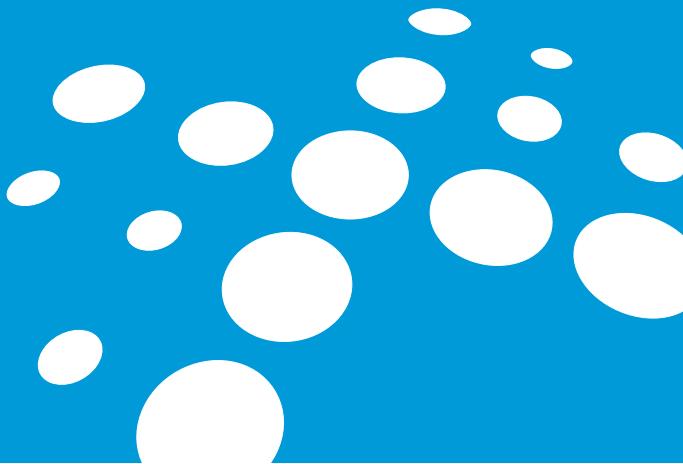


# Views from the Inside

No. 1

## Arrangements for facilitating trans-Tasman government institutional co-operation



# Arrangements for facilitating trans-Tasman government institutional co-operation



Australian Government

Department of Finance and Administration

Ministry of Economic Development  
*Manatū Ōhanga*



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# Series Foreword

I am delighted to be associated with this exciting new publishing venture at ANZSOG.

*Views from the Inside* will be a series of papers written on challenging issues in public sector management. Their purpose will be not only to disseminate new thinking and offer new insights into problems, but will allow all who read them to gain an insight into the ways that public sector leaders go about the task of doing things better.

Most of the papers will be written by senior public servants with an intimate practical knowledge of the issue at hand. They will be accessible and able to be read for profit by all people interested in the issue and not just by those acquainted with the research literature.

I am especially pleased that the first paper in the series is on the important issue of trans-Tasman relations. As the Chair of the Australian and New Zealand School of Government, I find it wholly appropriate that this inaugural paper should bring our two countries and their public services together in this way. The paper has grown out of a presentation by Ian Watt and Geoff Dangerfield at the trans-Tasman CEOs Meeting held in Wellington in February 2007.

I recommend this excellent paper to you.

**Dr Peter Shergold AC**

Chair, ANZSOG

Secretary, Department of Prime Minister and Cabinet, Australia

# Preface

This paper has its beginnings in the increasing levels of co-operation between the Australian and New Zealand Governments. The aim of the paper is to develop options to support trans-Tasman co-operation between countries, by examining the range of government interactions that currently take place, and drawing on these interactions to develop a set of principles that can be considered when entering into a new interaction, or reviewing existing arrangements.

Whole of government projects such as this paper need strong sponsors. We are, therefore, grateful for the significant support and encouragement from agency heads in Australia and New Zealand. In particular, we would like to recognise the support and contributions of the Department of the Prime Minister and Cabinet and the Department of Foreign Affairs and Trade in Australia, as well as the State Services Commission and the Ministry of Foreign Affairs and Trade in New Zealand.

Neither of our departments could have undertaken this project without input from other departmental and agency officials. The experience of trans-Tasman institutional co-operation lies with those who are actively engaged in it—from business law to border control and exchanging staff capability through secondments.

Departmental Chief Executives from both sides of the Tasman contributed to the project at an inaugural meeting in Wellington New Zealand on 15 February 2007. Their thoughtful and vibrant consideration of the ideas in this paper confirmed the need for the project, and their comments have been considered in the finalisation of this paper.

Mutual understanding and trust emerged as essential ingredients of the success of the co-operative arrangements described in the paper. They have also been critical to the Department of Finance and Administration and the Ministry of Economic Development in undertaking the project, which has led to the production of this paper.

We hope that officials contemplating new areas of co-operation or expanding existing arrangements will find this paper useful in framing their thinking. It should also be helpful in identifying departments/agencies that already have co-operation arrangements and may be able to share their experience.

It is also hoped that by developing an understanding of the range of existing interactions currently in place, and by drawing on the lessons learned from these interactions, officials will not have to feel that they are starting from scratch when entering into a trans-Tasman interaction.

**Dr Ian Watt**  
Secretary  
Department of Finance and Administration

**Mr Geoff Dangerfield**  
Chief Executive  
Ministry of Economic Development



# Setting the scene

New Zealand and Australia, in some ways, have led the world in co-operation between governments. The Trans-Tasman Travel Arrangement (1973), the Australian New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) 1983, the Trans-Tasman Mutual Recognition Arrangement (1998) and the development of a Single Economic Market, stand out in this relationship. These are complemented by an array of other formal and informal arrangements, agreements and treaties.

The development of a Single Economic Market between Australia and New Zealand seeks to adopt a strategic approach to shaping and guiding greater co-operation between the two economies in order to realise the benefits for business, consumers, and investors. To date, the work of the Single Economic Market program has been across a range of areas where the two jurisdictions seek to achieve comparable outcomes and lower the regulatory barriers to bilateral integration. A Single Economic Market will be achieved when businesses have the ability to conduct seamless operations across the Tasman without regulatory overlap.

Single Economic Market initiatives being progressed include:

- business law, banking regulation and accounting standards;
- competition and consumer policy;
- information sharing between regulators, mutual recognition and cross-border regulation and co-operation;
- investment protocol; and
- streamlining taxation and retirement savings portability.

The high level of co-operation between Australia and New Zealand partly reflects close economic, social, and cultural ties. The range of existing links and the public and bi-partisan political support for them in both countries make it almost inevitable that there will be future enhancement to trans-Tasman co-operation. The question is not so much if but how that will occur.

Existing Australia — New Zealand institutional co-operation covers the full range of Government activity. Some working in those areas see some of the benefits of co-operation, but not the full extent of whole-of-government activity and the full benefits than can arise from that activity. Others may not see the benefits but recognise fully the costs of working through differences in our respective New Zealand and Australian systems. Yet others will start from scratch in designing arrangements for institutional co-operation that have already been developed or that have proven costly or less effective than they needed to be. There is, therefore, a benefit in providing those seeking to facilitate present and future trans-Tasman institutional<sup>1</sup> co-operation, with some readily available guidance on possible options to further enhance that co-operation.

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<sup>1</sup> 'Institutional' and 'institutions' as used in this paper have a broad meaning. This extends beyond incorporated or unincorporated bodies to the full range of meetings and other trans-Tasman interactions for which a form of governance is required.

This includes how best to learn about the costs and benefits of delivering individual options, how to design fit for purpose instruments, and identifying sources of advice and experience.

This paper, therefore, is something of a roadmap for facilitating New Zealand — Australian institutional co-operation. It is intended to help guide officials along this journey as quickly and easily as possible. Accordingly, this paper:

- Broadly examines the context for trans-Tasman institutional co-operation and outlines the extensive range of existing co-operation.
- Sets out some broad lessons on the range of interactions that currently occur, ranging from administrative and information sharing approaches to binding processes and even joint bodies, any of which need to be considered on a fit-for-purpose basis. This includes comments on the work towards the proposed Australia New Zealand Therapeutics Products Authority (ANZTPA).
- Outlines a framework for consideration of trans-Tasman institutional co-operation.
- Develops an outline of design issues to be considered for trans-Tasman bodies.

# Introduction

The term and extent of co-operation between the Australian and New Zealand governments continues to grow. Co-operation extends through all levels of both countries' Executives—from the Prime Ministers downwards. It includes the chief executives of various government departments and agencies and their senior executives. Co-operation includes exploring the potential to share scarce resources, learning policy and implementation lessons and continued participation by New Zealand in an array of Ministerial Councils and officials' groups.

The Australian and New Zealand Parliaments are also actively involved in considering trans-Tasman interactions and co-operation. Recent Parliamentary reviews of the Australia — New Zealand relationship include:

- the 2006 report by the House of Representatives Legal and Constitutional Affairs Committee on the Harmonisation of Laws within Australia and between Australia and New Zealand;
- the 2006 review by the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade of Australia — New Zealand Trade and Investment; and
- the 2002 review of Closer Economic Relations (CER) by the New Zealand Parliament's Foreign Affairs, Defence and Trade Committee.

Cross-jurisdictional legal co-ordination is also increasingly the focus of trans-Tasman co-operation efforts. This includes work to improve civil court proceedings and the enforcement of orders and judgements across the Tasman, as evidenced by the announcement in May 2007 that the Australian and New Zealand governments have agreed to reforms recommended by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement.

