AUSTRALIA AND NEW ZEALAND ON DIFFERENT CORPORATE PATHS

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"[Company Reform in New Zealand] is a coherent law reform that is principled and stands up well, and I should be disappointed if the work were ultimately diminished because we felt it necessary to harmonise with a legislative regime in Australia that I suspect is not likely to be as coherent or as robust as ours.

Having said that, I do not think that we should not take any notice at all of what the Australians are doing. It would be nice to hope that one day they might look at or work and consider that it would be worth their harmonising with us. However, I do not think that we are quite at that position."[1]

I INTRODUCTION

The enactment of the Companies Act 1993 signalled a substantial change in New Zealand's company law. The aim of this article is to explore the background to its enactment by examining the reforms undertaken in corporate law in Australia and New Zealand during the 1950s, 1960s, 1980s and 1990s. In particular, this article will examine the approach to regulation in the corporate sphere in New Zealand. This article will also put forward suggestions for the interpretation of the Companies Act 1993, based on this examination.

What emerges from this examination reflects to a certain degree the broader social and political picture in New Zealand. From a mirroring of English company legislation, New Zealand broadened its approach by looking to an Australian model in the 1960s and 70s, and then adopting to a significant extent a North American model. The adoption of a North American model mirrored the deregulatory movement in New Zealand's economic and political life during the 1980s.

Despite the wishes of David Caygill, it is clear from an examination of Australian and New Zealand corporate law that New Zealand never has, and probably never will have, the corporate regulatory regime that characterises Australian corporate law. This difference, coupled, with the move to using some North American principles, gives rise to a number of implications for the Companies Act 1993. The first is that Australian, and English, authority will become less important in relation to interpreting this Act. The second is that the importance of the role of the courts in the enforcement and regulation of behaviour of directors under the Companies Act 1993 cannot be understated. The important role the courts have means that they will have to be open to a purposive interpretation of the legislation in order to achieve the legislature's aims of a "self-regulatory" corporate regime.

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This article will begin with an examination of Australian corporate reforms from the 1960s through to the 1980s, and will be followed by an examination of the enactment of the Companies Act 1955, the MacArthur Committee reports in the 1970s, and the reform of corporate law undertaken by the Law Commission in New Zealand during the 1980s. The last part will discuss the implications arising from this examination for the interpretation of the Companies Act 1993.

II COMPANY LAW REFORM IN AUSTRALIA

Up until the 1960s the history of company law reform in Australia and New Zealand followed a similar course. From the late 1960s onwards, however, Australian corporate law reform would follow a different path. The main driving force for corporate law reform in Australia during the late 1960s and 1970s would be corporate and regulatory failures, while in the mid 1980s reforms would be motivated by political considerations. Corporate law reforms in the 1990s would again be driven by large scale corporate fraud and perceived regulatory failure.

McQueen pointed out that the Uniform Companies Acts of 1961-62 were in the main based upon the Companies Act 1862 (UK) with the addition "of a number of ad hoc regulatory measures".[2] During the 1960s corporate collapses and failures on a large scale resulted in the establishment of the Eggleston Committee.[3] One of this committee's reports led to the introduction of the Companies (Amendment) Act 1971 (NSW),[4] which provided for the disclosure of substantial shareholdings, the disclosure of substantial shareholdings, the disclosure of directors' interests and a code regulating takeovers. This Act also amended the provisions dealing with accounts and audits and strengthened the provisions dealing with special investigations and defaulting officers.[5] Prior to this the New South Wales government had also passed the Securities Industry Act 1970 which regulated the securities industry and required the licensing of stockbrokers.[6]

The move to greater regulation in Australia was given further impetus by a stock market boom and crash in 1969. The abuse of the investing public from stock market practices during this boom resulted in the set-

1 Caygill, NZ Parliamentary Debates, Weekly Hansard 85, 10 August 1993, at 17333.

2 McQueen, "An examination of Australian Corporate Law and Regulation 1901-1961" (1992) 15 UNSWLJ 1 at 24. The Uniform Companies Acts were the product of an agreement between the state and the commonwealth governments in Australia designed to introduce "the element of uniformity into Australian company law" (see MacArthur Committee *Final Report of the Special Committee to Review the Companies Act* (1973) (MacArthur Committee Final Report at 20).

