NEW ZEALAND EXPORTERS AND THE AUSTRALIAN LEGAL SYSTEM

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INTRODUCTION:

Australia presents a familiar face to the New Zealand exporter involved in a legal matter. Both Australian and New Zealand legal systems derive from England, so Australian barristers are wigged and gowned, the court procedures follow much the same course, the legislation is in a recognisable format and basic style. Penetrate below that comfortingly familiar surface and one can be led by one's expectations into traps. My experience is that good Australian lawyers think differently from good New Zealand lawyers in subtle yet significant ways. I found the transition from teaching law in England to teaching law in Australia greater than the equivalent transition from New Zealand to England. I think it is the federal character of Australia which is at the heart of these differences. My intention in this paper is to provide a background for you so that you are not walking entirely starless.

The brief I have been given means that I must paint on a large canvas. My paper is, therefore, heterogeneous and lacks a theme. This will make my paper difficult to listen to, but I hope I can make it sufficiently comprehensible on oral delivery to stimulate some discussion.

I have divided my paper into five parts: a sketch of the landscape, the federal dimension, the new federal administrative law, some substantive areas of law, and harmonisation and the future.

THE LANDSCAPE

My topic speaks of the Australian legal system and I have used the same phrase in my introduction. That is inaccurate. There is no Australian legal system. There are nine Australian legal systems. Each of the six states has its own legal system and so does the Australian Capital Territory and the Northern Territory. Finally there is the Federal legal system. Wherever the exporter is doing business he will have two legal systems to watch; the federal (or Commonwealth) and that of the state or territory in which he is working. That is the first fundamental point. It does not mean that two different laws govern each thing one does, though laws of different legal systems can govern different aspects of the same transaction

and can, provided they are not inconsistent, govern one and the same aspect.

The judicial system: Among the states all but Tasmania have three levels of courts plus the High Court of Australia, in some situations the Federal Court, and in very limited circumstances the Privy Council[1]. The Territories have two levels of courts each, plus the Federal and High Courts. In every case the superior court is called the Supreme Court. New South Wales has a higher State Court of Appeal, eleswhere appeals go to a full court of the Supreme Court. On some subjects[2] an appeal from a judge of a state Supreme Court goes to the Federal Court. Appeals from territory Supreme Courts go to the Federal Court and thence to the High Court of Australia. As to intermediate courts, these variously named (District, County, Local) courts differ widely in monetary limits of jurisdiction from $12,000 in Victoria to $40,000 in Queensland.

As in New Zealand these monetary limits can be enlarged by consent.

The Federal Court, while having a practical status at least as high as a state Supreme Court (several Supreme Court judges have been appointed to the Federal Court), is in law an inferior court. It has no general jurisdiction, nor does its constituent statute confer jurisdiction in general terms. Each jurisdiction is separately and expressly conferred[3].

The legal profession: The New South Wales legal profession is divided, barristers must practice separately from solicitors. Elsewhere the profession is fused in law. But in practice the Victorian profession is fully divided. Few lawyers appearing before the courts are other than barristers practising as barristers. In other states and the territories the professions are fused to varying extents: there is the greatest degree of separation in Queensland and the least in Tasmania and the Northern Territory. As an interesting aside, the Sydney and Melbourne bars are differently organised. Sydney is modelled on the English bar with clerks each servicing a small number of barristers (it matters a lot to which set a young barrister gains chambers or a solicitor normally deals with in deciding on the barrister to brief). Melbourne is modelled on the Irish bar with clerks each servicing a list of scores of barristers arranged so as to provide a whole range of barristers from top QCs down (it matters less to which list a young barrister gains access or a solicitor normally deals with in deciding on the barrister to brief).

THE FEDERAL DIMENSION

The Division of Powers between Commonwealth and State.

Start here for complications. Australia, being a federation, has to have rules on who can do what. The basic premise is that the Commonwealth Parliament's powers are limited to those actually conferred in the Commonwealth Constitution. If an enactment exceeds the Commonwealth Constitution on one interpretation of it, but not on another, then the enactment is to be read down to ensure validity[4]. The states' Parliaments can rely on a plenary power to legislate for the state[5]. This follows the United States position. In Canada, the situation is the reverse. However, it does not mean that the states can legislate on every subject; the Commonwealth Constitution:

(a) confers power to legislate on some subjects exclusively on the Commonwealth Parliament[6]. The most important exclusive jurisdiction for the exporter is customs and excise duties[7].

(b) prohibits any legislation limiting the freedom of interstate trade[8].

(c) impliedly allows concurrent jurisdiction to Commonwealth and State Parliaments in all other areas[9].

(d) provides for Commonwealth laws to prevail over State laws when in conflict[10].

The High Court of Australia has refined this division and balance of powers. It has developed its own restrictions such as the early rule of "implied immunity" that State laws cannot interfere with the performance of duties by a Commonwealth entity[11] and vice versa[12]. That doctrine led to great difficulties and came into disrepute. It was replaced in the famous "Engineers" case by the rule that intra vires Commonwealth legislation prevails over inconsistent state law even when the effect of that is to bind the Crown in the right of the various states and their entities[13]. As a matter of logic the reverse cannot follow. That change of doctrine effected a significant change of the balance between Commonwealth and State.

