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THE LIMITS OF HARMONY:
Harmonisation of Law in the Context of CER

LLM Research Paper
International Law (LAWS 517)

Law Faculty
Victoria University of Wellington
Wellington 1990

C O N T E N T S

INTRODUCTION

Harmonisation of laws has received considerable attention recently in New Zealand with respect to the Australian New Zealand Closer Economic Relations Trade Agreement (CER). The Agreement and in particular the 1988 Memorandum of Understanding on the Harmonisation of Business Law have altered the context of business law reform in New Zealand. The aim of this paper is to put the debate into perspective and to suggest that a limited, conceptually certain view of harmonisation is the best way to achieve the goals of harmonisation.

To put the debate into perspective, the historical background of the Agreement and some of the overseas harmonisation experiences will be examined. In New Zealand there has been considerable discussion of harmonisation by academic writers, interest groups and governmental and non-governmental agencies. A review of this discussion and an examination of some of the more important statements in it will be made. Central to this discussion is the Report To Governments - By Steering Committee Of Officials.[1] Finally, I will attempt to give an alternative model of 'harmonisation'.

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1 Steering Committee of Officials Report to Governments - By Steering Committee of Officials Wellington, June 1990.

BACKGROUND

The idea of freer trade between Australia and New Zealand is not new. In 1906 a "reciprocal preferential trading arrangement" was prepared by the two countries' Prime Ministers; though the New Zealand Parliament refused to ratify it.[2] The first real attempt at free trade was the New Zealand Australia Free Trade Agreement (NAFTA) in 1965. The goal of that Agreement was free trade but the reality was somewhat more limited.[3] The Agreement has been described as "the culmination of a period of rather unsatisfactory relationships between Australia and New Zealand".[4] The free trade was limited to items in a schedule to the Agreement. The most important of which was forest products. Though there was provision made for adding to the list, virtually nothing was added which competed with New Zealand businesses.[5] Lloyd is critical of NAFTA as a free trade agreement. He suggests that although the value of trans-Tasman trade quadrupled between 1965 and 1978, the effect of NAFTA was

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2 Keith Sinclair (ed) Tasman Relations, Auckland University Press, 1987, 144, P J Lloyd

3 The objectives were stated in Article 2 which read

(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;

(b) to ensure as far as possible that trade within the Area takes place under conditions of fair competition.

(c) to contribute to the harmonious development and expansion of world trade and the progressive removal of barriers thereto.

4 Sir Frank Holmes New Zealand, ANZCERTA and ASEAN, address to the First ASEAN Economic Congress, p2.

5 Above n2, p148.

"slight".[6] He points out that there were many factors at work and that the proportion of New Zealand's total imports which came from Australia remained (subject to annual variations) at about 20-25 per cent.[7]

The Agreement did show that free trade was possible. Sir Frank Holmes noted[8]

> [o]verall, the, NAFTA with only limited liberalisation between the partners and in overall trade policy, may have been helpful in orientating more manufacturers towards exporting, especially to Australia. But it had limited significance, other than as a stepping stone to a more comprehensive change of policy. By the early 80's enough New Zealand manufacturers had succeeded in competition with Australians to make a genuine free trade area a political possibility.

A change was necessary to achieve this. New Zealands general economic policy had been isolationist. Import licensing had been in place since 1938 which had sheltered New Zealand manufacturers from competition. New Zealands import licensing had been one of the factors which had limited free trade under NAFTA as they made Australia reluctant to give significant tariff concessions.[9]

Any new agreement would have to deal with import licensing and ensure that progress could not easily be stalled.

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6 Above n2, p151.

7 Idem.

8 Above n4, p3.

9 Above n2, p146.

For New Zealand, the rationale behind CER was clear. Prime Minister David Lange said[10]

> [l]ife in the global market place is hard for the small guy. Size makes a difference. A country going it alone with only 3 million people is going uphill all the way. It doesn't take lateral thinking to tell you that our chances are better as part of an Australasian economy with a population based on 18 million people.

Australia is much more important to New Zealand as a trading partner than New Zealand is for Australia.[11] Nevertheless, New Zealand is a significant market for Australia. New Zealand is the largest export market for Australian manufacturers.[12]

For Australia there are also strategic concerns. As James notes "Australia would regard with horror a hostile force or government on its south-eastern flank."[13] Sir Owen Woodhouse notes the "wider defence and economic purposes of providing a focus of strength and stability for the whole region."[14]

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10 R Rickets (ed) Closer Economic Relations and Beyond : Seminars for the NZIIA Conference, 23 August 1988. Forward by Rt Hon David Lange, pv1.

11 Above n10, p1 per D Caygill. New Zealand receives 5.3% of Australias exports and Australia receives 16.6% of New Zealands.

12 Idem.

13 Colin James The Tasman Connection : A New Path. A discussion paper prepared for the Australia New Zealand Foundation, January 1982, p21.

14 Address by Sir Owen Woodhouse to the Australasian Law Reform Agencies Conference September 1988. Extracts reprinted in Law Commission Report No. 5 Annual Report 1988.

The objectives of the Agreement are[15]

(a) to strengthen the prouder relationship between New Zealand and Australia;

(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 with a minimum of disruption;

(d) to develop trade between New Zealand and Australia under conditions of fair competition.

One of the goals of the Agreement is clearly free trade; though the Agreement's goals are not limited to free trade.

Initially Australia had proposed a form of economic union and had then suggested a customs union. A customs union involves (amongst other things) a common external tariff which was unacceptable because of New Zealand's manufacturers' reliance on cheap imported componentry free trade became the objective of the new Agreement. This was achieved five years ahead of the original date for the final removal of import licensing on 1 July 1990.[16] Anti dumping was dealt with by Article 4 of the Protocol of Goods. Existing regulation was removed, with respect to trans-Tasman trade, from 1 July 1990 and

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15 Article 1 of the Agreement.

16 Agreed Documents from 1988 Review of ANZCERTA protocol on acceleration of Free Trade of Goods, Articles.

is now subject to the general competition laws of the importing nation.[17]

One area where there has been little progress is investment. Australia has a "Treaty of Friendship and Co-operation" with Japan (it has the acronym NARA) which grants Japan sort of a most favoured nation status. Australia is required to give Japan the same investment rights (amongst other things) that they give any other country.[18] New Zealand has pushed quite hard on free investment. Mike Moore as Minister of External Relations and Trade said "it is one of the big things New Zealand wants out of CER".[19] Australia appear to be unlikely to enter into a reciprocal free investment agreement[20], though are officially giving the matter on-going consideration.[21]

Harmonisation - The Framework

Article 22 3 (c) of the Agreement provides that

> [t]he Member Status shall undertake a general review of this Agreement in 1988. Under the general review the Member Status shall consider ...
> (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,

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17 Though competition laws have been altered to accommodate the trans-Tasman market. See the Commerce Amendment Act 1990.

18 Above no. 10, p15, Peter Fairfax.

19 The Dominion, Wellington, New Zealand, May 25 1990, p9.

20 Idem.

21 Above n10, p23, Sir Frank Holmes.

and transport, to reflect the stage reached in the closer economic relationship.

One of the Agreed Documents from the 1988 general review was a Memordandum of Understanding on Business Law.

Memorandum

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

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, New Zealand and Australia 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 Commerce Commission in New Zealand and the Trade Practices Commission in Australia;

   (b) co-operation in relation to business law and consumer affairs through the Standing Committee of Attorneys-General and the Standing Committee of Consumer Affairs Ministers;

   (c) pre-sale consumer protection;

   (d) co-operation between the Securities Commission in New Zealand and the National Companies and Securities Commission in Australia 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 business laws and regulatory practices of the two countries. To this end both Governments will examine the scope for harmonisation of business law 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 .....;

(e) commercial arbitration;

(f) the law relating to the sale of goods and services between the 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 program under review and make such variations to the program 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 Minister of Justice of New Zealand and the Attorney-General of Australia 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.

