closer relations with new zealand

> The crimson thread of kinship runs through us all.
>
> Sir Henry Parkes,
> *Constitution Convention, 1890.*

background. Australia and New Zealand have much in common. Both countries were colonised by the British and adopted many of their laws and legal traditions. But each maintains a distinct political, legal and economic system. Australia is a federation of States whereas New Zealand has a unitary system. In Australia the federal government and most of the States have a bicameral parliament. New Zealand's parliament has only one chamber. These differences make the law making process simpler and quicker in New Zealand than it is across the Tasman. Despite the many structural differences as well as differences in substantive laws, Australia and New Zealand are becoming increasingly aware of the benefits of harmonising their laws, especially in areas which affect trade.

political distinctiveness. Similarities in their backgrounds and the fact that the two countries are close together, led to a consideration of New Zealand's inclusion as an Australian colony in the lead up to federation. Indeed, one of the covering clauses of the Australian Constitution says

> The States shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia. ... as for the time being are parts of the Commonwealth and such colonies or territories as may be admitted into or established by the Commonwealth as States.

Recently, however, the Prime Minister of New Zealand, the Right Honourable Geoffrey Palmer, said that

> ... federation is not congenial to the New Zealand political experience. It was not congenial in 1900. I have no reason to imagine that it has become any more congenial in 1990. It is a very different thing to be a nation, than to be a state within a system. Nationhood once acquired is not lightly surrendered.

Despite the fact that political union is unlikely to become a reality, the economic and legal relationships between the two countries have been strengthened significantly in the last decade.

economic relations. Closer integration between the two economies was attempted after World War II in the form of the New Zealand Australia Free Trade Agreement (NAFTA) but it was not until 1983 that significant progress was made in this area. In that year the Australia New Zealand Closer Economic Relations Trade Agreement (ANCERTA) was signed. This bi-lateral trade agreement aimed to create a free trade area between the two countries by 1995. The success in removing tariffs and quantitative restrictions led the two governments to bring forward that date to 1 July 1990. Closer economic relations prompted the Hon Mr Justice Kirby to revive the issue of federation with New Zealand in an address in Auckland in 1983.

> Exactly a century ago, Australian and New Zealand lawyers and citizens were debating the precise form of their politcal relationship. Is it too much to hope, a hundred years on and in times less certain and more dangerous that the CER Agreement may revive the old debates and require our re-exploration of the lost opportunities?

legal change. The move towards a free trade area has not strengthened the political relationship between the two countries but it has necessitated legal change in many areas. In July 1988 the two governments concluded an arrangement which committed them to a programme for harmonising business law. Harmonisation does not mean that laws have to be identical, although that may be possible and appropriate in some cases. The aim is rather to ensure that the laws of the two countries fit together thereby promoting rather than discouraging free trade. Briefly, CER has led to legal change, or discussion of change, in at least three areas

- harmonising substantive commercial laws in areas such as trade practices, consumer protection, copyright, commercial arbitration, company and securities law and sale of goods

- reciprocal recognition and enforcement of judgments

- administration of justice, including proposals for a common court of appeal and an Australasian commercial causes court.

an example. Rather than outlining the degree to which all these areas of the law have been harmonised, a single example will be given to demonstrate the incidence and effect of harmonisation. The New Zealand and Australian Parliaments have recently introduced new legislation which extends the application of the competition laws of each country to conduct in the other that adversely affects markets for goods and services. This has been necessary because of a protocol to ANCERTA which recognises that the maintenance of anti-dumping provisions in respect of goods originating in the other country will be inappropriate on achievement of full free trade in goods on 1 July 1990. In particular the Commerce Act 1986 (NZ) s36A and the Trade Practices Act 1974 (Cth) s46A will prohibit persons with a dominant position in Australia or in New Zealand, or in both countries, from using that position to affect adversely markets in either country. In an address at the 9th Commonwealth Law Conference in New Zealand in April 1990, the Rt Honourable Geoffrey Palmer, the Prime Minister of New Zealand, said that

> It was agreed that from July both countries would deal with anti-competitive conduct by way of domestic competition laws instead of levying anti-dumpting duties at the Executive Government level. The Commerce Law Reform Bill at the Select Committee stage right now, is intended to implement this agreement by introducting the single market concept into competition law.

