AN INTERCHANGE OF IDEAS – THE FLOWS OF LEGAL INFORMATION ACROSS THE TASMAN

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I. Introduction

There have long been many links between the legal systems of New Zealand and Australia, and developments on one side of the Tasman have influenced the law on the other side. All Australasian lawyers know of the Torrens system of registration of titles to land, perhaps the prime example of legislation of the migration of legislation. Only a small proportion of those lawyers would be familiar with the Australian use of New Zealand precedents for "family law" statutes, a phenomenon discussed in Part II.F below. More recent decades have seen the enactment in New Zealand of the Fair Trading Act 1986, closely modelled on the Australian Trade Practices Act 1974, and the development in the Australian youth justice system of family group conferences from the New Zealand model initiated in 1989.

It is also generally known, too, that the legal profession on each side of the Tasman included a number of lawyers who first qualified on the other side of the Tasman Sea, or who have had significant professional experience there. Two famous early examples are Richard Davies Hanson, the long serving chief justice of South Australia, who practised in New Zealand from 1840 to 1846 before going to Adelaide and Henry Samuel Chapman who had both a legal and judicial career in New Zealand and experience in governmental, political and legal circles in Tasmania and Victoria. Only a specialist historian would, however, know of their close contemporary Arthur Todd Holroyd, an English barrister who practised in New Zealand in the 1840s before moving to Sydney, entering politics and spending almost a decade in the Legislative Assembly, as well as being appointed a Master of the Supreme Court in New South Wales and briefly an acting judge of that court in 1879.[1] I am currently engaged in a long-term project to identify and describe the 560 lawyers admitted to practice in New Zealand between 1841 and 1880. I have already identified more than 100 of that cohort who were also admitted to practice in one or more

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1 Arthur Todd Holroyd, 1806-1887. He was educated in England and Scotland in Medicine; travelled in Near East 1835-38; called to Bar 1842; travelled to New Zealand 1843-5 and to New South Wales 1845; called to Bar 1845; MLC 1851, MLA 1856-65; Chairman of Committees in Legislative Assembly 1856-7; Secretary of Public Works 1863-5; Master in Equity 1866 and acting Supreme Court Judge 1879. See HTE Holt, "Holroyd, Arthur Todd" (1806-1887) *Australian Dictionary of Biography* vol 4, (Melbourne UP, 1972) 411-412.

Australian jurisdictions, before or after their time in New Zealand. A significant number of the remainder had spent some time in Australia, and others had family connections to Australia.

Because so many lawyers were familiar with conditions on both sides of the Tasman, it is not surprising that there should very often be a willingness to draw on the law of one jurisdiction when in practice, or when preparing legislation, in another. This article will sketch briefly some aspects of the links between the Australasian jurisdictions, and then examine more closely certain aspects of those relationships to consider the mechanisms by which legal information passed between the jurisdictions, and how the nature of those mechanisms influenced the extent and nature of the links.

II. Legislation and the Interchange of Information

In the 19th century the Australasian colonies all, at different times and different extents, drew on the legislation of other colonies. In the 20th century borrowing could be both between Australia and New Zealand, and between New Zealand and one of the Australian states. The latter phenomenon has been the subject of only the most slender of study, and is not discussed here. The interchange of legislation can be established both from external sources – Parliamentary debates, official records etc – and on the internal evidence of textual similarities so striking that coincidental drafting can be ruled out. This article does not seek to establish the extent of these legislative borrowings, but rather to consider the process by which information about suitable possible models for such imitative legislation was transferred and exchanged.

A. Inter-government Agreements

There were a very few cases where several colonial governments sought to reach agreement, at conferences or through other negotiations, on a common text for legislation on issues where uniformity would be of particular benefit.[2] The first such enactment appears to have been the Australasian Creditors Act 1858, which simplified proceedings to enforce judgments of courts in other Australasian colonies against persons who had migrated to New Zealand.

Patent law provides another example. There was a significant degree of similarity between the patent laws of the Australasian colonies by 1860. New Zealand and Tasmania had effectively copied a Victorian Statute of 1856 while New South Wales drew on the Victorian Act but the legislation was not such a close copy. All these colonial statutes obviously owed much to earlier British legislation, but all had the key feature of making it clear that the only patents to be enforced in a colony were those granted in the colony. I have argued elsewhere that the primary driver for this clutch of statutes was a colonial determination to resist British suggestions for an imperial patent system which the colonies believed would inevitably disadvantage them as

2 Suggestions for uniform legislation in the Australasian colonies on such matters as the sale of public lands, coinage and value of money, postal communications, the naturalisation of aliens, lighthouses, railways and the like were made as early as 1856: J M Ward, *Earl Grey and the Australian Colonies 1846–1857* (Melbourne UP, 1958) at 12.

importers of intellectual property.[3] In 1863 an Inter-colonial Conference recommended that a patent granted in any one colony should be valid in the other colonies on registration.[4] A decade later in 1873 another Inter-colonial Conference specifically considered the desirability of uniform laws on patents, and agreement was reached not only that uniformity should be sought but that the Victorian Government would prepare a draft bill for the purpose.[5]

A later example of a search for uniform legislation concerned the simplification of the grant of probate where the deceased had owned property in a British jurisdiction other than that of residence. The aim was to have reciprocal legislation in each colony, and in the United Kingdom. The proposal originated from a Victorian Royal Commission on Inter-colonial Legislation and a Court of Appeal in 1870,[6] but it was almost a decade before substantial progress was made. New Zealand only passed the Inter-colonial Probate Act 1879 in response to a request from the Tasmanian government that other colonies do as Tasmania had done and give effect to the earlier proposals.[7]

