Foreword

In August 2010, the School of Law, University of Canterbury and the New Zealand Australia Research Centre co-hosted the Trans-Tasman Law and Legal Practice Conference.

The Conference, which ran over two days, brought together legal experts comprising academics, judges, a law commissioner and distinguished practitioners to discuss various legal relationships between Australia and New Zealand. It attracted distinguished speakers and the seven sessions were very well received. The two plenary sessions and general paper presentations resulted in lively and stimulating debate and it is hoped that this Conference will be the first of many in which trans-Tasman legal issues are discussed.

The Conference organisers acknowledge the generous financial support provided by a number of organisations. The New Zealand Law Foundation sponsored the expenses of the overseas speakers that enabled the organisers to attract prestigious presenters. Minter Ellison Rudd Watson Lawyers sponsored the conference dinner. This was held at a local vineyard. The School of Law sponsored general expenses and the Canterbury Law Review Trust has sponsored this publication.

This publication comprises ten papers from the Conference. The papers cover a wide range of topics and provide a very valuable resource for all those interested in this area of law.

The Hon Michael D Kirby AC CMG gave the opening plenary address. After considering the historical background and the arguments for and against a formal political union between the two nations, his paper addresses a new question. This is whether an attempt to procure political union has been overtaken by events that have followed the Closer Economics Relations (CER) Treaty. Is it is now too late to conjure the dream of Australasia? The paper observes that, in the case of the ANZ relationship, elements of a kind of federal association have emerged as a result of CER. These elements are likely to continue their expansion. It is not yet clear whether they will produce a kind of trans-Tasman confederation or whether they will stimulate a still closer political relationship.

Dr John Hopkins focuses on the constitutional framework that underpins the various legal arrangements of the growing trans-Tasman relationship. His paper examines the peculiar aversion to federalism and federal ideas in New Zealand and argues that New Zealand's limited understanding of the federal idea has blinded it to the wider realities of federalism and to the essentially federal relationship that already exists between the two countries. The relevant constitutional question should not be whether New Zealand and Australia wish to engage in federation but how the federal relationship that already exists should be managed.

Professor Nicholas Aroney observes that numerous studies have examined both the question of why New Zealand chose not to join the Australian colonies when they federated in 1901 and the question why the six separate colonies of Australia each decided to federate notwithstanding the political and other obstacles that stood in their way. However, very few of these studies examine the common issues that had to be addressed by all seven

colonies of Australasia when contemplating the possibility of federation in the 1890s. Each of the colonies, on both sides of the Tasman, stood in mutual relationships of constitutional and political independence to each other, and the fundamental questions confronting them all were essentially the same. When looked at this way, New Zealand's decision not to federate offers an important "counter-factual" that sheds light both on what it meant for each Australian colony to sign up for federation, and on the kind of federation that emerged as a result. His paper pursues the question of New Zealand's non-participation in federation as a way of illuminating these issues that are of very great significance for our understanding of the origin and meaning of the Australian constitution.

The thesis in Emeritus Professor James Davis' paper is that although progress in harmonizing the business laws of Australia and New Zealand has been slow, over the last ten years it has been steady, and that real advances are being made in achieving a "Single Economic Market". The paper suggests that over a wide range of legal issues the two countries are no longer foreign one from another, and, while not aspiring to be a Federation, do form a loose confederation. The range of developments has now culminated in the enactment of a Trans-Tasman Proceedings Act 2010 in both Canberra and Wellington.

Professor Reid Mortenson seizes the first opportunity to consider the trans-Tasman civil jurisdiction and judgments scheme closely. His paper gives an account of earlier attempts to improve the enforcement of judgments between Australia and New Zealand and the reasons for the new scheme in a Single Economic Market. In an extended examination of the scheme, the paper raises problems with aspects of it that fail to address the potential for related and concurrent proceedings (*lis pendens*) and that may undermine the efficiency of its enforcement jurisdiction. However, any shortcomings in the scheme should not be exaggerated. It establishes a Judicial Area that is unusually well-adapted to the circumstances of the Single Economic Market. The paper reflects on the proportionality of the principles of adjudicative jurisdiction and suggests an even deeper legal integration for Australia and New Zealand.

