HARMONISATION OF BUSINESS LAW BETWEEN AUSTRALIA AND NEW ZEALAND

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This paper considers in detail areas for harmonisation of Australian and New Zealand business law identified in the Memorandum of Understanding signed by the two Governments in 1988. It concludes with a proposal for the more effective and efficient reform of the business law of the two countries.

I INTRODUCTION

Australia and New Zealand share a number of common characteristics:

- they are geographically isolated outposts of European settlement in the southern hemisphere and adjacent to each other;
- they are former British colonies;
- in the early history of colonisation New Zealand's closest economic ties were with Australia in terms of labour, trade and banking;[1]
- they have distinct cultural similarities;
- they share the inheritance of the Common Law but are struggling towards a sense of national identity;
- each has an indigenous population which is becoming more conscious of its rights;
- both were prejudiced by the United Kingdom joining the EEC.

This makes it inevitable that there will be close contact between the two countries. There has long been a free movement of labour between them. The courts of both countries refer to the precedents of the other system, as well as to

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1 See CGF Simkin *The Instability of a Dependent Economy* (OUP 1951) 194.

English precedents.[2] Recently Professor Robert Baxt[3] has drawn attention to a difference of judicial philosophy and technique between the High Court of Australia and the New Zealand Court of Appeal. The High Court was more "black letter" and the New Zealand Court of Appeal more willing to look at policy. I too subscribe to this view. Below that level, however, the picture is more uniform. Australia has abolished appeal to the Judicial Committee of the Privy Council and New Zealand is likely to do so in the near future. Both appellate courts reveal a greater willingness to depart from English authority which they consider unsound, as well as on the traditional ground of differing local circumstances.[4] Also, both countries have at times borrowed from the other's legislation although this has perhaps been less frequent than one would have expected.[5] The reasons for this are the common trait of looking to London in the past coupled perhaps with the complexities of Australian federalism in practice which have resulted in more conservative law-making. This stands in marked contrast to the radicalism of some New Zealand legislation, facilitated by the almost indecent speed of the legislative process under a unicameral Parliament operating in a unitary system. In the past New Zealand has been much freer to experiment with legislation than Australia. Now we are locked in a closer embrace through CER and this raises fears that the New Zealand law reform process may become stifled, at least as far as the subject matter of CER is concerned.

CER is the name given to the Australia/New Zealand Closer Economic Relations Trade Agreement which was a treaty entered into between the governments of the two countries on 13 April 1982. The treaty is principally concerned with the establishment of a free trade area. This objective must be seen in the context of the range of possibilities normally considered under the concept of economic integration. Economists distinguish between five forms of economic integration - restricted free trade areas, free trade areas, customs unions, common markets and economic unions.[6] The lowest level of integration is the restricted free

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2 See for instance the late Prof Hamish Gray's inaugural address at the University of Birmingham 19 March 1970, "The Persistence of the Common Law" pp 6 et seq.

3 "Towards one Market. Harmonisation of Business Laws - The Implications of CER". Unpublished paper at the Joint Conference of the Australia and New Zealand Business Councils, Wellington, 3 and 4 November 1988. See too his "Closer Economic Relations with New Zealand and Implications for Trade Practices and Corporate Law" [1988] Australian International Law News 129.

4 See Sir Anthony Mason, The Wilfred Fullagar Memorial Lecture: "Future Directions in Australian Law" (1987) 13 Mon LR 149; Sir Robin Cooke, "The New Zealand National Legal Identity" (1987) 3 Canta LR 171.

5 Thus New Zealand adopted some of the Victorian companies legislation at the turn of the century. The Macarthur Report favoured following the then Australian Uniform Companies legislation.

6 See MC Copeland and GV Butcher "Administrative Options for Closer Economic Relations between Australia and New Zealand", NZ Institute of Economic Research (Inc), Wellington 1979, a Discussion Paper Commissioned by The Australia-New Zealand Foundation, Chapter 1; Sir Frank Holmes et al, "*Closer Economic Relations*

trade area in which some but not all trade restrictions between the member countries are abolished. One type of restricted free trade area is a preferential area in which a member country grants another country more favourable treatment than that given to non-member countries, without necessarily eliminating the trade barriers between them. In theory the General Agreement on Tariffs and Trade (GATT) prevents the creation of new preferential areas, yet in practice these have developed when attempts to establish free trade areas fail. A free trade area implies the abolition of all trade restrictions with each country retaining its own restrictions against imports from non-member countries. Trade restrictions for this purpose include tariffs, quotas, import licensing, and also less obvious forms of restriction such as differing standards and discrimination in government purchasing policies. The third stage of integration is a customs union. This involves the abolition of trade restrictions between the member states and the adoption of a common external tariff system. The next stage is a common market where not only are trade restrictions removed but restrictions on the movement of labour, capital and enterprise are also abolished. Lastly, an economic union is a common market with a harmonisation of national economic policies. The extent of harmonisation is greater than that of a common market. The ultimate stage is total economic union in which all monetary and fiscal policies are unified. An economic union of this kind, while falling short of political union, requires establishment of a supra-national authority whose decisions are binding on member states. Under CER Australia and New Zealand have moved from a restricted free trade area towards a free trade area. There is talk of further union and some of the moves taken recently foreshadow closer integration.

This paper sketches the historical development of the economic relations between the two countries leading to CER, makes a detailed study of the Memorandum of Understanding of July 1988 and then attempts to forecast future developments. While the primary thrust of the paper is business law the topics covered by the Memorandum of Understanding range over a broad front and the subject in context transcends the narrow category of business law. It leads inevitably to fundamental questions about the relationship between the two countries and the possibility of closer legal and political as well as economic integration.

II A SKETCH OF THE HISTORY LEADING TO CER

A The Imperial Vision

On 14 January 1840, Governor Gipps of New South Wales issued a proclamation extending the boundaries of the Colony of New South Wales to include any New Zealand territory which then was or might be acquired in sovereignty. This was followed by the Treaty of Waitangi on February 6. In May 1841 New Zealand was officially proclaimed as a separate British colony. The first fully operative

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with Australia - Agenda for Progress", (Institute of Policy Studies, Wellington, 1986) p 57.

representative constitution was provided by Imperial statute in 1852.[7] Economically New Zealand was dependent on the Australian connection for longer. Many of the early Pakeha settlers came via Australia. Australian banks provided the early finance and Australia provided the bulk of imports and in turn took the bulk of New Zealand exports. As Professor Gary Hawke has observed in "Australian and New Zealand Economic Development from about 1890-1940",[8] New Zealand and the Australian colonies shared a great deal of their 19th century economic experience. Both countries underwent European settlement, the development of sheep farming, the discovery and exploitation of gold and the development of urbanised society. Both, of course, shared a common British inheritance although the pattern of colonisation differed between the two countries. Australia was subject to involuntary colonisation through penal settlements in some places and the convicts included a significant number of people of Irish extraction.[9] New Zealand was not a convict settlement, and for this and other reasons did not attract a large number of Irish immigrants. The reason I stress the Irish factor is that a number of the Irish bore hostility to the English Crown which, together with post-war immigration of continental European immigrants in Australia, has engendered a greater feeling of detachment from the United Kingdom than is apparent in New Zealand.

In the last part of the 19th century there was a movement towards political federation of the Australian and New Zealand colonies.[10] The negotiations were attended by New Zealand politicians, largely it seems out of general interest and courtesy.[11] Eventually, the Australian constitution was drawn up and the imperial legislation, at the instigation of the New Zealand Government, provided for the possibility of the future integration of New Zealand.[12] For a variety of reasons New Zealand did not join the Commonwealth of Australia or Australasia as it probably would have become.[13] A New Zealand Royal Commission was appointed in 1901,[14] and of the witnesses who appeared before it 61 per cent opposed federation, 25 per cent favoured it and 13 per cent were non-committal. Reasons for opposing federation were political, economic and geographical but perhaps the most potent was the fear that New Zealand would lose its political identity. The

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7 See generally JL Robson (ed) *The British Commonwealth - The Development of its Laws and Constitutions*, Vol 4 "New Zealand", (2nd ed, London, Stevens, 1967) Chap 11.