The development and implementation of co-operative efforts and arrangements to facilitate those efforts often occurred in relative isolation and with little whole-of-government focus. Yet many of these may have an affect on other areas of government. Accordingly, the lessons and experience from other Australia — New Zealand efforts need to be shared.

This paper draws together the lessons from across the Australian and New Zealand Governments. It seeks to guide facilitating future institutional co-operation efforts by developing a framework for trans-Tasman institutional co-operation. It is not intended to be prescriptive. There are too many variables in the range of activities for that. The guidance should help those thinking about further means of facilitating to be able to:

- consider institutional co-operation into a wider and appropriate context;
- identify the options for facilitating institutional co-operation; and
- quickly work through the costs and benefits of the different options to facilitate implementation and make well informed recommendations.



# Existing trans-Tasman institutional co-operation

The Australia — New Zealand relationship is arguably one of the closest in the world. It is underpinned by a fairly unique nexus of strong, historical, cultural, geographical, political ties and people-to-people links. The two countries share a common legal and constitutional heritage, extensive shared values and interests, and confidence in each other's legal and regulatory systems and institutions. This has supported a high degree of operational co-operation across the Tasman, coordination of regulation and business laws, and the establishment of some shared institutions. Business linkages, particularly trade and investment, have flourished in this environment.

Ongoing co-operation between Australia and New Zealand, affects both economies' competitiveness in the region. Co-operation can help to lower our relative costs, improve quality, and enable us to benchmark performance both within our region and in a global context. There are also potential benefits in terms of export market activities, particularly within the Pacific and Asia Region.

## People-to-people links

The Trans-Tasman Travel Arrangement (TTTA) allows New Zealanders and Australians to live and work in each other's country with the minimum of bureaucratic obstacles. There are at present some 448,000 New Zealanders living in Australia, and almost 57,000 Australians resident in New Zealand. Australia is also New Zealand's largest source of foreign tourists and New Zealand is Australia's. New Zealanders and Australians currently make almost 2 million trips across the Tasman each year.

This freedom of movement across the Tasman is an important element in the bilateral relationship, underlining the people-to-people nature of the broader relationship and underpinning the government-to-government relationship and economic growth under CER.

Supporting the large numbers of Australians and New Zealanders living in and visiting each other's country are bilateral agreements in areas such as social security, health services, and child support. Australians are treated as domestic students under the terms of New Zealand's Education Act and New Zealanders also currently pay the same fees as Australians for access to all levels of the Australian education system. New Zealand sporting teams are increasingly included in Australian national sporting leagues, such as netball, soccer and rugby league, and the dominance of Australia and New Zealand teams in the successful Super 14 competition has been longstanding.

## **Significant political engagement**

A high level of political engagement supports the complex matrix of connections that underpin the bilateral relationship. There are formal annual meetings between the two Prime Ministers and other key advisors. There are also a range of annual meetings including between Customs, Defence, CER Ministers, and Treasurer/Finance Minister and six-monthly Foreign Ministers' meetings. New Zealand Ministers participate in many of Australia's State/Federal Ministerial Councils and there are joint Ministerial Councils in areas where we have (or have agreed to implement) joint agencies (specifically the Australia New Zealand Food Regulation Ministerial Council and the Therapeutic Products Interim Ministerial Council). Regulator to regulator and other officials' contacts are regular and widespread.

Connections are similarly strong across the spectrum of government agencies. Co-operative initiatives in recent years have included:

- the 2004 Australia and New Zealand Climate Change Partnership;
- the Australia/New Zealand Labour Forum (Chief Executives and senior management of the Department of Labour and Department of Employment and Workplace Relations have met annually since 2005);
- the 2005 establishment of a High Level Customs Steering Group to address a number of important border issues; and
- the 2006 Memorandum of Understanding (MoU) on Co-operation between the Australian Government Department of Families, Community Services and Indigenous Affairs and the Ministry of Social Development.

The New Zealand Treasury Department has regular meetings with both the Australian Treasury and the Department of Finance and Administration and there are annual talks between the two Secretaries of Foreign Affairs and Trade.

The defence relationship is underpinned by the Closer Defence Relations Agreement (1991, revised in 2003). New Zealand and Australia co-operate closely to maintain security and stability in the South Pacific. Notably, Australian and New Zealand defence and police personnel are deployed side by side in the Solomon Islands, Timor-Leste and most recently, Tonga.

## **Closer economic relations**

The Australian New Zealand Closer Economic Relations Trade Agreement (1983) (ANZCERTA) has been the key framework advancing the bilateral economic relationship for nearly a quarter of a century. Its organic nature has helped it evolve from commitments to eliminate tariffs, import licensing and quantitative restrictions and export incentives (for all goods) to allowing for free trade in services under the 1988 Services protocol. Free trade in goods and in nearly all services was achieved by 1990, five years ahead of schedule. More recent developments under this agenda include new rules of origin (2007) and the current efforts to achieve an investment protocol. This, in turn, has helped produce the current agenda, focused on developing a relatively seamless trans-Tasman regulatory environment.

ANZCERTA has been described by the World Trade Organisation as the ‘world’s most comprehensive, effective and mutually compatible free trade agreement’. The depth of the economic integration it has facilitated is reflected in the extent of trade, investment and people flows and depth of regulatory coordination and institutional co-operation.

ANZCERTA’s strength has been its ability to move beyond a traditional free trade agreement into a number of unique co-operation and institutional arrangements, which support deep and broad interactions across the spectrum of government and business activity. These may include:

- the unilateral recognition of laws (for example alignment of insider trading laws);
- policy coordination (for example, under the MoU on Business Law Co-ordination);
- mutual recognition (the Trans-Tasman Mutual Recognition Arrangement (TTMRA)) which, is more far reaching than mutual recognition regimes virtually anywhere else; and
- joint institutions (for example, the joint food standards agency, Food Standards Australia and New Zealand (FSANZ)).

With free trade in goods and nearly all services under ANZCERTA, the respective Government’s shared goal is now a seamless business environment, or Single Economic Market (SEM). A primary objective of deeper regulatory co-operation under the SEM is to further reduce compliance costs for businesses operating in both economies, through eliminating duplicate or conflicting regulation. This will promote the competitiveness of the trans-Tasman economy and achieve, where possible, greater economies of scale in carrying out complex and intensive regulatory functions.

The SEM agenda does not prescribe a particular end point or set of regulatory or institutional arrangements to govern trans-Tasman markets. Rather, under the SEM the Australian and New Zealand Governments are seeking innovative and practical ways to reduce further barriers to trans-Tasman business. These include barriers arising from different, conflicting or duplicative regulatory requirements. They also include strengthening our joint capacity to influence international regulatory developments and enhancing international competitiveness by creating an economic environment that attracts global capital and skills.

The SEM also creates an opportunity for New Zealand and Australia to look outward together. That is, to take advantage of our close economic relationship to work co-operatively to influence or address international developments (such as international regulatory convergence, global skills shortages, competition for foreign investment, increasing regionalism) which represent significant challenges to both our economies.

The focus of work of the SEM has been across a range of areas including banking regulation, business law co-ordination, taxation, and competition and consumer policy. The aim of this SEM work has been to reduce barriers to provide a seamless regulatory environment for business, consumers, and investors across the Tasman. The range of initiatives currently underway within the SEM work program are focused on four overarching themes:

- **reducing the impact of borders:** reducing formal barriers and streamlining border clearance processes, for example single lines for Australians and New Zealanders at major Australian airports and ongoing customs co-operation arrangements;

- **improving the business environment through regulatory coordination:** reducing behind-the-border-barriers to trade by streamlining trans-Tasman regulatory frameworks;
- **improving regulatory effectiveness:** finding ways for regulators on both sides of the Tasman to operate more efficiently and effectively, for example the proposed Australia New Zealand Therapeutic Products Authority will have the critical mass needed to effectively test medicines and therapeutic products to international standards; and
- **supporting business opportunities** through industry and innovation policy co-operation, and facilitating connections between businesses to take advantage of increasing openness in trans-Tasman markets.

## Private and public sector institutional co-operation

Complementing the government-to-government links, business connections are deep and extensive. They underpin the increasing integration of the two economies. Eighty senior political, business, academic, media and community leaders have met annually in the context of the Australia New Zealand Leadership Forum since 2004. The Forum is intended to extend and strengthen the constituency in each country that is well informed about, and favourably disposed towards, exploring future options for the development of the bi-lateral relationship.

Ties have also been strengthened by a network of links throughout the corporate world, universities, research institutes and cultural and sporting groups. Notably, in the educational area, the Australia and New Zealand School of Government (ANZSOG) was established by a consortium of Australian and New Zealand Governments, Universities and Business Schools to enhance the depth and breadth of policy and management skills and invest in the further education and development of those who are destined to be leaders in the public sector.