enforcement of orders and judgments. Palmer also pointed out that there is a consequential need to reform the law relating to the enforcement of orders and judgements. The legislation allows orders of the Federal Court of Australia and of the New Zealand High Court to be enforced reciprocally in matters covered by the legislation. This example of reciprocal enforcement of judgments may herald a more comprehensive enforcement scheme between the two countries. The Service and Execution of Process Act 1901 (Cth) provides for the enforcement of judgments made in one Australian State or Territory in another State or Territory. In an article published in 1983 entitled, 'Towards an Australasian Commercial Causes Court', PT Finnigan made the point that the resolution of trans-Tasman commercial disputes would be facilitated by the extension of this statute to New Zealand judgements and vice-versa.

administration of justice. Harmonisation of laws also raises questions of how these laws should be admistered. A number of commentators and academics have suggested a trans-Tasman court. In a speech given in Auckland in 1983 entitled, 'CER – A Trans Tasman Court?' The Hon Mr Justice Kirby concluded that despite its obvious advantages, there would be many practical difficulties associated with the creation of a special Trans Tasman court with limited jurisdiction in commercial or trade matters. The same suggestion was made by Dr Warren Pengilly at the 9th Commonwealth Law Conference in Auckland. Dr Pengilly said that it seemed inescapable that Australia and New Zealand would have to do what the European commuinity had done and create a multi-national court to handle trade and competition issues. The new trade practices provisions discussed above do not go this far. But they do give the High Court of New Zealand power to sit in Australia in cases that involve contravention of the New Zealand provision, and the Federal Court of Australia power to sit in New Zealand where the Australian provisions are involved.

conclusion. The amendments to the Commerce and Trade Practices Acts demonstrates that harmonisation of business law is squarely on the political agenda in both Australia and New Zealand. In the quest for free trade between the two countries, many legal and economic issues arise. Both governments are addressing these issues head on. It is likely that the dramatic changes to trade and the consequential legal developments which have taken place since 1983 will continue into the 1990s and beyond.

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the new zealand law commission

> Institutionally, law reformers are dreamers, creators, thinkers, idealists, imaginers and visionaries, Politicians are, by their very nature, decision-makers, doers, leaders, animators, instigators, sellers, energisers and persuaders. Bureaucrats are implementers, facilitators, stabilizers, adjusters, consensus-builders, warners, admonishers, consulters.
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> The Hon Mr Justice AM Linden (Canada), *Commonwealth Law Reform Agencies Conference, 1990.*

establishment. The New Zealand Law Commission (NZLC) began operation on 1 February 1986 as 'an independent constitutional law reform body' (1987 Annual Report). It took over the work of a number of ad hoc committees including the Criminal Law Reform Committee, the Contracts and Commercial Law Reform Committee and the Torts and General Law Reform Committee. Its current and founding President is Sir (Arthur) Owen Woodhouse who is depicted on the cover (see also the biographical article in this issue).

functions. In its 1989 Annual Report the Commission outlined its principal functions.

> The Commission's principal functions are to keep the whole of the law of New Zealand under review in a systematic way; to make recommendations to the Minister of Justice for the reform or development of particular aspects of the law; to advise on reviews of the law conducted by other government agencies; and to propose ways of making the law as understandable and accessible as is practicable. In making its recommendations the Commission is to take into account te ao Maori (the Maori dimension) and give consideration to the multicultural character of New Zealand society, and to have regard to the desirability of simplifying the expression and content of the law as far as practicable. (Law Commission Report No10, Annual Report 1989.)

The functions of the ALRC and the NZLC are similar. However while the NZLC can initiate its own projects the ALRC is confined to references from government. (However it can suggest suitable references to government.)

projects. At present the NZLC is giving priority to a number of projects including national emergencies, criminal procedure, legislation and arbitration. Follow up work is also being conducted on reports which have been tabled in parliament, including company law, courts structure, reform of the accident compensation legislation and personal property securities.

courts structure. The purpose of this reference was to 'determine the most desirable structure of the judicial system of New Zealand in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand ..... (and) to ascertain what further changes, if any, are desirable to ensure the ready access to the courts of the people of New Zealand.' The report: *The Structure of the Courts*, which was transmitted to government in March 1989, was based on a decision by the government to remove the right of appeal to the Judicial Committee of the Privy Council. The government has not gone ahead with legislation to remove this right of appeal and the report has not been implemented as yet. The Commission recommended that there should be three courts of general jurisdiction – the District