To meet the requirements of paragraph 11 of the Memorandum, the bilateral Steering Committee referred to above[22] was formed. The report in a section headed "Definition of the Task" notes that the objective of their report is harmonisation and that the removal of impediments to trade is an aspect of this.[23] It notes that few of the laws listed in the Memorandum create an impediment. The report goes on to state[24]

> [t]he MOU identifies the objective of the harmonisation process as being the creation of a mutually beneficial commercial environment and explicitly

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22 Above n1.

23 Above n1, p4.

24 Idem.

> notes that harmonisation does not mean replication of laws.

First, this is a mis-reading of paragraph 5 of the Memorandum. Paragraph 5 of the Memordandum says the goal of harmonisation and co-operation is achieving a mutually beneficial commercial environment and this includes the removal of any impediments to trade arising out of differences between the countries' business laws. Paragraph 2 and 3 of the Memorandum are narrower in their aims. Paragraph 2 notes that differences can impede the creation of "an environment conducive to the growth of trade in goods and services and the efficiency of both economies". Paragraph 3 notes the positive benefits. Paragraph 5, with its reference to a "mutually beneficial trans-Tasman commercial environment" appears to be referring to the benefits identified in paragraph 2 and 3.

It appears that paragraph 5 uses something of a shorthand. Effectively the Report takes the goal of the entire Agreement and makes it the goal of the business law harmonisation process.

Secondly, taken on its own, as an objective the "creation of a mutually beneficial commercial environment" is uncertain and elusive. What apart from the creation of a mutually beneficial commercial environment does it mean. It may not be meaningless but as the goal of a harmonisation programme is unhelpful.

The identified objective is optimistic about the potency of law. This optimism is reflected in the leaders of the Steering Committee letter to the Australian Attorney-General and New Zealand Minister of Commerce which prefaces the Report. It says[25]

> [a]s a tangible means by which trans-Tasman trade can be significantly enhanced, harmonisation in fact has its roots in the original CER Treaty. It has been clearly identified as a major 'second generation' CER issue taking the broad historical and economic thrust of CER forward by drawing on the shared common law heritage of the two countries.

Laws ability to effect broad social change and facilitate economic development was attacked in the context of the 'law and development movement'.[26] The movement was based on the promise that the development of Third World countries could be hastened by developing their law and legal institutions.[27] The movement was characterised by an instrumental view of law.[28] Laws, it was though, could be designed to achieve, and achieve social and economic change. The social consensus behind those purposes and the objective nature of law and legal institutions allowed law to achieve those purposes. Law was viewed as both as potent and important. The 'law and development movement' underwent a crisis in the mid 1970s withered and died. It failed for many reasons not least of which was that the concept of law was wrong.

> [Scholars] have come to see that legal change may have little or no effect on social economic conditions in the Third World.[29]

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25 Letter from leaders of Committee to ministers which is forward to n1.

26 See Synder "Law and Development In the Light of Dependency Theory" 14 Law & Society Spring, 1980, 723.

27 D. Trubek and M. Gulanter "Scholars in Self-Estrangement : Some Reflections on the Crisis in law and Development Studies in the United States 4 Wisconsin Law Review 1974, 1062,1079.

28 Ibid, 1973.

In the CER business law harmonisation context the insights gained in and by the demise of the 'law and development movement' are instructive. Harmonisation may not be able to achieve the objective the Steering Committee identify for it much less significantly enhance trans-Tasman trade, especially if there are already few legal impediments to trade.[30] Law can have a negative effect on trade if it places obstacles in the path of businesses trading as they would like. Harmonisation will have little effect on trade without businesses willing and able to take advantage of new opportunities created by it. In the CER context harmonisation of business law will create few opportunities as the legal differences at present create few impediments. Any positive impact on trade will be by facilitating and improving existing opportunities.

The harmonisation process should have clear goals and should be based upon realistic expectations. The Memorandum in paragraph 2 identifies the negative effect that legal differences can have on the trading environment. Paragraph 3 states that the harmonisation of "significant areas" 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.

These expectations are somewhat more limited than those identified by the Steering Committee Report.

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29 Ibid, 1080.

30 Above n1, p5.

In the Committee's examination of the meaning of harmonisation the Steering Committee noted that[31]

> [w]hile the removal of impediments to trade caused by differences in the commercial laws of the two countries is obviously an important part of the harmonisation process, the Steering Committee notes that it is only one element of the process. Few of the business laws listed by the MOU create an impediment to trade in the strict sense of that term, ie. preventing or obstructing business between the two countries. Impediments of this kind usually take the form of tariffs and other border measures, most of which have already been eliminated pursuant to ANZCERTA.

The Committee then goes on to state that harmonisation is really about lowering 'transaction costs'.[32] Paragraph 5 of the Memorandum states that harmonisation includes the removal of impediments. Harmonisation means something more than the mere removal of impediments. The precise meaning of harmonisation is difficult to determine from the Memorandum. There are indications that it is contemplated a reasonably limited concept. That it was left somewhat indefinite may reflect a desire not to artificially limit the subsequent examinations.

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31 Idem.

32. Idem.

33. Single European Act 1986 Article 8A.

34 Estein <u>The Harmonisation of European Company Laws</u> Bobbs-Merill Indianapolis 1973, p6.

HARMONISATION IN SOME OTHER SETTINGS

The EEC harmonisation programme

The European Community was always designed with the end goal of being one market. The Single European Act 1986, which further committee the European Community to being a single market, defines its internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensure in accordance with the provisions of this Treaty".[33] The Treaty's coverage of commercial and economic issues is comprehensive. Stein notes that[34]

> ...the Treaty contemplates a coherent economic system which is to assure conditions essentially akin to a national integrated market. The system is in the nature of a market economy tempered by social welfare considerations, strong public control of agriculture and transportation and moderate public guidance of the economy. The guidance aims of the "magic triangle" of objectives: balanced growth, stability and higher living standards.

To make this work the European Community (EC) relied on far greater intrusions into national laws than most international organisations. Gaudet[35] separates the law making power of the European Community into three categories:

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35 Gaudet Incidences des Communautes Européan sur le droit interne des Etats Members, 1963, Annales de la Faculte de Droit de Lieye, p5, quoted above n32.

36 Above n34, p10.

37 Above n34, p11.

(1) the removal of restrictions which impede members trading with other members
(2) laws which put in place Community policy on matters such as agriculture and transportation.
(3) "approximation" of laws of the Community Members "to the extent necessary for the functioning of the Common Market."

The European Commission has the power to give directives to Members. This power extends to giving directives on specific matters where harmonisation is desired. Individuals can obtain declaratory judgments against governments for failure to comply adequately or within time limits with such directives.[36]

This degree of formality reflects on the sheer scope of the EC. The creation of institutions such as the European Commission, Parliament, Council and Court of Justice is necessary when trying to knit together twelve countries with divergent interests and rich histories of interaction into one economy. The application of the institutions to harmonisation of business law merely reflects on the overall thoroughness and purposefulness.

The CER programme is in rather stark contrast. Apart from the Steering Committee the Memorandum provides that the Governments are to keep the other informed of reforms and for the Governments to consult when one considers that a law gives rise to an impediment to trade. This lessor degree of formality is appropriate considering the smaller scope of CER and the much greater possibility that problems may be amicably resolved.

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38 Above n10, p11.
39 Idem.

Differing terms are used in the European context of connote the reduction of differences between Community Members. Stein notes that there is no consistent usage of differing terms to indicate different concepts.[37] He concludes that there is no meaningful difference between the terms approximation, harmonisation and co-ordination:[38] "they imply a process which conceivably led as far as the creation of a single uniform rule but may stop short of such a result."[39] He also notes the importance of objective and institutions in harmonising the Community's law

> We concluded that approximation of laws in the first place has a very special function in the Treaty scheme, that is to bring about adjustment in national laws when they impede the coalescence process. This function not only controls the direction of the effort but also supplies it with motive force. Second the new institutions provide an "organised impulse" as well as a measure of enforcement and uniform interpretation.