8 Keith Sinclair ed *Tasman Relations* (Auckland University Press, 1987) p 104.

9 For a discussion of Irish immigration see Anthony Trollope *Australia* ed by P D Edwards and RB Joyce (University of Queensland Press, St Lucia, 1967) p 779; CMH Clark, *A History of Australia* Vol III (Melbourne UP, Melbourne, 1962) pp 236 et seq.

10 For a detailed discussion see JA La Nauze *The Making of the Australian Constitution* (Melbourne UP, 1972).

11 Above n 10, p 14.

12 The Commonwealth of Australia Constitution Act, ss 6, 121, 122.

13 Sir Keith Sinclair *A History of New Zealand* (Penguin Books, Harmondsworth, 1959) 231.

14 Appendix to the Journals of the House of Representatives of New Zealand 1901 Vol 1-A-4.

Royal Commission "unanimously arrived at the conclusion that merely for the doubtful prospect of further trade with the Commonwealth of Australia, for any advantage which might reasonably be expected to be derived ... from becoming a state in such Commonwealth, New Zealand should not sacrifice her independence as a separate colony ..."[15]. In recent times Mr Justice Michael Kirby has traced this development with what I detect to be a note of regret. I will return to this topic in the last part of this paper.[16] Exclusion from federation made New Zealand more dependent on the British connection.

Both countries developed as economic units of the imperial system. New Zealand responded more efficiently to the development of refrigeration in the meat industry possibly because Australia, with the growth of larger cities, particularly Sydney and Melbourne, was able to develop a substantial domestic market for its agricultural products.[17] The development of New Zealand as the United Kingdom's antipodean farm while apparently a blessing, ultimately became a curse. It is interesting to compare New Zealand with South American countries to show how much its economy has suffered from the concentration on a single primary market for colonial reasons.[18]

Both New Zealand and Australia developed domestic industries but these were hindered by the imperial system. British firms had local branches, not necessarily subsidiaries in the early period, and the natural tendency for both countries was to import many manufactured goods from the United Kingdom. Both countries eventually developed local industry with tariff barriers to protect it.[19] Both countries suffered badly in the depression of the 1930's and initially the tendency was to accept the advice of the financial institutions of the City of London which dominated local finance. The willingness of these authorities to subvert the interests of the United Kingdom economy has been demonstrated.[20] That tendency worked even more to the disadvantage of the two dominions.[21] Attempts to assert local economic autonomy in the 1930's were frustrated by the Imperial Government and financiers.[22] Government policies differed between the two countries in this period. There was the development of New Zealand as a welfare state and an

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15 Above n 14, p xxiv.

16 The Hon Mr Justice MD Kirby "CER - A Trans-Tasman Court in CER -The Business and Law Essentials" Legal Research Foundation Inc 1983 Part 1, p 16.

17 Hawke, above n 8.

18 See K Griffin *Underdevelopment in Spanish America; An Interpretation* (Allen and Unwin, London, 1969) p 147.

19 Hawke above n 8, pp 110 et seq; K Sinclair, "The Great Anzac Plant War - Australia-N.Z. Trade Relations 1919-39' in *Tasman Relations* (ed K Sinclair) 124.

20 See JM Keynes *Essays in Persuasion* (Macmillan, London, 1931) p 246, 248-9; JK Galbraith *Money: Whence it came, where it went* (Denton, London, 1975) Chap 13; G Ingham *Capitalism Divided? The City and Industry in British Social Development* (Macmillan, London, 1984) Chapters 3 and 8.

21 See WB Sutch *The Quest for Security in New Zealand 1840-1966*, 211; K Sinclair *Walter Nash* (Auckland UP, 1976) Chap XII.

22 See Sinclair *A History of New Zealand* 262.

attempt to build up tariff barriers to protect local industry. Australia did not go as far down the welfare path although paradoxically labour unions grew stronger in Australia than in New Zealand. The main changes took place after the Labour Party took power in New Zealand. In 1938 the New Zealand Government responded to a balance of payments crisis by introducing import licensing and exchange controls. The policy was a planned insulation of the New Zealand economy from external influences. The Australian response to similar crises was more orthodox. The war time Labour Government in Australia attempted to influence economic trends but not to the extent of their New Zealand counterparts.[23] The next development was the negotiation of the New Zealand/Australia Free Trade Agreement of 1965 (NAFTA).

B NAFTA

After World War II there were increasing trading relations between Australia and New Zealand which grew out of the development of both countries and their expanding trade. There were improved relations between the two countries and eventually the consideration of closer integration of the two economies. The idea began to develop that the two countries were not simply distant appendages of the United Kingdom economy but developing countries which had their own future. There was an earlier Australia/New Zealand trading agreement in 1933 which extended imperial preferences to trade between the two countries. NAFTA arose as a result of ministerial meetings which set up an Australian/New Zealand Consultative Committee on Trade. There was discussion of a free trade agreement in forest products which did not find favour and eventually NAFTA which purported to be a free trade agreement developed as a partial free trade agreement. It was partial in respect of the commodities covered and the instruments of protection of domestic production which it covered.[24] The objectives of the agreement as stated in Article 2 were:

> (a) to further the development of the Area and the use of the resources of the Area by promoting a sustained and mutually beneficial expansion of trade;
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> (b) to ensure as far as possible that trade within the Area takes place under conditions of fair competition; and
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> (c) to contribute to the harmonious development and expansion of world trade and to the progressive removal of barriers thereto.[25]

Article 4 of the Agreement which provided for the reduction and elimination of duties on goods traded between the two countries was limited to the items annexed to the Agreement in Schedule A. The most important items covered were forest products but at the insistence of Australian negotiators, an assortment of other

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23 See Hawke above n 8.

24 See PJ Lloyd, "Australia-New Zealand Trade Relations: NAFTA to CER" in *Tasman Relations* (ed Sinclair), 142.

25 New Zealand-Australia Free Trade Agreement.

manufactures were added. Article 4 also laid down a timetable for the elimination of import duties on goods listed in that schedule. In comparison with the EEC, NAFTA did not include a timetable for the automatic reduction and elimination of duties on all items. It is probably true to say that the New Zealand Government adopted a more conservative view to NAFTA than did the Australian Government. The Australian Government seems to have been prepared to extend it whereas the New Zealand Government was more cautious. Further progress towards freeing Trans-Tasman trade under NAFTA was slow. Although NAFTA led to an increase in Trans-Tasman trade its overall effect was probably quite slight. The significance of NAFTA probably lies in the fact that it demonstrated to both countries that free trade could be developed without necessarily threatening industry in either country. Some New Zealand commentators had made pronouncements that such developments would lead to concentration of industry in the Sydney and Melbourne areas[26] but this did not necessarily take place.

In 1979 the two governments decided to seek a new framework for trade liberalisation and this led to the CER Agreement.

C CER

Unlike NAFTA, the CER Agreement provided for a genuine free trade area. The objectives of the Agreement stated in article 1 are:

(a) to strengthen the broader relationship between Australia and New Zealand;
(b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
(d) to develop trade between New Zealand and Australia under conditions of fair competition.

Thus it can be seen from (b) and (c) that the objectives are ultimately free trade. The free trade provisions apply after a fixed transition period and we have recently entered into the second phase of the Agreement. Tariffs and import licence restrictions have gradually been eliminated and we are currently concerned with the so-called second generation issues. It is interesting to note that there is no clear provision in the Agreement relating to these matters.

Instead they are covered by the general provisions for consultation and review contained in article 22. This article provides as follows:

Consultation and Review

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26 Lloyd, above n 24.

1 In addition to the provisions for consultations elsewhere in this Agreement, Ministers of the Member States shall meet annually or otherwise as appropriate to review the operation of the Agreement.

2 The Member States shall, at the written request of either, promptly enter into consultations with a view to seeking an equitable and mutually satisfactory solution if the Member State which requested the consultations considers that:

(a) an obligation under this Agreement has not been or is not being fulfilled;
(b) a benefit conferred upon it by this Agreement is being denied;
(c) the achievement of any objective of this Agreement is being or may be frustrated; or
(d) a case of difficulty has arisen or may arise.