B. Governmental Appeals for Imitative Legislation

One of the more unusual examples of legislative imitation, and of the transmission of legal information, is to be found with the legislative reaction in some colonies to the "bank crisis" of 1893. This was effectively an episode of financial panic when the economic depression after the major market crashes of 1891 was rendered much more acute when it was known that large British deposits in Australian banks were to be withdrawn and repatriated.[8] This portended widespread financial disaster since in the Australasian colonies (unlike Europe and North America) banknotes, as such, were not legal tender.[9] In April and May 1893, eight New South Wales banks ceased to make payments or ceased to trade at all - four other banks had failed in the two years prior to this.[10] Runs on the surviving banks began. The New South Wales government reacted by pushing through – in two days under a suspension of standing orders – the Bank Note Issue Act 1893 (NSW) and the Current Account Depositors Act 1893 (NSW). Under the Bank Note Issue Act 1893, the Government could authorise the issue of banknotes on a large scale. These notes were to be legal tender, and were to be secured as far as possible by a first charge on the total assets of the bank of issue.

3 For a full discussion see J Finn, "Particularism versus Uniformity: Factors Shaping the Development of Australasian Intellectual Property Law in the 19th century" (2001) 6 AJLH 113.

4 Minutes of Inter-colonial Conference held in Melbourne March-April 1863, printed in *Votes and Proceedings of the Legislative Assembly of Victoria* 1863, vol 1, A29 at 6ff.

5 Minutes 11 February 1873, *Minutes of Inter-colonial Conference 1873* South Australia Parliamentary Paper No 31 (1873) 39.

6 See the correspondence between G Duffy and J P Boucaut in 1870, in Boucat Papers 1864-89, file V98, Mortlock Library, Adelaide.

7 Inter-colonial Probate Act (1879) 33 NZPD 8.

8 P Knaplund, *The British Empire 1815-1939* (New York, Harpers, 1941) at 464.

9 G Blainey, *A Land Half Won* (Melbourne, MacMillan of Australia, 1980) at 326.

10 These figures are drawn from the file "Papers relating to the Bank Note Issue Act 1893", Colonial Secretary's documents, file 4/908.1, State Archives of NSW. Much of the following account is based on the materials in that file.

The Current Account Depositors Act was more innovative. Under it, anyone who could prove a credit balance owed by a bank which had ceased to trade or to make payments could borrow from the Government (in the new legal tender notes) a sum equivalent to half the credit balance, secured against that balance. Private institutions would on occasion lend a further amount.[11]

The New South Wales Premier, George Dibbs, urged the other Australasian colonies to follow suit, sending copies to the respective premiers. Western Australia and New Zealand had anticipated the passage of the Acts by telegraphing requests for copies. Yet few actually took legislative action. New Zealand passed a replica of the Bank Note Issue Act[12] and Queensland copied the system of governmental loans to credit holders,[13] but the other colonies did not adopt either.[14]

C. Derivative Legislation Deliberately Modelled by Governments on that of Other Colonies

Sometimes colonial governments imitated the legislation of other colonies because of orders or suggestions from the Colonial office. Hobson, New Zealand's first Governor, received an official suggestion that he look to New South Wales and Tasmania for precedents for such legislation as was needed in the early days of the new colony.[15] There are a substantial number of early New Zealand ordinances which were derived from New South Wales. On occasion that influence was supplemented by information or presence drawn from the wider empire. William Martin, the first Chief Justice of the New Zealand, was largely instrumental in the drafting of the first rules of procedure to be applied in the Supreme Court of New Zealand. In 1843 he reported that:[16]

> For the work of adapting the practice of the English laws to the circumstances of this country, much benefit has been derived from the General Orders recently put forth by the Supreme Courts of the Cape and of Ceylon, from the general Rules of the Civil Court of Western Australia and from the practice of New South Wales.

By contrast New Zealand ordinances from 1846 onwards reflect both George Grey's determination to make changes and a frequent recourse to South Australian models – which may be seen as the natural consequence of Grey's experience in that colony. It may also be that, because the social

11 On this see also Sir George Reid, *My Reminiscences* (London, Cassell & Co, 1917) at 98-99.
12 Bank Note Issue Act 1893 (NZ).
13 Treasury Notes Advances Act 1893 (Qld).
14 In Tasmania, the crisis did provoke the passage, despite a cabinet split and the opposition of the Premier, of the Bank of Van Diemen's Land Company Act 1893 (Tas), a private member's Bill, which allowed the receiver of a collapsed bank to conduct a lottery of otherwise unsaleable land owned by the bank: Gormanston to Ripon, 16 Sept 1893, CO 280/396, PRO, London.
15 N A Foden, *The Constitutional Development of New Zealand in the First Decade 1839-1849* (Wellington, privately published, 1938) at 98.
16 Report of W Martin, enclosed with Shortland to Stanley, despatch 29/43, 8 May 1843, CO 209/21, PRO, London.

philosophies underlying the two colonies were seen as similar,[17] the South Australian statutes were on occasion seen as more appropriate for New Zealand conditions.

