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Business
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Business Council of Australia

Submission to the House of Representatives Standing
Committee on Legal and Constitutional Affairs

Inquiry into Harmonisation of Legal Systems

1. Introduction

The Business Council of Australia (BCA) welcomes the opportunity to make this submission to the inquiry of the House of Representatives Standing Committee on Legal and Constitutional Affairs into the harmonisation of Australian legal systems.

The BCA is an association of Chief Executives of leading Australian corporations. It was established in 1983 to provide a forum for Australian business leaders to contribute directly to public policy debates to build a better and more prosperous Australian society.

The key role of the BCA is to formulate and promote the views of Australian business. The BCA is committed to achieving the changes required to improve Australia's competitiveness and to establish a strong and growing economy as the basis for a prosperous and fair society that meets the aspirations of the whole Australian community.

The BCA has a particular responsibility to apply Australia's business experience and understanding to successfully resolving the challenges now facing Australia. In a global environment, Australia's future depends on achieving world class performance and competitiveness. On the basis of sound research and analysis, the BCA seeks to play a key role with government, interest groups and the broader community to achieve performance and world class competitiveness.

Business regulation and other laws that affect trade and commerce can have a significant impact on the competitiveness of an economy. Poorly conceived, inefficient and redundant regulation can add unnecessarily to the costs of running a business, reduce productivity, stifle innovation and hamper business growth. The costs of poor regulation not only result in less competitive businesses, but can also be passed on to customers or shareholders, or have to be offset by cost reductions in other areas, such as employment costs.

Australia is at particular risk from the costs of poor regulation. With over 700 Local governments, plus the Commonwealth, States and Territories, there is considerable scope for duplication, inconsistency and overlapping legislation. This is an innate challenge within our Federal system and we need to continue to look for ways in which this challenge can be overcome, while retaining the strengths of the Federal system.

The Terms of Reference for the Inquiry identify a number of areas where more efficient uniform approaches could be developed, including:

- statute of limitations
- legal procedures
- partnership laws
- service of legal proceedings
- evidence law
- standards of products
- legal obstacles to greater federal/state and Australia/New Zealand cooperation.

The BCA will not be commenting specifically on these legal and technical areas. The BCA does, however, have a strong interest in seeing the costs and inefficiencies that arise from multiple, overlapping and duplicated laws being reduced. The BCA therefore supports the harmonisation of laws within Australia and sees benefit from the harmonisation of laws between Australia and New Zealand.

2. Costs of Multiple Laws

One of the greatest frustrations for business in Australia is dealing with multiple layers of law. Most businesses have to deal with laws and regulations imposed by Local, State and Commonwealth Governments. There is typically little co-ordination between these levels of Government, resulting in unnecessary compliance costs for business.

There are also many areas where responsibility for regulation is shared between a number of different jurisdictions. This often results in different laws in different jurisdictions, despite each jurisdiction having the same policy objectives. The increase in compliance costs, particularly for national firms, can be considerable, even though there is no additional legal or social benefit from having a multitude of different regulations.

A classic example of this problem occurs in occupational health and safety (OH&S) regulation, where each State has a different regime to achieve the same outcome. The Productivity Commission has reported recently on the costs that this duplication and inconsistency imposes on business¹. Optus, for example, estimates that the cost of complying with multiple workers' compensation and OH&S arrangements adds about 5 to 10 per cent to the cost of workers' compensation premiums.

Similarly, a survey by the Building Products Innovation Council and the Housing Industry Association of building product manufacturing companies has estimated the cost impact of complying with different State and Territory building laws to be between 1 per cent and 5 per cent of company turnover. Even at a conservative 2 per cent cost impact, this equates to some \$600m annually on building product manufactures alone². While these areas do not relate to the specific issues being examined by the Committee, they highlight the very real costs to business of multiple and overlapping laws.

At a broader level, the total cost of duplication and coordination across Australia's multiple jurisdictions has been estimated at \$20 billion per annum³.

Australia cannot continue to carry the burden of different regulatory regimes, each trying to achieve the same outcome. The BCA therefore believes that Australian Governments should adopt the principle that, where an area of regulation is a shared responsibility between jurisdictions, there should be a move towards a single, consistent national regime. This is particularly the case where responsibility is shared between the Commonwealth and the States or between the different States.

3. Alternative Approaches

This principle does not mean that the Commonwealth should take over responsibility for all regulation. There are a range of alternative models for ensuring that a single regulatory regime can be achieved even where there is shared responsibility across different governments. The States in particular have a responsibility to harmonise their regulatory regimes in areas that are clearly State responsibilities.

