Trans-Tasman Business Law Harmonisation – Initial Findings

Summary

1. This report from Franks & Ogilvie summarises the responses from BusinessNZ members to the Questionnaire on the Government's Single Economic Market Outcomes Framework ("SEM Outcomes") distributed to members at the 22 April CEO Forum.1 Franks & Ogilvie prepared the Questionnaire with assistance from key professionals and the Ministry of Economic Development. 17 members responded to the Questionnaire.

2. BusinessNZ's interest in the SEM Outcomes is to provide a business view to Government on prioritisation of, and unexpected fishhooks in these outcomes. The 27 proposed SEM Outcomes were identified in the *Joint Statement of Intent* by Prime Ministers Rudd and Key on 20 August 2009 in order to give the trans-Tasman harmonisation of law "new intensity and a renewed focus". [2] They were somewhat restated in the revised *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law* signed on 23 June 2010. BusinessNZ wants to ensure that the Government has the benefit of practical experience early on in the policy making timeline.

General Themes

3. We were a little surprised at the consistency in one theme – that harmonisation should be subordinate to a primary goal of achieving better outcomes from law. While that theme was strong at the April meeting (reflected in the Questionnaire introduction) we had expected there to be at least some pushback, nominating areas where it would be worth sacrificing local preferences in law and regulation in favour of harmonisation for its own sake. It appears that most of the detailed responses were not from the CEOs who were at the meeting so the consistency of opinion is significant.

4. Even more surprisingly, there did not appear to be significant difference in this regard between the companies which operate Trans-Tasman, and those that operate in New Zealand only. Where they differed was in their cost/benefit analysis of each outcome for their particular business.

5. We think it is safe to take this as a sign of the value companies put on high quality law and regulation. Companies may be anxious not to leave any room for government to use harmonisation as an excuse for law changes which are not properly analysed and justified.

6. There were some general themes evident from the responses to the Questionnaire and the discussion at the April meeting, including:

[1] Note, all quotes italicised in this report and the appendices are taken verbatim from members' responses to the Questionnaire.

[2] Joint Statement of Intent: Single Economic Market Outcomes Framework by Prime Ministers Rudd and Key: August Report on Trans-Tasman Cooperation (20 August 2009).

(a) Cost/benefit appraisal of outcomes necessary:

- Members favour a cost/benefit appraisal of the outcomes being used by the Government. A concern was that although there may be some benefit to harmonisation of specific laws, if these are only a small number of occurrences, the resulting complexities in substantive law may mean the costs outweigh the benefits.

- Members focused on the cost or benefit of particular outcomes. For example, a large New Zealand based company commented on the cross-border insolvency proceedings outcome:

  "*Being able to pursue a creditor with Trans-Tasman assets/interests through one set of proceedings/administration/receivership/liquidation would be beneficial. That said, the difference in the substantive laws may result in complexities re asset tracing/distribution/priorities – for what may be a small number of instances."*

- A general theme was that the "same outcomes" in both countries help neither if they are unnecessarily expensive or ineffective or counter-productive.

- The Capital Market Development Task Force December 2009 recommendation that any drive for greater international capital market integration be *"measured against clear long term benefits for New Zealand's capital market, such as better allocation of capital, improved risk management and increased competition"* is in accord with this theme.

(b) Unnecessary regulation is undesirable:

- Closely linked with increased costs was concern over unnecessary regulation:

  "Any new proposal should comply with the Government's commitments to minimum effective regulation as set out in the New Zealand Government's Statement of Regulation."[3]

(c) Achieving similar outcomes from law is not ambitious enough:

- Members do not consider the primary goal should be achieving similar outcomes. In some outcomes it was apparent they want laws that give better outcomes for their businesses than for their competitors' businesses.

- Other objectives should be taken into account apart from achieving similar outcome: "*responsiveness to business and community needs, flexibility, rigor in business analysis, and a focus on economic growth and productivity are all important objectives*."

[3] Ministers Bill English and Rodney Hide released the first Government Statement on Regulation on 17 August 2009.

(d) Assimilation of our laws would be good in some areas, but not in others:

- There were comments that we should not assimilate to Australia law where New Zealand has better law, or where it would be a backward step as the Australian regulation is onerous and complex. For example one Australian owned company said in relation to the mutual recognition of financial advisors: "*if NZ were to align with Australia it would be a backward step as the Australian regulation is onerous and complex and does not necessarily provide greater protection or benefits to the consumer*".

- In other areas comments showed that harmonisation (or at least mutual recognition of laws) presents clear advantages and is important for maintaining New Zealand's reputation within the international community (for example, with the anti-money laundering regime).

(e) Some regulatory competition is healthy:

- Members felt that there are substantial benefits in regards to competitive advantage to New Zealand maintaining independence in its regulatory regime:

  "New Zealand and Australian interests do at times diverge, and occasionally conflict (anyone for an apple?). In particular our small scale sometimes limits the scope for NZ businesses to develop to a domestic size sufficient to then compete internationally. Harmonisation considerations should not be allowed to override the NZ interest in achieving scale."

- Neil Quigley, Professor of Economics at Victoria University in Commercial Law and Regulation was quoted:

  "maintaining independent regulation permits New Zealand to achieve a competitive advantage by putting in place regulations that have lower compliance and transaction costs than those in other countries".

- There was discussion at the April meeting on how the SEM project should not lose for New Zealand the advantage of flexibility to improve our law separately from that of Australia. In other words the SEM plan should not result in being locked into law that does not give us the best chance to improve our competitiveness and productivity.

(f) Harmonisation has limited value for those businesses not operating trans-Tasman:

- This theme was voiced by a New Zealand based company:

  "Before the Government pursues harmonisation it needs to understand the full impact and costs for New Zealand businesses as a whole. It would be regrettable if by assisting the minority of companies that operate on a trans-Tasman basis it increases compliance costs for the majority that don't".

(g) Mutual recognition may be enough in some areas:

- Several members commented that if mutual recognition is already working, this may be better than having one integrated process:

  "Mutual recognition of insolvency proceedings seems sensible and currently appears to work without obviously undue onus. The costs and ripple effect of mutual recognition will obviously be less than that of an integrated cross border process. Therefore, unless there are examples of significant prejudice, the former (mutual recognition) would appear the better option."

(h) New Zealand's smaller size should be taken into account:

- The size difference between New Zealand and Australian was commented on by several members:

  "New Zealand is small and even more geographically isolated and smaller from a materiality perspective as compared with Australia. Every effort should be made to minimise compliance costs in light of this."

  "New Zealand is a smaller market than Australia and our businesses often need to be able to cooperate and collaborate to effectively provide services here and compete offshore. This particular environment supports a more flexible competition regime in New Zealand."

- In some areas such as product labelling, it was felt that New Zealand's domestic industry's voice on issues is weaker on a trans-Tasman basis relative to Australian interest. This should be taken into account.

(i) New Zealand's sovereignty and "local flavour" should be taken into account:

- There were several comments on how our local circumstances should be taken into account:

  "From a sovereignty perspective, this proposal seems to impinge somewhat on the ability of separate states to have separate rules for their own citizens. While Australia and New Zealand have similar cultures, the two states do differ significantly on some major policy issues, and governments are meant to represent their own citizens – it is difficult to see how agreement would be reached in this area, as it directly affects the rights of citizens and thus supports some form of population-based determination (i.e. if 75% of the total population of the two countries supports a ban, then it would happen) – but this means that NZ would always be disadvantaged."

- Some laws reflect New Zealand's local conditions. For example, a trans-Tasman bank wrote on consumer credit: "*whilst NZ consumer laws are similar to those of Australia (and UK) they also take on a local flavour resulting from public pressure and lobbying groups*".

Priorities

7. Each outcome (or combination of outcomes) in the Questionnaire had at least one question asking members to rank the priority the proposal should be given by Government (where 1 represented low priority and 5 represented high priority).

8. The only outcome proposal that the majority of responders considered should be given medium or high priority was the outcome for financial services policy outcome on anti-money laundering. Most of the others were either ranked low to medium priority. A few had mixed combination of rankings of low/medium/high priorities.

9. Although it appears the members who responded did not think many of the outcomes deserved being given high priority, often there was not a clear consensus among the responders on this issue. The differences could reflect the range of interests and understanding of members in each outcome (e.g. different interests between companies who do business trans-Tasman and those who only do business in New Zealand; or different interests between those who are involved in the relevant sector, and those who are not).

Summary of responses

10. The attached appendices provide: a table of priority rankings; developments since the Questionnaire was distributed; and a detailed summary of the responses from BusinessNZ members on the outcomes.

11. We received responses from 17 members who represent major companies from a broad cross-section of the economy, including infrastructure, agriculture, financial and retail. Some do business on both sides of the Tasman, some have parent companies in Australia, and some are New Zealand focused. All of these members were happy for their comments to be used in the report. As some members did not want their comments attributed, all comments are unattributed.

12. BusinessNZ and Franks & Ogilvie thank all members who have been involved in this project.

APPENDICES TO SEM REPORT
FOR CEO FORUM 20 AUGUST 2010

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APPENDIX 1: TABLE OF PRIORITY RANKINGS

13. This table below summarises how members ranked the priority each outcome proposal should be given by Government (where 1 represented low, and 5 a high priority).

14. The table is not a definitive representation of members' or BusinessNZ's views. For this reason we have also included some overall comments on each outcome.

SEM Outcome	No. of responders who rated the outcome	Majority rating Low=1 or 2 Medium = 3 High = 4 or 5	Low	Medium	High	Overall comments
Insolvency (cross-border)	5	low	3	1	1	Having a single proceeding is unlikely to be worthwhile as there is such a low occurrence and the difference in substantive laws may result in complexities. Mutual recognition is enough.
Insolvency (equivalent outcomes)	5	medium	2	3		The current insolvency outcomes are not overtly different. A few differences in Australian outcomes were pointed out as possibly being of benefit to NZ.
Financial reporting policy (accounting standards, and regulatory bodies)	11	low	6	2	3	No support for IFRS for SMEs Current differences in equivalent IFRSs cause little costs for businesses. Concern that an Australian differential reporting model may be more onerous than NZ's current differential reporting requirements. Preference for sector neutral standards.
Financial reporting (auditors)	7	low/ medium	3	3	1	Mixed reaction to this outcome. Large entities stated that it is more important to have an internationally recognised auditor regardless of the audit regime in New Zealand.