# Existing vehicles for trans-Tasman institutional co-operation

Continuing to develop the trans-Tasman trade and economic relationship is an important priority for both Governments. This will certainly involve greater institutional co-operation between governments and co-ordination of governance structures. To date, however, there has been no systematic approach to capturing the lessons learned from the development and implementation of vehicles for trans-Tasman co-operation. Learning from this experience should improve the quality of these decisions, the efficiency with which issues may be resolved and their practical implementation.

Despite the broad context within which the Australia/New Zealand relationship operates, there are misconceptions about the ways in which institutional co-operation can and/or should take place. These misconceptions include:

- formal institutional co-operation needing to take place through a trans-Tasman body (an ‘institution’) established by law;
- the institutional co-operation agenda being confined to regulation and economic management; and
- defined work programs needing to be part of institutional co-operation between the governments.

These misconceptions hide the significant diversity of co-operative experiences to date and lessons learned from various engagements. To address the misconceptions the discussion that follows classifies the different types of institutional co-operation as a basis for the framework developed in the following section of the paper.

## Vehicles and instruments for trans-Tasman institutional co-operation are diverse

A review of the known vehicles for co-operation shows that there are significant institutional co-operation arrangements. These include:

- regular Ministerial meetings (both multi-jurisdictional and trans-Tasman only);
- regular officials’ meetings between government agencies/departments intended to co-ordinate activity, share policy and operational lessons, and share experience;
- shared representation on boards, councils and other bodies;
- staff exchanges between departments and other government agencies;
- mutual recognition;

- joint venture or other unincorporated activity (both multi-jurisdictional and trans-Tasman only);
- joint body, company or other incorporated institution (both multi-jurisdictional and trans-Tasman only); and
- alignment through unilateral policy and law reform.

## Institutional co-operation covers the full range of government activity

Case studies are a useful way to illustrate the breadth of existing co-operation activity. Several examples are discussed below:

### Annual meetings

Australian and New Zealand government departments and agencies are meeting more frequently and on a wider range of issues than ever before. Formal arrangements include:

- **Closer Economic Relations (CER) senior officials meetings** that take place prior to each CER ministerial forum. Led by the foreign affairs departments, these meetings have a wide-ranging agenda and involve officials from both countries across many departments.
- **Australian Department of Employment and Workplace Relations/New Zealand Department of Labour:** Two annual meetings have now taken place. The meetings provide networking opportunities for senior staff from both countries to share experiences and learning in relevant policy areas, identify and discuss common matters of interest and develop opportunities for joint work. The meetings also reinforce the strong working relationship between the two Departments on international issues.
- **Australian Department of Families, Community Services and Indigenous Affairs/New Zealand Ministry of Social Development:** Annual meetings take place at the CEO and senior management level. The two departments have concluded an MoU that outlines how they will share information and experience with policy development and implementation, as well as establish a secondment program.
- **Australian Treasury/New Zealand Treasury:** Annual meetings of senior management teams provide an opportunity to compare notes on economic developments and policy issues and the overall management of a Treasury department.
- **New Zealand Treasury/Department of Finance and Administration:** Annual meetings of Senior Management teams. There have also been contacts on specific issues including the development of Australia's Future Fund, public sector budgeting and public sector management and governance.

### Secondments between government departments/ agencies

Secondments, as well as other ad hoc appointments of Australian and New Zealand staff into the other country's government, have helped develop a better appreciation of how the respective systems of government work. These exchanges have assisted in gaining an understanding of the differences and similarities between the two systems and have supported a flow of policy development and implementation of ideas between the two governments.

The Australian and New Zealand Treasuries and Foreign Affairs Departments have long-standing secondment arrangements. A similar arrangement was recently put in place between the New Zealand Treasury and the Department of Finance and Administration. Secondments are also envisaged between New Zealand's Ministry of Social Development and Australia's Department of Families, Community Services and Indigenous Affairs.

## Information sharing

Such is the degree of confidence and trust between the two countries that information across a wide range of areas is shared in the interest of managing risk and enriching the trans-Tasman policy environment.

For example, areas where Australia and New Zealand Customs share intelligence include:

- Tactical or operational level intelligence sharing in the air passenger stream. One recent successful joint operation has led to on-going targeting of possible drug couriers travelling from South America to Australia transiting New Zealand.
- Exchange of risk and threat analyses.
- Exchange of commercial shipping risk assessments and details of boarding activities (actions undertaken and intelligence gained) where the next port of call is in our respective countries. This exchange was formalised in 2005 and now occurs very regularly. It has led to a better use of resources in both countries.
- There also exists a flexible, needs-driven, exchange of information on other vessels/crews that are of interest to either national agency.

## Memoranda of Understanding (MoUs) and other arrangements

Many of the vehicles for institutional co-operation are under the umbrella of arrangements that do not have the force of international law, but demonstrate significant commitment between the two Governments. These cover social, regulatory, and other areas of government. They include:

- **Australia New Zealand Government Procurement Agreement (ANZGPA):** This is a long-standing arrangement under ANZCERTA between the Australian Government, State and Territory Governments and the New Zealand Government. Its objectives are to create and maintain a single Australia New Zealand government procurement market to maximise opportunities for competitive suppliers and reduce costs of doing business for both government and industry. Specifically, ANZGPA seeks to ensure the absence of inter-state and trans-Tasman preference schemes and other forms of discrimination in government procurement, based on the place of origin of goods and services.
- **MoUs between the Australian and New Zealand Privacy Commissioners:** The Privacy Commissioners on both sides of the Tasman face similar issues and challenges. The MoU provides for the sharing of information and experience, as well as secondments.

- **Memorandum of Understanding on Business Law Co-ordination:** An MoU signed in 1988 provided the starting point for dialogue between Australia and New Zealand on business law issues. In 1999, officials agreed to revise the MoU to ensure that it reflected a common understanding of co-ordination in business law, key objectives for progressing work in this area, and a revised work program. The MoU on the Co-ordination of Business Law was signed in 2000, focusing on co-ordination and recognition that a single approach is not necessarily suitable for every area. Co-ordination of competition law, securities law, and takeovers law has since been extensive. Work is proceeding on consumer protection law, electronic transactions law, disclosure regimes, cross-border insolvency, and co-operation on patent examination.
  - **Memorandum of Understanding on contract for purchasing oil and petroleum products from Australian suppliers:** New Zealand and Australia entered into an arrangement to fulfil its obligations under the Agreement on an International Energy Program with the International Energy Agency. The New Zealand Government, therefore, decided to contract for additional petroleum stocks in New Zealand, with the contracts overseas in the form of an option to purchase petroleum stocks in certain circumstances. For these stocks to be credited to New Zealand's petroleum reserves, the Governments agreed that the Australian Government will not impede the release of these stocks to New Zealand.
  - **Trans-Tasman Mutual Recognition Arrangement (TTMRA):** The Trans-Tasman Mutual Recognition Arrangement (1998) has substantially reduced regulatory impediments to trans-Tasman trade relating to goods and occupations. It gives effect to two basic principles:
    - any good that may be legally sold in Australia may be legally sold in New Zealand, and vice versa; and
    - a person registered in Australia to practice an occupation is entitled to practice an equivalent occupation in New Zealand, and vice versa.These two obligations provide a powerful driver of on-going policy and regulatory co-ordination, including through Australian Ministerial Councils on which New Zealand participates. The COAG principles and guidelines on good regulatory practice recognise the need for trans-Tasman coordination.
  - **Trans-Tasman Travel Arrangement (TTA):** The Trans-Tasman Travel Arrangement is a series of ministerial understandings which allow Australians and New Zealanders to visit, live and work in each other's country without restriction.
- There are also less formal arrangements in place to facilitate bilateral co-operation. For example on fisheries issues, there is ongoing co-operation on surveillance and enforcement of illegal fishing in the Southern Ocean and bilateral discussions, usually annually, on adjacent fishing zones. In conjunction with other partners, Australia and New Zealand co-operate on funding and implementation arrangements for projects resulting from the final report of the High Seas Task Force and as members of the Pacific region, both are participants in negotiations for the South Pacific Regional Fisheries Management Organisation.

## Unincorporated joint ventures

Unincorporated joint ventures, such as ENSIS, between CSIRO and New Zealand's Scion (formerly the Forest Research Institute) are also emerging co-operation initiatives. ENSIS is a combination of Australasia's leading forestry research organisations pooling together knowledge and expertise. By using the complementary skills and tools, ENSIS's objective is to reduce duplication in research and to provide better technology outcomes more quickly for its clients and partners.

