, it avoids certain limitations of cooperative legislative schemes (noted at paragraphs 2.41 – 2.45 below).⁴⁶ The main drawback of the mechanism, however, is that the validity of the Commonwealth legislation on a referred matter will always depend upon the continuation of the underpinning referral from the States.⁴⁷ Maintaining an ongoing referral may become particularly important once the Commonwealth legislation has been in place for some time and is well-understood by those to whom it applies.

2.34 In his submission, Dr Simon Evans identified a number of other disadvantages that can reduce the effectiveness of the referral of powers mechanism:

- Potential reluctance on the part of the States to refer broad matters to the Commonwealth due to the possibility that the Commonwealth may legislate in an unforeseen or unapproved manner;
- The referral of a ‘...specific legislative text’ may undesirably constrain the Commonwealth legislative scope;

amendments by the Commonwealth and consultation for others: see AGD, *Submission No. 26*, p. 7.

44 AGD, *Submission No. 26*, p. 7.

45 AGD, *Submission No. 26*, p. 7.

46 See AGD, *Submission No. 26*, p. 7.

47 Professor George Williams, *Submission No. 2*, p. 2.

- The revocability of referrals; and
- For self-limited referrals, the potential for the referring States to seek advantageous arrangements with the Commonwealth when the referral is due to expire and an extension is sought.⁴⁸

Cooperative legislative schemes

2.35 The two main cooperative legislative schemes are applied legislation and complementary legislation.

Applied legislation

2.36 The applied legislation mechanism of harmonisation involves one jurisdiction enacting legislation on a given matter (for example the Commonwealth enacting legislation for one of the Territories) which is then applied by other jurisdictions. This mechanism was used to implement the national corporations law scheme between 1991 and 2001. The Commonwealth enacted corporations legislation for the Australian Capital Territory which was then applied independently in each of the other jurisdictions by virtue of their own legislation. Amendments made to the Commonwealth corporations legislation were automatically operative in the other jurisdictions.⁴⁹

Complementary legislation

2.37 The complementary legislation mechanism of harmonisation involves the Commonwealth establishing a national regulator with respect to a given matter together with complementary legislation enacted by the other jurisdictions to furnish the regulator with the necessary '...powers with respect to State matters'.⁵⁰ The result is a national regulation scheme on the matter in question. Examples of the complementary legislation mechanism include the current gene technology regulation scheme (established by the Commonwealth *Gene Technology Act* 2000 and associated State/Territory laws) and the human embryo research regulation scheme (established by the *Research Involving Human Embryos Act* 2003 and associated State/Territory laws).⁵¹

48 See Dr Simon Evans, *Submission No. 31*, p. 2.

49 See Attorney-General's Department, *Submission No. 26*, p. 4.

50 Attorney-General's Department, *Submission No. 26*, p. 4.

51 See Attorney-General's Department, *Submission No. 26*, p. 4.

Advantages and disadvantages

- 2.38 Professor George Williams submitted that the applied legislation mechanism of legal harmonisation is:
- ...arguably the best model because it does not depend upon a transfer of power, allows for change over time and is built upon Commonwealth-State cooperation.⁵²
- 2.39 The Committee was informed by the AGD that the complementary legislation mechanism is also advantageous because the national regulator can operate effectively:
- By having the States confer State functions and powers, the federal regulator is not impeded by Commonwealth constitutional limitations which might otherwise prevent, or put at risk, national (or inter-jurisdictional) administration.⁵³
- 2.40 Dr Simon Evans suggested in his submission to the inquiry that the complementary legislation mechanism ‘...provides a much higher level of uniformity across Australia’s legal systems’.⁵⁴
- 2.41 The main disadvantages of cooperative legislative schemes are certain constitutional limitations that have been identified by the High Court in two cases: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, and *R v Hughes* (2000) 202 CLR 535. In the *Re Wakim* decision, the Court:
- ...decided that the conferral of State jurisdiction on federal courts under the general and corporations law cross-vesting arrangements is not permitted by the Constitution. ...The practical effect of the decision is that disputes under co-operative schemes comprised by State laws or involving State officers generally cannot be determined by a federal court. That is so even though the State laws in question may be identical.⁵⁵
- 2.42 After *Re Wakim* the Commonwealth enacted the *Jurisdiction of Courts Legislation Act 2000* to ‘...restore jurisdiction in the limited area of review of decisions of Commonwealth officers under co-operative schemes’,⁵⁶ and the States also enacted legislation to ‘...validate past