A decade or so later a more complex path of governmental borrowing can be charted in New Zealand's goldfields legislation. The first legislation to control gold-mining in New Zealand was passed by the Nelson Provincial Council in 1858 at the time of a brief gold rush to the Aorere fields (near Collingwood). The Nelson government had neither the inclination nor the resources to legislate from scratch, so it basically took the current law relating to goldfields in the colony of Victoria (then probably the world centre of gold mining) and enacted a very slightly changed version of it. This, inter alia, allowed the Governor to set up Warden's Courts in any declared goldfield, in which the Warden could settle disputes between miners on various matters and also try persons offending against regulations made by any Mining Board set up under the Act. The central government then took this model and enacted it nationally as the Goldfields Act 1858. This meant that when a substantial gold field was discovered in Otago in 1862, there was a statute in place.

D. Interlude: The Information Available to Legislators

Such borrowings were not always regarded as successful. The interchange of information between colonies was on such a scale that legislators could frequently refer in very considerable detail to legislation in other Australasian colonies. Sometimes this was done so by opponents who could point to alternative and possibly preferable models.

An interesting example comes from the New Zealand debates on the Parliamentary Privilege Act 1865. The New Zealand statute, following closely on the Victorian legislation, asserted that the colonial legislature enjoyed all the privileges of the House of Commons in Britain. This choice of models was criticised by Hugh Carleton, the Chairman of Committees in the House of Representatives. He said:[18]

> He had before him four Privilege Acts passed in adjoining colonies. The Attorney-General had his choice of models from which to draft the Bill before the House, and had chosen the worst. Three colonies – Queensland, South Australia and Tasmania – defined the privileges of their legislatures; they knew precisely what they wanted, stated it and took it. The fourth, Victoria, fell back on a vague assumption of the privileges of the House of Commons. The Attorney-General had done the same ...

In the following year, Carleton had a more profound criticism of the legislation when the two chambers of the New Zealand Parliament disagreed over the fee to be imposed for the grant of a miner's right under the Goldfields Bill 1866. The Legislative Council had doubled the figure

17 Both colonies had been founded on alleged accordance with the principles of Edward Gibbon Wakefield, both were intended to be settled by a mixture of social classes, and in both the settlers were adamantly opposed to any transportation to them of British convicts. For the importance of Wakefield's influence on colonial thought, see Olssen, "Mr Wakefield and New Zealand as an Experiment in Post-Enlightenment Experimental Practice" NZJH, vol 31, no 2, 1997, 197.

18 [1865] NZPD 318 (17 August 1865).

set in the House of Representatives (from 10 shillings to £1). Carleton told the House of Representatives that he believed this should be regarded as a breach of privilege but this was not the case because the 1865 Parliamentary Privilege Act had conferred on both houses the privileges of the House of Commons which therefore included amending money bills. He renewed his criticism of the drafting of the legislation by Henry Sewell, the Attorney General:[19]

> The fact was that clause 4 of the New Zealand Privileges Act had been copied from a Victorian Act. The words 'inconsistent with the Constitution Act' had been retained in forgetfulness that the New Zealand Privileges Act would refer to a different Constitution Act, wanting in that very provision which should have created the inconsistency. The Victorian Constitution Act restrained the Council, the New Zealand Constitution Act did not and the New Zealand Privileges Act had been framed in forgetfulness of this distinction.

Carleton was informed by the Speaker of the House that the 1865 Bill had not been drafted by Sewell, but by James Prendergast – an English barrister who later became solicitor general and then Chief Justice of New Zealand and had spent several years in Victoria on the goldfields and in legal practice in Melbourne.

In other cases legislators referred to other colonies as a way of supporting the local – derivative – version. A further example is the adoption in South Australia of the Public Trustee. The debates on the Public Trustee Bill 1880 (SA) make it clear that many members were familiar with the New Zealand legislation of 1872, and drew on the New Zealand experience for arguments to support the Bill.[20] In the committee stage, Sir Henry Ayers said he had:[21]

> … carefully compared the New Zealand Act with the present Bill, since the last meeting of the Council, and found that most of the objections that had been raised against the Bill were met by the provisions of the New Zealand Act.

It is interesting that a supporter of the Public Trustee Bill 1870 in New Zealand had been involved in plans for a similar proposal in Victoria in the 1860s.[22]

Further examples are provided by the Tasmanian Liquor Licence Bill 1889, where there were frequent comments as to the licensing law and practice of New South Wales, Victoria, New Zealand and South Australia[23] and by South Australian legislation in 1872 to make the Auditor-General an officer of Parliament, and not an employee of the Government. The Bill was expressly stated to be virtually identical to New South Wales legislation of 1871, but during the debate in the House of Assembly, reference was also made to the relevant statutes in Britain, Victoria, Tasmania, Queensland and New Zealand.[24]

19 [1866] NZPD 1039 (4 October 1866).
20 See, for example, Hon W Morgan (Chief Secretary), [1880] SAPD 488 (27 July 1880).
21 [1880] SAPD 55-56, (3 August 1880). The concerns related principally to administration of the estates of lunatics.
22 G Webster, MHR for Wallace, see (1870) 9 NZPD 110 (18 August 1870).
23 See *Hobart Town Mercury*, 5 September 1889.
24 [1872] SAPD 280 (26 July 1872).