3 The Member States shall undertake a general review of the operation of this Agreement in 1988. Under the general review the Member States shall consider:

(a) whether the Agreement is bringing benefits to Australia and New Zealand on a reasonably equitable basis having regard to factors such as the impact on trade in the Area of standards, economic policies and practices, co-operation between industries, and Government (including State Government) purchasing policies;
(b) the need for additional measures in furtherance of the objectives of the Agreement to facilitate adjustment to the new relationship;
(c) the need for changes in Government economic policies and practices, in such fields as taxation, company law and standards and for changes in policies and practices affecting the other Member State concerning such factors as foreign investment, movement of people, tourism, and transport, to reflect the stage reached in the closer economic relationship;
(d) such modification of the operation of this Agreement as may be necessary to ensure that quantitative import restrictions and tariff quotas within the meaning of Article 5 of this Agreement on goods traded in the Area are eliminated by 30 June, 1995; and
(e) any other matter relating to this Agreement.

4 For the purpose of this Agreement, consultations between the Member States shall be deemed to have commenced on the day on which written notice requesting the consultations is given.

In 1988 negotiations were held between the two governments in Christchurch and agreement was reached to move towards the creation of a single Trans-Tasman market from 1 July 1990 which will cover both goods and services. This is covered by three Protocols signed on 18 August 1988. On 1 July 1988 a Memorandum of Understanding on the Harmonisation of Business Law was one of a number of instruments signed to record the consensus reached in the meetings. The following is the text of the Memorandum of Understanding.

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF NEW ZEALAND ON HARMONISATION OF BUSINESS LAW

This Memorandum records the following understandings reached in discussions between the Government of Australia and the Government of New Zealand regarding promotion of closer economic relations between Australia and New Zealand

Mutual benefits to be obtained by the two countries

1 Both Governments recognise the importance of accelerating, deepening and widening the relationship that has developed through the growth of Trans-Tasman trade since the commencement of the Australia New Zealand Closer Economic Relations Trade Agreement which came into force in 1983.

2 Both Governments also recognise that differences in the laws and regulatory practices relating to business may impede the enhancement of this relationship by inhibiting the creation of an environment conducive to the growth of trade in goods and services and the efficiency of both economies.

3 The further harmonisation of significant areas of business law and regulation can be of mutual benefit to both countries. Such harmonisation can advance the development of free trade and commerce between the two countries and facilitate the development of the efficiency and competitiveness of both countries in relation to international markets.

Existing business law harmonisation

4 Starting from their similar legal and commercial backgrounds, Australia and New Zealand have already achieved a significant degree of harmonisation and co-operation in a number of areas of business law, including:

(a) restrictive trade practices laws administered by the Trade Practices Commission in Australia and the Commerce Commission in New Zealand;
(b) co-operation in relation to business law and consumer affairs through the Standing Committee of Attornies-General and the Standing Committee of Consumer Affairs Ministers;
(c) pre-sale consumer protection;
(d) co-operation between the National Companies and Securities Commission in Australia and the Securities Commission in New Zealand on the admission of share prospectuses;
(e) intellectual property law.

Further development of business law harmonisation

5 It is desirable that the process of harmonisation and co-operation be continued with a view to achieving a mutually beneficial Trans-Tasman commercial environment, including the removal of any impediments to trade that may arise out of differences between the business laws and regulatory practices of the two countries. To this end both Governments will examine the scope for harmonisation of business laws and regulatory practices, including the removal of any impediments that are identified, in accordance with a program to be established. This program will include the following areas:

(a) companies, securities and futures laws, including:

(i) cross-recognition of essential elements of corporate status, including registration ('one place of registration'), and capacity and powers of corporations;
(ii) share capital requirements, including in relation to share buy-backs and no-par value shares;
(iii) fund raising, including recognition of prospectuses, regulation of unit trusts and other investment schemes;
(iv) registration of charges;
(v) disclosure of company operations, accounts and shareholding interests;
(vi) corporate governance;
(vii) takeover law;
(viii) insolvency;
(ix) securities industry regulation, including stock market rules, insider trading, transfer and settlement systems and licensing requirements;
(x) futures industry regulation;

(b) competition law, including in particular reliance on competition law to redress predatory trade between both countries;
(c) consumer protection, particularly with respect to post-sale consumer protection, and consumer credit laws;
(d) copyright law, including support of appropriate international conventions, and the protection of computer software and integrated circuits;
(e) commercial arbitration;
(f) the law relating to the sale of goods and services between two countries;
(g) mutual assistance between regulatory agencies in the administration and enforcement of business laws;
(h) further recognition and reciprocal enforcement of court decisions in each country, including enforcement of injunctions, orders for specific performance and revenue judgments.

6 The two Governments will keep the programme under review and make such variations to the programme as are mutually decided.

7 When either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to trade, and requests consultations, the two Governments will consult with a view to resolving the impediment, whether the area of law is already included on the program and regardless of the priority accorded to the matter at the time.

8 Both Governments recognise that effective harmonisation does not require replication of laws, although that may be appropriate in some cases.

9 Each Government will keep the other Government informed of proposed reforms in the business law area and, where feasible and appropriate, will consult on the harmonisation of the laws in question.

10 Each Government will take the necessary steps to facilitate prompt examination of the areas of business law and regulatory practices contained in the program to be established. The examination process is to include consultation with the business community and other relevant interests in both countries.

Outcome

11 Both Governments will seek to complete the examination of relevant law and practices, and to identify areas appropriate for harmonisation, by 30 June 1990.

12 The understandings set out in this Memorandum are not intended to preclude the taking of any other steps, through Ministerial forums and otherwise, to achieve the earlier harmonisation of any area of business law or regulatory practice.

Commencement and implementation

13 The Attorney-General of Australia and the Minister of Justice of New Zealand will have responsibility on behalf of their respective Governments for the implementation of this Memorandum of Understanding including the establishment, and any variation of, the program.

14 This Memorandum of Understanding will come into effect on the date of its signature.

III THE CONCEPT OF HARMONISATION

I will consider first of all the meaning of harmonisation and then the extent to which the particular examples quoted in the Memorandum of Understanding require harmonisation. Harmonisation is a very ambiguous concept which describes a political and legal process.[27] There are difficulties with it in the EEC as well as under CER. It seems to be generally agreed that harmonisation does not require unification or replication of laws. Sometimes an attempt is made to distinguish between "harmonisation", "approximation" and "co-ordination". However, the distinction between these terms in the EEC context has generally recognised to be illusory or at most simply reflecting differing degrees of intensity.[28] Harmonisation is simply a means to an end. In the case of CER the end is the establishment of a free trade area. Steps must be taken to eliminate obstacles to the establishment of this. It is a question of fact as to whether a particular law constitutes such an obstacle. In his useful address to the New Zealand Law Conference in Christchurch, 1987, John Collinge, Chairman of the New Zealand Commerce Commission, identifies four possible meanings of harmonisation. He wrote:[29]

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27 Holmes et al, above n 6, p 56; For recent Canadian discussion see WH Hurlburt "Harmonization of Provincial Legislation in Canada: the Elusive Goal" (1987) 12 Can Bus LJ 387 and the comment by Arthur Close at p 425; Prof Ronald Cuming "Harmonization of Law in Canada" in *Perspectives on the Harmonization of Law In Canada* (University of Toronto Press, Toronto, 1986) 1; Prof Jacob Ziegel, "Harmonization of Provincial Laws, with Particular Reference to Commercial, Consumer and Corporate Law" in Harmonization of Business Law in Canada (RCC Cuming Research Coordinator), University of Toronto Press, 1986, p 1.