## Joint trans-Tasman bodies

Even with the existence of a range of simpler institutional co-operation mechanisms, sometimes more formal structures are appropriate. Since the ANZCERTA agreement was signed there have been an increasing number of trans-Tasman bodies created which are accountable to the Australian and New Zealand Governments, as well as the State Governments of Australia. Examples include:

- **Food Standards Australia New Zealand (FSANZ):** An independent statutory agency established by the *Food Standards Australia New Zealand Act 1991*. Working within an integrated food regulatory system involving the governments of Australia and New Zealand, FSANZ sets food standards for the two countries. FSANZ is part of the Australian Government's Health and Ageing portfolio and the Food Safety portfolio of the New Zealand Government. FSANZ is a small agency, with offices in Canberra and Wellington. The 146 employees are members of the Australian Public Service, including 12 people employed in New Zealand. FSANZ is governed by a Board with members drawn from Australia and New Zealand who have a wide range of expertise and experience in food matters.
- **Australia New Zealand Therapeutics Products Authority (ANZTPA):** Australia and New Zealand signed a Treaty on 10 December 2003, setting out the two countries' desire to establish a joint agency for the regulation of therapeutic products<sup>2</sup>. ANZTPA is proposed to replace the Therapeutic Goods Administration in Australia and Medsafe in New Zealand. The primary objective of the parties in concluding the Agreement was to safeguard public health and safety, by establishing a world class agency to regulate therapeutic products. The Treaty also aims to reduce barriers to trans-Tasman trade and enhance Australia's and New Zealand's profile and influence internationally over the development of international regulatory standards and harmonisation initiatives. It is intended to facilitate the export of therapeutic products beyond Australasia.
  - The framework for the regulatory scheme proposed to be administered by ANZTPA would be set up under the Treaty and, once passed, implemented through Acts of Parliament in both countries, a single set of Rules made by the Ministerial Council, and technical Orders made by the Managing Director. The Treaty contains a fundamental requirement that the proposed joint agency has no lesser accountability to Ministers, Parliaments, industry and the public than is currently the case for Medsafe and the Therapeutic Goods Administration.
  - ANZTPA would be overseen by a two-member Ministerial Council comprising the New Zealand Minister of Health and the Australian Health Minister. It would also have a five member Board.

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<sup>2</sup> The Agreement between the Government of Australia and the Government of New Zealand for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products.

- **Australia and New Zealand School of Government (ANZSOG):** This is an important academic initiative supported by six governments and ten higher education institutions. The governments involved are the Commonwealth of Australia, the New Zealand Government, and the State Governments of New South Wales, Queensland, Victoria and Western Australia. The objective is developing high quality public sector leaders in both countries.

# A framework for facilitating trans-Tasman institutional co-operation

The significant breadth and depth of co-operation outlined above is a rich source of insights and lessons. It is useful to assess these in the context of an overarching framework. This framework can also guide the development of future co-operative arrangements.

## Objectives for trans-Tasman institutional co-operation

A starting point for establishing institutional co-operation is clarity about the objectives being pursued. These also define the benefits that might arise from greater co-operation. The common objectives that need to be considered include:

Objective	Explanation and Examples
Lower business and other compliance costs and technical barriers to trade	Lowering administrative costs of regulatory compliance (e.g. the costs of completing forms or training staff about regulatory compliance) and administrative costs associated with participating in both markets, such as additional costs of testing and certification in the other market (e.g. TTMRA; mutual recognition agreement on securities offerings).
Increased policy and regulatory effectiveness across borders	Ensuring that activities and people are not able to escape the reach of the law by crossing borders (e.g. mutual support agreement between the New Zealand Securities Commission and the Australian Securities and Investments Commission (ASIC), facilitated by changes in domestic law to allow information sharing; proposals for mutual banning of directors)
Increased cost effectiveness policy implementation and enhanced capacity within Government	Reducing costs to governments of making and administering regulations. This can extend to creating a common administrative capability (e.g. Joint Accreditation System of Australia and New Zealand (JAS-ANZ); Food Standards Australia New Zealand (FSANZ)) or drawing on Australian capability (e.g. appointment of Australian economists as lay members of the New Zealand High Court for Commerce Commission cases)
Increased influence over international policy directions, norms, rules and standards	In some cases cooperating to ensure that the development of regulatory norms, rules, and standards developed internationally but with likely domestic effects take New Zealand and Australian interests into account (e.g. both countries have committed to adopting international accounting standards and the domestic accounting standards bodies are coordinating the positions they take in the international accounting standards setting body)

## Approaches to trans-Tasman co-operation

Drawing on the range of co-operation arrangements outlined above, options for trans-Tasman co-operation fall into three broad categories:

- unilateral coordination;
- bilateral undertakings that are not legally binding; and
- bilateral legally binding commitments, including joint institutions.

### Unilateral coordination

One approach to reducing regulatory differences is to take the regulatory and policy settings of the other country into account when reforming one's own policy or law. Often this is done against the backdrop of converging regulatory and policy approaches internationally and the domestic choice is to go one-step further and decide to

- a. choose the model of the other country if there are two competing models internationally and/or
- b. adopt the specific provisions of the other country's law or policy.

Another approach is to unilaterally recognise the law of the other country, for example in a situation where an Australian firm operating in New Zealand (or vice versa) is already regulated and each country has confidence in the efficacy of the other's regime.

Examples of the options for unilateral action include:

	Explanation	Examples
Unilateral adoption	New Zealand adopts laws, policies or practices used in Australia	Alignment of insider trading laws Introduction of New Zealand's voluntary administration regime for business rehabilitation
	Australia adopts the laws or practices used in New Zealand	Adoption of a formal clearance regime for mergers by Australian competition regulators (this is yet to be enacted but is contained in a Bill supported by the Australian government)
Unilateral recognition	Compliance with Australian law satisfies New Zealand requirements	Safety standards for electrical appliances and fittings issued in Australia

Unilateral co-ordination of laws or policy retains maximum flexibility to determine regulatory settings while conferring many of the benefits of co-operation, including:

- A direct reduction in compliance costs for firms and others who only have to comply with one regime (where there is unilateral recognition) and a reduction in learning costs for firms where the regimes are similar (unilateral adoption).
- A familiar policy and regulatory environment for firms and other parties. Recent research suggests that familiarity is important to firms and has the effect of lowering the hurdle for entering into the other market.

- A sounder basis for co-operation between those implementing legislation and policy leading to laws and policies that are more effectively enforced and implemented across borders in relation to trans-Tasman transactions and others who are dealt with consistently on both sides of the Tasman, and potentially greater opportunities for learning between implementers of legislation and policy.
- A basis for strengthening mutual confidence in each other's laws, policies and decision-making by policy implementers and regulators, which makes the prospect of more formal arrangements such as mutual recognition agreements (aimed at further reducing compliance costs for firms and others) much more likely.

## Bilateral undertakings that are not legally binding

The principal difference between unilateral co-ordination and bilateral undertakings that are not legally binding is that the latter provides for reciprocity, i.e. both countries agree to have regard to the laws of the other when undertaking law reform with a view to reducing compliance costs (which is an undertaking made in the MoU on Business Law Coordination).

Such undertakings also help systematise co-operation, i.e. cross-appointments to regulatory agencies or other bodies (e.g. New Zealanders and Australians sitting on advisory boards) ensure that the trans-Tasman dimension is consistently taken into account. As such, bilateral undertakings represent a strong commitment to co-operation while at the same time (because they are not legally binding) preserving a high level of flexibility for each country to determine its own policy and regulatory settings.

Examples of non-legally binding undertakings include:

	Explanation	Examples
Policy coordination	Policy coordination and information sharing	MoU on Business Law Coordination Trans-Tasman Accounting Standards Advisory Group (TTASAG) Trans-Tasman Council on Banking Supervision
Standards development	Joint standards development	MoU between New Zealand's Financial Reporting Standards Board (FRSB) and Australian Accounting Standards Board (AASB) Product Safety Standards Consumer Safety Standards
Enforcement co-operation	Assistance in gathering evidence and enforcing compliance	MoU between the Securities Commission and ASIC
Cross-agency appointments	Arrangements for New Zealand membership of Australian institutions, and vice versa	New Zealand and Australian Takeovers Panels Accounting Standards Review Board (ASRB) and Financial Reporting Council (FRC) FRSB and AASB

Bilateral undertakings may need to be facilitated by changes to domestic law. For example, New Zealand's Securities Act has been amended to give the Securities Commission the right to exchange information with overseas counterparts, which includes ASIC, thus making possible the MoU between the two Commissions that provides for mutual assistance in relation to enforcement activities.