E. Government Departments and Agencies

Clearly often government officials gathered significant amounts of information as to the law in other jurisdictions before making recommendations for law changes. One good example is that of W J Blakeney, Registrar of Friendly Societies in Queensland in 1893, who informed a Minister that a draft for what became the Friendly Societies Amendment Bill 1894 had been prepared by a local barrister and that the draft had been:[25]

> … carefully examined and compared with my recommendations contained in a comparative statement of the Friendly Societies Acts of Queensland, Victoria, New Zealand and England compiled in May 1890 for the information of the then Minister of Justice.

Blakeney also sent copies of relevant New Zealand, Victorian, Tasmanian, New South Wales and South Australian Acts.

Government agencies were also instrumental in transmitting information about a range of other legislation. One of the most unusual is to be found the 1890s with Bills which attempted to prohibit "indecent" medical advertisements - those that dealt with, in drawings, pictures or print, "venereal or contagious diseases affecting the generative organs". A prohibition of these was first suggested in Victoria in 1897, as a part of a private member's Bill on indecent publications generally. This Bill had in fact been drafted for its mover by the parliamentary draftsman, Edward Carlile because the then Premier had agreed in principle to support the Bill. The Bill as enacted forbade the publication of indecent advertisements, which are advertisements which dealt with, in drawings, pictures or print, "venereal or contagious diseases affecting the generative organs". This became the Indecent Medical Advertisements Act 1899-1900 (Vic).

The Victorian parliamentary draftsman's file includes a differently drafted New South Wales Bill, introduced earlier in 1897, on the same subject. The file then has a redrafting of the advertisement provisions, which are later taken up again in New South Wales in September 1898 in a Bill which discarded the earlier New South Wales draft in favour of the revised Victorian wording.[26] However the different wording may well have been derived from the Indecent Publications Act 1892 (NZ), since s 5 of that Act is very similar to the wording eventually used in Victoria, and there is some evidence that the New Zealand Postal Department had specifically called the attention of the Victorian Government to the New Zealand section.[27]

F. Derivation Through Private Members Bills or Other Parliamentary Routes

As with many "law reform" type measures of the 19th and early 20th centuries, the significant changes came through private member's Bills.

One clear example of such legislation with trans-Tasman influence is in the field of adoption law. The prime source for such legislation can be traced to the United States, and thence to the British settlement colonies. The first

25 Blakeney to Under Colonial Secretary, 1 July 1893, File JUS/W2, Queensland State Archives.
26 Indecent Medical Advertisements Bill file, VPRS 10265.265, Victoria PRO.
27 See Melbourne *Age*, 1 May 1899.

to enact American-style legislation was New Brunswick in 1873.[28] New Zealand was second in the field in 1881, with the Adoption of Children Act 1881, which was introduced as a private member's Bill by George Marsden Waterhouse, a member of the Legislative Council. The New Zealand Act was copied almost verbatim by Western Australia in 1896, which indicates it must have been taken from that source, although the actual debate on the Bill in the Western Australian Parliament contained not a single reference to the New Zealand Act.[29]

A not entirely dissimilar pattern can be traced in relation to legislation to allow legitimation of children following the subsequent marriage of their parents – something permitted by Scots law but not by the common law. The first statute passed was the Legitimation Act 1894 in New Zealand, following a private member's Bill promoted and pushed through by John McGregor, a Dunedin lawyer of Scots background.[30] The New Zealand example was soon followed by other colonies. The Legitimation Act 1899 (Qld) was virtually a copy of the New Zealand Act,[31] and it was highly influential in the passage of the South Australian statute, the Legitimation Act 1898 (SA) and the later Victorian Registration of Births, Deaths and Marriages Act 1903.[32] Indeed when King O'Malley introduced a Bill into the South Australian Parliament in 1897, he expressly referred to it being based on the New Zealand Act.[33]

Perhaps better known is the inter-colonial element underlying the passage of testator's family maintenance legislation which gave to the courts the power to override the provisions of a will, where, and only where, the will failed to provide properly for persons for whom the testator had a moral duty to provide properly.[34] The Testator's Family Maintenance Act 1900 (NZ) was widely adopted in other jurisdictions.[35]

We can turn to a very different field of law, but one equally influenced by reform through private member's bills – the Crown's liability to suit.

Legislation to allow citizens to sue the Crown was first enacted in South Australia in 1851 although that statute was disallowed by the Colonial Office and a modified version was then accepted in 1853.[36] New South Wales passed

28 The claim by I Campbell, *Law of Adoption in New Zealand* (2nd ed, Sydney, Butterworths (Australia) Ltd, 1957) at 6 that New Zealand was the first "British" jurisdiction to so legislate is erroneous; see G D Kennedy, "The Legal Effects of Adoption" (1955) 33 Can Bar Rev 751 and A Castles, "Discretionary Power in Adoption Statutes" (1957) 7 Res Judicata 307.

29 The debates are reported at (1896) 10 WAPD (NS) 107 and 334.

30 *Dictionary of New Zealand Biography* vol 2, 287 and W D Stewart, *Life and Times of Sir Francis Bell* (Wellington, Butterworths, 1937) at 161-66.

31 Sir Denis Fitzpatrick, "Legitimation by Subsequent Marriage" (1905) 6 JCL&IL (2nd series) 22 at 40.

32 Ibid.

33 [1897] SAPD 593 (13 October 1897).

34 A fine account of the prolonged campaign culminating in this statute is R Atherton, "New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202.