Harmonisation is merely a means to an end; with the end being the social and political aims of the Community. It has been said in the EEC context that[40]

> The aim of harmonisation however, is not merely the imposition of similar or identical rules on a purely technical level, but the harmonisation of national policies behind the rules, and the development of a policy common to all the Member States. In order for harmonisation

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39 Caroline Bradley "Harmonised Takeover and Merger Regulations Within the EEC" 7 Company Lawyer, 1986, 131,134.

40 Case 41/74 [1974] ECR 1337.

> to be effective the Member States must lose their right to reform the rules independently: harmonisation involves an irrevocable surrender of legislative competence to the Community institutions.

Part of this surrender of legislative competence was accomplished by the doctrine of direct effect, which has already been briefly mentioned. In the Von Duyn[41] case in 1974 the European Court of Justice held that Commission directives can be relied on before national courts even though they have not been incorporated into legislation. the argument which carried the day was the policy that the effectiveness of directives would be greatly increased if they could be relied on before national courts.[42] Hartley in The Foundations of European Community Law notes that[43]

> [t]he fact of the matter is that Member States are often very remiss in implementing directives. The Netherlands is generally regarded as one of the most conscientious of the Member States, yet a study by two Dutch authors has shown that even the Dutch have a bad record in this regard: of the 94 directives chosen for examination, almost two-thirds were not implemented on time. If this is the state of affairs in The Netherlands, one can expect that things will be even worse in some other countries.

Direct effect emphasises the comprehensiveness of the European approach. This approach has, as Stein points out,[44] the virtue of being 'wholistic'. It

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42 T C Hartley The Foundations of European Community Law (2 ed) Clarendon Press : Oxford 1988, pp 201-204.

43 Above n41.

44 Above n34, p14.

45 Europe 1992 : The Facts Publication prepared by the British Department of Trade and Industry

involves harmonisation simultaneously of national policy and technical rules. The importance of policy co-ordination in the commercial area, has as will be shown, been emphatically demonstrated recently in New Zealand.

It is interesting that despite dealing with twelve countries and with civil and common law, only eight directives have been adopted in the field of company law.[45] These deal with areas of obvious importance such as accounting standards, mergers and takeovers and capitalisation requirements. The aim is to minimise difficulties for businesses operating in more than one Member. There are five other directives which have yet to be adopted and there is a proposal for a European Company Statute. This is a proposed complete new set of company law. If adopted it will be an alternative to existing national laws and will be available to new companies formed by the merger of companies from two or more Member States.[46b]

The European approach has been called 'positive' integration.[47] It has the strengths of being realistic and pragmatic. It recognises that differences are inevitable and rather than trying to eliminate them all, only those which present an obstacle to the goal of the EEC are dealt with. The

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and the Central Office of Information 1989, p21.

45 Ibid, 22.

46b Idem.

47 Sir Frank Holmes et al Closer Economic Relations with Australia : Agenda for Progress, Victoria University Press on behalf of the Institute of Policy Studies, p81.

48 Sealy "A Company Law for Tomorrow's World" 7 Company Laywer, 1981, 195,200.

approach taken then appears to be to try and provide common ground. A roaring analogy may be made. Europe's laws are a maze which an unwary interloper travels at their peril. Rather than smooth and straighten everything, the most serious problems are dealt with and where possible alternate routes are provided.

As has been noted, the implementation of Commission policy and directives is another matter. It has been said that in relation to United Kingdom company law that when implementing harmonisation policies generally the wrong option has been taken[48]

> What we needed to do thoroughly we have done by halves - for instance the abolition of ultra vires, for which there was good precedent throughout the Commonwealth. Where little more than a cosmetic touch would have met the case, we have gone overboard with pages and pages of complicated rules and sanctions.

Which neatly illustrates the problems and difficulties posed by harmonisation.

Harmonisation in some Federal Jurisdiction

Harmonisation has arisen in many countries. In Canada, Australia and the United States harmonisation issues have arisen in the context of different laws amongst the states or provinces. Though the issues are not identical to the ones posed by CER, their experiences are instructive.

In Canada the provinces, with the exception of Quebec, started from a similar common law base and

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49 R.C.C. Cumming (ed) Harmonisation of Business Law in Canada 1986, University of Toronto Press, Toronto, p170.

drifted apart. The question of harmonising the law soon arose. Ronald Cumming identified the problem which harmonisation addresses as being raised transaction costs.[49]

> A financier carrying on business in several jurisdictions in Canada is required to comply with the applicable personal property security law of each jurisdiction. Lack of substantial harmony among the laws of the jurisdictions in which he carries on business will inevitably increase his costs. At best, he will be required to obtain legal advice concerning the laws of each jurisdiction, prepare separate procedures for use in each of those jurisdictions. The need to do this may be of no great significance with respect to jurisdictions that offer a large potential market for the financier. However, the extra cost involved in compliance with the law of a jurisdiction that offers only a small market may at worst discourage entry into that market.

This is the concern motivating advocates of a high degree of harmonisation with Australia.

Hurlburt[50] calls this argument the business efficiency argument.[51]

Many businesses transcend provincial boundaries. Business is made less efficient if it has to conform to differing provincial laws and regulatory requirements. This is the argument for harmonisation which is most frequently made. It is most strongly made in connection with such fields as

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50 W H Hurlburt "Harmonisation of Provincial Legislation in Canada : The Elusive Goal" 12 Con Bus Law Journal 1986-87, 387,393 (this paper forms part of a symposium bearing the same name).

51 Idem.

52 Idem.

securities regulation, corporation law, personal property security law, and insurance law.

He then notes that while the insurance industry lobbies for uniform laws, the business community is generally apathetic towards reforms aimed at uniform law and do not lobby. His conclusion on the merits of the argument is that[52]

> If the business efficiency argument is important, it is surprising that business does not make it more frequently and more vigorously. Certainly, business spends much time lobbying for what it wants, but there does not appear to be evidence that in general if mounts vigorous and sustained lobbying efforts to achieve uniformity or harmonisation of laws. The lack of such evidence may be a reason for a careful examination of the argument wherever it is made , but emperical evidence for the costs caused by inharmonious laws is often available and the argument should not be overbooked.

Other reasons for advocating harmony are[53]

(a) non-business interests in areas such as matrimonial property and the law of succession

(b) differences without rational foundation may well bring the law into disrepute

(c) harmony assists the development of the law by focusing all the jurisprudential effort expended

(d) it strengthens the social and cultural ties between the provinces.[54]

Harmonisation is difficult to define.[55]

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53 Above n 50, p393-4.

54 See also n49, p4 J Ziegel.

55 Above n50, 389.

> Harmony is in the intellectual eye of the beholder. One legal philosopher's harmony may be another's dissonance. A lawyer may perceive doctrinal harmony where a businessman perceives administrative anarchy.

Ziegel argues for substantial uniformity "in areas deemed important for the fluent conduct of trade or commerce"[56] - though he argues that social and cultural reasons 'may be' as important as economic efficiency. He acknowledges that "[t]here are surprisingly little hard data about the costs of provincial diversity" and that "...many of the victims of non-uniform laws are surprisingly passive about their fate."[57]

The Uniform Law Conference of Canada has been central to the debate in Canada. It selects its topics by a fairly informal[58] means and has displayed impressive industriousness in developing and adopting 67 Acts.[59] Its effectiveness is another matter. Of the 56 Acts which are still current, only one has been accepted by all twelve provinces. By far, the majority have been adopted in half or fewer of the provinces.[60] Included in those figures are Acts which have been accepted in part or have been modified.

The failure of the Canadian Uniform Law Conference is attributable to a 'lack of will'

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56 Above n49, 6.

57 Idem.

58 Ibid, 13.

59 Ibid, 14.

60 Ibid, 20.

both generally and on the part of those active in the Conference.[61] Hurlburt argues that[62]

> [t]wo things are required. The first is the will to pursue harmonisation. The second is machinery to implement the will.