52 Professor George Williams, *Submission No. 2*, p. 2.

53 AGD, *Submission No. 26*, p. 4.

54 Dr Simon Evans, *Submission No. 31*, p. 2.

55 AGD, *Submission No. 26*, p. 5.

56 AGD, *Submission No. 26*, p. 5.

decisions of federal courts made in reliance on cross-vested State jurisdiction'.⁵⁷

2.43 In the *R v Hughes* decision, the High Court:

...held that the exercise by Commonwealth authorities of duties given by State laws will not be valid unless they are also within the scope of Commonwealth legislative power.

...In other words, the High Court held that it may not always be open under all kinds of co-operative schemes to rely on State power to fill gaps in Commonwealth constitutional power.⁵⁸

2.44 After *R v Hughes*, a new corporations law scheme was established by virtue of a referral of powers to the Commonwealth by the States (see paragraph 2.31 above). Legislative measures were also taken to '...reduce the *Hughes* risk'⁵⁹ for various other cooperative schemes and to validate, under State law, Commonwealth actions and decisions taken under schemes.

2.45 Despite the remedial action taken in the wake of the *Re Wakim* and *R v Hughes* decisions, the constitutional limitations to cooperative legislative schemes identified by the High Court still remain. The AGD stated in its submission that the limitations '...are technical and, in many cases, need not present a permanent impediment to cooperation, harmonisation or uniformity'.⁶⁰ The Department also noted, however, that the limitations may '...significantly contribute to the complexity of a scheme'.⁶¹ Professor George Williams submitted that:

These High Court decisions can cause problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology.⁶²

2.46 In order to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions comprehensively an amendment to the Constitution would be necessary.

57 AGD, *Submission No. 26*, p. 5.

58 AGD, *Submission No. 26*, pp. 5-6.

59 AGD, *Submission No. 26*, p. 6.

60 AGD, *Submission No. 26*, p. 5.

61 AGD, *Submission No. 26*, p. 5.

62 Professor George Williams, *Submission No. 2*, p. 2.

Constitutional amendment

2.47 A constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions was advocated by Professor George Williams in his evidence to the inquiry. Professor Williams submitted that:

There are now significant legal obstacles to effective harmonisation in Australia, even where there is bi-partisan support for co-operation across federal and State governments. Other than a change of approach by the High Court, the only complete solution is to amend the Constitution. Amendment of the Constitution by referendum is costly and difficult. On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes in other fields because co-operative schemes based on a referral of power are not politically achievable.⁶³

2.48 Professor Williams stated that the '...actual amendment to the Constitution could be straightforward', '...need not transfer any power from the States to the Commonwealth',⁶⁴ and should contain the following provisions:

1. the States may consent to federal courts determining matters arising under their law; and
2. the States may consent to federal agencies administering their law.⁶⁵

2.49 The AGD, while acknowledging the possibility of a constitutional amendment to resolve the limitations identified in *Re Wakim* and *R v Hughes*,⁶⁶ also sounded a note of caution in relation to the prospects for success of a proposal to amend the Constitution in this way:

63 Professor George Williams, *Submission No. 2*, p. 2.

64 Professor George Williams, *Submission No. 2*, p. 3.

65 Professor George Williams, *Submission No. 2*, p. 3. Professor Williams noted that the first of these provisions '...matches that recommended by the Constitutional Commission in 1988': *Submission No. 2*, p. 3.

66 AGD, *Submission No. 26*, p. 7.

...any proposal to amend the Constitution to address the constitutional limits of the Commonwealth's capacity to achieve harmonisation of laws is bound to be relatively technical in nature. It is therefore unlikely to attract widespread support without extensive intergovernmental, and bipartisan, technical consultation. Even given such consultation, there is no guarantee that a technical proposal with broad support could be developed.