28 See E Stein *Harmonization of European Company Laws* (Bobbs Merrill Co Inc, Indianapolis, 1971) 11-12.

29 New Zealand Law Society Conference papers 1987 p 61. In the same papers see too Jim Farmer QC "The Harmonisation of New Zealand and Australian Commercial

> Immediately, there is the question of the definition of 'harmonisation'. Obviously, it means bringing laws into harmony, but how is that to be achieved? First, it can mean working towards rules which are either identical or, at least, uniform in the sense that say maximum or minimum standards are required to be observed. On the other hand, it can mean working towards laws which are complementary with each other in that they are each compatible with the Treaty objective of free trade. The first definition can be discarded as an exclusive interpretation because it would restrict flexibility of action and fail to allow for differences between the two countries. However, in relation to say standards of labelling it may be pointless to have rules which are merely compatible since carrying on business throughout Australasia would simply mean adopting the highest standard. There may therefore be cases where harmonisation requires that there be a uniformity of rules as well as those cases in which compatibility is sufficient. There are, however, two ancillary meanings which, though not necessarily the preferred meanings, may be gladly seized upon when there is a dispute as to what constitutes harmonisation. The first is the working towards a reduction in differences of laws generally, i.e. minimising the likelihood of distortions but not necessarily eliminating trade distortion features. The second is the formal recognition of each other's laws so that matters valid in Australia would be recognized in New Zealand, and vice versa. This interpretation amounts, in effect, to each recognizing the right of the other to do as it wishes in any particular area of law. Accordingly, the word "harmonisation" appears to have been deftly chosen by the draftsman of the Treaty to cover such meaning as may be found to be most appropriate in each case. It means what governments like it to mean. The practical effect of this assessment is to leave significant discretions with each government (in relation to enacting laws) and to the courts (in interpreting same) as to what harmonisation requires in any particular case. Certainly, harmonisation does not mean the necessary adoption of identical policies but rather the commitment to make free trade work.

Further elucidation of the concept was attempted in the Report of the Proceedings of the Workshop on Harmonisation of Business Laws at the Joint Conference of the Australia and New Zealand Business Councils held in

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Law" p 67. On the meaning of 'replication' Sir Owen Woodhouse, President of the New Zealand Law Commission, had this to say at the ALRAC Conference 1988 "The Memorandum of Understanding states that 'effective harmonisation does not require replication of laws, although that may be appropriate in some cases'. I understand that that rather strange word 'replication' is used in the sense of precise identification, and in that sense, I suppose, the proviso is sensible enough, but I would think problems will arise unless those embarked upon various aspects of the general exercise act on the sensible principle that the more it is possible to move from approximisation of laws in the direction of actual uniformity, then the more reliable and helpful will be the end result. In saying that, I would add that half-way consensus-type solutions would often be no solutions at all. Sometimes for that reason the Australian model ought to be the general answer. On the other hand, sometimes the New Zealand recommendation will be more appropriate. In that regard I am able to say in this admirably candid Canberra climate that when one player is considerably larger, the smaller player must always be politely audible."

Wellington on 3 and 4 November 1988. The workshop proposed some very diplomatic guidelines which included the following resolutions:

(i) That the ANZBC recognise and emphasise to the two governments that:

(a) harmonisation of business laws does not require replication;
(b) harmonisation is not an end in itself but is rather a means of reducing or eliminating identified impediments to Trans-Tasman trade and investment; and
(c) the harmonisation process itself should not act as an impediment to continuing law reform in either country but the ANZBC endorses the need for such law reform to occur on the basis of consultation between the two countries.

(ii) That the ANZBC recommend to the two governments that harmonisation of Business Laws be proceeded with as rapidly as possible in those aspects which are of a technical/procedural nature, or otherwise not in dispute. In areas of substantive and fundamental content (such as those specified in paragraphs 5(a) and (b) of the Memorandum of Understanding on the Harmonisation of Business Law) compatibility of laws should be worked toward in an orderly manner, with a view to achieving the best possible regimes for both countries.

Turning to the particular examples listed in the Memorandum of Understanding, the memorandum makes it clear that the topics are simply listed to be examined by the governments with regard to "the scope for harmonisation ... in accordance with a program to be established". The programme will include the following areas:

(a) Companies, securities and futures laws

Australia is the only federal jurisdiction in the English speaking world with uniform companies legislation. The USA and Canada have not reached that stage for complex reasons.[30] In the USA there is a market for corporation law statutes which has been the subject of criticism[31] but is stoutly defended by the Law and Economics writers.[32] In Canada the Lawrence report[33] led to the Ontario Business Corporations Act of 1970 which in turn influenced the Canada Business

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30 For the US position see Henn and Alexander's *Laws of Corporations* (West, St Paul, Minn, 1983) 3rd ed; for the Canadian position see Ziegel above n 27; P Anisman "The Regulation of the Securities Market and the Harmonization of Provincial Laws" in *Harmonization of Business Law in Canada* (RCC Cuming Research Coordinator), p 77.

31 See for instance "Comment, Law for Sale: A Study of the Delaware Corporation Law of 1967" 117 U Pa L Rev 861 (1969); "Federation and Corporate Law: Reflections Upon Delaware" 83 Yale LJ 663 (1974).

32 See for instance R Winter "Shareholder Protection and the Theory of the Corporation" 6 J Leg Stud 251 (1977).

33 Ontario Legislative Assembly, "Interim Report of the Select Committee on Company Law" (1967).

Corporations Act 1975[34] which has influenced later provincial legislation.[35] There is not, however, the degree of uniformity achieved in Australia. Where areas of substantial uniformity of law exist between countries it is usually the legacy of colonialism but within Australia it has represented the political will since 1961, and the 1981 legislation, although ultimately based on the UK model, now differs significantly from it. There is now the prospect of federal legislation in the corporate and securities fields.[36] These then represent three divergent strands in any consideration of harmonisation of New Zealand and Australian laws -the common imperial past, the Australian momentum towards uniformity at least in the above areas and the fact that no other economic union has substantially uniform laws for complex reasons which are historical, political and sometimes economic.

(i) Cross recognition of corporate status. This is very basic and is common to all free trade areas.

(ii) Share capital requirements. Here the laws are presently the same although both countries are considering reform of the law to allow share buy-backs. The Australian legislation which is influenced by the English model and is characterised by detailed rules will permit buy back of both fully and partly paid ordinary shares if authorised by the company's articles. Public companies will be allowed to buy back up to 10% of their shares each year without the approval of the shareholders in general meeting. The latter approval will only be necessary in the case of selective buy backs or where there is a takeover. Proprietary companies will be allowed to buy shares and will only need approval of shareholders if they buy back more than 10% in any year. There are a large number of controls including a requirement of solvency declarations and cancellation of issued shares bought back.[37]

The New Zealand Law Commission proposals are simpler and based on the Canadian model.[38] They do not favour the use of the general meeting as a safeguard. Like the Australian proposals there is a solvency test but selective buy backs are allowed (a) if all the shareholders agree or (b) where:

(i) the constitution allows it, and

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34 See *Proposals for a New Business Corporations Law for Canada* (Ottawa, 1971) 2 Vols (the Dickerson Report).

35 See generally J Ziegel, above n 27, p 34.

36 The new Corporations Act and attendant legislation is enacted but not yet in force and likely to be the subject of a constitutional challenge in the High Court.

37 See the Australian Companies and Securities Law Review Committee's Report, "A Company's Purchase of its own Shares and the Cooperative Scheme Legislation Amendment Act 1989".

38 Law Commission Report No 9, *Company Law Reform and Restatement*, Draft Companies Act ss 49 et seq.

(ii) the procedure of section 51 is followed.

Section 51 requires the directors to resolve that the selective acquisition is in the interests not only of the company but is of benefit to the remaining shareholders and on terms which are fair and reasonable to them. Before the offer is made, disclosure must be given to shareholders who will have 10 working days to apply to the court for an order restraining the acquisition.

Currently Australia and New Zealand laws on companies financing the purchase of their own shares differ but it is proposed that the basic provisions will remain unchanged. The Law Commission's report also favours the abolition of par value again following the Canadian lead.[39] There has been no such proposal in Australia.

(iii) Fund raising.[40] Here the law relating to prospectuses, regulation of unit trusts and other investment schemes is different in the two countries. The detailed prospectus regulations differ although there has recently been agreement on the mutual recognition of prospectuses. At the moment New Zealand has rather dated legislation on unit trusts which are exempted from much of the Securities Act 1978. The matter is under review by the Securities Commission and a report is imminent. Unit trusts and other mutual funds are not common in New Zealand largely due to tax reasons. On the other hand both jurisdictions have been plagued with so called investment companies many of which collapsed in the "Crash". New Zealand has detailed regulation of participatory securities which differs from equivalent legislation in Australia. There is much to be said for harmonisation of laws on all three topics as well as the regulation of investment advisers.