The existence of will is the fundamental condition. If it exists, harmonisation will be pursued. If it does not exist, creating and maintaining harmonisation machinery is futile.

Close criticises the Uniform Law Conference for the informality with which it selects its project[63]

> ...the Conference should become much more selective in those topics it chooses to pursue as suitable for uniform legislation. At one time a number of very stringent tests had to be met before a particular topic was thought suitable for action by the Uniform Law Conference. Over the past 10 to 20 years the only criteria seems to have been that someone in some jurisdiction thought it would be a good idea and was prepared to work on it. the reputation of the Conference suffers badly when it wanders into areas where uniformity is of minor importance and where there is no "demand" for it.

In the CER context the Memorandum directs attention towards 'significant areas'.[64] The harmonisation process will be ongoing and could be trivialised by 'wandering into areas of minor importance' and eroding political enthusiasm towards the process.

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61 Ibid, 17.

62 Above n50, 416.

63 A Close "Harmonisation of Provincial Legislation in Canada" 12 Can Bus Law Journal 1986-87, 425,428.

64 Paragraph 3.

In Canada over time the push for uniform legislation changed from one for codification of existing laws to a recognition that uniform law was an exercise in law reform.[65] Compromises between divergent provincial legislation will often be unsatisfactory and therefore the uniformity they offer is shortlived. Speaking of the work of provincial law reform commissions Close said[66]

> [r]arely will a law reform commission replace harmony with discord without a corresponding gain in the form of an improved law. A loss of uniformity where the uniform law was bad or unworkable should not be mourned too loud or too long.

AUSTRALIA

In Australia there have been movements to harmonise state laws which have drifted apart over time. The Australian situation is in some ways worse than the Canadian. The Federal Government is comparatively weaker and the states are fiercely independent. There have been some moves toward reducing the differences between state laws since 1945.[67] The Uniform Companies Act 1964 and the Corporations Act 1989 are some of the successes. In Australia the role of the Standing Committee of Commonwealth and State Attorneys-General. This is a somewhat informal body which has the strength of involving personnel who are close to the decision making processes. This strength is perhaps outweighed by the requirement that all decisions reached must be unanimous. The main problem is a lack of desire on the part of the participants in the absence of clear

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65 Above n50, 408.

66 Above n50, 430.

67 Above n49, 40 J Ziegel.

incentives. This lack of desire is well shown by Michael Hodgman who in discussion following the presentation of a paper entitled "The Work of the Standing Committee of Attorneys-General"[68] by the Attorney-General N H Brown said[69]

> I am suspicious of this phrase "co-operative federalism" which is referred to so frequently in the paper which you have presented. Sir, I am not sure that uniformity is, in fact, the answer. If uniformity is the be-all and end-all, and it seems to me that co-operative federalism in the context of this paper seems to boil down to uniformity, it makes one wonder what is the point of having the States. We could not have wonderful social experimentation into such happy subjects, although I don't think there is any connection between daylight saving and abortion, but both South Australia and Tasmania have experimented, if that is the correct phrase, in both fields, and surely the founding father did at least anticipate that by the retention of the States as separate entities, it wasn't going to be a matter of course that uniformity was going to be foisted upon us.

Australia's and Canada's experiences illustrate the difficulty of obtaining harmony in the absence of the political will and incentives.

The United States

The United States is different from the Australian and Canadian situations as "... no one seriously argues any more that federal legislation cannot deal with every facet of human activity".[70] Federal

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68 1971 45 ALJ 489.

69 1971 45 ALJ 489,499.

70 M Shanker "The American Experience on Harmonisation (Uniformity) of State Laws. 12 Can Bus Journal 1986-87, 433,438.

statutes which overrule state legislation have been a force for uniformity in many areas. Nevertheless many areas central to commerce have been left to state legislation. In company law for instance, there is a market for company law with each state having its own legislation and companies choosing where to incorporate.[71]

The most distinctive feature of the United States situation is the National Conference of Commissions on Uniform State Laws. The National Conference has a full time staff and a duty to lobby for the enactment of its proposals.[72] It enjoys a good reputation but its record of success is not appreciably better than the Canadian Uniform Law Conference. Over half the Acts passed by the National Conference have been accepted in fewer than a quarter of the 53 jurisdictions.[73]

The crowning achievement of the National Conference is the Uniform Commercial Code. Advanced by the Conference in 1951 in conjunction with the American Law Institute it has been accepted in all of the states with the exception of Louisiana (where it has been partially adopted) and in the District of Columbia. Ziegel notes that[74]

> The near-universal adoption of the Uniform Commercial Code is indeed a magnificent achievement, but the success of this great enterprise is the result of special factors, and the enormous efforts made to secure its acceptance by the states.

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71 See "Federation and Corporate law : Reflections Upon Delaware" 83 Yale LJ 663(1974).

72 Above n50, 434.

73 Ibid, 436.

74 Above n49, 39.

Magnificent achievement it may be; nevertheless, it is not an unqualified success "... the UCC is not "uniform" and, no doubt never will be."[75] This virtual uniformity has its costs.[76]

> [i]t ... serves as a first-rate trap for the practitioner from another state who thinks he can rely on the official version of the Uniform Act which seemingly is in force in the other state. I could give many personal examples where some minor variation in a Uniform Act brought about by local legislation or local judicial interpretation tripped up the unsuspecting out-of-state businessman or lawyer. As a result, even when a Uniform Act has been enacted in a particular state, the out-of-state must check the precise statute actually enacted in that state and its local judicial interpretations.

Transaction costs, it appears, will always be with us. The achievement of the UCC is that[77]

> [d]espite some degrees of non uniformity, at least most of the country speaks the same basic language and deals with the same basic concepts in broad areas of commercial law. This result, even if flawed, is remarkable.

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75 C W Mooney "Introduction to the Uniform Commerical Code Annual survey : Some Observations on the Past, Present and Future of the U.C.C." 41 Bus L 1343,1346 (1986).

76 Above n50, 436.

77 Above n75, 1360.

DISCUSSION IN NEW ZEALAND

There has been discussion of CER and harmonisation in New Zealand. Apart from the Steering Committee's Report, other recent work in the area includes John Farrar's address to the Australasian Universities Law Schools Association "Harmonisation of Business Law between New Zealand and Australia"[78] and the Ministry of Commerce's Paper Impediments to Trans-Tasman Trade : Harmonisation of Business Law.[79] These both provide an overview of the laws which may be relevant to the harmonisation question and brief examinations of the concept itself. There have been a a number of statements made concerning the concept itself. An examination of these is useful. they show, if nothing else, the sheer ambiguity of the concept.

In terms of the distinction between harmonisation and replication Sir Owen Woodhouse had this to say at the Australasian Law Reform Conference in 1988.[80]

> Clearly the removal of regulatory impediments to trade is not the sole purpose of harmonisation. The contemporary, decisive approach to the closer economic relationship requires at least the provision of a congenial legal environment - one which can give confidence to those affected by it because it is stable, comprehensible and consistent on both sides of the Tasmania.
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> The Memorandum of Understanding states the effective harmonisation does not require replication of laws, although that may be appropriate in some cases. I understand that rather strange word 'replication' is

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78 19 VUWLR (1989) 435.

79 Impediments to Trans-Tasman Trade : Harmonisation of Business Law Ministry of Commerce, Wellington 1989.

80 Above n14.

> used in the sense of precise identification, and in that sense, I support 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 approximation of laws in the direction of actual uniformity, then the more helpful will be the end result. Sometimes for that reason the Australian model ought to be the general answer. One the other hand, sometimes the New Zealand recommendation will be more appropriate. In that regard I am able t say in this admirably candid Canberra climate that when one player is considerably larger, the smaller must always be politely audible.

Sir Owen advocates a high degree of uniformity. One might crisis that view by noting that actual uniformity will be virtually impossible to achieve and that all solutions will be compromises. Short of uniformity all responses will be 'half-way' measures.