SEM Outcome	No. of responders	Majority rating	Low	Medium	High	Overall comments
Financial services policy (financial advisers)	6	low	4		2	Mixed reaction to this outcome. Some who operate trans-Tasman said it would be advantageous as it would better enable transfer of staff. Others said it would be disadvantageous as the Australian regulation is "onerous and complex".
Financial services policy (comparable disclosures)	7	low	4	2	1	The Australian disclosure statements provide very little business to the consumer. However, the outcome would provide some consistency.
Financial services policy (anti-money laundering)	4	medium/ high		2	2	The ability to leverage off existing Australian frameworks would lower compliance costs and be more efficient.
Financial services policy (trustees)	4	low	4			Responders questioned the cost/benefit of this outcome. It could result in Australian corporate trustees "cherry picking" in the New Zealand market, and NZ corporate trustees only serving the "lower end" of the market.
Competition policy	6	low	5		1	Overwhelmingly against harmonisation 'for harmonisation sake' Acknowledgement that New Zealand markets sometimes require increased market power to achieve optimum efficiency. Most respondents do not support criminalisation of cartel behaviour.
Business reporting & corporations law	6	Evenly split low/ medium/ high	2	2	2	Multiple reporting not significant cost in New Zealand Little enthusiasm for a business numbering system.

SEM Outcome	No. of responders	Majority rating	Low	Medium	High	Overall comments
Personal property securities	7	low	5	1	1	Australian searchability useful but harmonisation not.
Intellectual property law (patent attorneys)	5	low	3	2		This could result in NZ patent attorneys going to Australia and resulting in higher costs for NZ clients. One responder did not think this was likely however.
Intellectual property law (trade mark regime)	6	low	5	1		Having a system of national registration as well as a single trans-Tasman regime would be best as having only a single regime would potentially increase costs for those only requiring a trade mark in one market.
Intellectual property law (patent regime)	5	low	4		1	There was concern that this proposal would have more costs than benefits due to the extra costs necessary for monitoring and defending a business's freedom to operate in one market.
Intellectual property law (plant variety protection regime)	3	low	3			This could be advantageous to one responder as it would remove a level of complexity and cost, however, it was still ranked low priority.
Consumer policy (product labelling)	5	evenly split low/ medium/ high	2	1	2	From a conceptual view this would be beneficial as it would allow "producers to obtain volumes of labels which would cover both markets". This is already in place for food products.
Consumer policy (enforcement)	5	low	3	2		Most responders felt this proposal would make little or no difference to their business although there were some comments on how it would "increase certainty" and result in "greater collaboration". One responder thought it would be difficult to have rules that would be a "perfect fit" for both countries.

SEM Outcome	No. of responders	Majority rating	Low	Medium	High	Overall comments
Consumer policy (product safety bans and standards)	3	low	2		1	This got a low priority ranking as most thought improving the current “mutual recognition” system would be sufficient.
Consumer policy (consumer credit)	3	low	3			Disadvantages of this proposal would be the one-off set up costs and losing the ability for the laws to reflect local flavour. Advantages would be cheaper ongoing compliance costs and in time greater certainty.
Consumer policy (trade measurement)	3	medium	1	2		The few who responded did not see this proposal as affecting their business. One thought it would be “likely to be beneficial in the overall context”.

APPENDIX 2: DEVELOPMENTS

1. There is a short summary of any developments since the Questionnaire went out under each outcome in the following Appendices. As the Questionnaire was circulated prior to these developments, the members have not been asked to comment on them. The developments include:

   (a) Consumer Law Reform: A Discussion Paper by the Ministry of Consumer Affairs;

   (b) Review of Securities Law: Discussion Document by the Ministry of Economic Development; and

   (c) Financial Service Providers (Pre-Implementation Adjustments) Bill (passed 24/6/10).

   New memorandum

2. A significant general development was a revised Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law (MoU) signed by Hon Simon Power, our Minister of Commerce, and Hon Chris Bowen, the Australian Minister for Financial Services, Superannuation and Corporate Law, on 23 June 2010. This replaced the MoU signed on 22 February 2006.

3. Compared to the 2006 MoU, the revised MoU is a stronger statement on strengthening coordination. For example, the 2006 MoU refers to "mutual benefits to be obtained by the two countries" while the revised MoU refers to "net trans-Tasman benefits".

4. The revised MoU is more affirmative. For example, the first statement is that "the Governments...seek to accelerate, deepen and widen the relationship", while the first statement in the 2006 MoU is "the Governments...recognise the importance of accelerating, deepening and widening the relationship".

5. The 2006 MoU acknowledged that any coordination would focus on "reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition". The revised MoU did not mention these goals, but did recognise that deeper regulatory integration would:

   - *Improve the environment for doing business on both sides of the Tasman,*
   - *Foster international competitiveness,*
   - *Increase national productivity, and*
   - *Maintain and drive job creation.*

6. The revised MoU incorporated the 7 principles that were listed in the Joint Statement of Intent: Single Economic Market Outcomes Framework (Joint Statement) of 20

August 2009. To give effect to these principles the revised MoU stated consideration will be given to:

- *The desirability of ensuring that a firm will only have to comply with one set of rules and will have certainty as to the application of those rules and the regulator (i.e. Australian or New Zealand) with which it needs to deal; and*

- *Whether an issue should be regulated solely through domestic rules or whether a bilateral or multilateral solution would be more appropriate.*

7. With regards to the list of framework outcomes, the Joint Statement referred to the "shared list of outcomes". The revised MoU added "Governments may determine jointly any further outcomes to be added to, varied, or removed from the Work Programme".

8. The annex to the revised MoU did vary the list of outcomes. A new addition is:

- Coordinated approach to the implementation of insurance regulation

9. This is a carry-over from the work programme under the 2006 MoU. Listed in the annex of that MoU was:

- Coordination of insurance regulation and the implementation and enforcement of insurance regulation

10. As this outcome was not included in the Questionnaire, we are unable to respond to it in any detail. However, one Australian based company did make some brief comments:

"The Insurance (Prudential Supervision) Bill is currently being developed in consultation with the industry and interested groups and I think there is general consensus around what it is trying to achieve and at the same time minimising the cost of compliance, such as avoiding duplication etc ...

Generally, the insurance industry recognises that NZ has been under regulated in this sector and also accepts that some regulation is required...

From the insurance sectors point of view we do not want to harmonise with Australia and their regulations and certainly the Australian authority (APRA) is way over the top. This was recognised by the previous government and I recall Michael Cullen stating that NZ would not adopt the APRA model (despite pressure from APRA to do so), but would develop an approach more suited to NZ."

APPENDIX 3: INSOLVENCY LAW

11. There are two SEM Outcomes identified in the area of insolvency law. These are:

    - Single cross-border insolvency proceedings.
    - Equivalent outcomes.

12. Both outcomes have a short-term time-frame which means they are expected to be completed by the end of 2011.

13. Overall, members felt neither outcome should be given high priority. They generally felt the costs would outweigh the benefits for the first outcome on the single cross-border insolvency proceedings. They believed there is little merit in the second outcome on equivalent outcomes as outcomes are already similar.

14. Since the Questionnaire was distributed the Insolvency Practitioners Bill was introduced (27/4/10). Although this has no direct relevance to these two outcomes, one member commented on the Bill:

    > *"the Bill is based on a negative licensing system and does not require established professional competencies which are out of step with the stricter environment that is proposed in Australia. It would be beneficial if there was a common qualification requirement for both countries."*

Single cross-border insolvency proceedings

Outcome proposal

15. The proposal is for "a single cross-border insolvency proceeding where an insolvent entity has interests on both sides of the Tasman".

16. One issue would be the differences in substantive law (e.g. use of voluntary administration, asset tracing, and priorities).

Responses

17. Out of the five members who responded, three gave this outcome a low priority ranking, one gave it a medium priority ranking and only one gave it a high priority ranking. Most of the members said this proposal would not affect them. It was generally felt that there would be more costs than benefits with this outcome and mutual recognition was sufficient.

18. Although members saw benefits in having a single cross-border insolvency proceeding, they felt the difficulties and complexities in achieving the outcome and the low need for it made it unworthy:

> "*However blending the systems may provide difficulties. There are currently different incentives and disincentives for directors to initiate action and avoid personal liabilities as a result. Australia uses Voluntary Administration (driven perhaps by the limitation of Directors liabilities that arise), in contrast NZ has not established a similar use of VA but rather sees existing insolvency practices (receivership/liquidation) as more effective.*"

> *"Mutual recognition of insolvency proceedings seems sensible and currently appears to work without obvious undue onus. The costs and ripple effect of mutual recognition will obviously be less than that of an integrated cross border process. Therefore, unless there are examples of significant prejudice, the former (mutual recognition) would appear the better option."*

19. A suggestion was made regarding New Zealand's personal property securities scheme:

> *"Benefits would exist where charges taken in New Zealand could also be effective against the same creditors trading assets in Australia without having to register charges in both countries, providing cross-broader mutual recognition."*

20. Another suggestion was for a choice of forum rule:

> *"Perhaps any proposal needs to also have a choice of law/forum rule embedded (i.e. if connection of creditor is more with one country than the other then that country/system governs the whole process). This would alleviate the need for changes to substantive laws (except for say the position of tax agencies). Could also have a special division of the Courts to deal with such "complex" insolvencies."*

Equivalent outcomes

Outcome proposal

21. The proposal is for an insolvent under administration to face equivalent outcomes on both sides of the Tasman and for each country to recognise those outcomes. This proposal is only for mutual recognition rather than having one harmonised system.

Responses

22. Out of the five members who responded, two gave it a low priority ranking and three gave it a medium priority ranking.

23. Members did not consider the existing insolvency outcomes to be overtly different. They did note some Australian outcomes which would be advantageous to New Zealand businesses, for example:

    (a) the substantial differences in the IRD priorities:

        "if New Zealand was changed then it would be an advantage to NZ creditors."

        "whether IRD/ATO should be protected ahead of employers and other creditors. Absent a fraudulent arrangement by Company/Directors/Shareholders the IRD/ATO is perhaps less vulnerable and in need of protection/priority."

    (b) the corporate groups regime in Australia could be a useful addition to New Zealand law:

        "it is more often that Trans-Tasman ops are headquartered out of Australia – with a small NZ presence."

24. One member noted voluntary administration has been more established in Australia, although they do not see voluntary administration as an advantage and still favoured the Receivership model.