35 Victoria 1906, New South Wales 1908, Tasmania 1912, Queensland 1914, South Australia 1919 and British Columbia 1924.

36 Claims Against the Crown Act 1851 (SA) and Claims Against the Crown Act 1853 (SA.) For the Colonial Office views of the second statute, see Wood to Merivale 16 March 1854, CO 323/77, at 271-273. On the early legislation generally see A P Canaway, "Actions Against the Commonwealth for Torts" (1904) 1 Commonwealth LR 241.

a slightly modified version of the South Australian statute in 1857,[37] and that version was adopted virtually verbatim in Western Australia in 1867[38] and in a modified version in Queensland in 1865.[39] In the debates on the Queensland Bill there were various references to the position in New South Wales and Victoria. However source material may have been restricted. One member stated that he could not find a copy of the Victorian legislation in the Queensland Parliamentary Library, although the New South Wales law was available.[40]

Meantime Victoria had gone down a different path with a statute enacted in 1858 which limited litigants to actions in contract.[41] That Act was largely adopted in Tasmania the following year,[42] and was the model used by Thomas Bannatyne Gillies, a Dunedin lawyer, when he moved the first New Zealand Bill in 1871. The Bill as enacted[43] was, however, modified both to move it closer to contemporary English law and to avoid problems found with the Victorian Act.[44]

After that the colonies all developed their respective statutes with somewhat different tests for when an action could be brought. In 1881 the New Zealand legislation allowed actions against the colonial government for any "wrong or damage independent of contract" if the alleged wrong occurred on a "public work".[45] This formulation was then taken up verbatim in Western Australia in 1898.[46]

G. Non-government Channels

Sometimes information moved in less orthodox or obvious channels which had little or nothing to do with governmental agencies though R B Joyce tells us that when Samuel Walker Griffith was drafting the Employers Liability Act 1886 (Qld):[47]

> The Trades and Labour Council sent Griffith copies of an amended Victorian Factories Bill and a lien law for Massachusetts and referred him to a New Zealand land boilers inspection bill.

Informal links may well have been particularly strong where supporters of "reform" governments in different colonies wished to share information and proposals. This certainly seems to have been the case in the 1890s in the case

37 Claims Against the Government Act 1857 (NSW).
38 Claims Against the Government Act 1867 (WA), and see E Russell, *A History of the Law in Western Australia* (Perth, UWA Press, 1980) at 42.
39 Claims Against the Government Act 1865 (Qld).
40 (1865) 2 QPD 354.
41 Claimants Against the Crown Relief Act 1858 (Vic). There were concerns that the proposal was designed to give the squatters a mode of enforcing a claim to title to the Crown lands they occupied without proper legal tenure: (1856) 1 VPD 115ff.
42 Crown Redress Act 1859 (Tas).
43 Crown Liabilities Redress Act 1871 (NZ).
44 See (1871) 10 NZPD 84 and 545.
45 Crown Suits Act 1881 (NZ), and see P Hogg, *Liability of The Crown* (2nd ed) (Toronto, Carswell & Co, 1989) at 81.
46 Crown Suits Act 1898 (WA), Hogg, ibid, and A P Canaway, "Actions Against the Commonwealth for Torts" (1904) 1 Commonwealth LR 241.
47 R B Joyce, *Samuel Walker Griffith* (Brisbane, U Queensland Press, 1984), at 124.

of the first Liberal government of Ballance and, later, Seddon in New Zealand and the South Australian liberal governments headed by Charles Kingston. In both colonies there are strong elements of state socialism in the measures introduced by the reformist governments, together with measures to reform labour relations, break up concentrations of wealth and limit exploitation of workers. One conduit for information about such "progressive" or proto-socialist legislation appears to have been the trade union movement.

However the main measures were assured of widespread publicity because of their very novelty. It is clear that there was a considerable degree of cross-fertilization between the different progressive governments. The most famous of these was the enactment in each colony of a system of resolving labour disputes through a state-mediated and controlled process including a Court of Arbitration. New Zealand historians have, until recently, claimed that William Pember Reeves, the mover of the Industrial Conciliation and Arbitration Act 1894 (NZ), was the prime architect of this model – though it is generally accepted that elements of the new regime were drawn from the legislation of New South Wales and South Australia.[48] Recent research by Jim Gardner has shown any such plaudits were undeserved, as Reeves had effectively plagiarised a draft by Charles Kingston.[49]

An example from the other side of the Tasman is the debate in the South Australian House of Representatives on the Workmen's Liens Bill. During the debate on that Bill, Thomas Price, a Labour politician and later Premier, compared the South Australian measure with the New Zealand law, and set out the history of New Zealand legislation in the field from 1871 through to the enactment of the Contractor's and Workmen's Liens Act 1892.[50] His speech included a reference to a Bill proposed in 1884 by George Marsden Waterhouse, whose promotion of adoption legislation was noted earlier. Waterhouse, we should note, had been active and successful in South Australian politics before migrating to New Zealand and rising again to the top in politics. He appears to be the only person to have been Premier of two different colonies in Australasia. Possibly Price received his information about the New Zealand position from Waterhouse, but it may have come through trade union or political channels.

III. Case Law

We must now turn to a quite different aspect of the interchange of legal information between the Tasman jurisdictions. Very little attention has been paid by legal historians to the influence of case law from one jurisdiction on the jurisprudence of another. This is partly because it is very difficult thing

48 See J Holt, *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland UP, 1986) at ch 1; N S Woods, *Industrial Conciliation and Arbitration in New Zealand* (Wellington Government Printer, 1963) at ch 1 and W P Reeves, *State Experiments in New Zealand* (London, Horace Marshall, 1902), vol 2, 85ff.