(iv) Registration of charges. Australian law regarding chattel security is quite complex and is a very bad precedent for reform. The bills of sale legislation differs in the various jurisdictions. Attempts to reform motor vehicle securities also differ and the relationship between the latter and the company charges reforms is not completely clear.[41] The drafting of the legislation is obtuse. The law on company charges was basically similar to New Zealand until the Australian states amended and up-dated their provisions in the light of the Eggleston Report in 1981. Proposals to amend the New Zealand provisions which differed from the Australian reforms failed to be enacted in 1983. Recently New Zealand

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39 Above n 38, s 28.

40 See the New Zealand Ministry of Commerce *Impediments to Trans-Tasman Trade - Harmonisation of Business Law* Chap. 7.

41 For a critique see AJ Duggan and S Begg's forthcoming work on *Credit and Security Law in Australia.*

enacted the Motor Vehicles Securities Act 1989 which was based on the Australian model but differs in significant respects.

The New Zealand Law Commission has considered the Australian reforms but prefers a more comprehensive reform of personal property security law on the North American model.[42] The general features of the Law Commission's proposals for a Personal Property Securities Bill are as follows:

(1) Unitary system: The Bill introduces a unitary computerised system which applies to natural persons and bodies corporate and replaces the Chattels Transfer Act 1924, the charges provisions of the Companies Act 1955 and the Motor Vehicle Securities Act 1989.

(2) Uniform rules: The Bill creates a set of uniform rules for all forms of security interests over personal property, disregarding the distinctions drawn under current law between various types of interests, such as chattel mortgages, leases, conditional sale agreements, 'Romalpa' provisions, fixed and floating charges, floor plan agreements and so on. The fundamental concept is 'security interest' which includes all of the above legal relationships.

(3) Perfection: The Bill provides a creditor with a security interest in personal property the means of perfecting that security interest. Thus, once a security interest has 'attached' to personal property (which occurs when a debtor having rights in personal property grants a security interest in that property to a creditor, and the creditor gives value) the creditor may 'perfect' the security interest either by registration of a financing statement in the personal property security registry, or by taking possession of the property.

(4) Registration: While perfection by possession will be common where the collateral is, for example, a negotiable instrument, most secured transactions will involve the registration of a financing statement, giving details of the security interest claimed by the creditor in the collateral. This will involve the establishment of a computerised, national register, on which details of all security interests in personal property will be entered. The current practice of registering copies of security agreements will be discontinued, but the register will give to a party conducting a search the necessary details of the security arrangement and the Bill will give rights to certain parties to obtain copies of security agreements from creditors in appropriate circumstances.

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42 On this topic see JH Farrar and M. O'Regan, *Reform of Personal Property Security Law*, New Zealand Law Commission Preliminary Paper No 6, and Report No 8 *A Personal Property Securities Act for New Zealand.*

(5) Priorities: The Bill provides a comprehensive set of rules to resolve the priority conflicts between competing security interests. In most cases, priority will be determined by the 'first-to-file' rule under which the earlier registration affords the secured party priority in respect of after-acquired property and future advances without regard to knowledge of intervening interests. However, the Bill entitles purchase money creditors to obtain a super-priority over earlier registered floating security interests.

(6) Transaction costs: Because the system envisaged by the Bill provides for a much greater degree of certainty than that provided by the current law, and because the registration system will allow for the registration to be completed easily (without the involvement of lawyers in most cases) and for searches to be undertaken by telephone, the introduction of the system should see a considerable improvement in the efficiency of the provision of credit by financiers and a reduction in the transaction costs involved.

While there is much to be said for adopting these reforms in both jurisdictions it is understood that there is some coolness to the New Zealand proposed reform in the Attorney-General's Department in Canberra. On the other hand there is interest in the Law Commission's proposals in some of the leading Australian law firms and in some of the Corporate Affairs Commissions. The technology is there to have on-line searching of company charges and it seems foolish to deny this facility to the business world while extending it to consumers in respect of motor vehicles.

(v) Disclosure. Work is being carried on in both countries on the improvement of accounting standards in line with international developments. The work carried on by the New Zealand Securities Commission is near to completion but there is a rather tense relationship with the Society of Accountants which feels that it has not been adequately consulted. It is concerned that the measurement principles which will be recommended by the Commission and are currently being recommended by the Law Commission will promote legal form over economic substance in financial statements contrary to the views of the Society. This will impair the usefulness of the information. In Australia accounting standards are now the responsibility of the Accounting Standards Review Board, a statutory body with representation from the accountancy bodies. The standards are enforced by the professional bodies in respect of their members and the National Companies and Securities Commission is responsible for their enforcement in the business community. In New Zealand at present the position is much more fragmented. Hence the difficulties in the relationship between the Society of Accountants and the Commission. The question of compliance and legal enforceability is the subject of active controversy. There is a clear need for common rules in this area

but the New Zealand Society of Accountants is not happy with all aspects of current Australian accounting standards.[43]

(vi) Corporate governance. The topic of corporate governance was part of the Law Commission's review of the Companies Act 1955 although the Department of Justice seems to be continuing to retain an interest in the topic as evidenced by the enactment of the Corporations (Investigations and Management) Act 1989. The Law Commission's approach follows the Canadian rather than the Australian model and engages in more radical reforms to the civil duties of directors and controlling shareholders as well as investors' remedies.[44] Whereas the Australian approach emphasises bureaucratic enforcement through the criminal law the New Zealand proposals opt for a civil law approach characterised by slimmed down administration and private enforcement. I think it is quite likely that the latter approach will not find favour with the Minister. Corporate governance is also the subject of a Senate Committee of Inquiry in Canberra whose deliberations are obscure. Research on corporate governance in Australia has been funded by the Business Council of Australia and has been carried out by the Centre for Commercial Law and Applied Research at Monash. Corporate governance is an area where it would be useful to have harmonisation of laws although it would be unfortunate if the Australian provisions of the Companies Code 1981 were to prevail. Both countries need to have a proper debate of these issues and work towards a common model.

(vii) Takeover Law. The takeover laws of the two countries currently differ although the New Zealand Companies Amendment Act 1963 was based on earlier Australian legislation and the Securities Commission's 1984 proposals were based on the current Australian Act.[45] However, the Securities Commission's latest proposals announced in 1988[46] are based on the model of the City of London Takeover Code rather than the Australian legislation and the Minister of Justice has announced that they now have cabinet approval. The New Zealand proposals require a mandatory bid once the threshold of 30% of the voting shares has been reached. The Australian legislation operates from a threshold of 20% but does not require a mandatory bid. It permits creeping and partial takeovers which the New Zealand proposals would proscribe. There is a

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43 For more detailed discussion see *Impediments to Trans-Tasman Trade* pp 16-17 and an unpublished paper given by Rex Anderson at the Securities Regulation Seminars of the Centre for Commercial & Corporate Law Inc, March 1989. See too Law Commission Report No 9 above n 38 pp 138 et seq.

44 Law Commission Report No 9 above n 38, draft ss 98-100 (powers of management), ss 101-113 (directors' duties); Part 8 Enforcement.

45 Securities Commission, *Company Takeovers: A Review of the Law and Practice in New Zealand*, 1983.

46 *Company Takeovers: Report to the Minister of Justice*, 1988.

real need for harmonisation of law on this topic and again the Australian model is defective and the source of much complicated litigation. On the other hand it is questionable whether there is a need for mandatory bids as opposed to pro-rata bids open to all shareholders at the same price. In recent discussions I have had with the Chairman of the New Zealand Securities Commission he has maintained that their proposals although apparently out of line with the CASA are not necessarily wholly inconsistent with Australian takeover practice.

First, as regards mandatory bids the practice of the NCSC in dealing with cases where the threshold has been exceeded is often to agree not to bring divestiture proceedings on condition that a bid is made for the remainder of the shares.

Secondly, because of the current restrictions partial bids have almost disappeared.

Thirdly, the New Zealand reforms would only outlaw creeping bids between 30% and 50%.

Fourthly, the New Zealand reforms favour an equal price rule whereas the Australian rule seems to require an identical offer.