APPENDIX 4: FINANCIAL REPORTING POLICY

1. There are four SEM Outcomes identified in financial reporting policy. These are:

    - Profit entities are able to use a single set of accounting standards and prepare only one set of financial statements.
    - Private not-for-profit entities are able to use a single set of accounting standards and prepare only one set of financial statements.
    - Financial reporting standards bodies in Australia and New Zealand have functional equivalence.
    - Trans-Tasman companies have to prepare only one set of financial statements to one set of standards.

2. Overall, the responses were mixed. There was acknowledgement that the slightly different standards in Australia and New Zealand for large for profit entities does cause an extra cost. However for most members the extra cost was considered to be immaterial. Members believed that the most important advantage may be from saving unnecessary audit expense as a result of the differing standards. Generally, the members with trans-Tasman operations ranked the outcomes with lower priority than the responses from domestic companies.

3. There was little support for IFRS for SMEs. Members preferred a differential IFRS but cautioned that a trans-Tasman framework may not have the extent of carve outs that the current NZ differential reporting framework enjoys.

4. Members expressed little desire for a single set of accounting statements. This was largely due to Australia's public filing requirements.

5. Since the Questionnaire the Australian Accounting Standards Board has released an exposure draft containing the proposed amendments to Australian and New Zealand financial reporting standards.[4]

6. The New Zealand Accounting Standards Review Board is still considering the viability of International Public Sector Accounting Standards for New Zealand.

[4] *Exposure Draft - ED 200A Proposals to Harmonise Australian and New Zealand Standards in Relation to Entities Applying IFRSs as Adopted in Australia and New Zealand* (July 2010, available at http://www.aasb.com.au/Work-In-Progress/Open-for-comment.aspx , Comment period for this ends 8 October 2010).

Single set of accounting statements based on one set of standards (profit entities)

Outcome proposal

7. The proposal is for profit entities to be able to use a single set of accounting standards and prepare only one set of financial statements. This has a short term timeframe which means it is expected to be completed by the end of 2011.

8. Since the Questionnaire was distributed the Australian Accounting Standards Board has confirmed that IFRS for SMEs is not presently a suitable set of requirements for a second tier of requirements for general purpose financial statements in Australia. The AASB are open to the possibility of adopting the IFRS for SMEs in future should the changes in that Standard make it practicable in an integrated public sector/private sector reporting environment.[5] The AASB is currently consulting on changes to the Australian differential reporting framework.

Responses

9. Most members said that current differences between NZIFRS and AIFRS are minimal and there would be few advantages in harmonisation.

10. Two trans-Tasman members felt there are no "*current complications or additional expenses resulting from any differences*." Commenting on the differences that exist, one said that these "*do not result in [x] incurring material additional costs in preparing financial statements*". This view was supported by a member who commented that its Australian entities have no difficulty applying the group accounting policies (based on NZ IFRS).

11. Two members believed that the greatest benefit of eliminating the difference between NZIFRS and AIFRS is in simplifying group audits. One of these said that the main impact of the differences is requiring them to have separate Australian audit sign-off on Australian accounts (see Auditing outcome below).

12. Non-trans-Tasman entities saw harmonisation as risking higher compliance costs and disclosure requirements on the vast majority of firms that operate only in New Zealand:

> *"[x] vehemently oppose mandatory reporting (public filing) by large privately owned companies as applies in Australia."*

13. Some members expressed concern with New Zealand ceding flexibility in this policy area.

> *"The practical implications of harmonisation depend on the form of the harmonised model. In our submission to the ASRB we recommended NZ-variant IFRS for each reporting tier. This would enable the international standards to be modified, where appropriate, to accommodate NZ specific considerations. The*

[5] AASB *An update on the Differential Reporting Project (*13 July 2010 available at http://www.aasb.gov.au/admin/file/content102/c3/Differential_Reporting_Project_Update_13_July_2010.pdf).

need for flexibility is demonstrated in the struggle the New Zealand co-operative movement faced in persuading the ASRB or FRSB of the need for change to IAS32 to allow co-operative capital to be recorded as equity rather than term liabilities (pure IFRS). Relief was only provided when the international co-operative community was able to persuade the IASRB to make changes to the international standard."

14. One member saw harmonisation as a potential advantage:

> *"Size of entities between New Zealand and Australia could give rise to scope for more entities being able to qualify for differential reporting."*

15. Although financial reporting standards do not regulate the filing requirements in each country, differential reporting standards based on a trans-Tasman perspective may put pressure on policy settlers to align these with Australia.

16. Members preferred a differential IFRS model over IFRS for SMEs. One response was characteristic – they did not consider harmonisation of second tier reporting standards as important but expressed that:

> *"A differential reporting framework of IFRS is more desirable than IFRS for SMEs. [x]'s view is that all companies within the Group should be able to apply one set of accounting standards, in particular the recognition and measurement requirements, for both Group reporting requirements and individual entity statutory accounts. This would ensure that there is no need to maintain two sets of books for each entity which would be the case if IFRS for SMEs is adopted. ... The greatest benefit of a differential reporting framework would be obtained by removing disclosure requirements while maintaining recognition and measurement criteria consistent with full IFRS."*

17. Other members were more specific:

> *"[x] supports ongoing NZ differential reporting, rather than IFRS for SMEs; primarily because IFRS for SMEs is more onerous than NZ differential reporting (e.g. IFRS for SMEs requires cash flow statement, whereas NZ differential reporting does not)."*

18. The Questionnaire asked whether there were a significant number of non-issuer entities that have parents that use IFRS for SMEs for their consolidated statements. None of the members applied these standards within their groups. One responder said they *"are not aware of a significant number of New Zealand non-issuer entities that have parents that use IFRS for SMEs for their consolidated statements."*

Single set of accounting statements based on one set of standards (not for profit entities)

Outcome proposal

19. The proposal is for not-for-profit entities to be able to use a single set of accounting standards and prepare only one set of financial statements. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

20. The New Zealand Accounting Standards Review Board is currently considering the viability of each of the two alternatives, (IPSAS and Enhanced NZ equivalents to IFRS) before it reaches an overall view. The Board stated "*a key element of the multi-standards approach ... is the use of IPSAS and so the viability of this approach is dependent on the viability of IPSAS*."[6]

Responses

21. The members generally preferred sector neutral accounting standards in New Zealand. They commented on the desirability of equal recognition and measurement requirements. There were no specific examples of the appropriateness of IPSAS or equivalent in New Zealand. One responder said:

> *"We also acknowledge sector specific standards would be beneficial on the basis that compliance with fully IFRS requirements is overly burdensome for some entities. In this regard we agree with the current work by the MED / ASRB towards establishing standards following appropriate cost / benefit analysis of each sector. That said, based on New Zealand's size we question the availability of appropriate resources throughout all aspects of financial reporting (standard setting / preparation / audit...) if too many sector specific standards are established."*

[6] See the June 2010 Accounting Standards Review Board communiqué (available at http://www.asrb.co.nz).

Functional equivalence of financial reporting standards bodies

Outcome proposal

22. The proposal is for financial reporting standards bodies in Australia and New Zealand have functional equivalence. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

23. Since the Questionnaire was distributed, the Commerce Minister Hon Simon Power on 28 April 2010 announced that the new Financial Markets Authority will be responsible for accreditation of professional accounting bodies; quality review of auditor practices; setting minimum licensing standards; and enforcement functions. The Minister said that the Accounting Standards Review Board will still change its name to the External Reporting Board (XRB), and will be responsible for making Auditing Standards (see Auditing outcome below).

Responses

24. No members addressed this outcome directly.

Single trans-Tasman financial statements

Outcome proposal

25. The proposal is for trans-Tasman companies to only have to prepare one set of financial statements to one set of standards. This has a short term timeframe which means it is expected to be completed by the end of 2011.

Responses

26. Nearly all of the non financial sector members believed that the outcome would result in significant savings. For example:

- One responder believed that it would reduce their costs by $40-50,000 per annum.
- A trans-Tasman business estimated that the New Zealand branch would save between 10 and 20 working days per annum for preparation and $23-30,000 in audit fees.
- A New Zealand business said they would be able to file their group statements with ASIC rather than bear the compliance cost associated with the preparation and audit of Australian consolidated statements.

27. The financial sector members were less optimistic. One commented that they could not envisage a situation where it was only required to prepare one set of trans-Tasman consolidated financial statements due to stakeholders such as the Reserve Bank.

28. There were cautions among the responses:

> *"There could be a disadvantage where a New Zealand company operating exclusively in the New Zealand market is competing with a Trans-Tasman competitor, in which case the parties might have inequitable access to their competitors' financial information."*

29. Finally, a responder with all operations based in New Zealand, questioned whether trans-Tasman financial statements were consistent with the entity approach required by IFRS.

Auditors registered in one country can operate in the other country

Outcome proposal

30. The SEM Outcome identified for audit policy is "auditors registered in one country can operate in the other country."

31. Since the Questionnaire was distributed the Commerce Minister Hon Simon Power announced on 28 April 2010 that the new Financial Markets Authority will be responsible for accreditation of professional accounting bodies, quality review of auditor practices, setting minimum licensing standards, and enforcement functions. Currently the New Zealand Institute of Chartered Accountants (NZICA) has these responsibilities. When the Questionnaire was prepared the Government proposed to grant the External Review Board (the reconstituted Accounting Standards Review Board) these roles. The change may be a result of fears that trans-Tasman recognition of auditors risked tainting the Australian auditor regulation. Australia's regulatory framework reaches the expectations of the European market regulators while without the change New Zealand's regulatory framework would not.

32. The proposal has a medium term timeframe which means it is expected to be completed by the end of 2014.

Responses

33. Overall the responses were mixed. Some considered the status quo as sufficient with changes requiring extra costs without providing additional assurance. Broadly, the non-financial sector members placed a lower value on international perception than the financial sector members.

34. Some members believed that the status quo achieves sound policy objectives:

> *"The NZICA already has a well developed self-regulated approach to the conduct of audit and auditors that has worked well. If regulation was proposed then NZICA would be well placed to have a separate section that operated under regulation and monitors compliance."*

35. This view contrasted with members who considered it more important for New Zealand to be seen as a good citizen. One responder said "*the ultimate objective should be for New Zealand to be recognised as a safe and desirable commercial jurisdiction where global business can be executed efficiently*" and did not consider that reducing the eligible pool of audits could increase costs.

36. The same responder commented that if the changes result in an inefficient market, mid-tier firms would evolve to Authorised Audit Company status and that inefficiencies will not last long if the skills and certifications were trans-Tasman or internationally recognised.

37. The suggestion of a voluntary registration system attracted some support, though two members believed that more aligned approach was needed: *"[x] supports harmonisation with Australia and believes voluntary registration may not be sufficient*."

