

CLOSER ECONOMIC RELATIONS – A TRANS-TASMAN CONFEDERATION?

JLR DAVIS*

May I first of all say what a pleasure it is for me to be presenting this paper. I started my academic career here at the Canterbury Law School in 1965, teaching, among other things, Conflict of Laws. To come back to a conference at which we are discussing, among other things, the effect of legislation on each side of the Tasman on the principles of the Conflict of Laws feels to me like the closing of quite a large circle.

I. INTRODUCTION

In the 27 years since the Australia/New Zealand Closer Economic Relations Trade Agreement (to give the CER its full title) came into force, it has obviously had a profound effect on all manner of relations between the two countries. My thesis in this paper is that, over the last ten years in particular, there has been a range of developments which has led to the relationship between New Zealand and Australia becoming more like a loose confederation than two wholly foreign countries. Those developments have now culminated in the enactment of a Trans-Tasman Proceedings Act 2010 in both Canberra and Wellington – legislation which I shall refer to compendiously as “the Trans-Tasman Proceedings legislation”.

Let me hasten to say that I do not regard a complete federation as being even a possibility in the foreseeable future. A common currency would obviously be a blessing to anyone who lives on one side of the Tasman and spends holidays on the other, but New Zealanders would as soon have their economy controlled by the Reserve Bank of Australia as Australians would contemplate having their economy managed by the Reserve Bank of New Zealand. And I think that most New Zealanders would continue to echo the views attributed to Sir George Grey, when he urged the abandonment of federation with the Australian colonies in 1891, namely that there were 1,200 reasons against federation, one for each mile of the Tasman.

When I refer to a loose confederation between the two countries, I seek to draw a parallel between the current moves under the CER and the way in which the States of Australia have treated each other less and less as foreign countries over the course of the last 110 years. It is all too easy to forget that, until 1 January 1901, each of the six colonies around the continent of Australia were as foreign from one another as from the Colony of New Zealand, or Fiji, South Africa, or wherever. The power of the court in each colony was strictly territorial, and could affect only those physically within the borders of that colony. Thus, the criminal law of New South Wales did not extend to Victoria or Queensland, and if one had committed a crime in, say, Sydney one could escape punishment by moving to Melbourne or Brisbane. And if two parties had entered into a contract in Adelaide, if one of

* BA, LLB (NZ), LLM (Cantab). Professor Emeritus of the Australian National University, Canberra, ACT.

them were to fail to perform their obligations under the contract, and move to Perth, the other would have to cross the Nullarbor and seek to find and sue the defaulting party in the Supreme Court of Western Australia.

One of the first matters that the new federal Parliament dealt with in 1901 was to pass the Service and Execution of Process Act 1901. Thereafter, if one had an action in contract or tort, one could sue in one's home State, provided that the proceedings had a sufficient connection with that State. This legislation also provided for the criminal process of each State to be served on the accused in any other State, thereby giving the criminal law of each State application throughout the country.

The jurisdiction of State courts in civil matters – such as actions in contract or tort – continued to be effective only over persons within the State, or causes of action having a close connection with the State, until 1987, when the cross-vesting scheme of State, Territory, and Commonwealth legislation expanded the jurisdiction of each superior court to cover people or proceedings anywhere within the country.¹ That scheme was subsequently overtaken by the Service and Execution of Process Act 1992 (Cth), which provides a much simpler means of ensuring that all courts throughout Australia have jurisdiction over anyone physically within the country at the time that they are served with the necessary process. To that extent, Australia is now much more one country than a collection of six States and two Territories. Furthermore, the substantive law of contract or torts has largely become uniform across the country, by means of decisions of the High Court of Australia, the intrusion of federal legislation, and the adoption by the States and Territories of common legislative solutions to areas outside federal legislative competence.

Let me now provide something of a roll-call of the moves that have been made over the last ten years to bring New Zealand and Australia into a closer relationship, more nearly approximating the current situation between the States and Territories of Australia than that which obtained at the turn of the last century.

II. MUTUAL RECOGNITION OF SECURITIES OFFERINGS

One such move is the scheme under which if a company with its principal place of business on one side of the Tasman seeks to raise funds by the issue of securities on both sides of that sea, it need comply with the regulatory requirements of only its “home” country. I have come to it first, because it was the first of the current proposals to be introduced, by an invitation issued by the Australian Government in October 2001 to work with the New Zealand Government toward a regime for coordination in the recognition of securities offerings, which culminated in an Agreement between the two countries being signed in February 2006.