Lastly, although there are differences in the thresholds, the Australian threshold is 20% unless the bidder uses one of the three proscribed methods.

Recently in a joint press statement issued on behalf of both Attornies-General the Australian Attorney-General stated that Australia has no objection in principle to the New Zealand reforms. On the other hand, according to Brent Davis in "Australian Business" a confidential Australian Government document on harmonisation is alleged to state "These differences, particularly with regard to the threshold, could lead to difficulty in maintaining a similar standard of investor protection in both countries and impede the future development of a common fund-raising environment between the two countries."[47] I understand that this is a report of a consultative group discussion and does not reflect Australian Government policy.

Australia is currently tied up with the problems of the Corporations Bill and ancillary legislation, and the topic of takeovers is intended to be addressed later. It is desirable for both countries to have a common takeover regime, but I personally would be unhappy if it took the form

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47 "Differing Laws Hinder Closer Ties with NZ" Australian Business, 14 June 1989, pp 74-5.

of the Australian CASA which is over complex and not particularly efficient.

(vii) Securities Industry Regulation. This topic was the subject of a departmental committee review in New Zealand, which excluded insider trading from its terms of reference. There is much to be said for the New Zealand Stock Exchange being federated with the Australian Stock Exchange and operating under similar rules. David Gascoigne of Rudd Watts and Stone is quoted as saying recently[48] - "For all intents and purposes, Australia and New Zealand should be treated as one market with New Zealand being treated as a regional market within the broader Australia-New Zealand market place." Although these remarks may have been made in the context of competition law I think they apply with equal or greater force to the sharemarket. The securities industry legislation on market manipulation in Australia provides some useful precedent for reform in New Zealand. It would be useful if both countries had a common system of licensing share brokers and the Chairman of the U.S. Securities and Exchange Commission emphasised the need for an efficient transfer and settlement system to facilitate global trading in a speech which he made at the IOSCO Conference held in Melbourne in November last year.[49] The Spencer Russell Report[50] seems to turn its back on Australia and favour a national supervisory authority set over self regulatory bodies. In other words it follows the flawed model of the UK Financial Services Act 1986 and the idea that New Zealand can get by with a system still largely characterised by self-regulation is very naive. The incestuous world of New Zealand finance and business make self-regulation almost impossible. There is little discipline or the self-restraint that is a prerequisite of effective self-regulation.[51] The Minister of Justice recently told me that the supervisory authority would have teeth but in my opinion it depends on who is wearing the dentures.

The insider trading legislation differs between the two jurisdictions. Essentially Australian legislation provides for an ineffective criminal sanction whereas the New Zealand legislation provides for an ineffective civil sanction. The only thing in common is likely to be the ineffectiveness of the laws.

(ix) Futures Industry Regulation. This is a subject of express legislation in New South Wales and the matter has been dealt with by the New Zealand Securities Law Reform Act 1988 by means of a blanket authority given to

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48 Australian Business, above n 47 p 74.

49 "Regulation of International Securities Markets" November 1988.

50 Sharemarket Inquiry, 31 March 1989.

51 For a critique of self-regulation see JH Farrar *Company Law* (1 ed, Butterworths, London, 1985) 498. This is not included in the 2nd edition.

the Securities Commission to approve a scheme for self-regulation. The Securities Commission and Economic Development Commission are carrying out a joint study of the linkage between futures share index trading and the Stock Exchange. Again futures is an area where there should be common systems of regulation.

(b) Competition law

The competition laws of the two countries have grown closer together with the enactment of the Fair Trading and Commerce Acts 1986 but there are still significant differences.[52] Both Australia and New Zealand carried out comprehensive reviews of their trade practices legislation in the early 1970s. Unlike Australia, New Zealand opted for limited reform. The Commerce Act 1975 was based substantially on the Trade Practices Act 1958 in terms of object, principles and structure. New matters of substance related principally to monopolies, mergers and takeovers. By the early 1980s, there was considerable dissatisfaction with the operation of New Zealand's trade practices legislation. After a false start with the ill-fated Competition Bill of 1982, new legislation was enacted in the form of the Commerce Act 1986. This legislation was modelled on the Australian Trade Practices Act 1974 (as amended), which in turn had been based on United States antitrust legislation.

While the trade practices legislation in both countries is now very similar, there are some significant differences. The most obvious is the compulsory pre-merger notification system operating in New Zealand. This has no counterpart in Australia which instead has a "strike-down" system, leaving the parties to assess whether their proposed merger is likely to contravene section 50 of the Australian Act. In practice, informal advance clearances are usually sought from the Trade Practices Commission if there is any doubt about the legality of a merger. The substantive test for merger control purposes is the same in both countries - whether the merger is likely to lead to the acquisition or strengthening of a dominant position. There are indications that the Australian courts[53] are interpreting dominance as involving a lower threshold of market power than that established in Commerce Commission decisions.[54]

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52 See *Impediments to Trans-Tasman Trade* pp 21-2; Baxt op cit., (above n 2). In what follows on this topic I acknowledge the contribution of Lindsay Hampton.

53 See *Trade Practices Commission* v *Australian Meat Holding Pty Ltd* (1988) ATPR para 40-876. The decision of Wilcox J was affirmed by the Full Federal Court of Australia in *Australian Meat Holdings Pty Ltd* v *Trade Practices Commission* (1989) ATPR para 40-932.

54 The two leading Commerce Commission decisions on the interpretation of dominance are *News Ltd/Independent Newspapers Ltd* (1987) 1 NZBLC (Com) para 99-504, and *Magnum Corporation Ltd/Dominion Breweries Ltd* (1987) 1 NZBLC (Com) para 99-500. The Commission's decision in *Magnum* was the subject of an unsuccessful judicial review action. See *Lion Corporation Ltd* v *Commerce Commission* (1988) 2 NZBLC para 99-099.

In contrast to the Australian position, the Commerce Act 1986 contains a statutory definition of a dominant position. The definition applies to both the misuse and merger provisions. The New Zealand misuse provision, section 36, is entitled "Use of Dominant Position in a Market". The Australian equivalent, section 46, has a lower threshold test, namely, a substantial degree of power in a market. This means that some Australian section 46 cases would not necessarily be decided the same way in New Zealand.[55] Another possible difference in the application of the two sections concerns the "essential facilities" doctrine. As yet, the doctrine has not been applied in Australia,[56] but it has received judicial endorsement in New Zealand[57] and it is the policy of the Ministry of Commerce, to encourage its development. Section 36 is seen by policy-makers as playing an important role in regulating natural monopolies operated by the various State-Owned Enterprises.

Vertical non-price restraints are subject to somewhat greater scrutiny in Australia because of the existence of separate exclusive dealing provisions. The Commerce Act does not specifically deal with exclusive dealing or price discrimination, but these practices may be caught by the application of section 27 (the catch-all general provision) or section 36.[58]

The Commerce Act 1986 has recently been the subject of review.[59] A Commerce Amendment Bill is imminent. Likely areas of reform include: (1) limiting section 29 (the exclusionary provisions section) to boycotts having the purpose of limiting competition;[60] (2) making authorisation available for resale price maintenance; (3) regulating the interface between competition law and intellectual property law by replacing the present section 45 with a provision along the lines of section 20 of the West German competition statute; (4) streamlining the merger pre-notification

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55 A case in point is *Mark Lyons* v *Bursill Sportsgear* (1987) ATPR para 40-809. In that case, a 30% market share was, in the circumstances, held to satisfy the Australian threshold test. It is doubtful if such a market share would be adequate to satisfy the New Zealand dominance test.

56 The full Federal Court of Australia in an obiter statement in *Queensland Wire Industries Pty Ltd* v *The Broken Hill Proprietary Co Ltd* (1987) 17 FCR 211 expressed reservations about the application of the doctrine in the Australian context.

57 See *Auckland Regional Authority* v *Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647. See also *Chatham Islands Fisherman's Co-operative Co Ltd* v *Chatham Islands Packing Co Ltd and Salmond Smith Biolab Ltd* (unreported, CP 878/88, 22 November 1988) Eichelbaum J (as he then was).