49 W J Gardner, *Prelude to arbitration in three movements: Ulster, South Australia and New Zealand* (Christchurch, Canterbury UP, 2009) at 142-145.

50 [1893] SAPD 2493.

to measure, and because the research is frankly often tedious. It is also much easier to document the movement of statutes and individuals and to assess how much influence cases may have had.

However, allowing for these matters, it is still possible to get some impression as to be the extent to which the case law of one jurisdiction formed part of the legal universe in another by looking to see how frequently, or infrequently, judges in the one jurisdiction used the case law jurisprudence of the other. We are able to get some idea of the patterns of usage from the data set out in the tables below. The first table (*Table 1* below) looks at New Zealand reported cases which cite Australian cases. The rather peculiar year pattern reflects the fact that 1874 begins the first period of continuous national law reporting in New Zealand.

A. Nature of the Data

The second column lists the number of cases reported in the law reports for that period in which one or more Australian cases were cited by the Judge. (Because counsel's argument is not always reported, judicial mention is the only reliable datum). Citations up to 1883 are to the various private reports; after that date the figure is for cases reported in the New Zealand Law Reports. The very limited number of citations in 1880-1884 is simply an artefact of the limited reporting of cases in that period. The reporting of cases is also affected to some extent by variations in the size of the relevant volumes of the reports, which were notably smaller, and thus reporting fewer cases, in wartime but larger and reporting more cases in the late 1930s and again from the late 1950s.

Table 1 – New Zealand citing Australian cases, including multiple citations

Year	NZ citing Australian	Citing 3+ Aust case
1870-1874	12	1
1875- 1879	8	1
1880- 1884	2	–
1885-1889	19	2
1890-1894	26	2
1895-1899	26	–
1900-1904	46	4
1905-1909	43	5
1910-1914	39	7
1915-1919	44	1
1920-1924	29	3
1925-1929	30	5
1930-1934	81	15
1935-1939	79	15
1940-1944	76	9

1945-1949	82	12
1950-1954	108	10
1955-1959	83	10
1960-1965	163	28
1965-1970	194	38

B. Accessibility of the Material

Lawyers are unlikely to use material from an overseas jurisdiction if they cannot readily discover useful material. Having access to a series of overseas law reports will not be of great use unless the reader can fairly quickly find the relevant cases within those reports. The availability of digests or indexes which would assist in finding answers to legal questions is therefore a major factor. This will determine the likelihood that lawyers and judges would make use of overseas case law. I have developed this argument in more detail elsewhere.[51]

The patterns of citation of Australian material in New Zealand are consistent with – and I suggest support – that hypothesis. Recourse to Victorian cases, widely used in the last quarter of the 19th century and in the years before World War I, would have been considerably assisted by the availability of digests of the Victorian law reports.

The rapid and generally consistent growth of the citations of Australian cases from 1920 – and especially after 1930 – can, I think, be linked to the publication of two quite different works.

The first is the *Australasian Judicial Dictionary*, compiled by Cyril Bedwell and published in Melbourne in 1920.[52] This volume drew on the case law of all the Australasian jurisdictions, and many of the statutory definitions used as well. It must have provided an invaluable source of information, particularly perhaps in the field of statutory interpretation.

The second, larger and ultimately more important publication is the 20 volume *Australian Digest* which was published from 1934. One measure of the importance accorded to this work was, as I have described more fully elsewhere, that the Otago District Law Society purchased the digest, despite its very considerable cost, in a period of serious financial strain. While the library committee of the Society was undecided whether the cost was justified, the wider membership appear to have persuaded the Executive of the Society to go ahead. This, I suggest, indicates how significant the publication was expected to be. Certainly the rate of citation of Australian decisions increased quite markedly.[53] In the 1950s a further finding aid, the *Australian Pilot to Halsbury's Laws of England*, was published and this almost certainly contributed to the further increase in citations after 1960.

51 J Finn, "New Zealand Lawyers and 'Overseas' Precedent 1874-1973 – Lessons from the Otago District Law Society Library" (2007) 11 Otago LR 469-494 and "Sometimes persuasive authority: Dominion case law and English judges 1895-1970" in H Foster, B Berger and A Buck (eds), *The Grand Experiment: Colonial Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008) at 101-114.

52 C Bedwell, *Australasian Judicial Dictionary* (Charles Frank, Melbourne, 1920).

53 J Finn, "New Zealand Lawyers and 'Overseas' Precedent 1874-1973 – Lessons from the Otago District Law Society Library" (2007) 11 Otago LR 469 at 488-489.

C. Citation of New Zealand Material in Australia

When we look at the reverse phenomenon, the citation of New Zealand material in Australia, we find – on the much less complete data so far available – a number of the same features. There are problems with acquiring good comparative data, but there is sufficient information to allow a good comparison to be made for a shorter period. The following table (*Table 2*) reveals some interesting patterns of citation of New Zealand material.