1 See the various Jurisdiction of Courts (Cross Vesting) Acts, passed by the Commonwealth, the States, and the Northern Territory in 1987 and by the Australian Capital Territory in 1993, under which the Supreme Court of each State and Territory, the Federal Court, and the Family Court each vested in all of the other courts the jurisdiction that a particular court had. The federal aspects of the scheme were found to be contrary to the Constitution in *Re Wakim, ex p McNally* (1999) 198 CLR 511 (HCA), but cross-vesting between the Supreme Courts of the States and Territories was not affected by that decision; see *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (HCA).

The first action to implement this scheme was an amendment to the Securities Act 1978 (NZ) in 2002, which added a new Part 5, under which securities offered in New Zealand may be exempt from compliance with that legislation, so long as the offeror company has complied with the regulatory requirements of a designated overseas country. Part 5 also extends Part 2 of the Securities Act 1978 (NZ) to offers made by New Zealand companies to investors in designated overseas countries, and provides for the enforcement in this country of pecuniary penalty orders made in those designated foreign countries that have a reciprocal recognition regime. To make it operational, that primary legislation required a set of regulations that would specify the countries that were to be designated for these purposes. That objective was achieved with the making of the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (SR 2008/153) on 3 June 2008.

Developments on the other side of the Tasman were not as speedy as on this side. It was only on 29 March 2007 that Canberra introduced primary legislation to implement the mutual recognition scheme, by adding a new Chapter 8 to the Corporations Act 2001 (Cth). That legislation went through both Houses of the Australian Parliament with reasonable despatch, the Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007 (Cth) having been assented to on 21 June 2007. However, the Australian legislation is similar to that in New Zealand, in that it needs a set of regulations to make it effective. That was achieved with the making of the Corporations Amendment Regulations 2008, No 94 on 3 June 2008, which adds a new Chapter 8 to the Corporations Regulations 2001. The Agreement between the two countries, and its supporting legislation, consequently came into force on 13 June 2008.

It must be added that, although this mutual recognition scheme has been described by the respective ministers as flowing from the CER, the legislation in both countries is drafted in such a way that it could, with little difficulty, be extended to apply to any other country. It is more of a means to lessen the regulatory burden on capital raising in a globalised market than an indication of a loose confederation between New Zealand and Australia. Nevertheless, in view of the length of time it took to complete the implementation of the scheme between the two neighbouring countries, which have so many aspects of trade and business in common, it is unlikely that a mutual recognition scheme between New Zealand and any other country would in fact be implemented in the next decade or so.

III. ENFORCEMENT OF REGULATORY PENALTIES AND FINES

One apparently surprising omission from the regulations that implement the mutual recognition of securities offerings is any provision imposing a sanction for failure to comply with the regulatory provisions applicable to the offering. In view of that omission, is it perhaps less surprising that the legislation passed by the Australian Parliament to give effect to this scheme also lacks any direct means of enforcing a sanction in any court other than one of the jurisdiction to which the offeror company is already amenable. In other words, if an Australian company issued securities to investors on both sides of the Tasman, any proceedings by an Australian regulatory body for a

criminal fine or civil pecuniary penalty could be brought only in Australia, and would be enforceable only in that country. An offeror company that had few assets in Australia would be protected against execution of any fine or pecuniary penalty.

The reason for this limitation on the enforcement of regulatory provisions outside the offeror's country of residence is the territorial nature of the legislation imposing the sanction. Even if it is not directly criminal in nature, it would be classified by any foreign court as at least quasi-criminal and hence enforceable only in the courts of the country enacting the legislation. However, the Trans-Tasman Proceedings legislation now provides that *any* civil pecuniary penalty orders, and any judgment imposing a fine for the commission of certain regulatory offences, shall be enforceable on both sides of the Tasman.

The genesis of that legislation is the Report, published in December 2006, of the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, composed of officials from the Ministry of Justice in this country and the Attorney-General's Department in Canberra. The major recommendation of that Working Group is the extension of the civil jurisdiction of the superior courts in each country to cover defendants within the other country. I shall return shortly to discuss that recommendation, but at this juncture I need mention only Recommendation 8, which is that:²

A civil pecuniary penalty order made in one country should be enforceable in the other as a civil judgment under the proposed trans-Tasman regime. Either country could exclude particular pecuniary penalty regimes in the other country from enforcement.