They may also provide the framework and impetus to develop legally binding instruments. For example, the recently agreed mutual recognition agreement on securities offerings has been on the action agenda of the MoU on Business Law Coordination, which is based on the principle that 'for each particular situation a firm will only have to comply with one set of rules, have certainty as to the application of those rules in the other jurisdiction, and which regulator it needs to deal with'.

### **Bilateral legally binding commitments**

Bilateral legally binding commitments, often contained in Treaties and reflected in domestic laws embody a strong commitment to reciprocity; provide the greatest certainty of outcomes (e.g. common food standards developed by FSANZ) and are the most durable cooperative arrangements (given the potentially high cost of extracting from them). For these reasons, they also significantly reduce each country's ability to determine its own policy and regulatory settings. Further, experience has shown that there can be practical difficulties in developing arrangements given differences in underlying legal frameworks and public sector management systems.

Examples of bilateral legally binding commitments include:

	<b>Explanation</b>	<b>Examples</b>
Administrative co-operation/contracting arrangements	New Zealand or Australia contracts with the other government to provide services on its behalf	A contracting option is under consideration in relation to patent examinations
Harmonisation	New Zealand and Australia harmonise standards/rules but maintain independent enforcement/implementation institutions	Food standards
Mutual support	New Zealand and Australia include provisions in legislation or by agreement requiring each regulator or other agency to avoid actions (including policy decisions) that may be detrimental to the attainment of the other's objectives	Legislative changes proposed by the Trans-Tasman Council on Banking Supervision
Mutual recognition	New Zealand and Australia retain their own rules and institutions, while recognising the rules of the other country	Trans-Tasman Mutual Recognition Arrangement Mutual Recognition of Securities Offerings
Joint institution	New Zealand and Australia jointly own an institution that provides functions on behalf of both countries	FSANZ JAS-ANZ Proposed ANZTPA

**Administrative co-operation arrangements** include the Customs Co-operation Arrangement and Social Security Agreement.

As far as officials are aware there are no contracting arrangements in place between New Zealand and Australia, but these may be a viable alternative to joint institutions in some situations. An example might be where a New Zealand or Australian government entity lacks sufficient specialist skills to undertake assessments and approvals, but these are available in the other country's government. Contracting arrangements have the advantage of allowing more national control to be exercised over the outputs than might be the case with a joint institution. Care should be taken in the drafting of the instrument to ensure that it is a contractual arrangement, subject to domestic law, and not an international arrangement subject to international law. Questions may also arise as to which countries' law the contract is to be subject to. Additionally, there may be a loss of some security of supply as this relies upon a willing supplier (and the ability to clearly specify regulatory services and performance measures).

**Mutual recognition agreements** are often seen to be a particularly effective form of co-ordination, as they allow each country to maintain its own rules while removing the cost of having to comply with two sets of rules. Experience has however shown that mutual recognition agreements are only viable when there is already a high level of convergence between the two sets of policy. Therefore, there are potentially significant costs for policy divergence (e.g. businesses will move to the least cost jurisdiction to register their product). This means that mutual recognition agreements are generally supported by consultation and referral provisions (in the case of the TTMRA) and/or policy coordination commitments (in the case of mutual recognition of security offerings), both of which reduce the flexibility of the parties to determine their own policy and regulatory settings.

**Harmonisation of standards** is often used as the co-operation mechanism when the objective is to both eliminate differences that create costs for firms operating in both markets and share resources in what is often a very expensive standards setting process. There is then the choice of the institution to undertake the standards setting work, which has in the case of food standards resulted in both a harmonisation mechanism and a joint institution. While harmonisation would appear to provide the greatest limitation on parties' ability to determine their own policy and regulatory settings, opt-out provisions can reintroduce some flexibility. In addition, thought has been given from time to time to a dual regime, whereby a firm that operates only in the domestic market can opt to comply with domestic rules, but if it wants to operate in both markets a single harmonised regime is available.

**Joint institutions** are a means to an end, rather than an end themselves. Thus, the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) has no regulatory functions but accredits quality management systems certifiers and product certifiers, FSANZ is primarily a standards-writing body, and ANZTPA is proposed to undertake a broad range of regulatory functions from approvals to enforcement. There are very few examples of joint regulatory institutions internationally, outside of the European Union. Particular challenges have been encountered in their design, primarily because government-owned institutions are embedded in the public management systems in each country, and while these may be similar in intent they are inevitably different in detail.

There is also a range of issues that arise out of the particular policy and regulatory functions that the joint institutions carry out because of differences in the underlying policy and legal frameworks of both countries. Despite these differences, officials now have more experience

in designing mutual recognition and harmonisation agreements and joint institutions. This experience both provides precedents for future initiatives and will be drawn on in key areas of work that should provide the basis of a more consistent approach.

## Key judgements

This analysis of options for institutional co-operation leads to some key judgments for choosing the particular approach to facilitate trans-Tasman co-operation:

- How much **certainty** is desirable? The more formal the arrangement the likely more certainty that the objectives will be achieved over time. For example, in some cases firms require policy certainty to give them confidence to invest.
- How much **influence** in the decision-making process is desirable? The more formal the arrangement the more influence, such as through having a seat at the table and participating in formal decision-making processes. This is likely to be a relevant criterion in situations where one country's decision-making directly and significantly affects the other's interests. There is also a strategic consideration, as a formal relationship in one area could have spill over benefits in other areas;
- How much **flexibility** is required to accommodate unique conditions and preferences? The more formal the arrangement the less flexibility there is likely to be. Safeguards could, however, be built into the arrangement to manage risks associated with the loss of flexibility. These safeguards include decision-making criteria, voting rules, opt-out provisions, and dispute resolution provisions; and
- How **feasible** is the option? The negotiation of the mutual recognition agreement on securities offerings, was for example, significantly protracted due to no prior arrangement for the mutual enforcement of civil pecuniary penalties or criminal fines. In a similar vein, the negotiation of the proposed governance arrangements for ANZTPA has been challenged by the fact that the public management systems of New Zealand and Australia seem to be different in more ways than had been previously appreciated.

The importance of safeguards as a means of retaining some flexibility in decision-making needs to be considered. Given co-operation is founded on a mutual interest, in almost all situations there will either be a common agreement or differences will be resolved by consensus. Safeguards are necessary for the management of those differences that cannot be resolved by consensus. Ultimately, an ability to opt-out (for example, a particular standard) may be the only way to resolve a difference of opinion.

Some differences, while represented as arising out of unique local conditions or different policy preferences, may actually reflect low quality analysis of the costs and benefits of particular actions. This issue is being addressed at least in part through co-ordinating another part of the New Zealand and Australian governments' machineries, namely their regulatory impact analysis systems. Governments in both countries require a regulatory impact statement (RIS) to be produced for most regulatory proposals.

In addition, a continued focus on evidence-based policy in both countries is also critical. As noted above the Council of Australian Governments (COAG) has also recently agreed that New Zealand can review and comment on a draft RIS (those that accompany the initial proposals to regulate, not the proposals that finally go to Cabinet) that have New Zealand implications, at the same time as they are formally reviewed by the Australian Office of Best Practice Regulation.

# A framework for considering options for possible trans-Tasman bodies

Trans-Tasman bodies may be the pinnacle of trans-Tasman co-operation but they can be a challenging form of institutional co-operation. In particular, there is a need to fully appreciate the implications of whether a body is an Australian Government/New Zealand body or an Australia Government/ State & Territory/ New Zealand body.

Despite the challenges, a trans-Tasman body may be the best option of those outlined in the framework discussed above. However, the problems encountered and solutions devised in respect of joint bodies that have been established to date suggest that more specific guidance would be particularly useful to help with the formation of joint bodies.

The starting point is to recognise that there are choices for institutional design. Existing trans-Tasman bodies serve different purposes, have different forms and accordingly reflect different design complexities.

Four existing forms of body illustrate the scope for choice:

## **A formal advisory body**

The Trans-Tasman Accounting and Auditing Standards Advisory Group (TTAASAG) provides advice to both governments on the harmonisation of accounting standards. Professional bodies, the accounting standards bodies, the auditing standards bodies and a designated senior official from each country comprise the Advisory Group. It is accountable for two expectations: to produce a consensus report each year to the respective governments to inform coordinated policy development and standards development; and to maximise Australia and New Zealand's joint influence in international accounting forums. TTAASAG, whose mandate is clear and supported by Ministers, is a powerful coordination body supporting the objective of harmonisation. TTAASAG is at the simplest end of the spectrum of institution design.

