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Australian Government

Attorney-General's Department

Access to Justice Division

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7 March 2011

Mr Kelvin Thomson MP
Chair
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr Thompson

Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement

I refer to the Department's appearance before the Joint Standing Committee on Treaties on 28 February 2011 in relation to the above Agreement. At that hearing, the Department took on notice two questions. Enclosed are the Departmental responses to those questions.

The action officer for this matter is Thomas John who can be contacted on 6141 3090.

Yours sincerely

Karen Moore

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JOINT STANDING COMMITTEE ON TREATIES
ATTORNEY-GENERAL'S DEPARTMENT

Question Taken on Notice at the hearing into the Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (the Agreement)

Senator Kerry O'Brien, asked the following question at the hearing on 28 February 2011:

Senator O'Brien—I am prompted to ask this question because there are certain notable proceedings taking place in the United Kingdom about an extradition. I see in this agreement there is provision for the enforcement of subpoenas. If someone were subpoenaed under this agreement, rather than extradited, would they have the same protections against being returned to New Zealand as they would under an extradition arrangement?

Mr John—There are safeguards with respect to subpoena proceedings that have been incorporated into the legislation. In as far as they protect in the same way as some would be protected under an extradition request, a different area within the department deals with that kind of question and I must admit that I am not be able to comment here but I will be very happy to provide further information.

Senator O'Brien—If you could take that on notice, that would be good. It is probably less contentious with New Zealand, but I can imagine that inventive prosecutors might look at this option. For example, with a country that had a death penalty it would be a way of circumventing our refusal to cooperate in proceedings where a death penalty was involved.

Dr Stone—New Zealand does not have the death penalty.

Senator O'Brien—They do not now.

The answer to the senator's question is as follows:

The legislation implementing the Agreement provides the definition of subpoenas as relating to the production or giving of evidence in matters covered by the Agreement only. Extradition, by contrast, generally relates to a process whereby a state surrenders to another state, for the purposes of criminal prosecution, a person that is suspected to have committed a criminal offence in another state. The Agreement does not cover extradition between Australia and New Zealand.

The Agreement incorporates arrangements that are currently already provided under the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Act 2006* (NZ). These Acts provide for the service of subpoenas in New Zealand or Australia, respectively, only where leave is granted by a court. These Acts will be repealed to avoid duplication upon commencement of the legislation implementing the Agreement.

The legislation implementing the Agreement, the *Trans-Tasman Proceedings Act 2010* (Cth) and the *Trans-Tasman Proceedings Act 2010* (NZ), provide safeguards for the service of subpoenas between Australia and New Zealand. Specifically, the legislation allows for the person named in the subpoena to apply to the court that gave leave for the subpoena to be served to have the subpoena set aside. The legislation also requires the court to set aside the subpoena if the court is

satisfied that any one of a number of situations would present in the event that a person complied with the subpoena. Such situations relevantly include: the person would be liable to be detained for the purpose of serving a sentence if he or she were to comply with the subpoena; or the person is liable to a prosecution or is being prosecuted for an offence in the territory where the subpoena was issued.

JOINT STANDING COMMITTEE ON TREATIES
ATTORNEY-GENERAL'S DEPARTMENT

Question Taken on Notice at the hearing into the Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (the Agreement)

The Hon Dr Sharman Stone, asked the following question at the hearing on 28 February 2011:

Dr Stone—To what extent are our legal practitioners—Australian lawyers and New Zealand lawyers—able to work in each other's jurisdictions without changes or special registrations? Is this also movement in that area of being able to work without impediment in either New Zealand or Australia?

Mrs Moore—Not specifically. Generally, if one lawyer wants to appear, for example, via video conference in a court in the other country, they still have to be admitted to practice in that country. There is a small exception to that in relation to applying to have the proceedings stayed on the grounds that the other country's court is the more appropriate venue for that dispute to be heard in, but otherwise it does not interfere with the regulation of the legal profession in either country.

Dr Stone —So won't that leave a major impediment still in place? If you are being represented by a law firm in Australia, clearly registered to function in whatever state, and then they cannot give this video conference evidence or do the work they need to do in the other jurisdiction, is not that a major impediment to in fact a free-flowing, less bureaucratic legal interchange between the two countries?

Mr John—I have to say that it was not addressed in this particular context in the sense that there were specific regulations. My understanding is there is work being done around mutual recognition across the Tasman, but I would have to take that question on notice in order to provide detailed information on that, because that is not my area.

Dr Stone—So that is unfinished business?

Mr John—We are not dealing with that particular aspect of it, no.

CHAIR—If you could take that on notice, we would appreciate it.

The answer to the honourable member's question is as follows:

A scheme for the mutual recognition of professional occupations, such as legal practitioners, between Australia and New Zealand is already in existence. The *Trans-Tasman Mutual Recognition Act 1997* (Cth) (the Mutual Recognition Act) makes it possible for a lawyer admitted to the New Zealand legal profession to be admitted to the Australian legal profession as though New Zealand admission were a sufficient ground of entitlement to Australian admission. New Zealand has mirror legislation, the *Trans-Tasman Mutual Recognition Act 1997* (NZ), which provides for a lawyer admitted to the Australian legal profession to be admitted to the New Zealand legal profession.

The Agreement goes further by allowing for legal representatives, who do not have local registration in the country in which the court proceedings are located, to seek leave of the court to appear remotely if they are registered where their client resides. The Agreement further provides that a legal representative seeking a stay of the proceedings under the Agreement has right to appear remotely without leave.