That recommendation was supplemented by Recommendation 9, under which:³

Fines imposed in one country for criminal offences under certain regulatory regimes should be enforceable in the other, in the same way as civil judgment debts. Only fines for offences under a regulatory regime that affects the effectiveness, integrity, and efficiency of trans-Tasman markets and in which both countries have a strong mutual interest should be included.

The report included a list of statutes that were regarded as coming within the regulatory regime referred to in that Recommendation. Among the New Zealand legislation is the Commerce Act 1986, the Companies Act 1993, the Fair Trading Act 1986, the Securities Act 1978 and the Securities Markets Act 1988. The report also listed the equivalent legislation from the Australian government, and noted that officials on both sides of the Tasman were seeking to identify any other relevant regulatory statutes. The Working Group also made the point that before one country's courts could enforce a fine, the regulatory agency seeking enforcement would have to show that there was a real and substantial connection between conduct constituting the offence and the country imposing the fine. Without such a restriction, the proposal could raise concerns that activity in one country was being regulated by the other.

2 Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, Recommendation 8.

3 Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, Recommendation 9.

Those recommendations have been given effect in Part 7, Div 2 of the Trans-Tasman Proceedings Act 2010 (Cth) and Part 2, Subpart 5 of the Trans-Tasman Proceedings Act 2010 (NZ). In each case, the primary legislation states the broad outline of the type of judgment which may be registered under this scheme, and leaves it to regulations in each country to determine precisely which aspects of each country's regulatory regime comes within the trans-Tasman scheme.

IV. MUTUAL RECOGNITION OF DISQUALIFICATION OF COMPANY DIRECTORS

One area in which both countries have moved rather more quickly to plug a loophole is the mutual recognition of the disqualification of a person to act as a director, promoter, or manager of a company.

The Companies Act 1993 (NZ) was amended in November 2006, by the addition of s 383(1)(ca), to include, among the grounds on which a court could prohibit a person from being a director or manager of a company the fact that the person "has been prohibited in a country, State, or territory outside New Zealand from carrying on activities [of a substantially similar nature]". The Corporations Act 2001 (Cth) was amended by the Corporations Amendment (No 1) Act 2009 (Cth), which added s 206B(6) and (7), under which a person who is disqualified under a foreign court order from being a director of a foreign company is similarly disqualified in Australia. That provision was applied to New Zealand court orders by the Corporations Amendment Regulations 2009 (No 2) (Cth) on 27 March 2009.

V. CROSS-BORDER INSOLVENCY

An issue that has become of greater and greater concern, right around the world, over the last 10 or 20 years, is the best way to manage the winding up of an insolvent company when it has assets and/or creditors in different countries. A major reason for the concern is that ownership of property, or the right to deal with property, is generally highly localized. Most countries around the world regard ownership or the right to possession of property as being governed by the law of the place where the property is located. If a company has assets in even two different countries, each of those two may have differing rules for determining ownership, or the priority to be given to particular debts (especially claims by employees, and claims by governments for outstanding taxes, duties, and other levies).

Some of the members of the British Commonwealth had attempted to lessen these problems, by enacting a provision that the local court administering an insolvency might request a court in another part of the British Commonwealth that had jurisdiction in bankruptcy to "act in aid of and be auxiliary to any Court of any Commonwealth country other than New Zealand, being a Court having jurisdiction in it in bankruptcy".⁴ Section 29 of the Bankruptcy Act 1966 (Cth) was more limited in its approach,

4 Insolvency Act 1967 (NZ), s 135.

seeking assistance only from the courts of the United Kingdom, New Zealand, Canada, and some other countries that were added subsequently by regulations made for that purpose.

But such a provision was obviously of only limited benefit. It has, however, been overtaken by the work of the United Nations Commission on International Trade Law (UNCITRAL). In 1997, it adopted the Model Law on Cross-Border Insolvency (the Model Law), which aims to provide international uniformity (or at least harmonization) of laws relating to insolvency.

The New Zealand Law Commission considered the adoption of the Model Law in the late 1990s, and in its report entitled, “Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?”⁵ gave an affirmative answer to that question. The Australian Government proposed the adoption of the Model Law in a report of the Corporate Law Economic Reform Program in December 2002. As a consequence of these deliberations, Wellington enacted the Insolvency (Cross-border) Act 2006 (NZ) on the same day as the Insolvency Act 2006 (NZ).⁶ The former of those Acts was brought into force on 24 July 2008 by the Insolvency (Cross-border) Act Commencement Order 2008 (SR 2008/171).