## **A service delivery agency**

The Joint Accreditation System–Australia New Zealand (JASANZ) is a joint body to provide accreditation services to certification bodies in both countries. It has no policy function but is a critical part of both countries standards and conformity assessment infrastructure. Accreditation manages domestic risk to health safety and the environment, and facilitates domestic and international trade. JASANZ, therefore, is responsible for managing considerable risks on behalf of businesses and regulators in both countries. JASANZ was established by Treaty as an international organisation. It is self funded. As such its governance and accountability regime is defined in the Treaty and falls outside the provisions of Australia's and New Zealand's public sector governance regimes.

## A joint standards body (which involves Australian state jurisdictions)

As noted earlier, Food Safety Australia and New Zealand (FSANZ) was established as a joint food standards setting body with those standards enforced by the State, Territory and New Zealand Governments. The Treaty associated with FSANZ in effect provides for New Zealand membership of Australia's Ministerial Food Council by establishing the Australia New Zealand Food Regulation Ministerial Council, which comprises Ministers from Australian Federal and State jurisdictions and the New Zealand Minister. New Zealand has one vote in ten on the Council but has certain rights in respect of nominations to the FZANZ board—three members out of twelve. The Australian Minister appoints the board.

## A joint regulator (Australian Government and New Zealand)

The Australia New Zealand Therapeutic Products Authority (ANZTPA) is proposed to replace the Australian Therapeutics Goods Administration (TGA) and the New Zealand Medical Devices Safety Authority (Medsafe). If established, it will assume responsibility for the full range of regulatory functions currently undertaken separately in each country.

As a legal entity, it would be recognised in the legislation of both countries. Legislation is currently being considered by the New Zealand Parliament and has recently been released for consultation in Australia. Under legislation the body would be directly accountable to the New Zealand and Australian Ministers and the respective Parliaments.

If established, ANZTPA will deliver common regulatory outcomes and have authority to implement laws in both countries. The regulations and decisions would be subject to common regulatory review and appeal mechanisms. This includes providing access for industry in both countries to those review and appeal mechanisms.

There has also been a range of accountability mechanisms included in the proposed arrangements. Among them are procedures for appropriate stakeholder input into and parliamentary scrutiny of subsequent legislation, including Rules and Orders, a procedure for the review of regulatory decisions, access/scrutiny of annual, corporate, and financial planning information and access to personal and official information.

## Approach to decision-making

Choosing the right form of trans-Tasman body requires a clear understanding of the explicit function it will carry out and the nature and materiality of the decisions it will make, and whether they are binding or not. Reflecting the framework outlined earlier, the key issues that need to be considered include:

- the scope and extent of **sovereign decision-making** each party is prepared to cede in the interest of achieving the benefits;
- the requirement for **flexibility** to accommodate unique conditions and preferences, including future preferences;
- **influence** in the decision-making process; and
- the **feasibility** of achieving the option within the political and legal constraints.

Three general principles support efficient development processes for joint bodies:

- **Understand the similarities and key differences** between the public governance systems and the broader legal systems in New Zealand and Australia, as well as the

significant interconnections between them. This will typically involve a multi-disciplinary team encompassing matter specific issues, financial areas (including within the agency, whole-of-government and cross-jurisdictional skills) and legal skills (including drafting of treaties, primary and secondary legislation, constitutional law, international law, criminal law, administrative law, commercial law, taxation and other areas).

- Ensure that **principles** of public body governance are applied from the outset. This would typically involve, as a minimum, consultation with relevant central agencies and lessons learned from existing bodies.
- Recognise the **timeframes** and **scale** of the resources required to design and establish the body from the outset. Consideration needs to be given to implications of the resources of other agencies that are to be involved in the exercise.

The considerable experience gained from the establishment and operation of the existing (and proposed) trans-Tasman bodies is useful in applying these principles. This experience, most recently that gained through work on the proposed ANZTPA but from other bodies as well, includes the development of workable solutions to problems that are likely to be common to all future trans-Tasman bodies. The most significant of these are discussed below.

## Governance and Accountability Issues

Attached at the **Annexure** are diagrams outlining the potential scope of various issues related to governance and accountability for any joint trans-Tasman body. It could be useful background in the development of a toolbox on governance and accountability issues for government officials to use when considering trans-Tasman institutional co-operation.

## The Australia New Zealand Therapeutics Authority (ANZTPA) experience

As well as governance and accountability issues, the experience with the proposed Australia New Zealand Therapeutics Authority (ANZTPA), for which legislation is currently before the New Zealand Parliament, is a valuable source of insights about the development of a trans-Tasman body.

As the first joint regulator, the proposed ANZTPA is significantly more ambitious in its governance, regulatory and enforcement functions than previous trans-Tasman agencies. Its establishment accordingly posed new challenges both in negotiations and design which provide some valuable lessons. Those examined here mostly reflect process.

## Process Lessons

The complexity of the ANZTPA experience provides for some specific practical lessons for any agencies that might be considering creating a new trans-Tasman body. These include:

- ways of working across government and across the Tasman;
- approaches to negotiations;
- how agreements and decisions reached are recorded; and
- the need for and approaches to dispute resolution mechanisms.

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<sup>3</sup> The Joint Accreditation System of Australia and New Zealand (JASANZ) and Food Standards Australia New Zealand (FSANZ)

## **Ways of working across government and across the Tasman**

All government agencies with an interest in a proposal should be identified early in the process, especially central agencies and those with a role in the relevant governance policy.

A means of conducting officials' processes has to be devised which can also keep working teams manageable in size, co-ordinated and quickly responsive:

- Establish a **project plan** that everyone is committed to, with latitude for creative flexibility as necessary.
- **Strong commitment to processes that bring to bear a whole of government perspective:** The time and resources to complete a project of this kind cannot be overestimated. Issues can arise that may involve agencies that were not anticipated at the outset. There may well be value in more generally informing agencies about the proposed body, to seek early expressions of interest or advice.
- Establish a dedicated project team, with **clear leadership and authority to co-ordinate and act.** Establish a key co-ordinating department with the authority to bring the right people to the table.
- Ensure that the **right people of sufficient seniority are at the negotiating table and empowered to take decisions.** Clearly establish who the **key officials** are, particularly when not dealing with matching departments in each country. Typically, relevant bodies include the agency with prime domestic responsibility for specific issues and those with broad experience in trans-Tasman coordination efforts.

## **Approaches to negotiations**

Officials should be aware of the relevant political realities of both parties in the negotiations and have an appropriate and clear mandate.

The first stage should involve:

- Confirming clearly the objectives of the exercise and the scope of political authority.
- Both countries gaining an understanding of how the government and business in each country operates in practice, as well as in theory.
- Building a good understanding of each others' institutional frameworks to support more open perspectives on governance options.
- Obtaining independent advice/information on industry views and the market situation in each others' countries.
- Building a good understanding of our respective legal systems which, although quite similar, are different in a number of important respects that can have implications if seeking to harmonise particular legislation.
- In considering the mix of skills required, identify key policy and regulatory expertise that will be required from the outset and throughout the process.

## **Recording agreements and decisions reached**

The work on ANZTPA to date has taken considerably more time than originally anticipated. As a result, some key officials changed in the course of the negotiations. The implications of this offered the following key lessons:

- The need to have recorded outcomes and agreed understandings of significant meetings.
- Changes in personnel, while often unavoidable over long time-frames, can raise issues that require consideration. For example, it can risk shifting the appetite for innovative approaches and problem solving, especially if the reasons for an underlying approach have not been well documented. What might be regarded as a creative and innovative solution by those at the start of processes may be seen by those coming later to the table as unacceptable risk or precedent.
- It is important to capture as much as possible of the context and the assumptions for decisions and positions taken during the negotiations.

## Dispute resolution mechanisms

The ANZTPA experience suggests the need to understand that joint work on developing a trans-Tasman body is a negotiation, albeit undertaken in a co-operative spirit. While interests may be generally aligned, there are still going to be points of difference.

Open communication between the lead agencies and other key officials is important from the outset. For ANZTPA the two Ministers in the Therapeutics Ministerial Council played a key role in this, with assurances of political support for the work being done, as well as providing capacity to resolve issues if they arose.

In addition:

- Often a whole of government approach is needed on both sides of the Tasman. This requires strong internal co-ordination prior to negotiations.
- Means to informally float ideas and concerns outside of the negotiations are critical. This can help in promptly identifying issues that may need deeper and separate attention, in parallel to other discussions.
- Consultation is an increasingly critical part of the legislative process in both countries. Mechanisms to successfully manage broader consultation and provide the capacity to reach agreements during the negotiation stage are needed as the negotiations proceed.
- Beyond the Ministerial Council-type arrangements, means to involve a wider set of ministers to ensure whole of government commitment or to inject innovative approaches may also help the establishment process.
- Clarity on both sides is needed about the principles and process for escalating issues to higher authorities within both governments' to provide a "circuit-breaker".