38. A number of members commented that it was more important for their businesses to have an internationally recognised auditor (the big four were cited) than the specifics of the New Zealand audit regulatory environment.

APPENDIX 5: FINANCIAL SERVICES

1. There are four SEM Outcomes identified in the area of financial services policy. These are:

    - Comparable disclosures.
    - Financial advisers.
    - Due diligence and anti-money laundering compliance.
    - Corporate Trustee regimes.

2. All of these outcomes have a medium-term time-frame which means they are expected to be completed by the end of 2014.

3. Since the Questionnaire there have been the following developments:

    (a) The Financial Service Providers (Pre-Implementation Adjustments) Bill was divided on 22 June into the Financial Advisers Amendment Bill (No 2) and the Financial Service Providers (Registration and Dispute Resolution) Amendment Bill. These were both passed on 30 June 2010. They amend the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 respectively. The relevant changes that may affect the framework outcomes are:

        i. Companies and other entities can give financial advice rather than just individuals. The proposed outcome is for financial advisers to operate across the Tasman. This may make it easier for recognised companies as well as individuals to operate across the Tasman without further approvals.

        ii. Some types of advice such as mere guidance and advice on buying or selling property are excluded. This would affect the framework outcome on comparable disclosures.

    (b) The Government is still finalising the regulations for the new regime. The Draft Code of Professional Conduct for Authorised Financial Advisers was released on 30 July by the Code Committee for Financial Advisers. The Code now needs to be considered and approved by the Commissioner for Financial Advisers and Commerce Minister, Hon Simon Power.

    (c) The Minister of Commerce released a discussion paper "Review of Securities Law" on 21 June 2010. This could be relevant to both outcomes. For example, the paper discussed the option of having a principle-based overlay to securities legislation which requires "*those providing financial services to retail customers, at any point in the value chain, to do so in a manner which treats those investors fairly*". This could be through a code of practice for financial market participants

similar to the code of professional conduct for authorised financial advisers under the Financial Advisers Act 2008.

(d) The Establishment Board of the Financial Markets Authority was announced on 26 May 2010. This new Crown entity will, among other functions, regulate and oversee financial advisers and financial service providers. Commerce Minister Simon Power announced the legislation will be fast-tracked to have it operating by early 2011.

(e) On 9 August 2010 the New Zealand Ministry of Justice released a consultation document on regulations and codes of practice under the AML/CFT Act.[7]

[7] AML/CFT Consultation document is available at http://www.justice.govt.nz/publications/global-publications/a/aml-cft-regulations-consultation-document/aml-cft-regulations-consultation-document (Comments to be provided by 6 September 2010).

Financial advisers

Outcome proposal

4. The proposal is that "recognised financial advisers in Australia and New Zealand are able to operate across the Tasman without the need for further approvals". This proposal is only for mutual recognition rather than having one harmonised system.

5. The main issue is over compliance costs in making the two regimes similar enough so mutual recognition can work – will the benefits outweigh the costs?

Responses

6. Out of the six members who responded only two thought this proposal should be given high priority. The other four members gave it a low priority ranking. Four members, however, said the outcome may benefit their business depending on whether it would lead to lower compliance costs for businesses.

7. Those who gave it low priority felt the Australian regulation is "*onerous and complex and does not necessarily provide greater protection or benefits to the consumer.*"

8. Some of those who gave it high priority operated on both sides of the Tasman and this outcome would allow them to transfer their staff.

9. As the New Zealand legislation is being amended now and is expected to be in force by July 2011 one member commented: "*opening up the trans-Tasman market for financial advisers is something that should be considered now.*"

Comparable disclosures

Outcome proposal

10. The proposal is for investors and other users of financial products in Australia and New Zealand to receive comparable disclosures.

11. Both New Zealand and Australia are currently reviewing financial adviser disclosure rules. The SEM may align these two projects. The current Australian requirements for financial advisers are more onerous than the current New Zealand requirements.

Responses

12. Out of the seven members who responded, three not involved in the finance sector ranked this proposal as deserving low priority and said it would neither benefit nor disadvantage their business. The other three members who are in the finance sector ranked it with medium priority (2) and high priority (1).

13. The members who gave it low priority felt the Australian system was overly complex and onerous.

14. The members who gave it higher priority saw advantage in the outcome providing consistency:

> *"this will advantage [x] by allowing for harmonisation of Compliance Policy between [x] and [x]. Further systems put in place by [x] could be adopted by [x]."*

15. The following substantive differences were identified as affecting the mutual recognition of financial advisors:

    (a) qualifications;

    (b) differences in aspects of insurance business ;

    (c) differences in conduct: "*the New Zealand regime will impose new conduct obligations on advisers in the areas of ethics and client care. Additionally, there will be criminal checks for some financial advisers and the different disclosure obligations referred to above*";

    (d) differences in superannuation regimes which is compulsory in Australia;

    (e) knowledge of the tax system;

    (f) "*the proposed NZ Financial advisor regime covers both product based advice and financial planning services, in contrast the Australian equivalent is entirely product based advice*";

    (g) differences in legislative frameworks relating to products and services advisers will advice on, including:

        i. "*The current definitions of "financial advice" for New Zealand are at odds with the Australian regime, which draws a clear distinction between 'general' and*

'personalised' advice and includes an assessment of the intention of both parties to distinguish between the two types of advice.

ii. *However, Australian advisers will be able to give advice to New Zealand funds, businesses and individuals without being part of the New Zealand regime unless advice or investment management decisions are given to "non-wholesale customers" in which case mutual recognition of qualifications will need to be agreed.*

iii. *The New Zealand regime, like the Australian, will exempt 'wholesale customers' though the likely thresholds will mean that more customers of that category in New Zealand will need to be advised by an Authorised Financial Advisor (AFA) than the case in Australia.*

iv. *Another key difference in the approach to commissions for financial advisors. Australia is to ban such commissions. The New Zealand government, by contrast, is to await the impact of new regime on adviser's performance before making a decision on this matter."*

16. Differences in the licensing of financial advisers identified were:

(a) "*if the Australian regime is based on licensing organisations, it is likely that [x] staff will be more qualified (in terms of formal recognition) than their Australian counterparts. Securities Commission registration would also need to extend trans-Tasman*";

(b) "*the NZ regime will be an occupational licensing regime which has differences to Australia which licenses entities as well as individuals*".

17. It was generally felt the Australian regime for comparable disclosures by financial advisers is overly complex:

"it would be more beneficial for NZ to observe and implement similar but more considered regulation than Australia";

"the disclosure statements in Australia are considered to provide very little benefit to the consumer."

18. Whether the more complex Australian regime gave greater transparency and accountability was questioned by one member who suggested:

"given the maturity of their regime, NZ may benefit from the simplified documentation that has been developed since their disclosure begun."

19. One member commented on the different factors that need to be considered for this outcome (but could also be considered for most of the outcomes):

"Complementary regulation – is there one Australia/NZ regulator or separate country regulators. One regulator would ensure consistency of compliance,

separate regulators will create difference. Therefore if there is no desire for a single regulator then the benefits of single regulation will be diluted.

Sovereignty – i.e. control of the country, what are the risks to NZ as a country if NZ chooses an Australian regulatory regime? This needs to be considered.

Retention of NZ profit – in the financial services industry Australian companies make strong margins on their NZ business – does NZ want mutual recognition which would allow greater competition and potentially drive margins and profit offshore? Adding to the NZ Current Account deficit."

Anti-money laundering compliance

Outcome proposal

20. The proposal was for "Trans-Tasman financial institutions to face the same customer due diligence and anti-money laundering compliance programme obligations on both sides of the Tasman".

21. The proposal was worded differently in the Annex to the revised Memorandum of Understanding. The new wording is: "Trans-Tasman financial institutions and businesses face equivalent anti-money laundering/counter-terrorist financing (AML/CFT) obligations on both sides of the Tasman".

22. As these obligations would include "customer due diligence", the change appears only to be a simplified wording of the proposal. More significant is the change to the time-frame. In the August 2009 Framework Outcomes document it was listed as having a short time-frame. In the new MoU Annex it is listed as medium. This may show the proposal is more complicated and difficult to implement than first thought.

23. The main issues with this proposal is that Australian AML/CTF regimes is currently more compromising as they have embraced a 'risk-based' approach as compared to the New Zealand's 'tick all boxes' approach to AML/CTF.

Responses

24. The four members who responded thought this proposal deserved a medium to high priority. The member who gave it the highest priority was concerned about implementation costs:

> *"as reporting entities begin to mobilise project resources for the impending two year implementation period, now would be an ideal time to introduce any changes in the NZ regime. Implementation costs will be significant for reporting entities and any opportunity to reduce the expense of introducing the new obligations would be of considerable financial benefit."*

25. The same member commented on the benefits of harmonisation which would:

> *"Achieve the need to comply with International requirements (no doubt driven by the US benefits of a Financial Actions Task Force (TATF) compliant regime at minimum cost to banks, and its focus on specified the New Zealand economy.*
>
> *Minimise unnecessary differences of impact for the many New Zealand bank customers (both corporate and individual) who maintain bank accounts in both New Zealand and Australia, and;*
>
> *Avoid making the New Zealand economy less competitive, in relation to Australia and other countries and individuals) that NZ transacts with."*

26. For those members who are based in both countries the ability to leverage off existing Australian frameworks would result in lower compliance costs and be more efficient:

"specifically for the Australian owned [x], harmonisation have obvious benefits. They can leverage off existing frameworks, including software. Most importantly, they can leverage off the considerable intellectual property which their Australian parents have developed and which they intend to share for the benefit of New Zealand banks."

27. The difference in approaches to AML/CFT regime was commented on. Some thought New Zealand having a more prescriptive regime was an advantage:

"this is a positive, as it provides clarity and certainty to the financial sector and minimises the likelihood of competitive disadvantages issues."

28. Most preferred the Australian approach:

"for NZ to be competitive in international services the KYC [know-your-customers] rules need to be efficient as well as robust. Excessive prescriptions can be an impediment to business and create barriers to clients using NZ financial institutions (as we have experienced when using UK ones). The Australian approach seems a better balance, although it would be nice if they accorded New Zealand sourced ID (e.g. Drivers licences) the same value as Australian ones."

29. Some felt New Zealand's smaller size warranted less onerous AML/CFT requirements than Australia:

"Given New Zealand's size it is likely that New Zealand will have a lower national risk profile than Australia, with the result that New Zealand's overall AML/CFT requirements should be less onerous."