Canberra introduced a Cross-Border Insolvency Bill in September 2007, but consideration of that Bill was not proceeded with, as the then Prime Minister called a general election shortly thereafter. However, the Bill was re-introduced in the first sitting week of the new Parliament, on 13 February 2008. One reason, at least, for prompt action being taken was that the Minister for Superannuation and Corporate Law, Senator Nick Sherry, noted in his Second Reading speech that the Bill:⁷

... will ... form a starting point for additional initiatives to streamline insolvency processes involving both Australia and New Zealand. New Zealand has already enacted the Model Law, but has been waiting for Australia to enact the law before providing for commencement. That can now occur. Adoption of the Model Law in both Australia and New Zealand will further the agenda of establishing closer economic relations between the two countries.

The Bill passed both Houses of the Parliament, was assented to on 26 May 2008 and came into force on 1 July of that year.

VI. ENFORCEMENT OF TAX JUDGMENTS

Just as the criminal law and the property law of each country is regarded as having effect and enforceability only within the borders of the country enacting it, so also is it a general rule that one country’s taxation laws cannot be enforced in another country. Although it was said in *Government of India v Taylor*,⁸ that the courts of England “will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States”, that principle

5 New Zealand Law Commission, *Cross-Border Insolvency* NZLC R 52 (18 February 1999).

6 This is no doubt the reason why the Insolvency Act 1967 (NZ), s 135 is not being repeated in the Insolvency (Cross-border) Act 2006 (NZ).

7 Speech by N Sherry Second Reading for Cross Border Insolvency Bill, (13 February 2008).

8 [1955] AC 491 (HL) 504, per Viscount Simonds, quoting Tomlin J in *Visser, Queen of Holland v Drukker* [1928] Ch 877 at 884.

cannot be applied literally. In that case, when the Government of India entered a proof of debt in the liquidation of a company that was incorporated in England, but had carried on business in India and owed arrears of tax to the Indian Government, the House of Lords held that the liquidator was entitled to reject the proof, as the liability to tax was one that an English court would not enforce. It was argued, although only faintly, that as India and England had a common sovereign, the English court was not being asked to collect money for the benefit of a foreign sovereign, but the House of Lords rejected the argument summarily, as not having any basis in earlier authority. However by statutory provisions enacted in 1991 and 1992 respectively, which apply only as between the CER partners, each of Australia and New Zealand permit the enforcement of claims for unpaid taxes from the other country.⁹

VII. MISUSE OF TRANS-TASMAN MARKET POWER

A further set of statutory provisions that apply only between New Zealand and Australia is s 36A of the Commerce Act 1986 (NZ) and s 46A of the Trade Practices Act 1974 (Cth), which together prohibit a company that has a substantial degree of power in a trans-Tasman market from misusing that power for the purpose of eliminating or substantially damaging a competitor, or preventing or deterring potential competitors from entering that market. Those provisions are supported by Part 1A of the Reciprocal Enforcement of Judgments Act 1934 (NZ) and s 5(10) of the Foreign Judgments Act 1991 (Cth), which provide for the trans-Tasman enforcement of judgments that have found a breach of one or other of the substantive prohibitions.

VIII. EXTENSION OF THE JURISDICTION OF THE SUPERIOR COURTS OF EACH COUNTRY

The proposal that goes considerably further than any of those already mentioned, but which is a logical progression from the cumulative effect of all of them, is that put forward by the Working Group, to which I have already made reference. Recommendation 1 of the Working Group proposed, in part, that civil initiating process issued out of any New Zealand court could be served in any Australian State or Territory, and civil initiating process issued out of any Australian federal, state, or territory court could be served in New Zealand. The intention of the Working Group was that this regime of widened jurisdiction would mean that the plaintiff would not have to establish any particular connection between the nature of the proceedings and the forum in which they were commenced; the defendant could apply for a stay of proceedings on the basis that a court in the other country is the more appropriate court to hear the matter; and a judgment from one country could be registered in the other and, on registration, it would have the same force and effect as a judgment of the court where it is registered.

It is this proposal, to my mind, which goes furthest in converting the two countries from foreign states, one from another, into a loose confederation. The Working Group make it clear that the regime is modelled on the Service

9 See Foreign Judgments Act 1991 (Cth), s 7(2)(a)(xi); Reciprocal Enforcement of Judgments Act 1934 (NZ), s 6(1)(e).

and Execution of Process Act 1992 (Cth), and it may be argued that that statute, within Australia, has been a major factor in breaking down some of the artificial barriers between the various States.