The options available include:

1. State and Commonwealth Governments agreeing to adopt a 'mutual recognition' approach, where compliance with the legislation of one jurisdiction is taken to be

1 Productivity Commission, *National Workers' Compensation and OHS Frameworks*, March 2004.

2 See Productivity Commission, *Reform of Building Regulation*, November 2004.

3 Drummond M L, Costing Constitutional Change: estimating the Costs of Five Variations on Australia's Federal System, *Australian Journal of Public Administration* • 61(4):43–56, December 2002.

compliance in another jurisdiction (examples include the mutual recognition arrangements in place between Australia and New Zealand⁴);

2. State Governments agreeing to adopt mirror legislation among themselves, independent of the Commonwealth (for example, the States could agree to each legislate the same OH&S laws);
3. State Governments agreeing to adopt mirror legislation based on a Commonwealth enactment (for example, mirror legislation introduced by the Commonwealth and States to manage offshore petroleum activities across the jurisdictional divide between State and Commonwealth waters);
4. State Governments agreeing to adopt a law passed by the Commonwealth in relation to a Territory (for example, this approach formed the basis of the co-operative Corporations Law scheme between 1991 and 2001, although the validity of this approach has been called into question by the High Court⁵);
5. State Governments agreeing to refer powers in a particular area to allow the Commonwealth to legislate on those matters (as has now happened in the area of corporations regulation);
6. the Commonwealth Government using current Constitutional powers, such as the corporations power, external affairs power or interstate trade and commerce powers;
7. an amendment to the Constitution to allow the Commonwealth and States to enter into co-operative arrangements (to overcome the issues raised by the High Court in relation to the Corporations Law); and
8. an amendment to the Constitution to extend the powers of the Commonwealth over a specific area (considered a remote possibility – arguably the only significant direct extension of Commonwealth power through a Constitutional change occurred in 1946 with the addition of the power of the Commonwealth Parliament to make laws to provide a wider range of social services, including “*maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services...benefits to students and family allowances*”⁶).

Each of these approaches has strengths and weaknesses, and which approach is best will depend on the issues involved and the existing legislative arrangements. The BCA is aware that some of the issues with these options have been raised in the submission of Professor George Williams to the Committee.

4. Issues with Harmonisation

While the BCA supports harmonisation in principle and believes that significant savings and increases in productivity would result from a concerted effort to remove duplication and multiple laws, the BCA does not support harmonisation at any cost. The content of the harmonised law is vitally important.

Attempts to harmonise laws are often met with concerns that the harmonised law will represent the lowest common denominator of existing laws. For example, attempts to harmonise environmental regulation across States have sometimes been resisted by

4 For details, see Productivity Commission, *Evaluation of Mutual Recognition Schemes*, Research Report, October 2003

5 In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R v Hughes* (2000) 202 CLR 595.

6 Clause xxxiiiA, Section 51.

conservation groups and others for fear that the resulting legislation will represent the 'softest' existing law. In other words, there is concern that more stringent environmental controls in some States will be sacrificed to satisfy those States with less stringent controls.

The opposite side of this coin is the risk that the harmonised law will represent the 'high water mark' of existing laws. For example, where one jurisdiction has a particularly onerous or restrictive approach to regulation, that jurisdiction may not be prepared to abandon its restrictive approach in the interests of harmonisation, forcing other jurisdictions to adopt its approach. A topical example can be seen in the current proposal by the States for uniform defamation laws. In one jurisdiction, New South Wales, the right of corporations to sue in defamation has been severely curtailed. Rather than NSW abandoning this legislative restriction in the interests of harmonised laws, the other States have agreed to adopt it.

Whether harmonisation of laws in any particular area is a positive move will therefore depend very much on the content of those harmonised laws.

Another concern put forward with harmonisation is that having different laws across different jurisdictions results in a degree of competitive pressure between jurisdictions and also allows innovative approaches to regulation to be tried. The BCA sees some merit in these arguments, but seriously questions whether the benefits of legislative competition and innovation outweigh the very real costs to business and others of having to deal with multiple regimes across multiple jurisdictions.

5. Conclusion

The BCA supports as a basic principle the need to harmonise laws in Australia, and as far as possible to replace multiple laws across multiple jurisdictions with nationally consistent laws. There are a number of ways in which this can be achieved. Whether harmonisation delivers a net benefit will depend, however, on the quality of the harmonised laws.

Overall, there are significant productivity gains and cost reductions to be made from removing duplicative, overlapping and inconsistent laws within Australia. There are also gains to be made in trans-Tasman trade through greater harmonisation of the laws of Australia and New Zealand.

The BCA will shortly be releasing a major research project on the costs of poor business regulation to Australia. We will provide a copy of that report to the Committee upon release.

The BCA would be happy to discuss the issues raised in this submission with the Committee.

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