Table 2 – Australian cases citing New Zealand cases, and New Zealand citing Australian cases, by number of judicial mentions[54]

Year	HCA	NSW	Qld	Tas	Vic	WA	NZ cites Aust
1889-1893	–	–	–		1		40
1894-1898	–	–	–	1	4	0	25
1899-1903	–	3(1)	–	1(1)	3	0	72
1904-1908	16(1)	12	12(1)	9(1)	12(1)	4	64
1909-1913	21(1)	11(1)	42(3)	7	10	10	61
1914-1918	16(2)	4(1)	24(2)	14(1)	20	8	57
1919-1923	20(3)	3	29(4)	10(1)	7	10(1)	40
1924-1928	18(1)	12	31(9)	7	24(2)	4	53

(Numbers in brackets represent Australian cases citing three or more New Zealand cases. The final column shows the number of New Zealand cases citing Australian cases for the same five year period. The New South Wales data before 1899 is not conclusive as the Reports could not be readily searched).

We might expect to see a significant use of New Zealand cases in Victoria, both because the absolute volume of litigation in that jurisdiction over this period would have been higher than anywhere else in Australia, with the possible exception of New South Wales, and because the degree of similarity between much of New Zealand's statute law and that of Victoria would mean that New Zealand decisions on the interpretation of statutes might well have been beneficial in Victoria.

Nor is it particularly suprising to see relatively small volumes in the reports for Tasmania and Western Australia, because the total volume of reported litigation was significantly smaller than in the more populous states. We would naturally expect to find fewer cases being cited because fewer cases have been reported. If some allowance is made for that, the overall pattern of use of New Zealand decisions in those two states may well show a significantly greater proportional influence of New Zealand law than was the case for Victoria or New South Wales.

54 These figures are based on data compiled for me at different times by three research assistants – Charlotte Wilson, Olivia Sinclair and Sarah Down – who went through the appropriate reports and collated material from the "cases cited section" of the relevant reports. In some jurisdictions and periods the early reports did not include such a section, and data collection was impossible. There are also gaps in our library holdings which meant no reliable data from South Australia could be gathered. It is omitted from the table. Cases cited on more than one occasion are counted on each occasion.

New South Wales is, in some ways, an anomaly. One would perhaps expect that as a jurisdiction with relatively close economic ties and good communications there might be a greater level of interplay with New Zealand. Certainly it does not come through in the use of the case law. By far the most interesting datum, and one for which there is no obvious explanation, is the huge disparity in frequency of citation between Queensland and the other jurisdictions. Further research may elucidate the position.

D. Accessibility of New Zealand Materials

It is quite likely that a significant number of the Australian cases after 1920 which cited only a single New Zealand case did so because the New Zealand case was seen as providing a helpful definition of a legal term or a word or phrase in a statute with a similar wording to that in issue – and the same would have been true of Australian cases cited in the New Zealand courts. Here again it seems likely that a key factor was the availability of the *Australasian Judicial Dictionary* after 1920.

It is also likely that the New Zealand material became much more accessible to Australian users with the publication in 1903 and 1929 of index volumes to the New Zealand Law reports.

One notable feature is that there were quite a number of references to the "alternative" series of reports of New Zealand cases, the Gazette Law Reports. Indeed one New South Wales case in 1929 referred to five New Zealand decisions – all from the Gazette Law Reports.[55] References to this series of reports are also to be found very frequently in Queensland and in Western Australia, but there are only two such references in Tasmania and not many more in Victoria. The limited data for South Australia contains none at all. This suggests to me that there may have been very limited holdings of the Gazette Law Reports in Tasmania, South Australia and Victoria. There appears to have been no Consolidated Index to the Gazette Law Reports.

E. Areas of Law

It is difficult to be precise about the areas in which there was particularly significant recourse to New Zealand law, and there may well be some variation between jurisdictions. However it does seem evident that there were a very significant number of cases in which New Zealand decisions on family protection or Testator's Family Maintenance legislation was in issue. The leading New Zealand case of *re Allardice, Allardice v Allardice*[56] was cited at least nine times in different Australian decisions. There also seems to have been a significant substratum of cases involving land law, local government and tax. The case apparently having the greatest number of NZ citations

55 *Re Collin* 1929, 46 WN (NSW) 169 at 170 (SC), citing *Armstrong v Armstrong* [1921] NZ Gaz LR 184; *Re Gracia, Newman v Newton* [1927] NZ Gaz LR 215; *Re Hutchinson* [1921] NZ Gaz LR 371; *Shepherd v Preen* [1918] NZ Gaz LR 60 and *M v M* [1916] NZ Gaz LR 593.

56 (1910) 29 NZLR 959 (CA).

is, fittingly, a testator's family maintenance case from Queensland – *Ahearn v Ahearn*.[57] A total of 11 New Zealand cases were cited – three of them reported only in the Gazette Law Reports.

IV. Other Media of Transmission

A. Published Material

Both newspapers and professional journals gave extensive reports of matters from other colonies, and the dominant place of Victoria in Australian economic and social life at this time ensured that much of such inter-colonial material derived from Victoria. Much, perhaps most, of this information was undoubtedly of only ephemeral significance, but there were times when important matters were brought to the attention of New Zealanders in this fashion.[58] Knowledge did not always lead to reform. The Victorian Bills of Sale Act 1876 was reprinted in its entirety in the *New Zealand Jurist*,[59] yet contributed little or nothing to the Chattels Securities Act 1880 (NZ).