The proposal is now on the verge of implementation. In July 2008 the respective relevant Ministers signed the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement here in Christchurch, one reason for that agreement being to give the Australian federal Government the constitutional power to legislate with respect to the jurisdiction of courts in the various States. That Agreement was followed by the introduction of the Trans-Tasman Proceedings Bill 2009 into the Australian Federal Parliament on 25 November 2009, which was assented to on 13 April 2010. However, only ss 1 and 2 commenced on that date; the remainder of the Act will commence within a maximum of six months after the Christchurch Agreement has entered into force, which requires completion of the legislative process on this side of the Tasman. The Trans-Tasman Proceedings Bill was introduced into the Parliament in Wellington on 24 November 2009, and received the Royal Assent on 31 August 2010. As with its Australian counterpart, only ss 1 and 2 came into force on assent. The remainder will come into force on a date appointed by the Governor-General by Order in Council, after the exchange of Notes between the two countries required by Article 16 of the Christchurch Agreement.

The Working Group's proposal met some criticism. Two particular comments of which I am aware are that this legislation will lead to forum shopping and that there is no mechanism for resolving disputes about which is the more appropriate forum for any particular dispute.¹⁰ Let me deal with each of these criticisms in turn.

A. Forum Shopping

I fully agree that the Trans-Tasman Proceedings legislation appears to permit a plaintiff to shop all around Australia and New Zealand to find the court that will give him or her the best result. But, in practice, forum shopping will be eliminated if New Zealand makes a relatively minor change to the law. For ease of explanation, let me confine myself to actions in contract and tort.

If a plaintiff brings an action in contract, the questions of determining the law governing the contract and where any disputes are to be litigated are resolved by finding the intentions of the parties, whether express or implied. The place of litigation is not selected by the plaintiff to suit his or her best interests, but (we must assume) has been chosen by both parties reaching agreement on the issue.

If the plaintiff brings proceedings in tort in any court in Australia, forum shopping has been eliminated by the decision of the High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson*,¹¹ under which all questions of liability, both substantive and procedural, are to be determined by the law of the place where the tort was committed. Prior to that decision, plaintiffs

¹⁰ See *Lawyers Weekly* (6 June 2007) 1.

¹¹ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA).

engaged in a great deal of forum shopping, often with considerable success. Since the turn of the century, plaintiffs and their advisers realize that it is pointless.

However, *Rogerson* was concerned only with intra-Australian torts – those where the tort was committed in one State or Territory and sued on in another. In *Régie Nationale des Usines Renault v Zhang*,¹² the High Court of Australia, in a case concerned with a tort allegedly committed in New Caledonia, but sued on in New South Wales, held that while generally such actions should be governed solely by the law of the place where the tort was committed, the Court “reserved for further consideration, as the occasion arises,” whether the assessment of damages should be governed exclusively by that law.¹³

While the High Court of Australia raised the possibility of forum shopping around Australia, for the purpose of obtaining a greater award of damages, the only circumstance in which the difference in the awards of damages is sufficiently large to make forum shopping worthwhile is in cases of personal injury. But it is difficult (if not impossible) to consider a plaintiff “resorting” to an Australian court in an action against a New Zealand defendant for personal injuries caused in New Zealand, as the defendant (presumably) would not be insured against such liability. The Accident Compensation Act 2001 (NZ) and its predecessors have removed the need for those who cause personal injury to others to insure against any possible liability.

It is nevertheless conceivable that Australian plaintiffs might resort to suing in New Zealand in an action in negligence for personal injuries. Suppose that a Sydney motorist collides with a pedestrian on the streets of Sydney, causing considerable injury to the pedestrian; and suppose further that the pedestrian has some connection with New Zealand, sufficient to make it at least colourable for him or her to commence proceedings in New Zealand. The current rule in New Zealand on the substantive law governing a tort committed outside New Zealand is, as O’Regan J noted in *Baxter v RMC Group plc*,¹⁴ that set out by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA*.¹⁵ Under that principle, in the circumstances posited, New South Wales has such a significant relationship with the occurrence and the parties that New South Wales law would be the substantive law applicable. But New Zealand continues generally to adhere to the distinction between matters of substance and matters of procedure, the latter being governed solely by the law of the place hearing the action. Hence, the plaintiff pedestrian, by suing in New Zealand, has damages assessed at common law, and escapes the statutory limitations placed upon the assessment of damages in New South Wales.