John Collinge, the former Chairman of the Commerce Commission in his address at the 1987 Law Society Conference said[81]

> [t]o put the Treaty in perspective, it must be seen as part only, but a consistent part, of New Zealand's macro-economic policy, its trade policy and its other international obligations. It must also be seen in the context of New Zealand's own legislation because the Treaty does not deprive the Member States to reform independently. Likewise there may be circumstances in which other international obligations must also be considered. Harmonisation of laws is not an end in itself but it is rather a means of assisting the economic aims of the Treaty. To harmonise, it is necessary to compare the different national rules and to find a solution to any significant differences geared to the free trade objective of the Treaty.

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81 New Zealand Law Conference Papers 1987, p61.

On the question of harmonisation he said

> Immediately there is the question of the definition of "harmonisation". Obviously it means bring 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 minimum or maximum 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 when 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 they are 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, ie minimising the likelihood of distortions but not necessarily eliminating trade distortion features. The second is the formal recognition of each others laws so matters valid in Australia would be recognised 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 most appropriate in each case. It means what governments like it to mean. The practical effect of this assessment is to leave significant discretions (in relation to enacting laws) and to the courts (in interpreting the 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.

This appears to say that harmonisation is so deft as to be meaningless and that this is a good thing. This was written before the 1988 Memorandum. the context of the debate has shifted away from harmonisation in the raw. The Memorandum allows the first definition given to the discorded as the general meaning and restricts the Members' 'right ... to do as it wishes'. This leaves the notions of compatibility and working towards a reduced differences generally. the focus shifts to what this means in the context of the Memorandum and the Australia New Zealand legal context.

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 contained the following resolutions[82]

> (i) That the ANZBC recognise and emphasis 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;
>
> (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 reform to occur on the basis of consultation between the two countries.

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82 Held in Wellington 3 and 4 November 1988. Source above n78, p447.

> (ii) That the ANZBC recommend to the two governments that the harmonisation of Business Laws be proceeded with as rapidly as possible in those areas 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 5(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 regimes for both countries.

The ANZBC approach is notable for its moderate approach. Its resolutions certainly do not amount to a strident lobby for rapid harmonisation. They emphasise the role of harmonisation - a means to an end - and the need for the harmonisation process to be orderly resulting in the best regimes in each country. It's an extremely pragmatic approach. The absence of any real concern about transaction costs from a body such as the ANZBC calls into question arguments for law reform made on the basis of them.

In a similar vein, Professor Farrar in his AULSA address said[83]

> Harmonisation is a very ambiguous concept which describes a political and a legal process ... 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.

Sir Frank Holmes, the leading proponent of free trade with Australia in Closer Economic Relations with Australia : Agenda for Progress said[84]

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83 Above n78, 435,445.

84 Above n46, p81.

> In general we consider that uniformity of laws is in most cases not necessary for the satisfactory operation of the Agreement. Approximation of laws can be useful and New Zealand continue to be influenced by Australian law and practice but it is not necessary for the smooth running of a free trade agreement.

This is the most minimal approach to harmonisation. It suggests that to eliminate barriers to free trade, very little need be done. On this point, it is consistent with the Steering Committee Report - though the Report uses the transaction-costs argument to suggest a bigger role for harmonisation.

The most critical view of harmonisation is from Ian Douglas who said[85]

> [y]ou have asked me to speak on 'Harmonisation', a word that was widely used in the lengthy discussions that preceded the formal negotiation of the closer economic relationship with Australia. It is like 'consensus', one of those warm friendly words that appeal to politicians, but in this context at least its easy amiability cloaks dangerous fallacies and ambivalent motives. Harmonisation is a dangerous concept for three reasons. First, arrangements based on it will almost inevitably be sub-optimal compromises. Secondly, harmonisation would limit options whereas the expansion of objectives is an important implicit objective of CER. Thirdly, the concept of harmonisation focuses thinking on the wrong issues and in so doing it detracts from the philosophical integrity of the Agreement.

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85 Seminar on CER - <u>An Agenda for Progress</u> Institute of Policy Studies Wellington. Ian Douglas "Harmonisation of Bounties, Tarrifs,etc.

The sub-optional compromises may be similar to the half-way consensus non-solutions referred to by Sir Owen.

The Law Commission has dealt with harmonisation several times. The Law Commission Report No. 8 A Personal Property Securities Act for New Zealand noted that there was no evidence that the significant differences in personal security law between Australia and New Zealand were causing difficulties. The adoption of the PPSA by New Zealand would cause no new problems.[86] The report notes the considerable problems with Australia's law and mentions some were in favour of harmonising with Australia simply to achieve harmony.[87] The report states[88]

> The Committee is of the view that a more measured approach to harmonisation issues is necessary, a view which is supported by the July 1988 Memorandum of Understanding between Australia and New Zealand on the harmonisation of business law and by the subsequent official press releases.

This measured approach was spelt out in the Commission's 1989 Annual Report : Report No. 10. This states[89]

> The Memorandum of Understanding entered into between Australia and New Zealand in June 1988 as part of the revised CER arrangements is likely to have an important although as yet uncertain effect

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86 Law Commission Report No. 8 : A Personal Property Securities Act for New Zealand April 1989, p177.

87 Ibid, p178.

88 Idem.

89 Law Commission 1989 Annual Report : Report No. 10, p5.

on the development of commercial law in its widest sense.

The Memorandum looked towards the harmonisation of business law and regulatory practices. It set up a programme to examine a number of areas, with the object of identifying those in which harmonisation will help to achieve a mutually beneficial trans-Tasman commercial environment. Particular attention is to be paid to areas where different laws impede trade between Australia and New Zealand.

The goal is clear, but the manner of its achievement is not yet so certain. Harmonisation is a word of imprecise meaning. In a statement of the time, the New Zealand Deputy Prime Minister referred to "compatible" laws and added that it would not be a matter of one country following or copying the other laws. Nevertheless there will inevitably be a drawing together of laws - they will be designed at least to fit with each other. And in some cases uniform law will be the sensible answer. The Memorandum itself states that effective harmonisation "does not require replication of laws although that may be appropriate in some cases. What is important is that common legislation should not crystalise around an existing inadequate or unsatisfactory law. Reform should not be frozen by the supposed goal of uniformity. On various topics either Australia or New Zealand might take the lead - one adopting or adopting more advanced legislation enacted in the other. Sometimes the two countries should co-operate in devising a new answer. Conversely, there will be a need to avoid legislation that is merely the mean point of two presently separate pieces of law. Compromise solutions are often no solutions at all.

Harmonisation has attracted a reasonable amount of interest and a wide range of opinions have been expressed. Most would agree with the statements that "harmonisation is a means to an end" and "harmonisation does not require replication". Where differences would emerge would be on the question of transaction costs. Those who view them as important may allow harmonisation to become a rather more intrusive concept - for instance, in delaying law reform. The concept underlying transaction costs is "the creation of a mutually beneficial commercial environment" and the role of law in this.

HARMONISATION - SOME PROBLEMS

The Steering Committee Report takes a 'liberal' view of the harmonisation question. It lacks clear objectives. The vagueness of the identified objective - "the creation of a mutually beneficial environment" results in an emphasis on investment related concern. Consider the following phrases:

"share capital requirements have an important effect on the operation of the trans-Tasman investment environment. Harmonisation laws will facilitate the development of a common fundraising environment"[90], "the development of harmonised requirements for corporate fundraising will assist in the creation of a more efficient trans-Tasman capital raising environment"[91]. Elsewhere the Report refers to a difference in laws being unlikely to have a "disharmonising effect on trans-Tasman business."[92] These considerations - harmonised business environment and a common fundraising environment - are not concerns in free trade agreement; though they fit with seeking a closer economic relationship generally. The EEC which is committed to a closer economic relationship than CER only aims at free movement of capital and not a "common fundraising environment." As noted earlier, CER has not achieved free capital movement.[93] As for a harmonised business environment, the importance of policy should not be overlooked. Business law can hinder the environment but cannot create it.