The "Engineers" case is the strategic redoubt from which successive benches of the High Court have sallied forth to move the balance of power towards the Commonwealth. Where the most desirable point of balance might be, I leave for argument by

Gough Whitlam and Joh Bjelke-Petersen. However, a most important recent development has been the decision of Koowarta v Bjelke-Petersen[14] which held (4 to 3) that the Constitutional power to legislate on external affairs[15] authorises legislation applying throughout Australia to give effect to the various United Nations Human Rights Covenants. Brennan J stated his view thus[16]:

> "When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs".

However, this would not extend to entering into a treaty merely as a means of conferring legislative power upon the Commonwealth.

The effect of Koowarta relevant to this gathering is that, insofar as there might not otherwise be power to legislate (which is unlikely), the CER Treaty will give rise to a power to implement its provisions internally in Australia.

The Importance of Jurisdiction: Notwithstanding extension of Commonwealth power such as that I have just noted, the Commonwealth Constitution remains an arcane document and one which necessarily involves lawyers in most subjects asking first "where is the jurisdiction?" It is only when that has been answered that a lawyer can then determine the applicable legislative provisions. The question of jurisdiction is not, of course, unknown to New Zealand lawyers but the importance it assumes in Australia is of quite another dimension.

The Unforseen Constitutional Issue and its Consequences: Consider a New Zealand exporter involved in apparently straightforward litigation in, let us say, Adelaide. The other side argues that some legislative provision relied on by our exporter is invalid as, e.g., inconsistent with some Commonwealth law. Our exporter might well find his case whisked off to Canberra for the constitutional question to be argued before the High Court, or even for the whole case to be tried[18]. The Commonwealth and state Attorney-Generals might intervene[19] - notice of the litigation and its constitutional question must be given to them and time allowed for their intervention[20]. Our exporter might, at worst, find himself back in Adelaide with the situation unchanged by his opposing party's argument except that it is now 12 months later and legal costs have increased by thousands of Australian dollars.

It is, of course, unusual for the scenario I have sketched to occur and the situation has been improved by the repeal in 1976 of the previous sections effecting compulsory removal of cases involving the powers of Commonwealth and states inter se. However, significant constitutional cases have arisen from the most mundane of litigational situations, including that most mundane of all - the action for damages for personal injuries arising out of a motor accident[21].

Inconsistency of Laws: I said earlier that where Commonwealth and state laws are inconsistent, the Commonwealth law prevails. Inconsistency arises generally in one of two situations. First, where there is a direct conflict: both laws apply to the same situation and if applied bring about different results, though this does not mean that acting in compliance with one necessarily means breach of the other[22]. In this situation the state law is excluded only in respect of the inconsistency itself. The second situation is more extensive. If a Commonwealth law is intended to"cover the field", state laws purportedly applying within that "field" have no operation at all within that "field". As a statement of the "covering the field" test, it is difficult to be more detailed than was Dixon J in Victoria v Commonwealth[23]:

> "... if it appears from the terms, the nature or the subject-matter of a Federal enactment that it was intended as a statement of the law governing a particular matter or set of rights and duties, then for a state law to regulate or apply to the same matter or relationship is ... inconsistent".

It may be of interest to this gathering to know that an industrial award under the Commonwealth Conciliation and Arbitration Act 1904 is a "law" for this purpose and prevails over any state statute, regulation or award applying to workers also covered by the Commonwealth award.

Freedom of Interstate Trade: Section 92 of the Commonwealth Constitution provides materially:

> " ... trade, commerce, and intercourse among the states ... shall be absolutely free".

That section has been litigated and written about endlessly. It was five years before the section was first litigated, but almost every year since then has brought its crop of s.92 cases, particularly through the 30's and 50's. Naturally, s. 92 has not been interpreted literally. It is difficult to generalise

on the effect of s. 92. The case law is so much made up of principles limited to particular activities and particular modes of regulation.

It can be said, however, first, that the section has been glossed by allowing reasonable regulation of an activity which involves interstate trade. Thus in Permewan Wright Consolidated Pty. Ltd. v Trewbilt[24], Stephen J said that this permits at least the protection of standards of public health and the proscription of deceptive or fraudulent practices. Mason J said that a method of regulation considered as appropriate by a state Parliament for intrastate trade can also be applied to interstate trade unless some feature of it discriminates against or places disadvantages upon interstate trade.

Secondly, as was first said by Isaacs J in James v Cowan[25], s. 92 confers "a personal right attaching to the individual and not attaching to the goods", Freedom of interstate trade means, essentially, freedom of individuals to engage in interstate trade subject to reasonable regulatory measures. Thus the section prevents establishment of a monopoly, nationalised or private. That was decided in the Airlines[26] and the Bank Nationalisation[27] cases.