While this set of circumstances is a possibility, it is not likely to arise often because one may assume that the defendant (or at least the defendant’s insurer) would apply for a stay of those proceedings under s 22 of the Trans-

12 *Régie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491 (HCA).

13 *Régie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491 (HCA) at [76].

14 *Baxter v RMC Group plc* [2003] 1 NZLR 304, at [58].

15 *Red Sea Insurance Co Ltd v Bouygues* [1995] 1 AC 190.

Tasman Proceedings Act 2010, and one would hope that the court would grant the stay, after taking into account the matters which it is required to consider under s 24(2) of that Act. And even the possibility of proceedings being brought in New Zealand in order to attempt to escape some limitation or restriction in the law in Australia could be eliminated entirely by New Zealand adopting the rule established by the Australian High Court in *Rogerson*,¹⁶ of referring all aspects of liability solely to the law of the place of commission.

Such a move has already been taken in relation to statutes of limitation. Until the early 1990s, a further reason for forum shopping within Australia was to avoid the application of a limitation statute.¹⁷ However, as a result of the decision in *McKain v R W Miller & Co (SA) Pty Ltd*,¹⁸ the Standing Committee of Attorneys-General (which comprises the First Law Officers of the Commonwealth, the Australian States and Territories, and New Zealand) proposed uniform legislation, the effect of which is that, in a tort action brought in either Australia or New Zealand, the only applicable statute of limitation is that of the place where the tort was committed. That proposed legislation was enacted in each relevant jurisdiction in the mid-1990s,¹⁹ thus eliminating the possibility of forum shopping for a longer limitation period.

B. Staying of Proceedings

The other criticism that was made when the current Trans-Tasman Proceedings legislation was no more than a proposal was that the courts in each country might take different views about whether an action should be stayed on the grounds of the chosen court being inappropriate.

One can think of the example – again, not all that likely, but distinctly possible – of a resident of Christchurch agreeing to purchase a home-unit in Bondi, relying on the description given to him or her by an estate agent in Sydney. Our Christchurch resident subsequently visits Bondi, discovers that the home unit is different from its description, and commences proceedings in Sydney seeking rescission of the contract under s 87 of the Trade Practices Act 1974 (Cth) for the misleading conduct engaged in by the estate agent. At much the same time, the seller of the home-unit commences proceedings in Christchurch against the Christchurch resident, seeking specific performance of the contract. While each side may seek to have the other's action stayed on the ground that the forum is inappropriate, the respective courts on each side of the Tasman might have declined to stay the proceedings.

16 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA).

17 See *Evers v Firth* (1986) 10 NSWLR 22 (NSWCA); *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 (HCA).

18 (1991) 174 CLR 1 (HCA).

19 See Limitation Act 1985 (ACT), ss 56-57; Choice of Law (Limitation Periods) Act 1993 (NSW), ss 5-6; Choice of Law (Limitation Periods) Act 1994 (NT), ss 5-6; Choice of Law (Limitation Periods) Act 1994 (Qld), ss 5-6; Limitation Act 1936 (SA), s 36A; Limitation Act 1974 (Tas), ss 32C & 32D; Choice of Law (Limitation Periods) Act 1993 (Vic), ss 5-6; Choice of Law (Limitation Periods) Act 1994 (WA), ss 5-6; Limitation Act 1950 (NZ), Part IIA.

The answer to this criticism may be given in two parts. First, this sort of impasse can arise despite the enactment of the Trans-Tasman Proceedings legislation, and although it might appear to be marginally more likely once that legislation is in force, it is not by any means a result solely of the passage of the legislation.

In a matrimonial property dispute, in which the wife sued in the Family Court of Australia and the husband sued in the High Court of New Zealand, neither court “gave way” to the other nor ordered a stay of its own proceedings. Fortunately, neither spouse pressed the matter any further, as the parties settled shortly after McGechan J handed down his judgment in *Gilmore v Gilmore*.²⁰

The reason given by McGechan J for this “regrettable” clash of jurisdictions²¹ was that New Zealand and Australia have different common law rules for determining whether proceedings should be stayed on the grounds of the inappropriate nature of the jurisdiction. While New Zealand would stay proceedings if it were satisfied that there is another forum that is the appropriate one for the trial of the action,²² the Australian courts will only order a stay if it is satisfied that the (Australian) forum chosen by the plaintiff is “clearly inappropriate”.²³