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90 Above n1, p20, para 7.37.

91 Ibid, p25, para 7.57.

92 Ibid, p20, para 7.36.

93 See text accompanying notes 17-20.

The ANZ/National Mutual merger provides an example of this. the merger was announced on 2 April 1990[94] and was to create a financial giant of some 110 billion dollar.[95] Given the genuinely trans-Tasman nature of the enterprises it would provide a good test of the degree of harmonisation.

In New Zealand all mergers over a certain threshold have to seek Commerce Commission approval lest they establish dominance in a market. Despite the size of the concerns approval was little more than a formality. After the proposal was received the investigative machinery of the Commission swung into action. On 1 May the investigation was completed and a report made to the Commerce Commission. the one and a half page report concluded that[96]

> ANZ and National Mutual are both significant financial institutions in their own right. However, their activities principally relate to different markets and the merger will not result in the creation of dominance in any market.

In Australia the Trade Practices Commission operates differently. Merger participants proceed with their plans but the Authority can challenge them in court. A practice of approaching the Trade Practices Commission for an informal approval has developed which is effectively similar to the New Zealand mechanism but lacks any legal status.[97] No approach to the Commission was made by the participants[98],

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94 The Australian April 3, p1.

95 The Australian April 2, p17.

96 Report from David Scobie and Dick Adam of Commerce Commission on ANZ/NML merger dated 1/5/90.

97 Above n79, p21.

98 The Australian May 25, p15.

however the merger did not result in sufficient concentration for it to be challenged.[99] Nevertheless the Chairman of the Commission, Professor Bob Baxt, had the Australian Treasury warned about the proposal.[100] He was not concerned about the market concentration resulting from the merger but feared that it could set a precedent leading to increased market concentration.[101]

The regulatory bodies which had an interest in the merger were the Reserve Bank, the Federal Treasury and the Superannuation and Insurance Commission. As the market concentration was in theory insufficient for the Trade Practices Authority, there was no authority reviewing the market power question. The merger was in part motivated by the Federal Government's opposition to mergers between Australia's large banks.[102] Ironically for similar reasons on 24 May Paul Keating, the Treasurer, vetoed the merger. He was quoted in The Australian as saying the merger would lead to[103]

> [u]ndue concentration of economic power ... It is vital for the efficient application of the nation's savings that there should be a reasonable diversity of institutions and effective competition in the banking, life insurance and more generally in the provision of financial services ... It is equally important that the community should have confidence that its savings are in secure hands.

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99 Idem. Professor Bob Baxt is quoted as saying the proposal did not involve "market dominance" problems.

100 Idem.

101 Idem.

102 The Australian April 3, p17.

103 The Australian May 24, p1.

One commentator noted the decision to veto reflected a concern that this merger would inevitably result in others and that before long there would be too dominant financial institutions in Australia. This process "is likely to detract from effective and vigorous competition than is in the national interest."[104]

A New Zealand official expressed privately what may be a more likely explanation. His opinion was that the Treasurer was really concerned about the influence of large institutions on the money supply.[105] Certainly the references to the [u]ndue concentration of economic power" can be interpreted consistently with this theory.

Either the merger was vetoed for Australia and effectively for New Zealand. The failure of the merger shows up a disharmony. What sort of disharmony is another question. Legally it appears the Treasurer had no power to veto the merger. Section 65 of the Banking Act 1959 does provide that a bank shall not without the prior written consent of the Treasurer

> (a) enter into an arrangement for any sale or disposal of its business by amalgamation or otherwise, or for carrying on of business in partnership with another bank; or
>
> (b) effect a reconstruction of the bank.

The transaction though dubbed a merger was in form and in substance a takeover of a reconstituted National Mutual by the ANZ. Though section 65 is a

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104 Idem.

105 Who in the best tradition of unnamed officials declined to be quoted.

legal discontinuity it was irrelevant to the 'business disharmony'. Despite the lack of legal authority the participants decided that compliance with the directive was the most sensible path. Will Bailey, ANZ's Chief Executive said[106]

> You can't fight the Government of the day, well we can ... but if the Government of the day is committed to the process we would only lose money and the QCs would be the winners.

For whatever reasons the Australian Government had blocked the merger. The relevant regulatory authorities had approved it with conditions.[107] The Trade Practices Commission were concerned but not by the market concentration levels involved in the merger.

At the official opening of the National Mutual New Zealand head office the then Prime Minister, Geoffrey Palmer, referred to the merger. The front page report in the Dominion reads[108]

> The scuttling this week of the proposed merger between insurance group National Mutual and ANZ Bank highlighted the need for the harmonisation of laws between Australia and New Zealand, Mr Palmer said at the opening of National Mutual's new head office yesterday.
>
> "The announcement by the Australian Treasurer highlights major differences in the regulatory environment between New Zealand and Australia.
>
> We are going to have to sort these things out because we don't want them to become obstacles to business," he said ...

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106 The Australian May 25, p13.

107 The Australian May 24, p1.

108 Dominion May 26, p1.

> Mr Palmer said it was important to have similar rules on both sides of the Tasman to avoid discontinuity of the type that had scuttled the merger.
>
> "Obviously it will take time to get that harmony, and harmony doesn't mean that it's always the same, but nevertheless there needs to be broad comparability."

The comments, if accurately reported, ignore that essentially the same result was achieved by the regulatory authorities on both sides of the Tasmania. The Trade Practices Commission showed itself willing to get involved despite the lack of a legislative mandate.

The 'discontinuity' was a reflection of the discontinuity in the Government's policies. Given the sort of action the Treasurer was willing to take, it is hard to see how any degree of legal harmonisation would change things. Paul Keating did not like it, it did not happen and all the similar rules in the world would not change it.

The failure of the merger illustrates the importance of governmental policy in the creation of that utopia which is "a mutually beneficial commercial environment". It also illustrates the relative unimportance of law in that endeavour: despite the regulatory environment achieving similar results the merger failed. If anything the merger shows harmony in the regulatory/legal framework; further harmonisation would have been equally redundant as the present level.

Constitutional Differences

The Steering Committee fails to identify and deal with differences in the systems of Government. New Zealand with its unicameral legislature has the ability to pass legislation with "almost indecent

speed."[109] We have the "fastest law in the west".[110] Australia in contrast has bicameral legislatives in every state except Queensland and a bicameral Federal Parliament. the fierce independence of the states also needs to be taken into account.

Harmonisation is easier to achieve by changing New Zealand law than through mutual change or changing the Australia law. The Steering Committee Report perhaps bears this concern out in the matters subject to specific follow up action.[111] No Australian law reform imitative is held up or will be directly monitored. The important reform of insolvency law is dealt with by monitoring the consultations between officials from both countries in the development of the legislation.[112] New Zealand's law, on the other hand, is subject to a fair amount of scrutiny and in respect of the Law Commissions Personal Property Security Act (PPSA) the proposal is that it is deferred until Australia have completed their reform exercise.[113] This delaying of New Zealand's law reform goes well beyond what is required by Article 9 of the Memorandum - that the governments are to keep each other informed and consult on proposed business law. Perhaps the greater emphasis on New Zealand law reflects that the New Zealand members of the Committee came to the table with more enthusiasm.

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109 Jack Hodder's phrase in The Capital Letter TCL 13/24 3/7/90, p1.

110 GWR Palmer Unbridled Power (2 ed), Auckland OUP 1987, p138.

111 See Appendix A.

112 Above n1, p73.

113 Above n1, p72.

there appears to be something of a lack of excitement about harmonisation in Australia.[114]

New Zealands ability to pass legislation quickly can be a disharmonising influence as well. The Corporations (Investigation and Management) Act 1989 was legislation which was rapidly implemented to deal with some of the potentially disastrous corporate failures in the wake of the 1987 share market crash. It gives a wide range of powers to the Securities Commission and the Registrar of Companies to investigate and place companies in statutory management.[115] The powers given to statutory managers include powers to suspend payments of debts or the discharge of obligations and a wide ranging moratorium on the exercise of rights against the corporation for the duration of the statutory management.[116]

The Steering Committee Report does not refer to the Companies (Investigation and Management) Act at all. this is a surprising omission. that Act represents a substantial legal discontinuity. A cynic could say that the message is that serious law reform will slow down while ad hoc measures continue unimpeded.