30. The following aspects (apart from customer due diligence) where closer alignment between the two countries would be needed for harmonisation to occur were noted:

(a) *"Alignment of risk assessment models. While certain comparable products, services and customer types may contain different attributes, applying the same risk models will ensure interpretation of outcomes will be consistent. We will be speaking the same language.*

(b) *Account monitoring systems. The four big Australian owned banks will want to leverage off their respective parents. [x] for example has purchased and implemented purpose built software for transactional monitoring. [x] will be looking to take advantage of this investment to minimise costs and produce consistent outputs for analysis and reporting purposes.*

(c) *The supervisory model. Australia has one AML/CFT supervisor (AUSTRAC), while NZ has created a multi-supervisor model (i.e. RBNZ, Securities Commission and Department of Internal Affairs). In New Zealand, the proliferation of non-specialist supervisors in the AML field may lead to inconsistent approaches and diffusion of expertise.*

(d) *Record keeping. The unwillingness of New Zealand authorities to adopt a 'cut and paste' of the Australian requirements means there are a number of differences of detail between the precise information that must be collected in the two jurisdictions. Trans-Tasman businesses need to carefully review their Australian systems against the New Zealand requirements before seeking to apply them here."*

(e) Differences in supervision: *"the Australian model has a single ALM/CFT regulator, compared to a multiple supervisor model in New Zealand. This could create inconsistencies in terms of how the legislation regulations are interpreted and applied by the multiple supervisors."*

(f) Codes of Practice: *"in New Zealand, the operation of Codes of Practice could undermine the risk based approach because if a reporting entity chooses not to comply with a Code because of the entity's different risk profile, it will still need to adopt "equally effective means" of compliance. As a result, Codes of Practice risk becoming de facto regulations."*

31. It was felt that mutual recognition of AML regimes would allow for necessary flexibility:

> *"in this context it would be helpful to give the AML/CFT supervisors a power to recognise equivalence of particular or comprehensive aspects of the Australian regime. This would allow some flexibility over time for CDD required under New Zealand law (and vice versa) whether or not it occurred in the context of a designated business group."*

32. The importance a AML/CFT regime to our international reputation was commented by a couple of members:

> *"it is important that this legislation is implemented as soon as practicable to maintain New Zealand's reputation within the international financial community."*
>
> *"further review should be conducted in relation to enhancing checks / controls for establishing / registering a company via the New Zealand Companies Office. Companies that are registered in New Zealand but do not have a "physical presence" in New Zealand represent a significant money laundering / terrorist financing risk. These can have an impact on the reputation of New Zealand within the international financial community."*

Corporate Trustees regime

Outcome proposal

33. The proposal is: "the New Zealand and Australian corporate Trustee regimes are aligned in respect of financial products."

34. The first reading of the Securities Trustees and Statutory Supervisors Bill was on 23 March 2010 and it has been referred to the Commerce Committee which is due to report back on 24 September 2010.

35. The proposal is to create a common market for trustee services in Australia and New Zealand. This may result in mutual recognition of corporate trustees and/or greater alignment of trustees' duties and powers in respect of the supervision of certain financial products.

36. The main issue will be over compliance costs, standards, and the types of liability Trustees will have for different kinds of failure.

Responses

37. The four members who responded all ranked this as deserving low priority. Most of them said the proposal would neither advantage nor disadvantage them. The benefits would depend on the compliance costs associated with the outcome:

> *"If a single market for corporate trustee services means greater competition and lower prices, then this would advantage [x]. However, if the regulation of corporate trustees imposed high compliance costs on them, these would be paid by issuers and this would disadvantage [x]".*
>
> *"The premise that opening up the market for corporate trustee services would reduce costs of issuing debt products in the New Zealand capital market may not be well founded. [x] query whether the New Zealand capital market has sufficient volume or depth to attract Australia corporate trustee into the New Zealand market. Is there any evidence that the New Zealand capital market is inefficient in terms of pricing for corporate trustee services. [x] suspects that given the size of the New Zealand market, the existing corporate trustees complete fiercely on price, and subsequently query whether this compromises the resources that corporate trustees are able to engage for the purpose of discharging their duty? There is a possibility that Australian corporate trustees would 'cherry pick' in the New Zealand capital market by focussing on large issues by New Zealand issuers. This would put further pressure on New Zealand corporate trustees to serve the 'lower end' of the New Zealand capital fund market."*

38. Although this outcome was ranked with low priority, some felt that it could boost investor confidence:

> *"a more uniform and consistent approach will encourage investment, and provide greater clarity around the role of trustees in relation to managed funds."*

39. Members were asked what level of prudence and liability would be necessary if a trans-Tasman market for corporate trustee services was established. One member said it would be a balance between:

    (a) the need to ensure that investors have confidence in the issue of securities; with

    (b) the costs imposed on corporate trustees and, in turn, issuers.

40. Another comment was:

    > *"a corporate trustee should have both civil and criminal liability for breaching their duties. They should be liable for damages to any investor who suffers a loss as a direct consequence of a corporate trustee breaching their duty of care. A corporate trustee should also face criminal liability for being wilful or reckless and not observing its standard of care. Criminal liability should extend to directors of a corporate trustee who know or ought to have known that the corporate trustee was in breach of a duty of care."*

41. The different roles of trustees in relation to securities was commented on by several members:

    > *"we understand that the Commerce Minister is likely to extend the NZ trustee licensing regime to trustees of KiwiSaver schemes, where the trustee is also the issuer of the relevant scheme. Accordingly, the new Financial Markets Authority will need to be satisfied that potential Australian trustees of KiwiSaver schemes are competent and able to accept the high level of prudence required by KiwiSaver trustees, given their status as issuers as well as trustees under the KiwiSaver Act 2003. In Australia, we understand that many issuers will choose to act as 'responsible entities' and will not appoint an independent trustee except where they would benefit from the trustees managing the administrative function of the funds. Potentially, issuers in NZ and Australia will have different perceptions about the role of trustees in relation to managed funds."*

    > *"the extent to which there could be mutual regulation of corporate trustees will depend on the extent to which there is mutual regulation on the issuing of securities. In other words, if different securities laws in each country require corporate trustees of issuers to undertake different action, then the regulation of corporate trustee may also have to be different."*

APPENDIX 6: COMPETITION POLICY

1. There are three SEM Outcomes identified in competition policy. These are:

    - Firms operating in both markets are faced with the same consequences for the same anti-competitive conduct purposes.

    - Competition and consumer law regulators in both jurisdictions are able to share confidential information for enforcement.

    - Cross membership between the ACCC and the NZ Commerce Commission at associate member level.

2. Members were overwhelmingly against harmonisation 'for harmonisation sake'. All bar one responder ranked all of these outcomes as deserving little or very little priority for the Government. No responder believed that harmonisation would provide New Zealand a competitive advantage.

3. Some members suggested alternative focuses for the Government to benefit New Zealand. For example one responder considered joint resourcing of a Productivity Commission advantageous and suggested such a body would be better placed than the Commerce Commission to ensure the separation of the development of competition policy and enforcement.

4. These comments represents the general theme of responses:

    "New Zealand and Australian interests do at times diverge, and occasionally conflict (anyone for an apple?) ... Harmonisation considerations should not be allowed to override the New Zealand interest in achieving scale."

    "Further harmonisation to competition law will not justify the cost. New Zealand should improve its law as benefits New Zealand."

5. Many members feared New Zealand losing the ability to structure export industries in a way to achieve economies of scale. For example, the kiwifruit industry was referred to with mention of the conscious regulatory framework to achieve efficiencies of scale for the benefit of that industry as a whole.

    "Given the regulatory framework which precludes export of kiwifruit other than to Australia, the Australian and New Zealand markets are already effectively competitive in the kiwifruit sector, and thus harmonisation of market rules would probably not have a significant impact. However, it would be important that the kiwifruit industry structure were recognised in Australia as well if the industries were harmonised to also preclude export from Australia. This may not be consistent with existing Australian policy or international commitments, and thus would require further investigation."

6. There was some interest in New Zealand adopting the ACCC ‘informal’ clearance option.

Same consequences for the same anti-competitive conduct

Outcome proposal

7. The proposal is for firms operating in both markets to be faced with the same consequences for the same anti-competitive conduct purposes. The Government believes that this will prevent firms being able to avoid the consequences of anti-competitive conduct through choosing the jurisdiction with more lenient penalties. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

8. The penalty regimes in the Commerce Act and the Australian Trade Practices Act are broadly aligned, the exception being for cartel conduct. The Ministry of Economic Development released an Occasional Paper Criminalisation of Cartel Behaviour in January.[8]

Responses

9. The general theme of responses is represented by this comment:

> *"Overall we do not consider the harmonisation of competition law would justify the costs. New Zealand is a smaller market than Australia and our businesses often need to be able to cooperate and collaborate to effectively provide services here and compete offshore. This particular environment supports a more flexible competition regime in New Zealand. For example the recent credit card interchange dispute was settled between the bank and the card schemes (Visa and MasterCard) in a pragmatic fashion with the Commerce Commission, without any centrally imposed pricing regime as happened in Australia."*

10. The majority of members did not support the criminalisation of cartel behaviour. Many stated that it was not necessary, and lacks a strong policy basis. None considered harmonisation or being seen internationally as a 'good citizen' as a good reason for criminalising. Comments included:

> *"Financial penalty is enough. Ability for a competitor to obtain immunity by informing on others that could lead to their criminal conviction is distasteful."*
>
> *"In a small market like NZ there are often valid, pro-competitive reasons for businesses to cooperate with each other. The criminalisation of cartels could deter such legitimate cooperation."*

11. Interestingly the concerns expressed by the competition law experts contained in the Questionnaire preamble were not repeated in the comments from the members. Specifically:

    (a) The tendency for Australian law to be prescriptive rather than based on principle;

    (b) The more bureaucratic processes Australia accepts;

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[8] Occasional Paper Criminalisation of Cartel Behaviour in January available at: http://www.med.govt.nz/templates/MultipageDocumentTOC____42430.aspx.

(c) The more political nature of Australian competition law; and

(d) A trans-Tasman net benefits approach that may result in a flow of wealth out of New Zealand into Australia.