The third generalisation that can be made is that a law, to be invalid under s. 92, must act expressly or impliedly upon interstate movement or an activity preparatory or following interstate movement as such[28]. Thus, following an example given by Dixon J in the case from which I have derived the statement just made, an enactment forbidding sale of a mixture of wheat and haychaff cannot apply to the contract for sale or purchase of such a mixture interstate.

Fourthly, it goes without saying that an enactment which gives a different result when applied to an intrastate transaction from when applied to an interstate one is invalid.

It may be helpful to give a very few examples of areas in which s. 92 operates. That of statutory monopolies has already been mentioned.

(a) Primary production schemes: compulsory acquisition of produce is unlawful it if is effected immediately upon production[29].

(b) An enactment regulating some aspect of manufacture, e.g. ingredients of processed food, is unlawful, but an enactment regulating some aspect of sale, e.g. packaging, is not[30].

(c) Licensing or registration of interstate hauliers is valid only if conditions in the relevant legislation are stated sufficiently precisely, and road user charges are valid only if proportionate to the distance travelled on roads within the charging state[31].

Section 92 has raised legal casuistry to great heights.

Taxation: Income Tax: This is not an exclusive Commonwealth power though for many years no state has levied an income tax. How it came about that the only income tax is the Commonwealth's is an interesting story.

For some decades after federation both Commonwealth and states levied income taxes. Early in World War II the Commonwealth set out to prevent the states exercising their powers to impose income tax. This could not be done directly, so it was done indirectly by four Acts:

(a) Income Tax Act 1942 imposing a tax rendering as much as the 1941 Commonwealth and state taxes combined.

(b) Income Tax Assessment Act 1942 giving the Commonwealth priority over the states in collection of income tax.

(c) States Grants (Income Tax Reimbursement) Act 1942 granting to the states amounts equivalent to their income taxes of 1941 **provided** they did not levy an income tax in 1942.

(d) Income Tax (Wartime Arrangements) Act 1942 transferring state income tax personnel to the Commonwealth public service.

Neat - and upheld by the High Court in the First Uniform Tax case[32]. After a few years on that basis, going back was practically difficult and politically impossible. The Fraser Government tried to encourage states to levy income taxes as part of its "new federalism", but without success.

Taxation: Excise Duties: Not taxes on booze and fags, but consumption taxes. This is another rather casuistic area of the Constitution. For the purposes of the Commonwealth Constitution, I would define an excise duty as a tax on the sale and purchase of goods at any time from production or

manufacture down to but excluding sale to the ultimate consumer, whether or not it is assessed by value or quantity of the goods concerned, provided it is expected that the duty will be passed on to the ultimate consumer. That is the general statement, its application is less than simple. Here are some examples:

(a) A fee for service is lawful. This includes road user charges[33], but a fee is not lawful if based on items used in production such as sheep or cattle,aliter horses[34].

(b) A variable licence fee can be lawful depending on how closely its calculation relates to goods[35]. Thus a tax based on the value of liquor sold is valid[35] but a tax based on the value of fish processed is invalid[36].

(c) Ad valorum receipt duties are invalid if they relate to payments for goods[37].

Taxation: Stamp Duties: It can be seen from what has been said that licence fees and stamp duties form a large slice of state taxation. These imposts are therefore very high compared with New Zealand. Property and security dealings particularly will be affected as to their viability. It may well be cost effective to take extensive legal advice in a number of states before establishing a **modus operandi** in Australia. I will say nothing more as to do so would go beyond the areas of my expertise.

Companies: This is subject to concurrent Commonwealth and state legislative power, made more difficult by the limited ambit of Commonwealth power. Section 51 (20) of the Constitution confers power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Hence, there is no Commonwealth Companies Act. Lengthy negotiations by the various Attorney-Generals led to uniform Companies Acts at the beginning of the 60's, but by the mid-70's the Acts had drifted apart in significant ways and the process had to be repeated for a new set of Acts at the beginning of the 80's.

I have raised the subject for two reasons. The first is that it cannot be assumed that company law will be materially the same in, say, Queensland as it is in New South Wales or any other state. The second is that section 51 (20) is the jurisdictional foundation for many Commonwealth business laws

and I will note some salient features of that power.

(a) Commonwealth statutes are provided to be limited to foreign, trading or financial corporations[38] though the doctrine of incidental powers enables the statute to reach beyond companies, e.g., by permitting injunctions against natural persons associated with corporations falling within the Act[39].

(b) The test of whether a corporation is a trading or financial corporation is whether its trading or financial activity is one of its substantial activities, i.e., not insignificant but not necessarily predominant[40]. Thus, a professional football league[41] is such a corporation but a local authority[42] is not.

THE NEW ADMINISTRATIVE LAW

This refers to the package of three Commonwealth Acts in the mid-70's: The Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, and the Administrative Decisions (Judicial Review) Act 1977. Only the first requires special attention here. The Ombudsman Act covers ground familiar to New Zealanders and the Judicial Review Act covers, in more advanced and comprehensive terms, the area covered by our Judicature Amendment Act 1972.