The harmonisation process can only go so far towards uniformity. Some of the limits arise from the political framework of the issue. The independence of the Australian states and the fact that New Zealand and Australia are separate countries ensure that complete uniformity will be very difficult to

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114 There is for instance, no substantive discussion in the Australian Law Journal for the period 1988-90.

115 Sections 38 and 19.

116 Section 44.

achieve. In competition law an areas where harmonisation is especially important given the role that law will play in regulating fair trade between the countries the Ministry of Commerce noted the importance of domestic market factors in the context of the countries different market threshold tests.[117] It said[118]

> Although on the face of it this results in differing levels of protection for traders depending on their direction of trade, in practice this is of limited significance. Both New Zealand and Australia have recently considered the thresholds for application of section 36 and section 46 respectively. Both countries are of the view that their existing thresholds are appropriate to their domestic market circumstances and that, consistent with the principle that domestic companies and those of the other Member States should be treated equally within a free trade area, the same thresholds should also apply in the trans-Tasman context.

This exercise - that uniformity is hard to achieve reflects the overseas experience. One writer suggests that perhaps it is human nature to change things and that it would be surprising if a law reform agency did not alter a piece of legislation.[119] This is perhaps borne out by the companies bill where the Justice Department were recently criticised for rewriting the Law Commission Draft Companies Bill[120] line by line.[121]

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117 Ministry of Commerce Reports and Decisions : Review of the Commerce Act 1986 Appendix 2, p2.

118 Idem.

119 Above n63, p431.

120 Law Commission Report No. 9 Company Law Reform and Restatement.

121 Dominion Sunday Times 14/11/90 p21

Competition law is an area where harmonisation is important. New Zealands Commerce Act 1986 was modelled on the Australian Trade Practices Act. the Steering Committee notes[122]

> Consequently in the competition law area the effective starting point can be said to be one of significant harmonisation. There are of course differences between the NZ Com Act and the ATPA which can be attributed largely to differences in constitutional arrangements, drafting style and policy objectives in each country.

The Committee has drafted a legislative scheme to allow external competition law to anti-competitive trans-Tasman behaviour.[123] The identified ongoing task is "preserving and building on the very substantial degree of harmonisation which already exists."[124]

The courts as well are pursuing harmony in the competition law area. In Apple & Pear Board v Apple Fields Limited[125] Cooke P said[126]

> The wording of S43(i) is close to that of S1(i)(b) of the Trade Practices Act 1974 of the Commonwealth of Australia, from which the provisions of our Commerce Act were largely copied...
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> Nevertheless, if there were a clear and settled body of Australian judicial authority laying down the meaning of "specifically", I should be strongly

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122 Above n1, p42.

123 Which has resulted in legislative change. See The Commerce Amendment Act 1990.

124 Above n1, p43.

125 Apple & Pear Board v Apple Fields Ltd [1989] 3 NZLR 158,164.

126 Ibid.

> disposed to follow it. As mentioned more than once previously (for example in Dominion Rent A Car Limited v Budget Rent A Car Systems [1987] 2 NZLR 395,407; Vicom New Zealand Limited v Vicomm Systems Limited [1981] 2 NZLR 600,605; Taylor Bros Limited v Taylors Group Limited [1988] 2 NZLR 1,39), I think that Australasian uniformity and reciprocity in commercial law are goals to be pursued by the Courts as well as the legislature.

A high degree of harmonisation in competition law is being pursued with a recognition of the inevitability of differences due to policy and market factors.

Company Law however is an area where harmonisation might not be a concern. The Law Commission in Report No. 9 Company Law Reform and Restatement states that most of the responses to the discussion papers did not see core company law as a major harmonisation concern.[127] The report notes that "[i]t is difficult to see how divergence in core company law would affect trans-Tasman trade,"[128] and that harmonisation has never been taken to mean that the legislation in both countries must be identical."[129] The report notes that if the recommendations in it are accepted there will be a substantial difference between the countries in form, nevertheless "the essential elements of both jurisdictions will remain comparable."[130]

The Steering Committee, however, anticipate future harmonisation of corporate law and notes that when the Corporations Act 1989 becomes law the

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127 Above n120, para 151.

128 Above n120, para 152.

129 Above n120, para 153.

130 Above n120, para 153.

Commonwealth Parliament will have control of company legislation.[131]

Company Law is an area where harmonisation may not be an issue. The United States copes quite nicely with 'unharmonised' law.

Nevertheless, it is not inconceivable that it might have to be addressed. Currently there is 'broad compatibility' which will remain with the passing of the new Acts. The Steering Committee refers to the dangers of 'backdoor incorporation' once one place of corporate registration is implemented.[132] The point is that if standards were too different, it would encourage the incorporation of a company in a country in order to do business in the other. That this is a concern reflects upon the stage reached in the overall relationship. In the United States the Delaware Corporations Act attracts considerable business to the State, and its lawyers, by the law level of corporate responsibility it requires.[133] Nevertheless, at present this concern is effectively a constraint on 'disharmony'. It exists but is not of particular concern. The differences between company and competition illustrate that harmonisation will mean and require different things in different areas.

The Steering Committee relied on transaction costs to suggest a high degree of harmonisation. Their report has been criticised for this. Jack Hodder as

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131 Above n1, para 7.04.

132 One place of registration is seen as essential, see above n1, para 7.12.

133 See above n71.

an editor of The Capital Letter said in response to the report that it[134]

> ... proceeds on the basis that harmonisation is not just about removing impediments to trade but involves increasing 'compatibility' of laws to reduce transaction and compliance costs (para 4.03). In the absence of any real discussion of such costs, some may translate that as harmonisation for harmonisations sake.

The report virtually assumes the importance of the costs and the benefits of removing them. However it is easy to doubt the importance of transaction costs. There has been no strong business lobby concerning them. Some business people are in favour of a degree of 'disharmony' as it provides incentives to trade. Lindsay Ferguson, Managing Director of Magnum Corporation, recently told a CER conference that there were serious dangers in many harmonisation proposals[135]

> Harmonisation kills trade. If labour costs, energy costs, regulatory costs and so forth, were identical across countries, there would be little basis for trade.

The absence of a lobby from business undermines the importance of the transaction costs argument.

Attempting to reduce transaction costs is made difficult by the impossibility of removing them completely. Differences will always exist for the unwary. The possibility of difference is sufficient to create a transaction cost. Unless the possibility of difference is removed then there will be costs involved in identifying what the

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134 See above n109.

135 Evening Post 15/11/90, p10.

differences, if any, are. The possibility of difference will exist as long as New Zealand and Australia are separate countries.

The Steering Committee note that "[t]he great bulk of companies incorporated in both countries may never be involved in business dealings across the Tasman."[136] Just as there are businesses which will trade in the trans-Tasman market, some lawyers will develop expertise in dealing with the needs of such clients. This expertise and specialisation will with increased efficiencies lower transaction costs (or increase lawyers profits) and perhaps attract clients. The legal services market will respond and to an extent deal with the problem.

Harmonisation depends on political will. It is Parliaments which will ultimately be responsible for changing the law. The overseas experience is that if the harmonisation process wanders into areas of little importance and demand, the political will can evaporate and the whole process can be marginalised.[137] If harmonisation is to be an ongoing process reflecting the broader New Zealand-Australia economic relationship it is crucial that this does not happen. An attempt to purge transaction costs could result in the whole harmonisation process losing momentum.

It must be borne in mind when considering the political will to harmonise that it is a question of Australian political will as well. Burnett notes that "New Zealand has considerable goodwill in Australia but no political leverage. The goodwill

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136 Above n1, para 7.17.