58 Exclusive dealing may be the subject of an authorisation application under s 27. Recently, a majority of the Commerce Commission declined to authorise Fisher & Paykel's exclusive dealing arrangements concerning whitewear. See *Re Fisher & Paykel Ltd (No 2)* (1989) 2 NZBLC (Com) para 99-520.

59 See Department of Trade & Industry Discussion Paper *Review of the Commerce Act 1986.*

60 For a detailed discussion of s 29, see Pengilley "The Exclusionary Provisions of the New Zealand Commerce Act in light of United States Decisions and Australian Experience" (1988) 3 Canta LR 357.

systems; and (5) eliminating anti-dumping actions involving Trans-Tasman goods and extending section 36 to control Trans-Tasman predatory pricing.

(c) Consumer protection

Although the Fair Trading Act 1986 goes some way to harmonisation of consumer protection New Zealand has not adopted the further provisions of the Australian Trade Practices legislation which deal with unconscionable conduct and manufacturers' liability. Professor Baxt also dealt with this in his paper last year. The Vernon Report[61] commissioned by the Department of Justice and the Ministry of Consumer Affairs recommended reforms that paid little or no attention to Australian law. These particular proposals were the subject of very effective if somewhat restrained criticism by Professor David Harland, the leading Australian expert.[62]

Another area in need of harmonisation but on which little work has been done is consumer credit laws. These differ between states and between Australia and New Zealand. Linked with this is the question of creditors' remedies, a matter omitted from the proposed New Zealand Personal Property Securities Act but one which is the subject of some piecemeal reforms in a Law Reform Miscellaneous Provisions Bill currently before the New Zealand Parliament and an on-going review by the Ministry of Consumer Affairs.

(d) Copyright law

There is a need for harmonisation of copyright laws with particular reference to computer software. Indeed there is a good deal of sense in having uniform laws on copyright, trade and markets and patents as well as the interface of intellectual property and competition law.[63]

(e) Commercial arbitration

New Zealand arbitration law is very out-dated and there has been significant reform in the leading Australian jurisdictions.[64] The matter of arbitration is currently being considered by the Law Commission which has put out a discussion paper which does not favour the Australian precedents but bases itself on the UNCITRAL model law on international commercial arbitration of 21 June 1985.[65] There is a need for sensible harmonised commercial arbitration rules governing

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61 Prof David H Vernon *An Outline for Post-Sales Consumer Legislation in New Zealand - A Report to the Minister of Justice* (Wellington, Government Printer, 1987).

62 See "Post-sale Consumer Legislation for New Zealand - a Discussion of the Report to the Minister of Justice by Professor David H Vernon" (1988) 3 Cant L R 410.

63 See *Impediments to Trans-Tasman Trade* 22-4.

64 See eg the NSW Commercial Arbitration Act 1984.

65 Preliminary Paper No 7 *Arbitration.*

international arbitration between the two countries but this is not necessarily appropriate for the resolution of domestic disputes with builders. It may be that there is room for two arbitration Acts or systems.

(f) Sales of goods and services

Both countries have legislation based on the imperial Sale of Goods Act of 1893. However this has been amended in Australia by the trade practices legislation and there have been other proposals for reform. New Zealand favoured reforms based on earlier Ontario proposals in respect of consumer warranties[66] in the report of the Contracts and Commercial Law Reform Committee in 1977.[67] However these were never adopted in Ontario or New Zealand. The matter seems to be under consideration by the Ministry of Consumer Affairs and possibly also by the Law Reform Division of the Justice Department but so far nothing tangible has been achieved. There is much to be said for a Trans-Tasman review of the law in the light of the later comprehensive proposals of the Ontario Law Reform Commission[68] and the proposed Canadian uniform legislation based on them.[69] Sale of goods, however, is affected by the new contract legislation which will shortly be considered.

(g) Mutual assistance between regulatory agencies

In practice there seems to be increasing co-operation between the Securities Commission and Commerce Commission and the NCSC and Australian Trade Practices Commission.[70] The New Zealand Securities Amendment Act 1988 contained provision to facilitate such assistance.[71]

(h) Further recognition and reciprocal investment of court decisions

This is an important matter for harmonisation. In the EEC it has been the subject of an express and detailed convention. The New Zealand Ministry of Commerce sees this as an area of importance on which progress can be made.[72]

(i) The problem of contract law

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66 OLRC *Report on Consumer Warranties and Guarantees in the Sale of Goods* 1972.

67 "Working Paper on Warranties in Sales of Consumer Goods 1977" discussed in Butterworths *Commercial Law in New Zealand* (ed JH Farrar, Butterworths, Wellington, 1986) para 14.9.

68 OLRC *Report on Sale of Goods* (3 vols) 1979.

69 Uniform Law Conference of Canada Proceedings of the Sixty-fourth Annual Meeting August 1982, p 531.

70 *Impediments to Trans-Tasman Trade* 13-14.

71 Securities Amendment Act 1988, s 46. Compare, the proposed International Securities Enforcement Cooperation Act 1989 currently before the US Congress.

72 *Impediments to Trans-Tasman Trade* 28-29.

A matter not expressly covered by the Memorandum of Understanding is contract law. The principal differences here are that New Zealand followed the early policy of the English Law Commission and attempted to codify certain areas of the Common Law. The English Commission, under pressure from Lord Hailsham as Lord Chancellor, effectively dropped the project but the part-time New Zealand Contracts and Commercial Law Reform Committee proceeded to reform and codify the following areas of contract law:[73]

Illegal Contracts
Minors Contracts
Contractual Mistakes
Privity
Contractual Remedies

The legislation is characterised by general principles and wide judicial discretions which are not necessarily suitable for the resolution of international commercial litigation. As my friend and colleague Professor John Burrows has written, by enacting this legislation New Zealand has taken risks and has effectively cut itself off from the mainstream of contract law.[74] At the end of the day John judges the legislation more charitably than I do. Of the reforms I think that the first has been successful in the domestic sphere, the last moderately successful, but the third and fourth have given rise to uncertainty in commercial transactions. The uncertainty in respect of the Contractual Remedies Act 1979 is tempered by the possibility of contracting out of its provisions. It is arguable that the Minors Contracts Act is too complex. Australia has limited statutory reform of contract law and this differs from state to state. A matter of some complexity now is the relationship between the fair trading legislation and contractual relief. Some thought needs to be given to harmonisation of contract law although it should be recognised that much of the Contractual Remedies Act 1979 has not yet been extended to the sale of goods in New Zealand. This produces major anomalies of its own.

(j) The UN Convention on Uniform Sales

Australia acceded to the UN Convention[75] on 17 March 1988, and it came into force in the Australian jurisdictions on 1st April 1989. As Chairman of the

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73 For discussion of the legislation see *Cheshire Fifoot & Furmston's Law of Contract* (7 NZ ed, Butterworths, 1987) by JF Burrows, J Finn and S Todd.

74 See JF Burrows "Contract Statutes: The New Zealand Experience" (1983) Statute Law Review 76. For other views see David McLauchlan "Contractual and Commercial Law Reform in New Zealand" [1984] 11 NZULR 36, 39-48; Jim Farmer QC "The Harmonisation of New Zealand and Australian Commercial Law" New Zealand Law Society Conference Papers 1987, p 67.

75 For a recent article see Professor Barry Nicholas "The Vienna Convention on International Sales Law" (1989) 105 LQR 201. The classic work is Professor John Honnold's Uniform Law for International Sales under the 1980 UN Convention (Kluwer, 1982).

relevant session at the International Congress of Comparative Law in 1986, I raised the matter with Mr Lange, then New Zealand Minister of Foreign Affairs, who did not find time to reply. I raised the matter with the Minister of Justice who, with his customary diligence, referred it to his Department which then responded with the usual delay. In an attempt to make greater progress I invited Professor John Honnold, former head of UNCITRAL and the leading US expert on the convention, to New Zealand. Professor Honnold, with his characteristic cheerfulness and tenacity, has been exerting pressure on the New Zealand Ministries of Foreign Affairs, Justice and Commerce ever since. There was an attempt by the New Zealand authorities to persuade Australia to exempt Trans-Tasman trade for a limited period which the Australian Government rebuffed. I understand that the reason for the New Zealand move was to safeguard small businesses trading with Australia who might be ignorant of the changes in the Australian laws. The Australian authorities were reluctant to restart the elaborate processes of consultation necessary to allow this. As the Convention is ratified and acceded to by more countries it is likely to provide the basis of much international trade, particularly with Eastern Bloc countries. New Zealand should and no doubt will adopt the convention and it should play its part in the development of a revised Trans-Tasman Sale of Goods Act.

