

## TERMS OF REFERENCE

### **REVIEW OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF AUSTRALIA ON COORDINATION OF BUSINESS LAW**

The Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law (MOU) was signed in 2000. It is required to be reviewed five years from the date of its signature, and every five years following that date.

The 2005 review of the MOU is an opportunity to both review the work programme and, in addition, identify any areas where the MOU might be strengthened.

The key principles in the MOU still appear relevant, however it is appropriate to consider:

- whether the framework set up by the MOU needs to be modified;
- what amendments need to be made to the MOU to reflect the changes that have occurred to the business and political environment over the past five years; and
- how the MOU can be amended to enhance future business law coordination.

#### **MOU Framework**

The MOU recognises that an array of approaches exists to achieve the goal of increased coordination in business law. It takes into account that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. The focus of the MOU is on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.

The framework is based on the presumption that coordination should take place unless there is a good reason for the law to be different between Australia and New Zealand. The MOU also notes, however, that the governments need to ensure in each case that the benefits of coordination outweigh the costs.

#### ***Experience over past 5 years***

There has been a significant alignment of Australian and New Zealand business laws over the past five years. When the MOU was signed, New Zealand was beginning a period of significant reform of its financial markets regulation aimed at promoting confidence in New Zealand's markets. This involved strengthening the regulatory frameworks and bringing New Zealand into line with international norms, drawing where possible on Australian experience. Areas of significant reform undertaken by New Zealand in recognition that its regulatory regime did not meet international standards include takeovers law, the law relating to the regulation of stock exchanges, and insider trading and market manipulation law.

Hence much of the trans-Tasman alignment has been the result of unilateral reforms by New Zealand in areas such as securities market law, but it has also resulted from both countries aligning with international standards.

More recently, there have been a number of joint Australian and New Zealand coordination initiatives, such as the work on the adoption of international financial reporting standards and the proposal for the establishment of a mutual recognition regime for offers of securities. Another example of a joint initiative was the request by both governments to the Australian Productivity Commission to examine the potential benefits from greater cooperation, coordination and integration of the core components of the competition and consumer protection regimes of Australia and New Zealand.

### ***Future business law and regulatory co-ordination***

Over time the challenge will be to maintain alignment in areas where there are coordinated regimes, and this in turn will depend heavily on the efficacy and timing of the communication and consultation between the policy departments.

In some cases it may be appropriate for joint trans-Tasman research projects to be undertaken on issues where the two countries can benefit from putting resources into joint research. This may involve research by independent bodies such as the Australian Productivity Commission or internal research projects by officials which include a trans-Tasman focus on the regimes where the law is closely aligned.

In areas such as accounting standards, it has become apparent that regional co-operation as well as trans-Tasman co-operation may be a way of enhancing influence at the international level.

As the substantive rules are aligned there has been an increasing emphasis on cooperation between the regulators, i.e., the agencies responsible for the administration of the rules. This is likely to continue, and the review should have regard to trans-Tasman risks and opportunities in relation to the administration of business laws, and how these should be reflected in the work programme.

In addition, it is also recognised that effective law coordination requires a coordinated underlying legal infrastructure. Other complementary processes are progressing in parallel to the MOU work programme, in particular the work of the Trans-Tasman Working Group on Enforceability of Court Proceedings and Regulatory Enforcement<sup>1</sup>.

### ***Business and political environment***

Changes to the business or political environment for business law coordination are relevant for two main reasons: they could help focus the coordination work programme on what is seen to matter most, and they could influence 'what is within the art of the possible' in terms of how to coordinate in the areas within the scope of the MOU. Without limiting what the review might reveal, the following developments in the business and political environment should be taken into account:

- The commitment by both governments to the objective of a single economic market (SEM), defined by the Productivity Commission as a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations adopted by each country;

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<sup>1</sup> The Trans-Tasman Working Group on court proceedings and regulatory enforcement consists of officials from the Attorney-General's Department in Australia and the Ministry of Justice in New Zealand. The group has been tasked to "examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings" that operate Trans-Tasman and propose options for change.

- recent research that reveals what business and consumers see as the barriers and opportunities to the achievement of a SEM<sup>2</sup>, and the regulatory implications of this;
- the broader international context, and in particular the opportunities that trans-Tasman cooperation provides to influence evolving international norms as they relate to business law;
- the work relevant to business law coordination arising from the Australia-New Zealand Leadership Forums which promotes dialogue with the business sector.

### ***Work programme***

The work programme should be reviewed. This review should include:

- an assessment of progress with implementing the current work programme;
- an assessment of what should be removed and/or amended on the current work programme, and what should be added. This will take into account the outcomes of the work on the business and political context.

There is a substantial ongoing work programme in a number of areas. It is expected that this work programme will comprise the bulk of the future agenda, however some additional items are likely to be identified. The review recognises that the MOU does not dictate the extent of progress on the individual agenda items, but provides the process for reporting annually to Ministers and for the five yearly reviews.

### ***Approach to Review***

Officials will consult with the Australian and New Zealand government agencies responsible for the administration and enforcement of business laws, as well as business and consumer stakeholders (this will include obtaining a consumer perspective).

A joint letter will be sent to these stakeholders seeking their views on whether the MOU principles are still valid, and asking them to highlight any areas which they consider should appear on the MOU work programme.

Officials will report to the Australian Treasurer and the New Zealand Minister of Commerce by 31 October 2005.

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<sup>2</sup> For example, *New Zealand - Australia Economic Interdependence*, prepared for the Ministry of Economic Development by the Law and Economic Consulting Group and ACIL Tasman.

## **Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law**

### **This Memorandum:**

- replaces the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Harmonisation of Business Law signed on 1 July 1988
- records the following understandings reached in discussions between the Government of New Zealand and the Government of Australia regarding promotion of closer economic relations between New Zealand and Australia.