There is also the very significant expense and uncertainty of constitutional referenda to consider. Amendments to address the constitutional limits of Commonwealth constitutional power would be technical and therefore unlikely to engage public attention.⁶⁷

- 2.50 The Department also noted that the 1984 referendum proposing an amendment to '...confirm the Commonwealth's constitutional power to participate in co-operative legislative schemes'⁶⁸ did not succeed, and that a successful constitutional amendment:

...would not assist in overcoming the need for a proliferation of complex arrangements involving Commonwealth, State and Territory legislation to achieve co-operative objectives – objectives which may be achieved more simply under the mechanism already provided by subsection 51(xxxvii) of the Constitution.⁶⁹

- 2.51 The Committee notes however that the referral of powers mechanism under subsection 51(xxxvii) of the Constitution has its own drawbacks (set out at paragraphs 2.33 – 2.34 above).
- 2.52 The possibility of a constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions also attracted comment elsewhere in the evidence to the inquiry. The Queensland Attorney-General, for example, expressed strong support for such an amendment,⁷⁰ whereas the LSNSW suggested that an

67 AGD, *Submission No. 26*, pp. 7-8. Dr Simon Evans agreed that the amendment contemplated by Professor Williams '...would remove many of the constitutional impediments to effective cooperative federalism' but also submitted that '...constitutional reform in this area is not likely even in the medium term': *Submission No. 31*, p. 3.

68 AGD, *Submission No. 26*, p. 8.

69 AGD, *Submission No. 26*, p. 8.

70 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, pp. 5, 6 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2. In-principle support was also

amendment would be little more than a 'bandaid' and that a thorough re-examination of the whole Constitution is required.⁷¹

- 2.53 The Committee supports the idea of a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court in the *Re Wakim* and *R v Hughes* decisions. Given the importance of intergovernmental cooperation in Australia's federal system, there should not be a constitutional obstacle to legislative harmonisation at such a crucial and fundamental level as between the Commonwealth and the States and Territories, either now or in the future. The avenues for cooperation between the jurisdictions should be preserved rather than impeded, particularly in the case of matters requiring a national approach. As Professor Williams stated:

...the costs of not acting are very high. Do we really want to go through the next century of the Australian federation without an effective means of fostering cooperation between the federal and state governments in some of the most important areas of public policy today facing the nation?

...the change is necessary. We should do it now rather than waiting for another century and simply limping along with our current problems.⁷²

- 2.54 A constitutional amendment to remove the *Re Wakim* and *R v Hughes* limitations would enable the full use of cooperative schemes which are workable and can achieve a high level of legal harmonisation among the jurisdictions.
- 2.55 At the same time, the Committee is mindful of the very real issues that confront referenda proposing constitutional amendment. They are most expensive to mount and have a poor success rate (only 8 of the 44 referenda for constitutional amendment since Federation have been successful). It is also quite possible, as the AGD noted, that a proposal to amend the constitution to facilitate cooperative legislative schemes may not attract the requisite support due to the technical nature of the matter. Professor Williams, however, suggested that this factor would actually work in favour of obtaining support for such a proposal:

expressed by the BCA; see Mr Steven Münchenberg, BCA, *Transcript of Evidence* 6 April 2006, p. 69.

71 Mr Ian Tunstall, LSNSW, *Transcript of Evidence*, 6 April 2006, p. 34.

72 Professor George Williams, *Transcript of Evidence*, 6 April 2006, pp. 77, 78.

The Attorney-General's Department has also said that this would be a very technical amendment and that it might be difficult to convince Australians of its worth. But my view is that, in fact, this is exactly the type of amendment which is more likely to succeed at a referendum. That is because it is very different to some of the big ticket items that sometimes polarise people in the Australian community. This is an item like some of the successful changes by referendum to the New South Wales constitution that have been effective in getting very high levels of public support because they are seen as technically necessary and as commonsense to remedy a defect in the constitutional system.⁷³

- 2.56 The Committee was interested to learn from the Queensland Attorney-General and the Treasury that the issue of a constitutional amendment to facilitate cooperative legislative schemes is currently being considered by SCAG.⁷⁴ Treasury indicated that:

As part of this process, a range of issues have been under consideration by officials from the Australian Government and the States and Territories. The Special Committee of Solicitors-General has also been consulted for its views. There are still many issues to be considered by SCAG before deciding whether a constitutional referendum might be desirable.⁷⁵

- 2.57 The Committee was also informed that, as far back as March 2002, SCAG agreed that Commonwealth and State officials would develop text for a constitutional amendment to resolve the limitations identified in the *Re Wakim* and *R v Hughes* decisions.⁷⁶
- 2.58 It is clear, then, that a constitutional amendment has been identified by the Australian Government as a possible measure. The Committee considers that four years has been ample time for preparatory work

73 Professor George Williams, *Transcript of Evidence*, 6 April 2006, pp. 77-78. Professor Williams also drew a parallel between the possible amendment and the uncontroversial proposals that succeeded in the referenda of 1967 and 1977: p. 78.