The Administrative Appeals Tribunal has a wide jurisdiction ranging broadly in subject-matter, importance and volume, with a wide and expert membership (including judges of the Federal Court) to match. Most important among the jurisdictions of interest to exporters is customs appeals. If our exporter establishes himself in Australia there is also a considerable number of relevant Acts under which he would have an appeal right to the Tribunal.

The first general point to be made about the Tribunal is that the width of its jurisdiction coupled with the quality of its membership in practice gives it the independence of a court. It is an observable phenomenon that tribunals or regulatory agencies which deal with only one government agency or species of business tend to become more easily persuaded of the correctness of that agency's or business's evidence or arguments. A tribunal with wide-ranging jurisdiction is largely preserved from such "capture"; its personnel never strike up the required close relationship with the respondent, for that to

occur. This is reflected in the case of the Administrative Appeals Tribunal by the success rate of applicants. This has ranged from a low of 30.8% in 1978-79 to a high of 53.5% in 1981-82. The average is 42.1%[44]. So the Tribunal is a rather favourable forum for the individual against government.

Secondly, the Tribunal and applicant get a detailed statement of the reasons for the decision challenged and a complete set of relevant file material, including intra-office memoranda (which I know from experience with the Ombudsman can be very revealing)[45]. So the Tribunal is equipped to make its own assessment of the merits of the case.

Thirdly, the Tribunal hears appeals on the merits. It has power to substitute its own decision for that of the agency and hearing is **de novo**, i.e., all material must be presented to the Tribunal and it decides as if it were the agency itself[46]. In consequence, the Tribunal decides what is the correct or preferable decision on the material presented to it, without regard to the material, processes or reasoning of the decision challenged[47]. The decision challenged has no probative value in determining what is the correct or preferable decision[48].

Fourthly, the Tribunal is not bound by Government policy and must choose in each case whether to follow or depart from it[49]. The Tribunal has defined the situations in which it would depart from policy, particularly if set at the political level[50].

This constitutes a formidable tribunal which is likely to be a valuable avenue of action for the New Zealand businessman operating in Australia.

SUBSTANTIVE AREAS OF LAW

I want to deal here with two particular aspects of CER and counterpoint New Zealand and Australian law. Obviously I cannot do this in detail.

Customs: Remedies: In Australia there are wide rights of appeal to the Administrative Appeals Tribunal. In general one can say that all the material decisions relating to customs duty are appealable save, as New Zealand businessmen have recently had borne to them, anti-dumping and countervailing charges. In New Zealand, appeal rights are few and not uniform. The only decisions relating to customs duty which are appealable in New Zealand are those relating to value[51]. There the appeal right is to the High Court (Administrative Division). There is

an appeal against export licence decisions but it is only internal (to the Minister).

The contrast of remedies appears starkly from a tabular analysis of decisions appealable:

Australia	New Zealand
Disputes as to duty	
Valuation (several types)	Valuation
Drawbacks	
Fair rates of exchange	
Refund of export duty	
Quota orders	
Clearance certificates	
Landing certificates	
Accounting for goods	
Warehousing decisions	
Warehouse licences	
Customs agents licences	Customs agents licences
Origin of cinema films	
Trans-shipment and preferences	
	Export licences
	Customs carriers licences

Customs: Substantive Law: It is not surprising to know that there have been very few reported cases in New Zealand on the assessment of customs duties and related topics. My count is six. The situation in Australia was much the same up to the advent of the Administrative Appeals Tribunal. However, since then 211 appeals have been lodged, almost all of them on the assessment of duty and related topics[52].

This makes up a considerable body of law which is generally applicable to New Zealand since both countries have adopted the "Brussels Nomenclature" and the "Brussels Definition of Value". I say only "generally applicable" because both Brussels rules are subject to local variation. In the case of valuation, for instance, the Tribunal decision in Re Renault (Wholesale) Pty. Ltd. v Collector of Customs (No. 3)[53], which held that the value of packing surrounding completely knocked down motor vehicle kits was not to be included for duty, was overturned by the Customs Amendment Act 1978 (Cth). The jurisprudence of the Administrative Appeals Tribunal should be consulted by legal advisers to businessmen involved in customs questions, whether in Australia or New Zealand

Because both classification and valuation for customs duties in Australia and New Zealand, draw heavily on international documents, the Administrative Appeals Tribunal has not hesitated to consider and follow previous decisions of United States[54] courts.

Customs: The Treaty: The CER Treaty does not effect a customs union, so there is no provision for a common customs tariff. The Treaty provides in art.4 (3) and (4) for a staged phasing out of tariffs over five years for goods qualifying as those of the other member under the rules of origin in art. 3. However, the relevant tariff will still apply to items not qualifying under the rules of origin so the Australian tariff, its meaning and application will continue to be relevant to New Zealand exporters.