### **Mutual benefits to be obtained by the two countries**

1. The Governments of New Zealand and Australia recognise the importance of accelerating, deepening and widening the relationship that has developed through the growth of trans-Tasman trade, particularly since the commencement of the Australia New Zealand Closer Economic Relations Trade Agreement in 1983. Both Governments consider that further coordination of significant areas of business law (including consumer law) can facilitate the achievement of this goal.
2. Both Governments also acknowledge the importance of a global approach to business law issues (particularly in light of the increasing prevalence of electronic commerce) and the significance of the trans-Tasman relationship in that approach.
3. Both Governments are aware that existing laws and regulatory practices relating to business within each economy may impede the development of trans-Tasman business activity. Through the development of increased coordination and dialogue, both parties will endeavour to minimise such impediments.
4. An array of approaches exists to achieve the goal of increased coordination in business law. Both Governments recognise that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.
5. This Memorandum of Understanding reflects our desire to deepen the trans-Tasman relationship within a global market, through increased coordination of business law, thereby creating a mutually beneficial trans-Tasman commercial environment. Such an environment will allow New Zealand and Australia to share a common outward focus in commercial activities within the greater global market.

### **EXISTING BUSINESS LAW COORDINATION**

6. Starting from their similar legal and commercial backgrounds, New Zealand and Australia have already achieved a significant degree of coordination and cooperation in a number of areas of business law, including:
  - a. competition laws enforced by the Commerce Commission in New Zealand and Australian Competition and Consumer Commission;
  - b. consumer protection laws, including fair trading laws;
  - c. cross investment activity including the offer of securities between Australia and New Zealand, in particular, equities and interests in managed funds; cross border listings on ASX and NZSE;
  - d. and the cross border operations of the two futures markets, SFE and NZFE; and mutual recognition of registered occupations, as provided for under the Trans-Tasman Mutual Recognition Arrangement.

### **Further development of business law coordination**

7. Attached in the Annex is a list of areas identified by both Governments as possible candidates for coordination. Both Governments will examine further the scope for coordination of business laws and

regulatory practices in each of these areas.

8. In order to determine the suitability of each of these candidates for coordination, regard will be given to:
  - a. The desirability of ensuring for each particular situation, that a firm, ideally, will only have to comply with one set of rules, and have certainty as to the application of those rules in the other jurisdiction, and with which regulator (ie Australian or New Zealand) it needs to deal;
  - b. Whether the situation should be regulated solely through domestic rules or whether a bilateral, or multilateral solution would be more appropriate; and
  - c. Whether a good reason exists for the law in this area to be different between Australia and New Zealand.
9. Having taken these principles into consideration, both Governments will still need to ensure that realistic goals are set and that the benefits of coordination outweigh the costs. Globalising and localising factors also need to be considered by both Governments in this respect. (Globalising and localising factors are forces that would push law makers to take either a more multilateral or a more domestic approach to the formation of business law. An example of a globalising factor could be the reduction of compliance costs and uncertainty to businesses trading across borders. An example of a localising factor could be a unique local condition).

### **Consultation**

10. In addition to the items specified in the work programme (see Annex), when either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to the development of the trans-Tasman relationship, the two Governments will consult with a view to resolving the impediment, whether or not the area of law is already included in the programme and regardless of the priority accorded to the matter at the time.
11. Each Government will keep the other Government informed of proposed reforms in the business law area. Further, each Government will give the other the opportunity to be involved in the others reform process at an early stage.
12. Each Government will take the necessary steps to facilitate early examination of the areas of business law and regulatory practices contained in the programme.

### **Report back to Ministers**

13. Officials will report annually to their respective Ministers responsible for business law as to the status of the work highlighted for action in the Annex to this Memorandum of Understanding.

### **Review of the Memorandum of Understanding**

14. Both Governments mutually determine that they will review this Memorandum of Understanding five years from the date of its signature, and every five years following that date.

### **Outcome**

15. Both Governments will seek to finalise their consideration of the suitability of the candidates specified in the work program for further coordination, by the end of 2000.
16. The understandings set out in this Memorandum are not intended to preclude the possibility of earlier coordination in any area of business law or regulatory practice.

### **Commencement and implementation**

17. The Minister of Commerce of New Zealand and the Treasurer of the Commonwealth of Australia will have responsibility on behalf of their respective Governments for the implementation of this Memorandum of Understanding including the establishment, and any variation, of the work programme.
18. This Memorandum of Understanding will come into effect on the date of its signature.

**Signed in Auckland, 31 August 2000 by:**

**Hon Paul Swain**, Minister of Commerce, for the Government of NZ

**Hon Joe Hockey**, Minister for Financial Services and Regulation, for the Government of Australia

**Hon Jim Sutton**, Minister for Trade Negotiations, for the Government of NZ

**Hon Mark Vaile**, Minister for Trade, for the Government of Australia

## **Annex**

### **Work Programme for Coordination of Business Law**

- a. Providing for the cross-recognition of companies
- b. Seeking to achieve greater compatibility in our disclosure regimes in relation to financial products
- c. Managing cross-border insolvency
- d. Providing a regulatory framework for recognising in each jurisdiction a stock market operating in compliance with comparable rules of the other jurisdiction
- e. Exploring the potential for more closely coordinating the granting and recognition of registered intellectual property rights
- f. Facilitating information sharing and, where appropriate, jointly participating in policy, compliance and education programs on consumer issues relating to business law including consumer protection in electronic commerce
- g. Seeking to achieve greater consistency in legislation affecting electronic transactions
- h. Exploring the potential for greater consistency in trans-Tasman application and enforcement of competition law.