But, to provide the second part of the answer, in relation to actions commenced in the future on either side of the Tasman, s 19 of the Trans-Tasman Proceedings Act 2010 (Cth) and s 24 of the Trans-Tasman Proceedings Act 2010 (NZ) contain an identical statutory test for the determination of whether the courts in one country should stay proceedings. Whatever the differences in the judge-made law in the two countries, one would assume that the common statutory provisions will be interpreted in the same way on either side of the Tasman. It must, however, be acknowledged that even though both countries have the same test for determining whether to order a stay, the factors on each side may be finely balanced, and each court, on either side of the Tasman, may feel justified in continuing to exercise jurisdiction.²⁴

C. Evasion of Consumer Protection Measures

One final comment about the Trans-Tasman Proceedings legislation is that, by giving New Zealand courts jurisdiction over Australian residents, it may enable a shrewd contract-drafter to avoid the application of some consumer protection measures. A choice of law clause, specifying New Zealand law as the law governing the contract, coupled with an exclusive jurisdiction clause specifying the High Court of New Zealand, should enable an Australian business to avoid at least the Contracts Review Act 1980 (NSW).

20 *Gilmore v Gilmore* [1993] NZFLR 561.

21 *Ibid.*, at 568.

22 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 (HL). For the adoption of *Spiliada* in New Zealand, see *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA); *Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216 (CA).

23 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA).

24 See Nygh, “*Voth* in the Family Court: Forum Conveniens in Property and Custody Litigation” (1993) 7 AJFL 260 at 269.

Let me give an example. In 1997, a company registered in New Zealand, Rimini Ltd (Rimini), entered into a “Master Franchise Agreement” with an Australian company, Manning Management & Marketing Pty Ltd (Manning), under which Manning was granted a commercial cleaning franchise (described in the contract as the “Cleantastic” franchise) covering an area in east Sydney. Some time later, Rimini purported to terminate the franchise, and subsequently commenced proceedings in New Zealand claiming relief on various grounds under the contract. The reason for it commencing the proceedings in New Zealand was that, not only was it a New Zealand company, but cl 27 of the “Master Franchise Agreement” provided that the contract was to be governed by the law of New Zealand.

Manning, being an Australian company, did not want to litigate on the other side of the Tasman, and filed a motion in the New Zealand proceedings to have them stayed, on the ground that New Zealand was not an appropriate forum for the determination of this dispute, but that Sydney was such an appropriate forum. Manning pointed out that, although Rimini was incorporated in New Zealand, its principal, Mr Beadle, resided in Sydney and the contract had been prepared by solicitors in Sydney, had been executed there, and was to be wholly performed there. Randerson J granted the stay.²⁵ Rimini would have been left to its fate before the Supreme Court of New South Wales.

There can be little doubt that Rimini’s advisers had drafted its contract in that way in the hope of avoiding aspects of the law of New South Wales – and especially, I suspect, the Contracts Review Act 1980 (NSW). But, upon Randerson J staying the New Zealand proceedings and leaving Rimini to litigate in Sydney, those hopes would have been dashed. Subsection 17(3) of the Contracts Review Act 1980 (NSW) provides:

This Act applies to and in relation to a contract only if:

- a) the law of the State [of New South Wales] is the proper law of the contract; [or]
- b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State [of New South Wales] ...

That subsection would have scuttled Rimini because, once its “Master Franchise Agreement” was litigated upon in New South Wales, it would have come within the terms of s 17(3)(b) of the Contracts Review Act 1980 (NSW), and the New South Wales court would have disregarded the express choice of New Zealand law as the governing law, to the extent that such law was inconsistent with the terms of the Contracts Review Act 1980 (NSW).

However, had Rimini’s advisers included an exclusive jurisdiction clause as well as the choice of law clause, when Manning sought the stay of proceedings, I assume that Randerson J would have refused it. Despite the close connection of the contract and at least one of the parties with Sydney, they had agreed to litigate solely in New Zealand, and one can only hope that any objection that Manning may have put up to continuing the proceedings in New Zealand would have been met with the response that such an objection would have been readily within the parties’ contemplation

25 *Rimini Ltd v Manning Management & Marketing Pty Ltd* [2003] 3 NZLR 22.

at the time of entering into the contract, and that it was too late to raise such objections when Rimini was merely seeking to ensure that both parties kept to their bounden word.