137 See text accompanying notes 62-64.

can easily be expended."[138] To avoid harmonisation becoming a one-way street where New Zealand law changes to assimilate, or try to, with Australian law care must be taken in choosing subjects for reform.[139]

There is also the question of what happens if a harmonisation reform works badly. If for instance business groups were to lobby against a reform or proposed reform and it were to become a 'political' issue. this again could adversely affect on-going harmonisation.

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138 A Burnett "ANZ Relations : CER in context Legal Research Foundation 1983, p71.

139 See text accompanying notes 19-21.

TOWARDS A LIMITED CONCEPT OF HARMONISATION

Harmonisation is a means to an end; not an end in itself. However, it is an ambiguous concept. The Steering Committee's Report identifies an equally nebulous objective for the harmonisation programme and then attacks transaction costs without any examination of them. The Report has been criticised for losing sight of the 'instrumental' nature of harmonisation.[140]

Harmonisation is unlikely to affect trade much. The leading proponent of free trade does not see it as important to achieving free trade.[141] There appears to be little demand for harmonisation from the business community. In light of this and the role of harmonisation, a limited concept is called for.

The objective of the Agreement is something more than merely free trade; but the core of the Agreement is free trade. Similarly the objective of business law harmonisation is something more than the removal of impediments to free trade; but the removal (and prevention) of impediments is at its core.

Harmonisation should continue to be a major imperative in on-going law reform in both countries. A limited concept which deals with real rather than presumed or imagined problems, is the best way to avoid the whole process being marginalised. An over-emphasis on transaction costs may reduce political enthusiasm towards the programme. At present there is, at least in New Zealand, considerable enthusiasm about harmonisation. This

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140 See above n134.

141 See above n84.

enthusiasm could turn to disenchantment if there are unrealistic expectations which are not met.

Expecting harmonisation to result in a 'mutually beneficial commercial environment' is unrealistic. Government policy is far more important to achieving this than law. Overall the question of how far the relationship will go is a question for the governments. The well spring of the harmonisation programme in the original Agreement, Article 22 S(c) notes that harmonisation is 'to reflect the stage reached in the closer economic relationship". An extensive programme focusing on transaction costs in pursuit of efficiency might take the legal harmonisation ahead of the general relationship. A strong indication of the Government's approach to harmonisation was given by Trade Negotiations Minister, Philip Burdon , to the Australia-New Zealand Business Council.[142] A report of the speech said

> Mr Burdon told the Australia-New Zealand Business Council in Christchurch yesterday that the review [of the Agreement in 1992] would look at the remaining impediments to trade and economic relations between the two countries.
>
> Tax, tariff harmonisation and business law - let alone currency alignment - could have a great impact on the way New Zealanders did business.
>
> New Zealand had no need to be afraid of those issues but they had to be approached with care ...
>
> Mr Burdon said that the Government had to ask what were the impediments, but also what would be the cost of removing them. What was in New Zealand's interests?
>
> "I am only too aware that the removal of impediments could lead to quite

142 Evening Post Wellington 15/11/90, p10.

> unacceptable costs, and costs in terms of our economic and political sovereignty. Harmonisation will not, for me, be a goal in itself without careful analysis of the costs as well as the undoubted benefits."

Which suggests a careful view of harmonisation. It also suggests caution about the wider implications of CER. CER has caused New Zealanders to look critically at New Zealand's future and the importance and value of our 'independent' place in the world. The answer to those questions has large implications for harmonisation. Harmonisation could become a one way street. New Zealand at the end of the day can simply change its law much more easily than Australia. If the only way to achieve 'harmony' is through a unilateral change in New Zealand's law, should it be done? The answer to this depends on the values placed on harmonisation and on what perhaps amounts to 'Kiwi pride'.

The writers opinion is that the question should be 'what is best for New Zealand?' If there are identified benefits for New Zealand flowing from harmonisation to reduce transaction costs the importance of benefits may transcend the value of rugged independence and in the long term provide for independence to be maintained.

At the same time, it is easy to be critical of the transaction cost or business efficiency argument. It seems to be an argument made easily in the abstract but harder to substantiate.

A limited view of harmonisation would involve significant areas being involved for harmonisation. Competition law in particular and the law relating to takeovers are areas where a high degree of harmonisation would be appropriate. In respect of a lot of areas there is already 'broad compatibility'.

Lawyers from both sides of the Tasman talk the same language and deal with the same concepts thanks to the common law heritage.[143] New Zealand and Australia have the sort of harmony which when achieved in the United States was called a remarkable achievement.[144] It may be hard to advance on this.

Harmonisation should not slow down the more general law reform. It should be taken into account in law reform and may provide impetus for reform. New Zealand and Australia should continue to look to the best models for reform on offer and not be restricted to the other countries initiatives or current law.

Harmonisation can be a very positive thing. It could end up bringing the lawyers and legal institutions closer together - particularly if professional requirements are harmonised (and its hard to see why they should not be) - than the laws of the countries.[145] This would be extremely positive and would of itself improve efficiencies and lower transaction costs. It would be precisely the sort of strengthening of the general Australia New Zealand relationship that was one of the Agreement's objectives.

A limited approach is in keeping with the Agreement and the Memorandum. It has the further advantage of being much more likely to work. A high degree of harmonisation will be difficult to achieve.

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143 Above n78, p436.

144 Above n77.

145 This is of course already happending. A good example is the setting up of a liaison committee to examine harmonisation by the Australasian Law Reform Agencies Conference.

Australia's states will see to that. A limited concept of harmonisation will ultimately prove to be the better view simply because it is the most that can be achieved. When it is also satisfying the objectives of the Agreement and comes with the least costs, it is by far the more attractive view.
This limited approach would provide clear goals to the harmonisation programme. Without clear goals much effort could be wasted due to the ambiguity of the concept. The pursuit of business efficiency could paradoxically lead to law reform inefficiency. A limited approach would not eschew transaction costs but rather than attempting to identify and deal with them immediately, would favour a gradual approach and deal with such discontinuities as they became problems.

CONCLUSION

Harmonisation is a concept which has been discussed in several jurisdictions. It's an elusive concept and a difficult goal. European experience suggests that a relatively low level of business law harmonisation is necessary for the functioning of a common market. The CER relationship is a free trade area between two countries with similar legal systems and a common legal history. There is already a high degree of harmonisation and with careful measured progress, the objectives of the Agreement could easily have been met.

The harmonisation of law question could perhaps have been easily resolved. However the bilateral Steering Committee focused on an unclear goal and concerned itself with transaction costs. The Committee did so on the basis that a high degree of harmonisation could significantly enhance trade. This appears unlikely. Trade increases result from general economic conditions and policies and business having the desire and confidence to use opportunities open to it. Law can impede this but of itself cannot improve trade in the face of low business confidence.

The Steering Committee focus on efficiency may have been based on an ideological commitment. The pursuit of efficiency sometimes seems to breed a religious zeal all of its own.

Harmonisation should be a means and not an end. Sir Kenneth has said that[146]

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146 Sir Kenneth keith address to the Legal Research Foundation "Reforming the Law" 23 November 1989, p8.

> [W]e should not be mesmerised by the mere incantation of the acronyms. CER does not mean that there must be one law in all areas for the whole of Australia and New Zealand. The Australian states would resist any such interpretation. It will often be the case that great differences in our law (and indeed within Australia) can remain consistently with the purposes of promoting and enhancing trade.

New Zealand and Australia are independent countries with different concerns and policies. The law should be able to reflect differences.

A limited approach is in accordance with the role of law in free trade agreements and both the CER Agreement and the Memorandum of Understanding. There is another review of business law in 1992. By then, perhaps the issues will have become clearer.

A limited approach will provide the certainty and clarify necessary to ensure that the harmonisation process is ongoing, certain and consistent. It is important that there is careful progress and not a brief enthusiastic flurry or ad hoc responses.

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