The tariff continues to be relevant to new measures for the assistance and protection of industry in Australia or New Zealand - art. 4 (11) subpara. (a) of which provides that the member state shall:

> "set the tariff at the lowest tariff which:
>
> (i) is consistent with the need to protect its own producers or manufacturers of like or directly competitive goods; and
>
> (ii) will permit reasonable competition in its market between goods produced or manufactured in its own territory and like goods or directly competitive goods imported from the territory of the other Member State".

Paragraph (11) also makes provision for margins of preference to the other member state to be provided - sub-para. (c) and (d).

Next, the word "tariff" is defined in para. (13) to exclude certain imposts. The first two exclusions are:

> "(a) fees or charges connected with importation which approximate the cost of services rendered and do not represent an indirect form of protection or a taxation for fiscal purposes;
>
> (b) duties, taxes or other charges on goods, ingredients and components, or those portions of such duties, taxes or other charges, which are levied at rates not higher than those duties, taxes or other charges applied to like goods, ingredients and components produced or manufactured in the country of importation".

These might, and probably should, have been drafted in the light of experience with the analogous European Economic Community Treaty articles and the extensive case law they have generated. At any rate they cannot start to apply until after all duties have been phased out. I think the subparagraphs will still be difficult to apply and, if incorporated in legislation, will generate litigation. For instance, assume that some law in Australia requires inspection of meat before sale to ensure it is not knackery horse, can Australia charge for an inspection its officers make of meat imported from New Zealand notwithstanding it has been inspected by New Zealand officers? After hard-fought litigation, the European Court of Justice held that such a charge could not be made[57]. If Australian and New Zealand imports are not levied or calculated in the same way, an avenue for argument appears in subpara. (b). Finally, subpara. (f) excludes from the meaning of "tariff" charges imposed on intermediate goods (i.e. goods including raw materials which come from third countries which can be imported more cheaply or on more favourable terms into one member state than the other), or as part of anti-dumping or countervailing action.

Customs: Anti-dumping, etc. The three articles on intermediate goods, anti-dumping action and countervailing action are arts. 14-16. The article on intermediate goods is part of the concept of ensuring equal opportunity. It does not fit naturally with anti-dumping and countervailing charges, but there are elements in common and it is convenient to deal with it here. Article 14 understandably does not have even a remotely analogous provision in the Australian or New Zealand Customs Act. Section 129 of the Customs Act 1966 (NZ) seems to encompass the areas covered by both art.15 on anti-dumping and 16 on countervailing action. Thus the precondition in art.15 (1) of export at less than "normal" value is parallel to but less explicit than s.129 (2) (a),(b) and (d) of the New Zealand Act which provides for means of ascertaining what could be called the "normal" value, while the precondition in art.16(3) of there being a "subsidy" on the goods parallels s. 129 (2) (c).

Both arts.15 and 16 have materially the same triggering criteria, namely:

"(a) material injury to an established [or domestic (art 16)] industry;

(b) the threat of material injury to an established [or domestic (art. 16)] industry; or

(c) material retardation of the establishment of an industry".

In contrast the triggering criterion in s. 129 (2) is "likely to have an effect prejudicial to any industry ... or the

establishment of any industry". The current New Zealand criterion is, I think, significantly weaker than the Treaty criteria.

The triggering criterion in art.14 (1) concerning intermediate goods is that the advantage in importing raw materials from third countries "frustrates or threatens to frustrate the achievement of equal opportunities for producers or manufacturers in both Member States" - whatever that may mean. What a marvellous "fudge" clause for those who are looking for an "out". One hopes and can probably expect that our trade departments would require an extreme case before taking action, but one cannot be so optimistic about businessmen whose efforts to operate art.14 might well be expensive for exporters. Can relative exchange rates give rise to an art.14 situation? What of relative tariff levels? Quantitative restrictions? Import licensing? It would be interesting to know the negotiating history of art. 14 (1).

In the case of Australia, art. 15 and 16 bear a strong resemblance to the Customs Tariff (Anti-Dumping) Act 1975 as amended in 1981[58]. The differences in preconditions and triggering criteria differ little save in expression. Thus, art.15 (1) uses the word "normal" which is also used in the Australian Act. The only difference is that the trigger in the Act concerning the establishment of an industry speaks of hindering rather than retarding. That difference is one which could well be important in some cases.

Customs: Harmonisation: Art. 21 of the Treaty provides that on written request by one of them, the member states will meet to consider what harmonisation "may be appropriate" - a thoroughly anodyne statement. I must leave aside the question of harmonisation by way of a customs union. Short of that, I see a number of areas for harmonisation.

First, New Zealand needs a reasonable appeal system for customs. That, plus ready access to each other's appellate decisions on classification and valuation issues would go a long way towards harmonising customs law on both sides of the Tasman. A transnational court or tribunal would be preferable, but I will leave Kirby J to develop that matter. I can see no reason against providing an appeal system.

(1) Assessment of customs duty is assessment of a tax.

(2) Assessment is by determination of facts and law.

(3) Assessment is a question of rights and liabilities.

(4) Government should collect taxes only when lawfully due.

(5) Appeal to the High Court (Administrative Division) or a tribunal would promote observance of the fourth point.