And, one must add, if the same set of facts were to come before a New Zealand court after all the provisions of the Trans-Tasman Proceedings Act 2010 (NZ) have come into force, that conclusion would have been well-nigh inevitable. Paragraph 25(1)(b) of that Act provides:²⁶

25(1) On an application under section 22 [for a stay of proceedings] (and despite section 24 [which lists the factors which a New Zealand court must take into account in determining the application for a stay]) the New Zealand court—

(a) ...

(b) must not, by order, stay the proceeding, if satisfied that an exclusive choice of court agreement designates a New Zealand court as the court to determine those matters.

The only circumstance in which the injunction of para (b) may be set aside is if the court is satisfied, under ss 25(2), of a variety of matters, the most relevant of which, for present purposes, is para 25(2)(c) that giving effect to an exclusive choice of court agreement “would lead to a manifest injustice or would be manifestly contrary to New Zealand public policy”.

But it may be observed that, at least in Australia, the Contracts Review Act 1980 (NSW) is one of the few measures of consumer protection that applies to only certain contracts. Most of the consumer protection law on the other side of the Tasman is contained in the Trade Practices Act 1974 (Cth), and generally applies to *conduct* rather than to particular categories of *contract*. Thus, to continue with the illustration of Rimini, even if Manning were sued in New Zealand, it could have commenced its own proceedings against Rimini in either the Federal Court of Australia or the Supreme Court of New South Wales, claiming that Rimini was in breach of Part IVA of the Trade Practices Act 1974. That Part forbids a corporation from engaging in “unconscionable conduct” and s 51AC was enacted to some extent to protect franchisees against rapacious franchisors. Part IVA, and especially s 51AC, could be availed of by Manning simply because the legislation applies to conduct and not to provisions of a contract, and would be applicable whatever the governing law of the contract and despite an exclusive jurisdiction clause. And although that section seeks to control the conduct of “a corporation”, s 4 defines a “corporation” as including a “foreign corporation”, thus including Rimini within its field of operation.

An example of the application of the Trade Practices Act 1974 (Cth), despite an exclusive jurisdiction clause in the relevant contract, is *Society of Lloyd’s v White*.²⁷ Mr White, when he became a “name” at Lloyd’s (and took on unlimited liability to the Society of Lloyd’s) “irrevocably agree[d] that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of the Member’s membership”. Lloyd’s suffered catastrophic losses in the late 1980s and early 1990s and drew down on Mr White’s letter of credit, but he responded by commencing

²⁶ Trans-Tasman Proceedings Act, [25(1)].

²⁷ *Society of Lloyd’s v White* [2004] VSCA 101.

proceedings in Melbourne, claiming that Lloyd's had engaged in misleading or deceptive conduct, contrary to s 52 of the Trade Practices Act 1974 (Cth) and s 9 of the Fair Trading Act 1999 (Vic) when they signed him up. Lloyd's sought to stay those Melbourne proceedings – indeed Lloyd's tried three times, before three different judges in Victoria, to stay those proceedings – relying on the exclusive jurisdiction clause, but was unsuccessful each time. Meanwhile, Lloyd's started proceedings in England, claiming money was due under the agreement, and also seeking an anti-suit injunction to have White (and others) desist from their Victorian proceedings.

The end result of this multi-jurisdictional battle was that the Victorian Court of Appeal upheld Mr White's right to rely on the Trade Practices Act 1974 (Cth) and the Fair Trading Act 1999. As Buchanan JA said:²⁸

In my opinion, Warren J was entitled to emphasize the importance of White's ability in Victoria to invoke the protection of the Trade Practices Act [1974 (Cth)], Fair Trading Act [1999], and companies' legislation, laws embodying specific policies directed against practices which the legislature has deemed oppressive or unjust. Membership of Lloyd's was sold in many marketplaces. Customers in each market were entitled to the protection of the laws regulating commerce in that market. When it entered a foreign jurisdiction Lloyd's was required to deal with the legal system it found. In my view, names in markets without effective consumer protection laws have no legitimate complaint about the operation of laws in other jurisdictions simply because they may produce different results. It is one thing to require claims to be determined by the courts of one country; it is another to require all claims to be determined by the same laws whether or not they are the appropriate laws to govern the transaction giving rise to a claim.

IX. Conclusion

Although progress in harmonizing the two countries' business laws has been slow, it is my impression that over the last ten years it has been steady, and that real advances are being made in achieving a "Single Economic Market". Over a wide range of legal issues, the two countries are, I suggest, no longer foreign one from another, and, while not aspiring to be a Federation, do form a loose confederation.

28 *Society of Lloyd's v White* [2004] VSCA 101 at [19].