IV THE FUTURE

A The Immediate Future

The Memorandum of Understanding states that both governments will seek to complete the examination of relevant law and practices and to identify areas appropriate for harmonisation by 30 June 1990, but the Memorandum does not preclude the taking of other steps to achieve similar ends. The Minister of Justice has the responsibility of implementing New Zealand's obligations under the Memorandum. Given that this is the case it is very surprising that little that New Zealand has done since the Christchurch meeting seems to be in compliance with the Memorandum.[76] The insider trading and takeover proposals of the Securities Commission differ from Australian law. The work which has been done by the Law Commission on review of the Companies Act follows the earlier enthusiasm of the Minister of Justice for the Canadian reforms. It pays relatively little attention to the Australian law, although an attempt has been made to explain the proposals to representatives of the Federal Attorney-General's Department in their visits to Wellington. Attempts have been made to explain the personal property security reform proposals but the status of these in New Zealand remains unsettled. Support for the latter reforms has been given by two leading Australian experts but institutional support has not yet been forthcoming. There are now indications of possible opposition. The problem with seeking institutional support in Australia lies in the complexity of the Australian federal system.

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76 See generally Jenni McManus "Harmonising New Zealand and Australian Commercial Law" National Business Review, May 1989.

The report on the New Zealand sharemarket, which was produced too late in the day and yet with excessive speed, positively rejects a proposal to federate with the Australian Stock Exchange. It pays remarkably little attention to any Australian laws in this area. On the other hand the insolvency proposals of the Justice Department follow the Australian Law Reform Commission's Report closely. All in all, this is not very impressive evidence of a new solidarity but is partially explained by the built-in delay in law reform.

CER, and particularly the 1988 Memorandum of Understanding, necessitate a reorientation of thinking. Each partner must consider the law of the other in contemplating reform of areas covered by CER. This at least seems to be the perception of the Department of Justice and the Ministry of Commerce in New Zealand. I suspect that the position of the Law Commission may be different - its mandate is to consider what objectively is the best model and to look at Australian laws as part of the total mix. It may be argued that this difference is simply a question of perspective and priority. But its significance should not be underestimated.

B The Intermediate Future

The protocols signed on 18 August 1988 provide for a further review of the CER Agreement and all associated instruments in 1992.

The next stage will be to achieve free trade in services and freedom of investment.[77] Amongst services, shipping and aviation are vitally important to the success of CER. These are politically sensitive topics and CER transport costs, especially inland transport, are still too high.[78] It is likely that there will be more Trans-Tasman relationships between law firms. Rudd, Watts and Stone and Minter Ellison are pioneers in this respect. Some of the large Australian law firms are investigating the take-over of medium-sized New Zealand firms and are already recruiting New Zealand law graduates.

CER is not an investment agreement but it has always been clear that it might induce some degree of Trans-Tasman industry rationalisation. Indeed article 13 refers to such policies. The Heads of Agreement contained further provisions to aid rationalisation but these were dropped from the actual Agreement. Currently the regulatory agencies of the two countries adopt different approaches. The Australian Foreign Investment Review Board adopts a regulatory and interventionist approach while the New Zealand Overseas Investment Commission adopts a laissez-faire approach (except in relation to media, rural land and deep-sea fishing which are politically sensitive areas). The position regarding investment is further complicated because of Australia's understandings with Japan and the USA not to

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77 Sir Frank Holmes, above n 6, Chap 4; AE Bollard and MA Thompson (ed) *Trans-Tasman Trade and Investment* (Institute of Policy Studies, Wellington, 1987).

78 See Charlotte Williams *New Zealand Transport Policy and Closer Economic Relations with Australia* (Institute of Policy Studies, Wellington, 1987).

grant other countries advantageous investment access.[79] Services, investment and possibly a move towards a common currency unit[80] will be topics for the intermediate future.

C *The Longer Term*

Business law is ultimately an economic reflex, and with closer economic relations in the longer term we will inevitably see the closer integration of New Zealand into the Australian law reform process. There are areas of law such as capital markets, company law and competition law where the law will gradually assimilate, after a number of false starts and problems. There are compelling economic reasons why this will be so. In other areas the progress will be slower. There is a need for closer consultation between the Standing Committee of Attornies-General and the law reform agencies of both countries, particularly with a view to CER and uniformity of laws. This need was recognised at the ALRAC Conference in 1988.

We may see at some stage a CER court. Canada and the USA deal with the matter by International Joint Commission but the EEC have the European Court of Justice which is emerging as a significant force in European economic and legal integration.[81] The question of providing a joint body to resolve difficulties was considered from time to time in the negotiations leading to CER but no agreement was reached. Mr Justice Kirby said in his 1983 Auckland address[82] that he had been informed by the Australian authorities that consultation was still regarded as essentially between the two governments in respect of the formal provisions of the agreement. This does not preclude private agreements to settle disputes and indeed we have seen interest on both sides of the Tasman in Alternative Dispute Resolution (ADR).[83] Mr Justice Kirby considered a number of alternatives for Trans-Tasman adjudication, including a regional Judicial Committee of the Privy Council, but this is twenty years too late. What we are most likely to see is reform of civil process and mutual recognition of judgments, improved access by legal practitioners to the courts of the other jurisdictions, and possibly dual judicial commissions, as well as a significant increase in ADR.[84]

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79 Holmes, above n 6, 93 et seq.

80 On the currency question see Holmes, above n 6, p 131.

81 See Clarence J Mann *The Function of Judicial Decision in European Economic Integration* (Nijhoff 1973) Pierre Pescatore *The Law of Integration* (Sijthoff, 1974) Robert Lecourt *L'Europe des Juges* (Brussels, 1976) Lord Mackenzie Stuart *The European Communities and the Rule of Law* (Stevens, 1977) H Rasmussen *On Law and Policy in the European Court of Justice* (Nijhoff, 1986).

82 Kirby, above n 16, pp 19. Sir Owen Woodhouse favoured the setting up of some settlement mechanism at an early stage in his address to the ALRAC Conference 1988. He said a model could be found in the Canada-USA Free Trade Agreement.

83 See Peter Dwight "Commercial Dispute Resolution in Australia: Some Trends and Misconceptions" (1989) 1 Bond LR 1.

84 See Kirby, above n 16, pp 48-49.

Business law harmonisation and reform are too important to be left entirely to politicians, public servants and hybrids like Law Commissions. There needs to be more effective participation by business and the business-law bar than currently exists with the Business Law and Administration Liaison Group and its Australian counterpart which are merely consultative mechanisms.

I propose the setting up of an Australasian Business Law Institute similar to the American Law Institute[85] but specialising in Business Law. This would provide a forum for rational debate of harmonisation and reform of business law. Membership of the Institute would be drawn from the judiciary, the legal profession and the law schools with sponsorship from the large law firms and the business sector. Its task would be to settle the principles for model legislation drawing on the best aspects of Australian and New Zealand law and law reform ideas. A particular scholar or team of scholars would prepare the first draft for discussion by a specialist committee and ultimately by the Institute in plenary session. Our existing law reform bodies and liaison groups are not necessarily the best agencies for this kind of work. We need a greater input from a broader range of people across the Tasman and more thorough and systematic debate than we get from the domestic law reform process.

Working together and building on a common inheritance, with more things in common than which separate us, the path will lead through closer economic integration to a measure of closer legal integration. Whether it will eventually lead us to some closer political union is uncertain. My feeling is, like greatness, it might be thrust upon us.

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85 For a discussion of the American Law Institute and its relationship to law reform in the USA see *American Law Institute, History of the Institute and the Restatements; Proceedings of the American Law Institute*, Vol. 1 (1923); JH Farrar *Law Reform and the Law Commission* (Sweet & Maxwell, 1974) 92-96.