(6) There can be no question of the competence of a court or tribunal to do the job.

Secondly, Australian and New Zealand law should incorporate as they affect individuals, arts 3 (rules of origin), 4 (13) (exceptions to abolition of tariff), and 14 - 16. All are provisions essential to the proper assessment of duty in the long term and which (saving Australia in arts. 15 - 16) are provided for in existing law either inconsistently or not at all.

Thirdly, substantive elements of customs law apart from levels of duty in the tariff items could be made and kept uniform. Negotiation for that limited uniformity would probably not raise the difficult issues of protection policy and national interest, which would be involved in discussions on a customs union. On the other hand, it would ease the road of one doing business on both sides of the Tasman to have uniform classification, valuation and other substantive law.

Trade Practices: The Law: This is one of the subjects which art. 12 recognises can impede or distort trade and on which the member states must consult on the written request of either "with a view to resolving any problems which arise" from differences in the laws[60]. Note that the requirement is substantially stronger than the equivalent concerning customs.

The Australian and New Zealand trade practices laws are very different and this is not the place for a full-scale comparison. Because it will be more familiar, I will deal with this topic by using the structure of the Commerce Act 1975, rather than that of the Trade Practices Act 1974 (Cth) or my own. I will therefore use four headings:

- prohibited trade practices
- examinable trade practices
- approvable trade practices and
- monopolies, mergers and takeovers.

Probibited trade practices are exactly that, their commission is an offence. They are contained in ss. 48 - 54 of the Commerce Act 1975 and the most important of them are :-

(a) refusal to sell unless other goods or services obtained[61],

(b) collective bidding and tendering[62],

(c) pyramid selling[63].

The Australian Act also lists prohibited practices:

(a) horizontal price fixing arrangements except for:
  (i) joint pricing for joint supply by joint venturers of joint product,
  (ii) recommended price arrangements for goods by 50 or more **independent** parties,
  (iii) price arrangements for collective acquisition and joint advertising of goods[64],

(b) arrangements or covenants having the purpose or effect of substantially lessening competition[65],

(c) price fixing covenants[66],

(d) exclusionary covenants, (boycotts)[67].

One needs go no further to appreciate the fundamentally different approach of the Australian Act. The New Zealand Act is particularist, the Australian is generalist. The New Zealand Act prohibits by reference to the act done and does not evaluate its actual effect on competition; the Australian also evaluates the effect on competition and prohibits any action whatsoever if it substantially lessens competition. A former research officer of the Commerce Commission, Peter Baynes, in a lecture to economics students in 1978 said that the New Zealand Act does not promote competition but allows someone who wants to compete to do so. The Australian Act, by contrast, promotes competition.

Examinable trade practices are lawful, unless the Commerce Commission orders otherwise[68]. The most important are :

(a) certain arrangements for sale or purchase only with certain persons or on certain prices or conditions including resale price maintenance[69],

(b) quantity discounts[70],

(c) arrangements to limit output[71],

(d) refusal to sell[72],

(e) tied loans[73].

Such practices will be prohibited if contrary to the public interest by reason of certain effects such as:

(a) increasing costs or maintaining prices or profits at an artificial level[74]; or

(b) preventing, reducing or limiting competition[75],

unless:

(c) the demonstrable advantages to the public of the practice outweigh those effects[76]; or

(d) those effects are "not unreasonable"[77].

There is no Australian equivalent.

Approvable trade practices require specific approval before they can be acted upon lawfully. These are collective pricing agreements[78] and individual resale price maintenance arrangements[79]. These may be approved on the same test as examinable trade practices may be allowed to continue. Under the Australian Act the equivalent classification is called authorisable practices. The only authorisable practices are those in para. (a) (i),(ii) and (iii) above concerning prohibited practices, i.e., joint venture and collective acquisitions and marketing situations, and price arrangements among at least 50 independent parties, pricing arrangements for services[80], and exclusive dealing arrangements[81].

Except for the last category, the practice may be authorised if its benefit to the public outweighs its competitive detriment. In the last category the test is whether its benefit to the public is such that it should be allowed. Broadly speaking the tests in both Acts are similar. In New Zealand all applicants have withdrawn their applications before a decision was reached.

It can be seen that in the area of restrictive trade practices, the Australian law is far stricter than the New Zealand and is more distinctly competition promoting. However, the key factor remains how much will is there to enforce the law? If the Commerce Act in substance echoed the Trade Practices Act, it would make little difference without greater Government will.

Monopolisation, mergers and takeovers are really two distinct topics: monopolisation, and mergers and takeovers. Because the Commerce Act is so ineffective in this area, it is preferable to deal first with the Australian law.

Monopolisation is dealt with in s.46 of the Trade Practices Act. Section 46 involves fulfilment of three conditions:

(a) a corporation in a position substantially to control a market in goods and services;

(b) action taking advantage of its power in that market;

(c) for the purpose of eliminating a competitor, preventing entry, or deterring or preventing competition.