Professor Jeremy Finn investigates aspects of the multifaceted relationships between New Zealand law and New Zealand lawyers and those of the other Australasian colonies (before 1900), and with the states and Commonwealth of Australia after 1901. His paper argues that the development of law in New Zealand and in the separate Australian colonies before 1900, and to a lesser extent in Australia in later years, was profoundly influenced by the continual exchange of legal information and lawyers. This significantly shaped the respective legal cultures in a way which generally facilitated the continuation of legal links across the Tasman. The paper explains and demonstrates the very substantial use, on either side of the Tasman, of models for legislation which were developed elsewhere. It explores aspects of the use by lawyers and judges of case law from other trans-Tasman jurisdictions, a phenomenon which has been less well documented but may have been – at least in the case of New Zealand – equally influential. The paper also considers the very substantial movement of lawyers across the Tasman in different periods, and attempts to explain some of the patterns of movement and their possible consequences.

Emeritus Professor John Burrows QC addresses law reform in New Zealand and takes the opportunity of comparing the arrangements in the two countries. His paper notes that we never quite understand our own system until we contrast it with another. Nonetheless, a solution that works in one place may not in another, and the reasons for this can be quite complicated.

The Law Commission is only one law reform body and, in fact, most of the work of law reform is done by other bodies, in particular government bodies. Law Commissions are independent. This gives them an advantage over governmental agencies, but does not absolve them from working collaboratively with those agencies. That can involve some interesting tensions. Law Commissions do not make law, they can only recommend it. They lack the capacity to control the destiny of their recommendations, which must inevitably go through the governmental and parliamentary process.

The paper also poses the question "What is the 'law' in law reform?" The law consists of legislation and case law. When changes to a particular area of law that is not working as it should are settled and adopted by Parliament, they become new "law". But in between the old and the new law is a process of devising and determining the policy of that new law. Much that goes into the policy process goes well beyond "law" as commonly understood.

Principal Family Court Judge Boshier observes that, in family law, enforcement of orders as between New Zealand and Australia can be cumbersome. Nonetheless, New Zealanders' lives are so closely entwined with Australia in so many respects, that more efficient means of trans-Tasman judicial co-operation seems so clearly vital. If family law is to maintain its relevance, it needs to acknowledge that movement between Australia and New Zealand is easy and inexpensive, and that there will be consequential family relationships with which both countries will have to deal. Judge Boshier believes that we are at the beginning of some exciting new developments and that currently we are laying a principled basis for enhancing judicial co-operation and resolution of family disputes for the future.

David Howman, Director General of the World Anti-Doping Agency (WADA), addresses the impact that the World Anti-Doping Code 2003 has had for lawyers practising in "sport law" and the effect it has had on international law. His paper looks at a number of legal issues that have emanated since the Code came into effect in August 2004 (the opening ceremony of the Olympic Games in Athens) and envisages future legal challenges. Specific trans-Tasman issues and cases are referred to in the context of the international perspective.

His paper examines how the Code, a true set of international rules that harmonises both sport and governments, has fared legally and what effect it has had in Australia and New Zealand.

The final paper in this collection is co-authored by Hayden Opie, Director of Studies in the Sports Law Program at Melbourne Law School and Professor Elizabeth Toomey. Their paper makes observations on some of the trans-Tasman legal features of trans-Tasman professional sports leagues and draws attention to two instances where legislators on both sides of the Tasman have addressed similar sports law issues: one co-operatively

and the other independently. The leagues highlight an alternative form of politico-economic engagement, that of regionalism, but also a point of major division concerning compensation for personal injury. In regard to anti-doping regulation New Zealand drew on the experience of Australia, while independent paths were pursued when it came to establishing a legal framework for multiple major sports events. The authors believe that in looking to sports law some useful insights and lessons may be extracted that are of relevance to an assessment of the trans-Tasman legal relationship.

It is hoped this collection of essays on trans-Tasman legal issues inspires further debate on the growing trans-Tasman relationship. As Editor, it has been a pleasure to work with the authors who adopted such an enthusiastic approach to their work.

Professor Elizabeth Toomey
Editor