74 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 5 and the Hon Linda Lavarch MP, *Submission No. 19.1*, p. 2; Treasury, *Submission No. 21.1*, p. 5 and *Submission No. 21.2*, p. 9.

75 Treasury, *Submission No. 21.2*, p. 9.

76 Queensland Attorney-General, the Hon Rod Welford MP, *Submission No. 19*, p. 5. Professor Williams stated that the constitutional amendment has been '...on the agenda as an item at SCAG since 2002; it just has not moved anywhere': *Transcript of Evidence*, 6 April 2006, p. 81.

on this amendment, and that the time has come for the matter to be accorded a higher priority and taken forward. The Committee is also of the view that it would be advantageous for the Australian Government to draft the amendment sufficiently generally so as to encompass the broadest possible range of cooperative legislative schemes. This would provide some degree of protection against unforeseen constitutional obstacles for future cooperative arrangements, and would also be prudent given the expense and effort involved in mounting referenda.

2.59 The Committee is also of the view that a dedicated and wide-ranging consultation and education process will need to precede any referendum that is eventually held on this matter in order to maximise its chances of success, and that any referendum on the matter should be held at the same time as a federal election.

Recommendation 1

2.60 **The Committee recommends that:**

- **The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;**
- **The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;**
- **A dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that**
- **Any referendum on the constitutional amendment should be held at the same time as a federal election.**

Harmonisation between Australia and New Zealand

2.61 The AGD noted that:

Any process to harmonise laws with New Zealand may begin with some formal agreement between Australia and New Zealand. This agreement could take the form of a treaty.⁷⁷

2.62 The NZG identified four main mechanisms for achieving legal harmonisation between Australia and New Zealand:

- Treaties/agreements implemented by domestic legislation in each country;
- Mirror legislation adopted in each country without a treaty or arrangement;
- Each country giving legal effect to rules formulated by a joint body via domestic legislation;⁷⁸ and
- One country adopting, by way of domestic legislation, a regulatory scheme or body established in the other country.⁷⁹

2.63 The central overarching trade agreement between Australia and New Zealand is the Australia New Zealand Closer Economic Relations Trade Agreement (CER) of 1983, under which a number of other agreements and arrangements exist.⁸⁰

2.64 The Committee was informed that there are a number of harmonisation arrangements already in place or in development between Australia and New Zealand. Some examples include:

77 AGD, *Submission No. 26*, p. 8. The AGD noted that the States and Territories are involved in the treaty-making process: *Submission No. 26*, p. 8.

78 DFAT also noted that the creation of a '...regulatory body which regulates both jurisdictions and which has essentially the same rules and regulations applying in both Australia and New Zealand' can be a mechanism of legal harmonisation: *Submission No. 28*, p. 4.

79 NZG, *Submission No. 23*, pp. 13-15.

80 Telstra registered a concern with the Committee that the CER '...does not appear to have kept pace with other international agreements. Telcos are a clear example here': Dr Tony Warren, Telstra, *Transcript of Evidence*, 6 April 2006, p. 2. The Committee notes that, as at November 2006, the CER is under review by the Joint Standing Committee on Foreign Affairs, Defence and Trade. Further information is available at: http://www.aph.gov.au/house/committee/jfadt/nz_cer/index.htm.

- The Australia-New Zealand Therapeutic Products Authority (in development), the joint therapeutic goods regulator that will be established by legislation in both Australia and New Zealand;⁸¹
- Food Standards Australia New Zealand, the joint statutory authority established by the *Food Standards Australia New Zealand Act 1991* that develops and implements a single set of food standards for both countries;⁸² and
- The Joint Accreditation System of Australia and New Zealand established by the 1990 Agreement on Standards, Accreditation and Quality, which ‘...is the joint accreditation body for certification of management systems, products and personnel’.⁸³

2.65 The Committee was also informed that there are a number of coordination and cooperation arrangements in place between Australia and New Zealand such as the following:

- *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law*, which, under the CER, sets out a number of areas for greater coordination and harmonisation of business law between Australia and New Zealand;⁸⁴
- The trans-Tasman Mutual Recognition Arrangement (1998), which, under the CER, ‘...extends Australia’s Mutual Recognition scheme operating between the Commonwealth, State and Territory jurisdictions to include New Zealand’;⁸⁵ and
- The Single Economic Market initiative (2004), which will seek to ‘...create a more favourable climate for trans-Tasman business through regulatory harmonisation’.⁸⁶

2.66 As some of these examples indicate, coordination and cooperation arrangements between Australia and New Zealand can involve or lead to formal legal harmonisation, for example the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* and the Trans-

81 HE Mrs Kate Lackey, NZG, *Transcript of Evidence* 21 March 2006, p. 44. See also NZG, *Submission No. 23*, pp. 18-19.

82 See NZG, *Submission No. 23*, p. 7.

83 DFAT, *Submission No. 28*, p. 5 (Attachment A). See also NZG, *Submission No. 23*, p. 7.

84 See Treasury, *Submission No. 21.1*, pp. 6-13 and NZG, *Submission No. 23*, pp. 7, 10.

85 Treasury, *Submission No. 21.1*, p. 12; see also NZG, *Submission No. 23*, pp. 7, 8-9.

86 DFAT, *Submission No. 28*, p. 2.

Tasman Mutual Recognition Arrangement.⁸⁷ The NZG also noted a number of cooperative techniques for achieving greater coordination, for example cooperation between regulators (information sharing, assistance in evidence-gathering, cross-appointment of members), joint research, analysis, and policy development, and cooperation in regional and multilateral fora.⁸⁸

Fora for pursuing harmonisation of legal systems

Harmonisation within Australia

2.67 The main fora for pursuing legal harmonisation within Australia are the Council of Australian Governments (COAG) and the various ministerial councils. COAG is the senior intergovernmental forum within Australia and comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association. COAG deals with policy issues of national import including National Competition Policy arrangements.⁸⁹

2.68 The ministerial councils comprise relevant ministers from each government, including ministers from the NZG when matters affecting New Zealand are considered. The AGD informed the Committee that:

There are over 40 ministerial councils which facilitate consultation and cooperation between the Australian Government and State and Territory Governments in specific policy areas. The Councils initiate, develop and monitor policy reform in their areas of portfolio responsibility.⁹⁰

2.69 The ministerial councils also supervise the implementation of policy decisions agreed by COAG. Examples of ministerial councils dealing with matters relevant to the inquiry include:

- Ministerial Council on Consumer Affairs;
- Ministerial Council for Corporations;

87 DFAT noted that ‘...mutual recognition of each jurisdiction’s processes and standards... is often linked to the harmonisation of laws, standards, and regulations to the greatest extent possible’: *Submission No. 28*, p. 4.

88 See NZG, *Submission No. 23*, pp. 12-13.

89 More information on COAG can be found at: <http://www.coag.gov.au/about.htm>.

90 AGD, *Submission No. 26*, pp. 8-9.

- Workplace Relations Ministers' Council; and
- SCAG.⁹¹

Harmonisation between Australia and New Zealand

2.70 The main fora that can be utilised for pursuing legal harmonisation between Australia and New Zealand are:

- Australian ministerial councils involving NZG ministers (see paragraph 2.68 above);
- Official bilateral working groups such as the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (2003),⁹² the Trans-Tasman Accounting Standards Advisory Group (2004),⁹³ and the Trans-Tasman Council on Banking Supervision (2005);⁹⁴ and
- 'Formalised arrangements for discussion of policy proposals and implementation issues, for example the MoU on Business Law Coordination'.⁹⁵

2.71 The NZG further noted that 'informal discussions between Ministers and officials in the context of unilateral reforms' and 'cooperation in regional and multilateral fora' also take place.⁹⁶

91 A full list of the ministerial councils can be found at:
http://www.coag.gov.au/ministerial_councils.htm.

92 AGD, *Submission No. 26*, pp. 9-10; see also NZG, *Submission No. 23*, pp. 17-18.

93 Treasury, *Submission No. 21.1*, p. 8; see also NZG, *Submission No. 23*, p. 16.

94 Treasury, *Submission No. 21.1*, p. 11; NZG, *Submission No. 23*, p. 16.

95 NZG, *Submission No. 23*, p. 15.

96 NZG, *Submission No. 23*, p. 15.