These conditions land the Trade Practices Commission squarely in the middle of economic analysis - determination of the market, market share and barriers to entering the market. United States and European Economic Community case law is highly relevant here as s. 46 owes much in its phrasing to art. 86 of the European Economic Community Treaty as elabor-

ated by the European Court prior to 1974 and to the classic U.S. Supreme Court elaborations of the second leg of s.2 of the Sherman Act. The difficulties of enforcing anti-monopolisation laws in the northern hemisphere have also been experienced in Australia, the most important example being Top Performance Motors Pty. Ltd. v Ira Berk Motors (Qld) Pty. Ltd.[82] where action to protect legitimate trade and business interests was held not to infringe s. 46.

The New Zealand approach to monopolisation is quite different; it is concerned with the establishment of monopolies, not with their exercise of power. Where the Commerce Commission decides that there exists a monopoly, oligopoly or circumstances tending to bring this about which monopoly or oligopoly is or would be contrary to the public interest, the Commission may require disposition of business or part of a business, termination of agreements, or other action (including dissolution of a company) which might be considered necessary[83]. The problem of how to unscramble eggs means that these powers can really only be used before the eggs are cracked. I would note however, that if CER results in freer cross-Tasman investment, the Commission could assist practically in breaking down monopolies by orders to refrain from practices which would hinder the establishment of Australian-based competitors. The question of investment is being dealt with elsewhere and I will go no further here.

Mergers and Takeovers: Section 50 (1) of the Australian Act covers mergers or takeovers as a result of which the acquirer is, or is likely to be, in a position to control or dominate the market. Mergers can be authorised after agreement is made, but the acquisition agreement has to be subject to the Commission's approval, so this is, in practice, an authorisable (i.e. "illegal unless approved") situation. To be approved, the merger must be likely to result in such a **public** benefit that it should be allowed[84]. The very nature of the dangers inherent in an undertaking able to control or dominate the market is such that if a merger in fact falls within s. 50 (1), it will rarely be approved.

In New Zealand the conditions and powers are much the same as for monopolisation[85]. The conditions relating to infringement of the public interest[86] include those relating to the equivalent issue in examinable trade practices[87], but go on

to set out conditions of a general nature relating to the shape of the economy. The last point to be noted is that while in Australia mergers and takeovers are authorisable, i.e., approvable in New Zealand parlance, here some are approvable and some examinable.

Trade Practices: Harmonisation: The European experience is that uniform trade practices law is very important in establishing non-discriminatory trade and market access. I think harmonisation of trade practices law under CER is virtually inevitable. I also think that it is virtually inevitable that harmonisation will involve bringing New Zealand law into line with the Australian - which will doubtless also be amended. My reasons for this are set out in the next section.

Harmonisation and the Future: Article 12 (1) (a) of the CER Treaty provides:

> "The member states shall:
>
> Examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specificiations and testing procedures, domestic labelling and restrictive trade practices".

The matters specified are all ones which have considerable potential to inhibit free trade. They also share the characteristic that there are already laws on them in both Australia and New Zealand. Finally, it is safe to say that public policy is in favour of adequate standards, testing procedures (which can be alternatives- New Zealand favours the former, Australia the latter) and labelling requirements as well as of adequate controls of restrictive trade practices. No doubt there will be fierce bargaining in harmonisation talks, but few great issues of economic policy are likely to arise.

The public policy for adequate laws on these subjects means that the reduction of standards, controls, and so on, would be subject to much domestic criticism. Harmonisation will therefore consist of harmonisation **up** to the more stringent law, subject to minor concessions. That is the European experience. That is why I said before that the Commerce Act would be brought into line with the Australian Trade Practices Act.

That is as far as the Treaty goes on harmonisation and I do not think that the Treaty can itself be developed incrementally into a common market or a customs union. Indeed I do not think one can establish a common market of two

countries. Each action would have to be agreed by two equal parties. Accordingly a common market as such could not acquire any force independently of the two governments.

To establish genuine free trading conditions across the Tasman, however, certain matters additional to those covered by the Treaty need to be achieved:

(a) complete freedom of movement and establishment of people;

(b) non-discriminatory purchasing by **all** governments[88];

(c) abolition of exchange control between Australia and New Zealand;

(d) complete freedom of investment in both countries for the nationals of either.

These in turn seem to require:

(e) a customs union, preferably administered by a single service (with the Customs administration of both countries being abolished);

(f) a uniform immigration law and policy, again preferably administered by a single service (with consequential abolitions);

(g) a uniform exchange control and foreign investment law vis-a-vis third countries, again administered by a single service (with consequential abolitions);

(h) a regional highest court.

Those eight matters are not presently achievable. Possibly in ten years there might be the political will to move. More probably, our children will be the ones to achieve that development.