## Conclusion

These process lessons point to broader issues in the establishment phase of ANZTPA and the development of trans-Tasman bodies more generally. In developing this paper further, and in developing governance principles and potential vehicles for trans-Tasman co-operation (the 'toolbox') more work could be undertaken to identify and examine in greater detail, broader lessons from the ANZTPA experience. The extent to which these lessons are more generally applicable to the establishment and operation of trans-Tasman bodies could also be considered.



# Conclusion: general lessons for trans-Tasman institutional co-operation

This paper develops a reasonably comprehensive framework for considering options for trans-Tasman institutional co-operation that may prove helpful for policy officials in both countries as they reflect on the scope for future co-operation initiatives and their design.

Eight general lessons can be drawn from past experience as outlined in this paper:

## **Lesson #1: Consider co-operation in the context of the existing relationship**

The broad scope of the Australia — New Zealand relationship outlined at the beginning of this paper means that for many areas there will be a presumption in favour of co-operation. In other areas of policy development, both sides should seek to minimise unintended consequences on the other party. For example, the Trans-Tasman Mutual Recognition Arrangement (TTMRA) for goods and occupations is a cornerstone of a single economic market and means that many policies developed on either side of the Tasman will have implications for the other side. Understanding the implications of those policies and how they may impact on the integrity of the arrangement requires proactive co-operation efforts, both within each jurisdiction and with counterparts in the other jurisdiction, including with State/Territory governments.

## **Lesson #2: Consider more than one option for co-operation**

The framework for considering institutional co-operation developed in this paper shows the options for approaches to co-operation that exist. There is no presumption in favour of one or the other. Indeed, the framework shows that thinking about effective trans-Tasman co-operation should not be confined to joint bodies. Thinking only about joint bodies risks two things: that the instrument is over engineered to achieve the policy objective; or that coordination is regarded as too hard, risky and expensive. Beyond joint bodies there is, for example, a choice between harmonising or mutually recognising mandatory standards. There is also a choice between establishing a joint institution to undertake certain approval functions and contracting the other agency to provide approval functions. The choice of option should be informed by long-term strategic considerations and the desire to ensure the least cost, most effective co-operation vehicle possible.

Experience also suggests that informal and/or non-binding forms of co-operation can deliver many of the benefits ascribed to binding formal instruments. In many cases informal co-operation will be the driver of convergent regulatory regimes which then create the conditions for deeper coordination. For example, the unilateral alignment of our respective securities regulations made possible the eventual Treaty on Mutual Recognition of Securities Offerings.

### **Lesson #3: Differences between the jurisdictions matter**

Australia and New Zealand have very similar legal and other traditions, but they are not the same. The differences that exist make formal and institutional co-operation arrangements potentially more difficult. These need to be considered when developing co-operation arrangements. These differences are not insurmountable but require careful attention if the co-operation arrangement is to be successful. Generally speaking, the more formal the arrangement the more significant that these differences become and the greater effort and advice required to manage them. That said, experience with existing trans-Tasman bodies and other co-operation approaches can help to quickly address issues that arise in new areas of co-operation.

### **Lesson #4: For trans-Tasman bodies consider applying the principles of existing governance regimes that exist on both sides of the Tasman**

Thinking about governance on both sides of the Tasman comes from broadly the same school. In this context, a trans-Tasman body need not necessarily be that different to the creation of a government body in one or other jurisdiction. The same public sector management principles will generally apply. There is a significant amount of guidance in Australia and New Zealand about the principles that underpin the creation of a new public body (such as Australia's *Governance Arrangements for Australian Government Bodies*, New Zealand's *Crown Entity Legislation and Public Finance Act* and the *Legislation Advisory Committee Guidelines on the creation of a new public body*), as well as lessons from the bodies that have already been established. ANZTPA is the more recent example.

### **Lesson #5: Identify clearly how the proposed co-operation efforts will deliver net benefits for both countries.**

This should be based on a robust and clear-eyed view of the judgements that need to be weighed. The benefits of this co-operation generally will not be delivered without some cost arising. It is, therefore, important for the potential investment of resources on facilitating institutional co-operation to be understood and supported at an early stage. In addition, each country has its own national interests and rights to protect our sovereign states and the impact on these interests and rights needs to be considered as part of any cost benefit analysis.

### **Lesson #6: Ensure political authority at all critical stages of the design process particularly in relation to binding commitments**

Ministers, and in some case Cabinet, will need to be aware of and agree to the potential trans-Tasman processes given their ultimate accountability to the respective Parliaments and populations. This is vital for gaining the mandate required to develop any significant new co-operation arrangement.

### **Lesson #7: Consider the different political systems between Australia and New Zealand—federal versus unitary—and their impact for institutional cooperation**

Australia is a constitutional federation and New Zealand is a unitary state. Each country has its own national interests and rights to promote and protect as sovereign states. In Australia, policy implementation may often involve the States and Territories and this will need to be considered when determining the type of institutional co-operation between Australia and New Zealand.

## **Lesson #8: Seek and use the specialist knowledge across the respective bureaucracies at an early stage in the co-operation design process**

There is an increasing level of understanding between officials of the two countries in a range of specialist areas. Similarly, agencies with relevant policy responsibilities will often need to be involved on any trans-Tasman issues that might set a precedent for the relevant country, or require some adjustment to policies that had been prepared purely in the context of domestic operation. Key agencies with broad experience in trans-Tasman regulatory and institutional co-operation include:

- In New Zealand: The Ministry of Economic Development, the State Services Commission, the Ministry of Foreign Affairs and Trade, the Treasury and the Ministry of Justice;
- In Australia: The Department of Finance and Administration, the Department of the Prime Minister and Cabinet, the Treasury, the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Industry Tourism and Resources.

