SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 2

Program 1.1

Question No. 49

Senator Bishop asked the following question at the hearing on 12 February 2013:

a) In relation to the list of jurisdictions with which Australia has a reciprocal arrangement for judgements under the Foreign Judgement's Act, how are those jurisdictions selected for inclusion?
b) What process does the Attorney General's Department go through to assess prospective jurisdictions for inclusion in that list?
c) How relevant is the similarity of legal systems in these assessments?
d) What role do other considerations such as trade negotiations play in this process?

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

a)

Part 2 of the *Foreign Judgments Act 1991* (the 'Act') provides, amongst other things, for the registration and enforcement in Australia of judgments given in foreign courts to which the Act has been extended. The hallmark for such an extension is "substantial reciprocity". Only countries that can satisfy the "substantial reciprocity" requirement can be selected.

Whether "substantial reciprocity" exists depends upon a mutual understanding by the relevant domestic and foreign courts in relation to the recognition and enforcement of each other's' judgments. If the relevant courts can reach such understanding, then, on the advice of the courts, the authorities of each country give an assurance that their courts will reciprocate. In Australia, the exchange of assurances results in the amendment of the Foreign Judgments Regulations 1992 (the Regulations), including the respective foreign court(s) in relation to which the assurance was given.

When the Regulations were first promulgated in 1992, only New Zealand's superior and inferior courts were included. According to the Explanatory Statement, the superior courts of New Zealand were selected because all Australian superior courts had already been prescribed under New Zealand's *Reciprocal Enforcement of Judgments Act 1934* (New Zealand's reciprocal enforcement of judgments legislation which is similar to that of the Act). In relation to the inferior courts, the Explanatory Statement confirms that New Zealand had agreed to enforce the money judgments of all Australian inferior courts.

In 1993, the Regulations were again amended and a significant number of superior and inferior foreign courts were added to the regime. According to the Explanatory Statement, the foreign courts were selected because either foreign legislation had already extended reciprocity of treatment to Australia or because foreign authorities had given an undertaking to extend such reciprocity.

Subsequent amendments to the Regulations selecting further foreign courts to the regime have been made based on similar considerations.

b)

The Department's processes are targeted at establishing "substantial reciprocity" as required under the Act. Because there are a number of ways with which "substantial reciprocity" can be established, there is no singular process that determines the selection of a foreign court. For example, "substantial reciprocity" may be established based upon Australia's inclusion in relevant foreign law, extending reciprocal treatment to Australian courts (as for example was the case with the selection of France and Germany). Alternatively, "substantial reciprocity" may exist because there is an agreement between Australia and the foreign country to that effect (such as was with the selection of the NZ inferior courts).

Importantly, reciprocity exists because courts, on the basis of judicial comity, agree to recognise and enforce their respective judgments accordingly. The executive assumes merely a facilitative role in that regard.

c)

The similarity of the legal systems is an important consideration, for example, for the selection of courts of countries that were part of the Commonwealth of Nations. However, it is not a decisive criteria. For example, a range of countries belonging to the civil law tradition have also been selected, including France, Germany and Japan. The key again is that domestic and foreign courts agree to reciprocate the recognition and enforcement of each other's judgements.

d)

Like the similarity of legal systems, current or planned trade negotiations may play a role in relation to considering the selection of the trade negotiation parties' courts for the purpose of inclusion in the regime.

e)

The Act is currently subject to a review of Australia's private international law rules and principles. The review is being conducted under the auspices of the Standing Council on Law and Justice. A public consultation is currently on foot and aims at identifying whether reform in this area would deliver worthwhile micro-economic benefits for the community. The discussion paper released in support of this public consultation raises a number of questions. These questions include whether there is a need to reform the current jurisdictional rules under s 7 of the Act and whether more foreign courts should be added to the regime (and if so, which ones).

Multilaterally, Australia has been active and has work towards seeking to progress the so-called "Judgments Project", which is being conducted under the auspices of the Hague Conference on Private International Law (HCCH) and aims at the conclusion of a global modern instrument that will govern the recognition and enforcement of judgments internationally.