* The views expressed here are the writer's personal views

FOOTNOTES:

1. For a note on the most recent moves to eliminate appeals to the Privy Council - see "The Last of England - Farewell to their Lordships Forever" (1982) 56 Law Inst. Jo. 780.
2. Notably in income tax appeals.
3. Federal Court of Australia Act 1976 ss. 19 (1) and 24 (1) and (2).
4. Acts Interpretation Act 1901 (Cth) s. 15A.
5. Commonwealth Constitution s. 107
6. 52, 77 and 90
7. s. 90
8. s. 92
9. By combining s. 107 with other ss giving Commonwealth legislative power, notably s. 51.
10. s. 109
11. d'Emden v Pedder (1904) 1 CLR 91 (Tasmanian Stamp Duties Act cannot apply to Commonwealth Officers' receipt of salary).
12. Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association (1906)4 CLR 488 (Commonwealth Conciliation and Arbitration Act not apply to State Government employees' unions).
13. Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (1920) 28 CLR 129.
14. (1982) 39 ALR 417.
15. s. 51 (20).
16. Ibid., at 486.
17. Ibid., at 487.
18. Judiciary Act 1903 s. 40 as substituted in 1976.
19. Ibid., s. 78A.
20. Ibid., s. 783.
21. See, e.g., Nominal Defendant v Dunstan (1963) 109 CLR 143.
22. See, eg., Hume v Parker (1926) 38 CLR 441 and Ex parte McLean (1930) 43 CLR 472.
23. (1937) 58 CLR 618 at 630.
24. (1979) 27 ALR 182.
25. (1930) 43 CLR 386 at 418.
26. Australian National Airways Pty. Ltd v Commonwealth (1945) 71 CLR 29.
27. Commonwealth v Bank of New South Wales (1949) 79 CLR 497.
28. O. Gilpin Ltd. v Commissioner for Road Transport (1935) 52 CLR 189 at 204 - 206.
29. Wilcox Mofflin Ltd. v New South Wales (1952) 85 CLR 488.
30. O'Sullivan v Miracle Foods (South Australia) Pty Ltd. (1966) 115 CLR 117.
31. Hughes and Vale Pty Ltd v New South Wales (No.2) (1955) 93 CLR 127.
32. South Australia v Commonwealth (1942) 65 CLR 373. See also the Second Uniform Tax case, Victoria v Commonwealth (1957) 99 CLR 575.
33. Armstrong v Victoria (No 2) (1957) 99 CLR 28.

34. Logan Downs Pty Ltd v Queensland (1977) 12 ALR 484.

35. Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 59

36. M.G. Kailis (1962) Pty Ltd v Western Australia (1974) 130 CLR 245.

37. Western Australia v Chamberlain Industries Pty Ltd (1970) 121 CLR 1.

38. e.g., Trade Practices Act 1974 s. 4 (1).

39. Trade Practices Commission v Sterling (1980) 28 ALR 497 (Lockhart J).

40. State Superannuation Board v Trade Practices Commission (1982) 44 ALR 1.

41. R. v JJ Federal Court of Australia, ex p. Western Australian National Football League (Inc) (1979) 143 CLR 190.

42. R. v Trade Practices Commission, ex p. St George County Council (1974) 130 CLR 533.

43. See the writer's introductory article, "The New Administrative Law" (1977) ALJ 801.

44. See the appendices to Annual Reports of the Administrative Review Council.

45. Administrative Appeals Tribunal Act 1975 ss. 37 and 38.

46. Ibid., s. 43.

47. Re Woolworths Ltd. v Collector of Customs (New South Wales) (1978) 1 ALD 116 (AAT).

48. Collins v Minister for Immigration and Ethnic Affairs (1981) 36 ALR 598 (FCA).

49. Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 (FCA).

50. Drake v Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 (AAT).

51. Customs Act 1966 ss. 124A (8), 140 (3) and 140A (1).

52. Sixth Annual Report of the Administrative Review Council 1981-82 pp. 65 - 67 and 84.

53. (1978) 2 ALD 111 (AAT).

54. Ibid.

57. Simmenthal v Minister for Finance (case 35/36) [1976] ECR 1871.

58. Ss. 8 and 10 respectively.

59. S. 8(7) and detailed in s. 5.

60. Article 12 (2).

61. Commerce Act s. 50.

62. Ss. 48 and 49.

63. S. 48A.

64. Trade Practices Act s. 45A and 88 (3).

65. S. 45B.

66. S. 45C.

67. S. 45 (1).

68. Commerce Act s. 22 (1).

69. S. 23 (1) (a), (c) and (g).

70. S. 23 (1) (f).

71. S. 23 (1) (j).

72. S. 23 (1) (i).

73. S. 23 (1) (ka).
74. S. 21 (1) (a) to (k).
75. S. 21 (e) and (f).
76. S. 21 (2) (a).
77. S. 21 (2) (b).
78. Ss. 23 (1) (b), (d) and (e) and 27.
79. S. 28.
80. Trade Practices Act s. 88 (5) (b)
81. S. 88 (8)
82. (1975) 5 ALR 465 (FCA).
83. Commerce Act s. 65 (2)
84. Trade Practices Act s 90 (9).
85. Commerce Act s. 78 (2) to (4).
86. S. 80.
87. S. 21 (1).
88. Art 11 covers only the Commonwealth Government and not State Governments.