12. One responder stated that:

> *"Any improvement in the regulation of competition policy likely requires adoption of a single trans-Tasman regulator to be effective. Companies operating exclusively on one side of the Tasman or another will derive little benefit from trans-Tasman harmonization in this area of policy. The risk we perceive is that companies operating trans-Tasman would incur greater (duplicate?) cost if a common regulatory framework is administered separately against the respective Australian and NZ operations of the same company, presumably for the same breach of common policy."*

Sharing information for enforcement and cross membership of agencies

Outcome proposal

13. The proposal is for more effective enforcement of competition and consumer laws on both sides of the Tasman by allowing regulators in both jurisdictions to share confidential information and for the ACCC and the New Zealand Commerce Commission to share members at associate member level. This has a short term timeframe which means it is expected to be completed by the end of 2011.

14. Since the questionnaire the Commerce Select Committee has taken submissions on the Commerce Commission (International Co-operation, and Fees) Bill. The Committee is due to report back to Parliament in November 2010.

Responses

15. Members cautioned that information should only be shared when it is protected to the extent that it would be under New Zealand law and should not be routinely shared.

16. One responder (among those who believed the change is not necessary) commented:

> *"It does not seem appropriate or relevant for the Commerce Commission to commercially share sensitive NZ business information with overseas agencies unless the business is operating within the jurisdiction of that overseas agency. If the business is operating in that overseas jurisdiction then the agency in that country can presumably seek the information directly from the business concerned under its existing statutory powers."*

APPENDIX 7: BUSINESS REPORTING & CORPORATIONS LAW POLICY

1. There are three SEM Outcomes identified in the business reporting and corporation law policy areas. These are:

    - There is a standard set of representations of electronic financial and business performance data that businesses use when reporting to government in both Australia and New Zealand.

    - Trans-Tasman businesses have a single business identifier recognised by government agencies on both sides of the Tasman.

    - Trans-Tasman businesses are required to have to file company information only once to meet the requirements of both governments.

2. Overall members were unenthusiastic about the proposals. Among the general comments were:

    "without a detailed understanding of the proposal it would appear to lead to a simplified method of expanding business operation into either country. A separate legal entity in either jurisdiction to ring fence activity may still be a preferred structure."

3. Since the Questionnaire was distributed the new Companies Office website was launched. Changes to company records can now only be made by registered users. Registered users must have a new 'igovt' (identity verification) login. Igovt is being rolled out across government departments. In the long term, the scheme could allow people to deal online with government agencies and access internet banking and other secure web services using a single logon and password.

4. Australia is advancing its single business reporting regime. Since 1 July businesses have been able to pre-fill and complete government reports via their own accounting software systems, using a single secure login, known as an AUSKey.

Standard set of representations

Outcome proposal

5. The Government believes that a standard set of representations of electronic financial and business performance data that businesses use when reporting to government in both Australia and New Zealand would reduce compliance costs for business by reducing duplicated reporting and automating collection and submission of information. The governments expect the outcome to result in more efficient collection of information. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

Responses

6. Most members did not consider multiple reporting as a significant cost in New Zealand. Only one responder believed that business reporting deserves the Government's urgent attention.

Single business identifier

Outcome proposal

7. The Government believes a trans-Tasman single business identifier will significantly reduce compliance, reporting and stationary costs and open up a range of possibilities for further alignment for businesses operating in both jurisdictions. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

Responses

8. The responses did not consider the intended benefits of the outcome to be significant:

> *"Whilst we support the principle of alignment in this fashion it is difficult to see how this would work in practice without significant steps towards aligning the relevant rules and policies. (For example there are different rules for the identifying of directors addresses in Australia and New Zealand so before single reporting, the rules would need to be aligned)."*
>
> *"This is trivial. I would be guided by immediate compliance costs. If these can be demonstrated to be lower cost, then fine by me. Otherwise, all we ultimately see is more compliance cost."*
>
> *"There is some benefit in the Australian practice of always identifying a contracting party by its ABN and a similar process in NZ would reduce credit default. 'Unique' company names do get confused. There is unlikely to be significant benefit in that identifier being trans-Tasman except as an enabling step for other changes such as a joint PPSR."*

Single business portal

Outcome proposal

9. Trans-Tasman businesses will be required to have to file company information only once to meet the requirements of both governments. This has a medium term timeframe which means it is expected to be completed by the end of 2014.

Responses

10. Members did not offer example of specific advantages or efficiency gains related to the outcome:

> *"For a single portal to be safe and effective it needs to have enough sophistication to segregate some uses, such as confidential tax information. The main benefits are likely to be in navigation (will only need to find one website) and compliance reminders / diary. One-step updating of common information such as addresses could be achieved now by minor changes to existing filings to automatic data sharing."*

> *"[x] considers that a single portal could be useful, on the basis that there was a reduction in requirements because the different areas of Government were able to better share and use data and information. There would need to be no reduction in current online service functionality provided (e.g. Companies Office and IRD online filing processes). There would be security issues requiring different levels of access depending on the types of reports being submitted; payroll type data in particular where there are privacy requirements. Practically there is no requirement to have one single address for [x], this would cause issues as correspondence can too easily be lost. For example, all tax correspondence to [x] from IRD is addressed to [x]'s Head of Taxation, this would need to remain so."*

APPENDIX 8: PERSONAL PROPERTY SECURITIES LAW

1. The SEM Outcome identified in personal property securities law is "a single trans-Tasman register for personal property securities".

2. This has a short term timeframe which means it is expected to be completed by the end of 2011. The Australian Personal Properties Securities Act 2009 and register does not come into effect until May 2011.

Responses

3. Overall, members were mixed on their feelings to this reform. The general attitude was that Australian searchability would be useful but harmonisation not. Comments that were typical included:

> *"The New Zealand PPSA works well and is fairly well understood. The associated litigation (on matters of PPSA law) is very low. The increased business compliance costs associated with adopting the more prescriptive Australian model would outweigh any consumer benefits."*

4. Financial sector members acknowledged that there might be benefits of harmonisation, for example allowing New Zealand customers to easily offer security over their Australian-based personal property. However, as with all the members, they were concerned with what might be substantial implementation and compliance costs for New Zealand stakeholders if a trans-Tasman PPSR was introduced.

5. No members believed that the benefits would justify requiring re-registration.

APPENDIX 9: INTELLECTUAL PROPERTY

1. There are four SEM Outcomes identified in the area of intellectual property. These are:

    - Patent attorneys.
    - Trade mark regime.
    - Patents regime.
    - Plant variety right regime.

2. All four outcomes have a medium-term time-frame which means they are expected to be completed by the end of 2014.

3. Since the Questionnaire there has been no progress with the Patents Bill or the Patents Attorney Bill. Both are waiting for a second reading and are low in the Order Paper (number 25 and 36 respectively on 5 August).

4. On 15 July the Minister of Commerce, Hon Simon Power announced the Patents Bill, which says that computer programs are not a patentable invention, will proceed through Parliament unamended. The Intellectual Property Office of New Zealand (IPONZ), part of the Economic Development Ministry, will develop guidelines to allow inventions that contain "embedded software" to be patented, in consultation with parties. This is not relevant to the outcomes.

Patent attorneys

Outcome proposal

5. The proposal on patent attorneys is that "there is a single trans-Tasman regulatory framework for patent attorneys".

6. The main issue is the potential for the proposal to impact on the supply and cost of patent attorneys for New Zealand businesses.

Responses

7. Of the five members who responded, two gave this outcome a medium priority ranking while three gave it low priority ranking. Three members did not consider the proposal would be of significance to their business.

8. Although the three major IP firms in New Zealand "*have established relationships in Australia or associated offices*" there was concern that this outcome may result in patent attorneys going to Australia:

> *"the more likely scenario if there was a single regime would be the risk that New Zealand patent attorneys would move to Australia to obtain the benefit of preferential tax treatments, superannuation etc. If there is no additional cost or effort required to be admitted in that jurisdiction, many people would seek out the most favourable personal position. This could actually reduce the expertise available in New Zealand...there could be a cost to the New Zealand legal services industry, as well as higher costs for New Zealand clients whose work is done in Australia."*

9. Not all members agreed with this. One member said large firms used by them would be unlikely to migrate to Australia.

10. Whether Australian patent attorneys are better as they are required to have technical qualifications was also questioned:

> *"this is unlikely to affect [x] as [x] only uses patent attorneys from large and reputable firms in New Zealand. All of those patent attorneys tend to be technically qualified."*

11. However, the member who made this comment did recommend New Zealand adopting another Australian qualification:

> *"It would be advantageous to adopt the Trade Mark Attorney qualification in New Zealand. This is currently only available in Australia. Trade mark practitioners would then have a valuable recognised qualification, without the need to carry out unnecessary intensive study of patents."*

Trade mark regime

Outcome proposal

12. The proposal is that "there is one trans-Tasman trade mark regime". This could be done by either:

    (a) Having mutual recognition of each others' trade mark examination results; or

    (b) A single trade mark registration regime across both jurisdictions which would provide for a single trans-Tasman trade mark right enforceable in both jurisdictions.

13. A potential issue would be how local concerns (for example, Maori concerns and word usages) would be taken into account if a single trade mark regime went ahead.

Responses

14. Most of the six members who ranked this outcome gave this a low priority ranking. Only one gave it a medium ranking.

15. Four members agreed that having a system of national registration as well as a single trans-Tasman regime would be ideal. This combination would potentially reduce filing and transactional costs. Three members swayed towards having a single regime, although they recognised advantages and disadvantages in both. Two others preferred having two regimes.

16. Regardless of the low priority ranking, two members thought having a single regime would potentially save time and costs due to being able to search across one register, and only filing once when having a trade mark in both countries. However, for a business only wanting to register a trade mark in New Zealand, it was felt this outcome could result in delays caused by the greater scale of the Australian system.

17. One member offered the following list of advantages and disadvantages of the outcome:

    (a) Advantages:

        i. *"A single freedom to operate search is likely to reduce costs and save time.*

        ii. *Many marks are filed in both countries, and a single filing system would save time, costs and transactional and records administration.*

        iii. *A common examination process would eliminate inconsistencies between the Australian and New Zealand examination systems."*

    (b) Disadvantages:

        i. *"For a mark required in only one market, there is potential for increased costs. This is particularly relevant for NZ, where both official fees and professional charges are currently considerably lower than in Australia. Freedom to*

operate searches will be more costly and time consuming as the searchable database would be five times as large."

ii. "*the cost of registration could become prohibitive, particularly for small businesses. In addition, a single system would potentially preclude registration where there was in fact no potential for confusion – e.g. a dairy in Christchurch is unlikely to be confused with a dairy in Perth – which could mean more litigation and/or people being unable to get marks. This may in fact increase compliance/enforcement and therefore cost."*

18. One member commented on intellectual capital issues:

"if a single regime were adopted then some of the intellectual capital issues could be affected by allowing registration to be lodged in the country of choice, rather than domicile."