A more specialised but perhaps briefly influential link was provided by the *Commonwealth Law Review*, published in Sydney from 1903 to 1909, initially quarterly but later monthly. While much of the content of this journal was focused on aspects of the Constitution and the law of the new Commonwealth of Australia, there was also some emphasis on industrial law and the interplay of an arbitration system and the common law.[60] Several New Zealand authors published pieces in the Review, including Sir Robert Stout, who wrote a piece criticising the Privy Council as being slow to decide cases and unfamiliar with local conditions.[61] Stout advocated the abolition of colonial appeals to the Privy Council, with each colony deciding its own appellate structure, although he put forward in the article a plea for a single Australasian final appellate court. Other New Zealand contributions to the Journal were by T F Martin,[62] H Dean Bamford[63] and

57 1917] St R Qd 167. The cases cited were: *Re Bell* (1915) 34 NZLR 1069; *Colquhoun v The Public Trustee* (1911) 31 NZLR 1139; *E v E* (1915) 34 NZLR 785; *Re Heagerty; Heagerty v Considine* (1915) 34 NZLR 905; I*nspector of Awards v Wellington Woollen Manufacturing Co* (1913) 15 NZGLR 657; *Inspector of Awards v Whitcombe and Toombs Ltd* (1907) 9 NZGLR 645; *Michie v Hopcraft* (1910) 29 NZLR 779; *Parker v Carr* (1905) 7 NZ Gaz LR 466; *Re Phillips* (1902) 4 NZ Gaz LR 192; *Shanaghan v Kircaldie Stains* (1899) 17 NZLR 534; *Van Breda v Ferguson* (1893) 11 NZLR 764.

58 For the extent of such inter-colonial cultural and social ties see R Arnold, "Some Australasian Aspects of New Zealand life 1890-1913" New Zealand Journal of History, vol 4, no 1, 1970, at 54.

59 (1877) 2 NZ Jurist (NS) 178.

60 C E Weigall, "Industrial Arbitration and Common Law Rights" (1904) 2 Commonwealth LR 248-255; G J Meillon, "The Union Label" (1905) 3 Commonwealth LR 70-75.

61 Sir Robert Stout, "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3-13. Stout was not the only judge to criticise the Privy Council: see H B Higgins, "The Weakness of the Privy Council" (1906) 3 Commonwealth LR 258. Stout contributed another article in 1907 on local body statutory liability, "Local Bodies Statutory Liabilities" (1907) 4 Commonwealth LR 145-153 and 193-201.

62 T F Martin, "Real Property Law in NZ" (1904) 2 Commonwealth LR 19-21 and 49-56; "Contracts of Indemnity" (1906) 4 Commonwealth LR 13-20 and "The Land Question in New Zealand" (1908) 5 Commonwealth LR 247-254.

63 H D Bamford, "Unsoundness of Mind in relation to Torts" 1906 Commonwealth LR 3-12.

Maurice Richmond.[64] There was also an anonymous article in 1907 which reproduced, with little editorial additions, large portions of the judgments, especially that of Stout CJ, in *Union Steamship Co Ltd v Spendiff* [1903] 23 NZLR 239.[65]

B. Personal and Private Transfers

Until the advent of the computer age, the simplest and most compact method of transferring legal information between jurisdictions was within the skull of a legal practitioner. Lawyers who moved between jurisdictions inevitably carried with them a huge volume of information about the jurisdiction in which they had previously practised. The knowledge may not always have been precise but it is evident that sometimes migrants had enormous influence on the law in their new jurisdiction. A leading example is Moses Wilson Gray, an Irish barrister who came to Victoria and prospered conducting in mining litigation. He later moved to Otago in New Zealand where he became unquestionably the leading authority on goldfields law, and mining law more generally, and later a District Court judge in the Otago goldfield.[66]

However the high nobility of colonial populations had another effect which may have been very influential in spreading legal information. It was very common to find members of the same family dispersed over different colonies. The Stephen family in eastern Australia and New Zealand is an obvious example. In my work on early New Zealand lawyers, I have already found a number who practised only in New Zealand but who has been born and brought up in an Australian colony, and whose parents remained resident in that colony. We may readily believe that such family links often lead to an exchange of information about legal matters. It might, for example, be worth reading any preserved correspondence between George Burnett Barton, admitted as a solicitor in Dunedin in 1871 and later editor of the *New Zealand Jurist*, and his better-known brother Edmund Barton, later Premier of the Commonwealth of Australia.

V. Conclusion

This article can only sketch some of the links that connected the trans-Tasman legal world in the 19th and early 20th centuries. As noted earlier, the question of New Zealand influence on the legislation of the various Australian states after 1900 is almost totally unexplored. Nor has work been done to document fully the level of official interchange of material between the colonial governments and colonial parliaments, let alone the extent of the use of private channels for conveying legal information. There is a great deal still to be done in looking at the influence of case law from one Australasian

64 M Richmond, "The Indefeasibility of Registered Proprietorship" (1908) 5 Commonwealth LR 193-211.

65 Anon, "Extra-Territorial Jurisdiction and the New Zealand Courts" (1907) 4 Commonwealth LR 101-109.

66 C Woods, "Gray, Moses Wilson (1813 - 1875)" *Australian Dictionary of Biography* vol 4 (Melbourne University Press, 1972) at 287-288.

jurisdiction in other jurisdictions, and about the transmission of information about that case law. Future research may, and I hope will, explore precisely how these links operated, and the consequences for both Australian and New Zealand law of the constant, if uneven, influence of law from the other side of the Tasman. What has been done, however, is sufficient to show we must think of a trans-Tasman legal world, rather than two jurisdictions separated by sea.