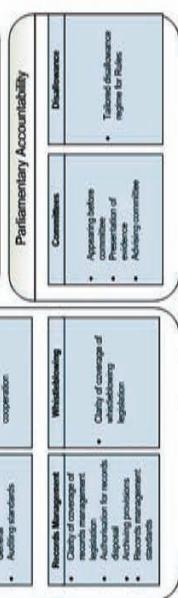
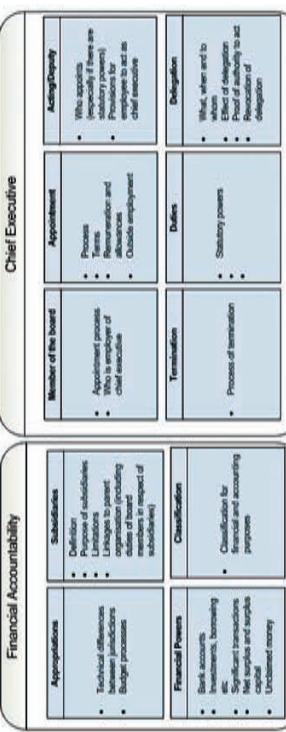
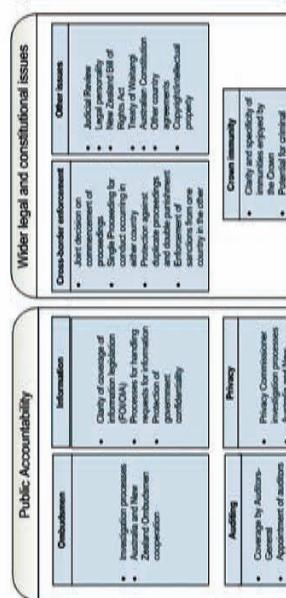
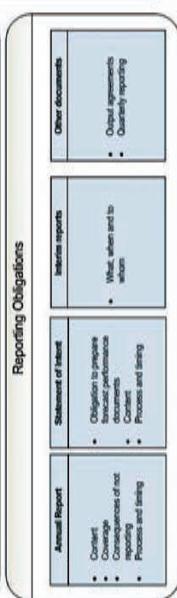
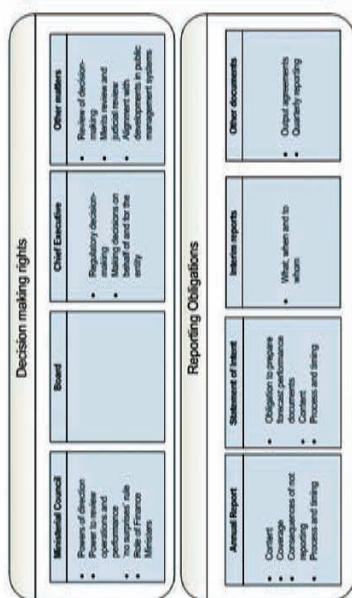
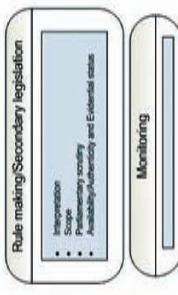
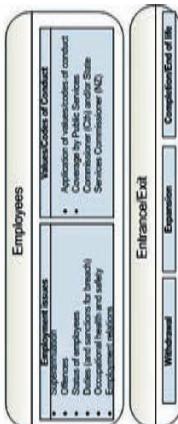
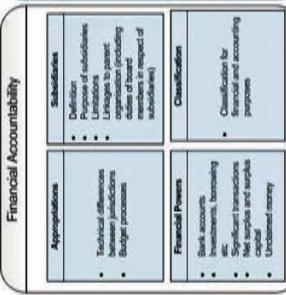
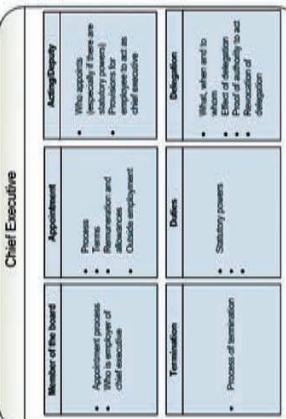
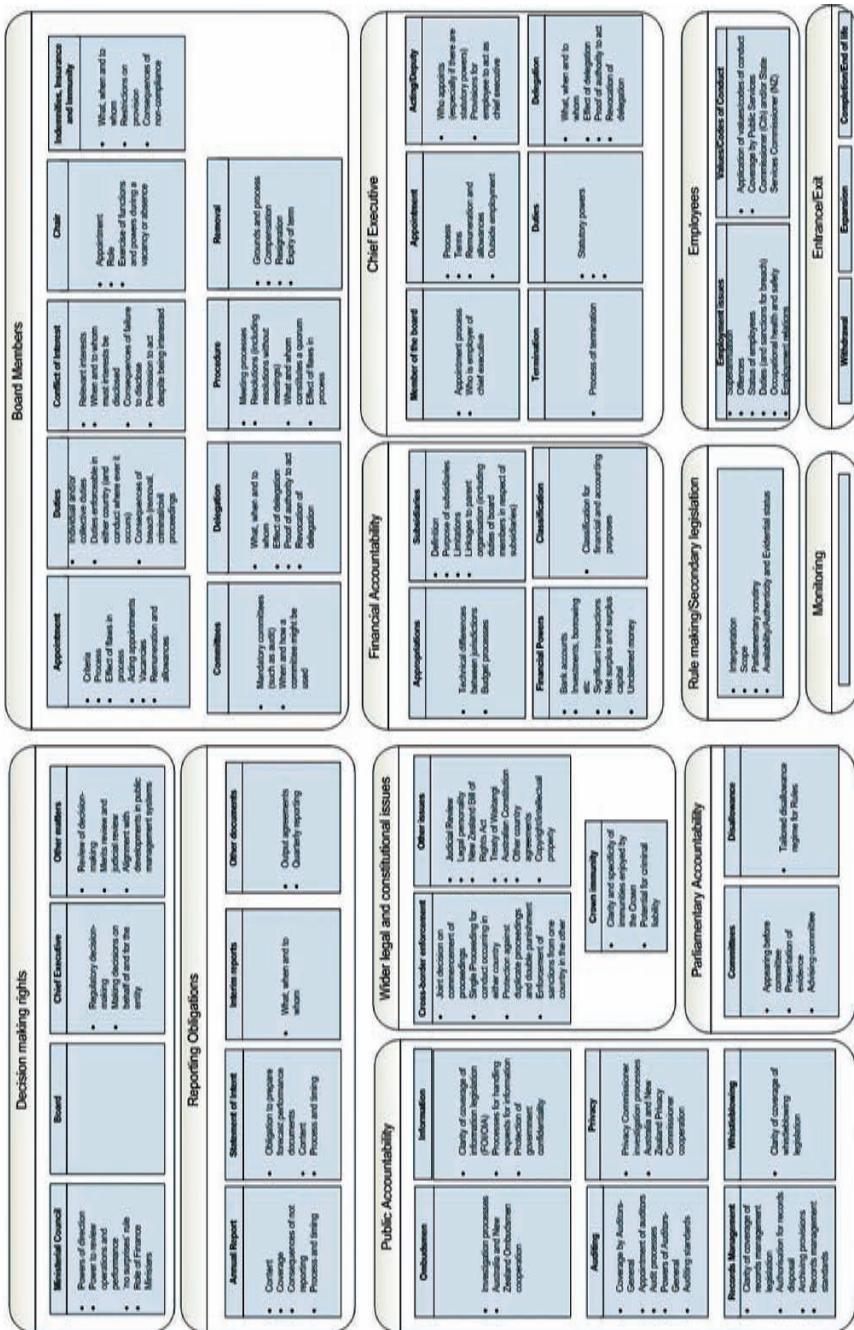


# Annexure

## Overview of potential governance and accountability issues

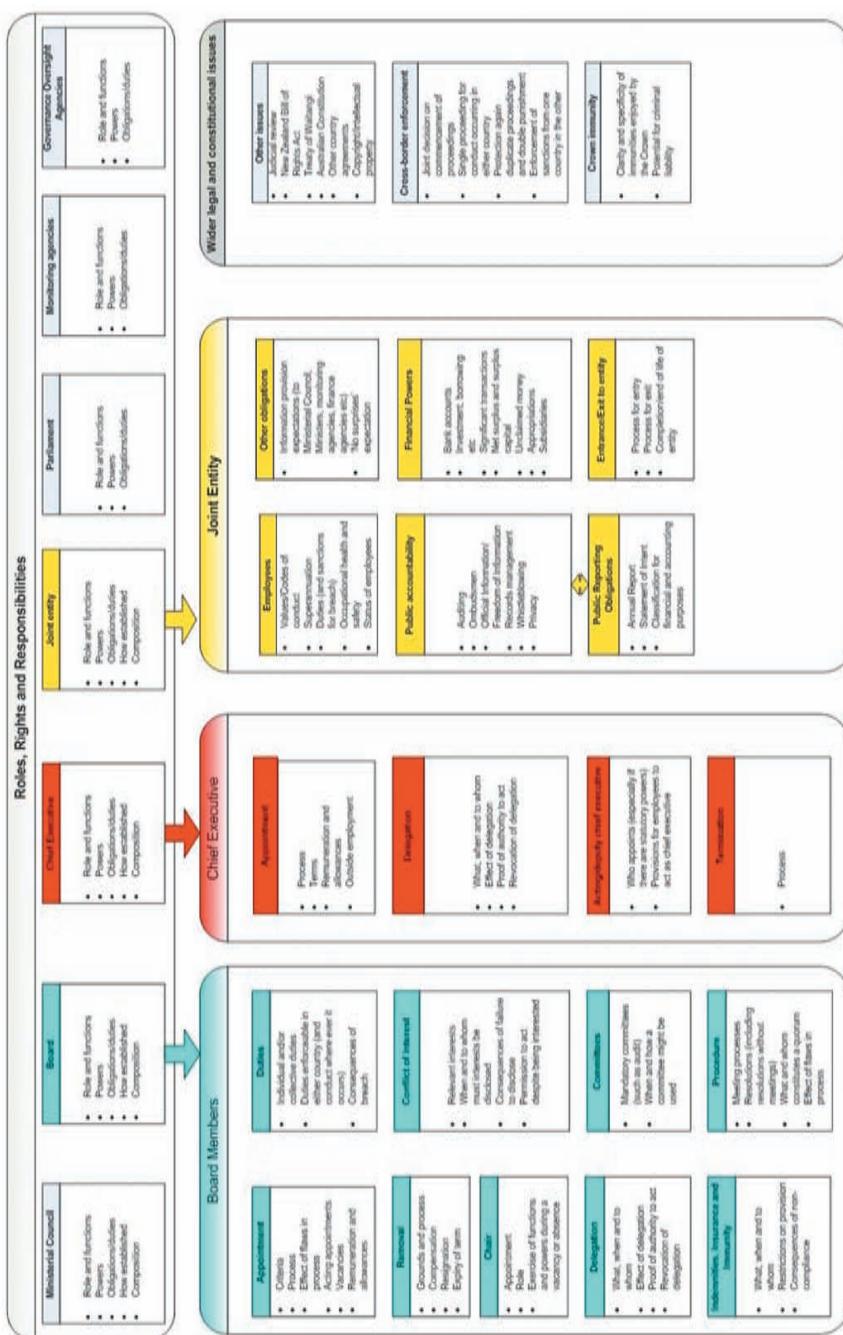


# Trans-Tasman Governance and Accountability Modules (grouped by ‘categories’)



# Trans-Tasman Governance and Accountability Modules

## An example of shaping a joint entity





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