19. Another member compared the outcome with the European situation:

"unlike in Europe, where the establishment of community marks has resulted in protection through a large number of countries, the potential for having two countries under one mark is not significant."

Patent regime

Outcome proposal

20. The proposal is that "there is one application process for patents in both jurisdictions." This differs from the proposals on trade mark and plant variety rights regimes as they are both proposing a single regime, rather than just a single application process.

21. The differences between the two regimes could become an issue if a single application process occurs. For example, differences on the extension of patent terms, the costs of applying for patents, and WAI 262 and indigenous rights concerns.

Responses

22. Out of the five members who responded, all but one gave this proposal a low priority. The other member gave it a high priority. Four members who gave it a low priority felt having a single patent application process would be of little or no significance to their business.

23. A potential significant adverse effect on their business was identified by one member:

> *"A single patent application process could have a significant adverse effect on [x]'s business if such a system resulted in a process where a single patent application could be filed which was effective in both New Zealand and Australia. [x] wishes to ensure it continues to have freedom to operate in New Zealand for its manufacturing operations. Five times as many patents are filed in Australia than New Zealand. If the result of any new regime was that those patent applications were also effective in New Zealand, [x]'s costs associated with monitoring and defending its freedom to operate in New Zealand would increase significantly."*

24. The effect on existing patents was also commented on:

> *"Consideration would also need to be given to whether or not existing patents would need "grandfathered", as the geographical nature of patent rights means that if someone had obtained a patent in Australia but no New Zealand, there could be potential infringement effective immediately upon harmonisation, or even cases where patent rights held by different parties to each jurisdiction overlapped. This would need to be worked through and appropriate safeguards included to ensure that existing patent protection was not eroded."*

25. Members either thought the outcome would not affect innovation or that it may even have a detrimental effect on it:

> *"so long as the R & D exception to patent infringement is retained in any new regime [x]'s ability to innovate will not be affected."*
>
> *"It is possible that more inventions would be protected if inventors could protect two markets at once, but the underlying innovation is unlikely to be influenced and unless the costs of filing an application remained substantially the same, it could in fact have a detrimental impact on the protection of innovation."*

Plant variety right regime

Outcome proposal

26. The proposal is for a "single plant variety right regime".

27. There are significant differences between the current regimes in the two countries. NZ has not yet ratified UPOV 91 due to WAI 262 concerns, while Australia has. As a result Australia has a scheme consistent with the model law under UPOV 91. In addition, Australia uses a system where trials are carried out under the supervision of "Qualified Persons". These differences would have to be overcome in order to have one regime.

Responses

28. The three members who responded gave this proposal a low priority.

29. Regardless of the priority ranking the only member would be currently affected by this proposal saw advantages in it:

> *"Having a single PVR regime would significantly advantage our business as we would not be required to conduct growing trials in Australia, which would remove a level of complexity and cost. However given that PVRs are governed generally by the UPOV convention and NZ is likely to ratify UPOV91 in any event, the laws will be substantially harmonised in any event."*

30. There was concern that having a single regime would increase costs:

> *"associated with monitoring and defending its freedom to operate in New Zealand in respect of new plant varieties."*
>
> *"costs and time associated with associated with establishing growing trials in both jurisdictions."*

31. It was felt the outcome would not necessarily result in New Zealand companies having access to increased expertise:

> *"As New Zealand is a world leader in kiwifruit and other PVR offices tend to rely on the expertise of the NZ PVR office, we do not believe that the Australian expertise would add value in our case. This may be different in other crops, but as a generalisation, there is already a reasonably high level of co-operation between PVR offices worldwide under UPOV and they tend to seek out the countries that have expertise in particular crops."*

APPENDIX 10: CONSUMER LAW

1. There are five SEM Outcomes identified in the area of Consumer Law. These are:

    - Product labelling regimes.
    - Enforcement of consumer law.
    - Product safety bans and standards.
    - Consumer credit requirements.
    - Trade measurement.

2. Four of the outcomes have short-term time frames which mean they are expected to be completed by the end of 2011. These are: product labelling regimes; enforcement of consumer law; product safety bans and standards; and trade measurement.

3. The only outcome with a medium-term time frame (completed by end of 2014) is for consumer credit requirements.

4. Since the Questionnaire was distributed the Ministry of Consumer Affairs has released a discussion paper: *Consumer Law Reform: A Discussion Paper*. Submissions closed on 30 July 2010. The objectives of the review are:

    (a) To have in place principles-based consumer law.

    (b) To achieve simplification and consolidation of the existing law.

    (c) To achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the government's agenda of a single economic market with Australia.

5. The outcome of the review may be significant to these outcomes in the following ways:

    (a) *Product labelling regimes* – There was no comparison with the Australian product labelling regime in the paper, or mention of trans-Tasman harmonisation. One suggested enhancement to the Fair Trading Act was that "*consumer information standard regulation-making powers should include a similar provision [to product safety standard regulation-making powers in section 29] in order to clearly enable testing requirements to be specified in the regulation*". This was in relation to Consumer Information Standards (Water Efficiency) Regulations 2010 which has already been considered under the Framework Outcome. If implemented it could have wider implications.

    (b) *Enforcement of consumer law* – the paper suggests two additional enforcement provisions:

        i. Currently a person in trade can "undertake" to amend its behaviour which has breached the Fair Trading Act through a settlement agreement with

the Commerce Commission. The problem is that the person can choose to disregard the settlement agreement at a later time. The paper suggests having a formal provision for undertakings with the Commerce Commission that are enforceable. This would be similar to the court enforceable undertakings provision in the Australian Trade Practices Act (and proposed Australian Consumer Law).

ii. The paper proposes banning orders where an individual is restricted from holding a particular position or undertaking particular activities. Australian is not mentioned.

(c) *Product safety bans and standards* – The paper found the product safety system in New Zealand is generally consistent with the Australian system under their Trade Practices Act (and the proposed Australian Consumer Law). Some differences were mentioned, but no proposals outlined to harmonise these difference. The differences include:

i. The extension of the system for safety standards to apply to services. There is a broader scope for service safety standards in New Zealand than in Australia.

ii. The test for product bans and recalls in both countries are currently "*will or may cause injury to any person"*. The recommendation in the proposed Australian Consumer Law is to change this test to "*reasonably foreseeable*" which is part of the legal test for negligence.

(d) *Consumer credit requirements* – there was not significant mention of consumer credit requirements in the paper.

(e) *Trade measurement* – The paper said the current trade measurement law is "*substantially sound*". The paper made the following comments which are relevant to trans-Tasman harmonisation:

i. The New Zealand system could follow the Australian system which requires that all weighing and measuring equipment used in trade be verified on a regular basis;

ii. The paper considers consolidating the Weights and Measurements Act in an enhanced Fair Trading Act. This would be contrary to international trends and to Australia where there is a standalone National Measurement Act.

6. Apart from the effect on the SEM specified outcomes, there are other areas in the paper that consider options which would bring New Zealand consumer law closer to that of Australia. This shows that principles in the Memorandum of Understanding the Joint Statement are being applied to other areas of law reform. The paper states:

"The review of our consumer law at the same time as the Australian Consumer Law reforms is very timely and provides a real time opportunity to achieve harmonisation of approach where this is appropriate."

7. The paper is only at consultation stage and does not set out recommendations. These extra areas, therefore, only outline options in which trans-Tasman harmonisation has been considered. They include:

   (a) To have unfair contract terms and substantiation provisions in the Fair Trading Act: "*Unfair contract terms and substantiation provisions are included in the Australian Consumer Law... One objective of the Consumer Law Reform is to achieve harmonisation of approach, where this is appropriate, with the Australian Consumer Law.... Including unfair contract terms and substantiation provisions as part of the Fair Trading Act also would support this objective*."

   (b) To have unsolicited goods and services provisions in the Fair Trading Act: *"The work undertaken by Australia regarding unsolicited sales practices, unsolicited supply of goods and services and unconscionable conduct is timely. It has assisted the analysis which follows and also provides an opportunity to consider harmonisation of law in these areas."*

   (c) To prohibit unconscionable conduct in the Fair Trading Act: *There are no provisions in the Fair Trading Act which match those in the Trade Practices Act, despite the Fair Trading Act having largely been taken from the Trade Practices Act. The primary issue for New Zealand in this area is therefore whether there is any merit in including provisions prohibiting unconscionable conduct in the Fair Trading Act.*

   (d) To have detailed provisions regulating lay-by sales: "*The Australian Consumer Law provides a model that could potentially be adopted by New Zealand for layby sales. This model provides for regulation of layby sales using a principles-based approach under the general consumer law as a form of consumer transactions. In a New Zealand context, this would mean including such regulation in the Fair Trading Act."*

8. The Consumer Guarantees Amendment Bill, a member's bill, was introduced on 6 May 2010 and had a first reading on 21 July 2010. It seeks to improve its operation in two areas in relation to extended warranties, and the supply of goods and services by suppliers through a competitive bidding process using an online trading facility. It is not relevant to the outcomes.

9. The Food Bill, a Government bill was introduced on 26 May 2010 and had a first reading on 22 July 2010. It introduces substantial reforms to the regulatory regime for the safety and suitability of food and will be relevant to the product safety outcome.

Product labelling regimes

Outcome proposal

10. The proposal is for a "harmonised or coordinated consumer product labelling regimes". The proposal was targeted at two specific mandatory labelling regimes – gas appliance safety labelling and water efficiency labelling.

11. Immediate issues behind the proposal are now completed. The Ministry of Economic Development and the Ministry of Consumer Affairs will continue to monitor existing mandatory consumer information labelling regimes in Australia and New Zealand.

12. The main issue is whether it is better to address targeted regimes in this way as compared to a more comprehensive approach to harmonisation.

Responses

13. The priority ranking was mixed for this proposal. Two members gave it a high priority ranking, while three gave it a low or medium ranking.

14. When asked if the targeted approach to harmonisation would advantage or disadvantage their business, several members said from a conceptual perspective, it would be beneficial:

> *"It would presumably also allow economies of scale whereby producers could obtain volumes of labels which would cover both markets, rather than having to produce separate sets for each market."*
>
> *"The benefit from a harmonised approach is increased certainty and commonality of labelling requirements which leads to reduced costs for manufacturers operating across NZ and Australia. We already have this in place for food products and this demonstrates the validity of a harmonised approach to standards setting. Consumers have access to NZ and Australian products and will benefit from common labelling (less confusion) as a result of a harmonised approach".*

15. In contrast, a company doing business only in New Zealand saw the outcome as being limited

> *"As a domestically focused business we see the benefits of harmonisation as limited for us, further, where, harmonised rules apply to our business e.g. food labelling, we perceive some disadvantages as the domestic industry's voice on issues is weaker on a trans-Tasman basis relative to Australian interest."*

16. The same members commented on the potential net benefits for the economy if harmonisation of product labelling occurred:

> *"Whether there are net benefits for the economy will depend on the extent of trade between the countries. Where there is a large amount of trade, as in the case of food, the benefits could be expected to exceed the costs. Accordingly, we*

recommend harmonisation be considered on a sector by sector, or product group by product group basis".

17. Country of origin labelling was commented on by a couple of members:

"overseas labelling requirements does influence consumer expectations regarding labelling in this market, e.g. the strong demand for country of origin labelling. Generally speaking where there is strong consumer demand for information that is not prescribed by regulation, brand-owners are willing to provide this information on a voluntary basis to meet consumer demand, and/or position their offer relative to others."

"at present product from NZ and Australia are differentiated despite the fact that under CER we are moving to operate as one market and perhaps it is time to recognise that an origin label "product of NZ or Australia" is appropriate".

Enforcement of consumer law

Outcome proposal

18. The proposal is for "harmonised or coordinated approaches to enforcement of consumer law". The aim of this proposal was to develop a vehicle to facilitate improved communications and information sharing between consumer law enforcement agencies on both sides of the Tasman to enable a more consistent and/or coordinated approach to the enforcement of consumer law where this is appropriate.

19. The main issue for this proposal is whether the benefits in harmonisation would be more than the costs in making the required changes.

Responses

20. The five members who responded gave this proposal a low or medium ranking of priority. They said it would make either very little or no difference to their business.

21. The perceived benefits of this proposal depended on whether the member was operating trans-Tasman or only within New Zealand. One who operates only in New Zealand gave it a low priority but saw the need for:

> *"greater collaboration between agencies in relation to interpretation of rules and a commitment to undertake similar levels of monitoring and enforcement".*

22. This member also commented on the lack of enforcement of food standards in the New Zealand market:

> *"The approach seems to be to only respond to complaints. This leads to double standards in the market where the large mainstream brands go to considerable lengths to comply with the rules, while smaller competitors simply ignore the rules with impunity. There is a particular problem with goods imported by ethnic traders – often the labelling isn't even in English (a mandatory requirement)."*

23. Most members operating in both markets saw potential benefits in the outcome:

> *"The benefit is the increased certainty of interpretation across Australian jurisdictions and between Australia and New Zealand. At present the major concern is the lack of common interpretation between the different Australian jurisdictions and this causes major issues for both NZ and Australian businesses operation across the Australian States. Food labelling (including claims) standards are a good example of the high level of inconsistency of interpretation between Australian jurisdictions and the issues this causes businesses."*

24. Some agreed that there is an increase in the need for enforcement under consumer law that have a trans-Tasman element:

> *"this is not an urgent issue but suspect with increasing online activity and migration to Australia it would be beneficial to establish harmonisation".*
>
> *Increase in e-commerce, website advertising, and use of email (SPAM laws).*

Greater migration to Australia including existing customers who continue to use [x] as their bank (mainly via website) and existing customers who have credit facilities with us who then default."

25. One member saw an increase only "*to the extent that our business engages with Australian consumers, where those consumers are currently being prevented from enforcing their rights under our NZ consumer contracts / supplies*."

26. This was not so for all trans-Tasman businesses, one saw the outcome as disadvantageous to their business:

"Domestic supplies: unaffected day-to-day except to the extent that our business is required to comply with rules which have been put in place by Australian legislature (which may or may not be politically motivated). Cross-border supplies: to the extent they are not already available, potentially opens easier avenue for Australian customers to enforce rights through NZ process. In general, net effect would appear to be disadvantageous to our business ... enforcement rules necessarily flow from the consumer laws themselves. To the extent our respective consumer laws are different, then there would be a real risk that the enforcement rules would not be a perfect fit to either NZ or Australia. Harmonisation may be difficult, costly, and possibly out of keeping with the spirit of each country's consumer laws. Cons potentially may outweigh the pros."

27. One member listed the following advantages and disadvantages:

(a) *Potential advantages*

i. "Any easing of the ability to enforce judgements in our favour across the Tasman will for the most part be of benefit to us (e.g. easier to track down and seek judgments of debtors who default). [x] suspect this will become increasingly important as migration from NZ to Australia increases.

ii. If greater communication, cooperation and coordination include greater communication by the government to parties such as [x] about what these processes are and how they affect us, both here and in Australia, then this will be a positive thing in terms of our compliance and ability to tap into these processes for our own purposes.

iii. If movement towards a single economic market leads to closer alignment of processes for enforcement and actual consumer laws then this will also be of benefit to us as we will have a much better understanding of how things stand here and in Australia. The alignment between consumer laws themselves is important and could be highly beneficial, especially with increased ability now to do internet advertising, online banking and cross border transactions. We are increasingly doing more online and if the laws are more closely aligned not only will our understanding of their laws help us to avoid inadvertently breaching Australian law, we are also more likely to be operating in a way that is already compliant with Australian laws. Closer alignment of laws is likely to be of benefit to us from a [x]

perspective. If we have to comply with Australian laws because we are a subsidiary of [x] then if the laws are closely aligned this should not be too onerous for us to comply with.

(b) *Potential disadvantages:*

i. *If we inadvertently breach Australian laws (very possible in the online and email space) this will be more easily enforceable by Australian authorities if there is greater communication, coordination and cooperation in this area. So from this perspective this will not be an advantage for us."*

Product safety bans and standards

Outcome proposal

28. The proposal is to "streamline arrangements for mutual recognition of product safety bans and standards, based on the Productivity Commission's Review of Mutual Recognition Schemes".

29. One issue will be over how necessary it is to preserve separate discretion on product safety bans.

Responses

30. Out of the three who responded, two members gave this a low priority ranking while one thought it deserved "reasonably high priority."

31. There was concern over how the outcome would affect members' businesses, one commented on:

> *"Australia's history of banning NZ fruit (apples) in contravention of the existing framework. We are not sure how the proposal would affect our business and assume it would not given what we sell (kiwifruit) and that we have not had any issues to date".*

32. Most of the members preferred a streamlined arrangement for mutual recognition rather than a common approach:

> *"assuming there is an evidence based approach to establishing the safety or danger of a product, mutual recognition should work effectively".*

> *"Agree that a streamline arrangement for mutual recognition of product safety bans standards will promote clarity for businesses and consumers. Many businesses operate across NZ and Australia and consumers have access to NZ and Australian goods – hence it makes sense to have a streamlined approach. Basic difference in approach by NZ (risk based) vs Australia (hazard based) needs to be recognised and protected. Key is to have a streamlined arrangement for mutual recognition rather than a common approach. NZ approach works well and should not be changed to adopt the Australian approach. NZ approach involves voluntary industry responses and this must be protected."*

33. Not all felt mutual recognition was necessary and some saw the need for preserving a separate discretion in regards to safety bans:

> *"From a sovereignty perspective, this proposal seems to impinge somewhat on the ability of separate states to have separate rules for their own citizens. While Australia and New Zealand have similar cultures, the two states do differ significantly on some major policy issues, and governments are meant to represent their own citizens – it is difficult to see how agreement would be reached in this are, as it directly affects the rights of citizens and thus supports some form of population-based determination (i.e. if 75% of the total population*

of the two countries supports a ban, then it would happen) – but this means that NZ would always be disadvantaged".

Consumers credit requirements

Outcome proposal

34. The proposal is that "businesses face equivalent consumer credit requirements and enforcement regimes on both sides of the Tasman".

35. One issue would be over whether having an equivalent regime would result in increased costs for lenders and/or borrowers.

Responses

36. The three members who responded gave this proposal a low priority ranking.

37. Members saw disadvantages and advantages in the proposal for their businesses.

    (a) The disadvantages were:

        i. *"changing the CCCFA will bring significant one off compliance costs".*

        ii. *"A disadvantage may be that whilst NZ consumer laws are similar to those of Australia (and UK) they also take on a local flavour resulting from public pressures and lobbying groups. For example the CCCFA has been in operation in NZ since 2004 and case law and guidelines and best practice are developing. It is much more established than the more recent Australian equivalent legislation. Harmonisation opens the risk that Australian flavours may not necessarily suit the products / rules preferred by our NZ consumers".*

    (b) The advantages were:

        i. *"for a trans-Tasman Bank harmonisation of this area of law would allow for [x] to harmonise compliance obligations and procedures".*

        ii. *"the advantage of course is cheaper implementation and ongoing compliance costs for [x]".*

        iii. *"In time it would allow greater certainty for those cross-border supplies, and allow [x] to implement one rule and compliance plan across both its NZ and Australian businesses. However, initially there would be considerable additional costs and disruption for NZ businesses if they had to adopt a new regime."*

38. One comment was that it is difficult to know if the Australian regime is more expensive for lenders and/or borrowers than the New Zealand regimes:

> *"At present it is hard to be certain because a large amount of the Australian regime is still being implemented / developed and the NZ CCCFA is still relatively new. However the proposed New Zealand and Australian regimes promote*

'responsible lending' although it is interesting to note that Australia is heading towards interest rate caps."

Trade measurement

Outcome proposal

39. The proposal is for "equivalent approaches to approval and verification of weighing and measuring equipment on both sides of the Tasman". There have already been meetings between the Australian National Measurement Institute (NMI) and the New Zealand Ministry of Consumer Affairs (MCA) which resulted in an agreed planned way forward.

40. The issue is whether equivalent approaches are necessary given the current similarities in approaches.

Responses

41. Out of the three who responded, one gave this outcome a low priority ranking while two gave it a medium priority ranking.

42. Generally members did not see this proposal as affecting their business and were content with the status quo:

> *"In NZ the trade measurement is the average quantity system (AQS). In Australia the current system is the minimum quantity system. However from the 1 July 2010, businesses can choose to continue with this system or adopt the AQS system. This provides flexibility and also allows for the business to choose either system. For this reason the status quo is suitable and no action is required in relation to harmonisation."*

43. One member saw overall benefits in the outcome although from a retail perspective the status quo is sufficient:

> *"it's not a specific priority for us, but the proposals are likely to be beneficial in the overall context...from a suppliers' perspective, there are likely to be benefits from harmonisation."*