3 Officially known as the "Company Law Advisory Committee". See the MacArthur Committee Final Report, supra n2 at 21. For a discussion of this period see Sykes, *Two Centuries of Panic* (Allen & Unwin, 1989), Ch. 17 "Nickel Fever". Subsequent chapters in Sykes' book show that the desire to avoid the problems of the 1960s were, at best, only partially successful.

4 MacArthur Committee Final Report, supra n2 at 22.

5 Idem.

6 Idem.

ting up of the Senate Select Committee on Securities and Exchange,[7] which produced "the Rae Report".[8] This report criticised the stock exchanges in relation to their regulation of both the stock markets and the stockbrokers, and also attacked the lack of uniformity in State legislation and administrative practices of the State's administrative bodies.[9] The Committee commented:[10]

> We have no doubt that, in the absence of an effective regulatory organisation, exploitation of the investor will continue, rising to serious levels whenever investor interest, conditions of liquidity and other circumstances occur and produce heightened stock market activity. Government in Australia would be irresponsible if it were not to upgrade substantially regulatory procedures so as to guard against repetition of fraud, abuse and incompetence on the scale of recent years.
>
> In Australia at present there is no body or group of bodies which has, individually or collectively, the responsibility, the jurisdiction, the power and the expertise to ensure the adequacy and effectiveness of regulation of the securities market and related company activities. Rather, regulation depends upon the action of a number of bodies, the principal ones being the stock exchanges and the State and Territorial Companies Office.

Following on from this report the Federal Government moved to introduce legislation (the Corporations and Securities Industry Bill).[11] This legislation provided for the establishment of a Corporations and Exchange Commission, along the lines of the United States agency, the Securities and Exchange Commission.[12] The Commission's role was to include acting as a collector and disseminator of financial information from public companies as well as exercising surveillance and regulatory powers.[13] The Bill, however, went further than the mere creation of a regulatory commission and covered fundraising, "licensing of securities dealers and regulation of their transactions, public company accounts and audits, and the conduct of company takeovers".[14]

While this Bill did not proceed, it did provide the incentive for some of the States to work towards greater uniformity in company law.[15] With a change of federal government in 1975 a co-operative scheme of companies and securities regulation was put in place by the States with the Federal Government, which enables the States to maintain substantial control over this area. The scheme provided for a Ministerial Council for Companies and Securities as the policy making body, with the National Companies and Securities Commission ("the NCSC") responsible for regula-

7 Redmond, *Companies and Securities Law: Commentary and Materials,* Sydney, Law Book Company Ltd, 2nd ed, 1992, at 55-56.
8 "Australian Securities Markets and their Regulation" (1974) (Report from the Senate Select Committee on Securities and Exchange) (Rae Report), (see ibid at 56).
9 Idem.
10 Rae Report, supra n8, Part I, at 15-15.4.
11 Redmond, supra n7 at 57.
12 Idem.
13 Idem.
14 Idem.
15 Ibid at 58.

tion (subject to the direction of the Ministerial Council). The NCSC was not given sole jurisdiction in this area as it was required to delegate the administration of the scheme to the State corporate affairs commissions.[16]

The scheme was reviewed by the Federal Government in 1986 and one of the conclusions of the review was "that the distribution of functions between the NCSC and its delegates had resulted in administrative duplication and general operational inefficiency".[17] Of major concern to the Federal Government was the lack of control it exercised over both the NCSC[18] and the content of corporate law in Australia.[19] The introduction of the Corporations Law in the mid 1980s by the Federal Government was at least partly motivated by a desire to obtain control of this important aspect of Australian commercial life. As MacPherson states:[20]

> [O]ne can understand the Commonwealth initiative to seek to control corporate Australia. This head of power has inherent within it enormous possibilities to achieve objectives of a social and economic nature that go beyond the regulation of companies *per se*.

McQueen makes the point that the Commonwealth Government was more concerned with being able to "both secure the passage of the legislation and to prevent (if possible) constitutional challenges to the legislation" than in making (contentious) wholesale changes to the legislation and to that end it "followed the 'safe' course of only making cosmetic changes to the existing legislation".[21] As Redmond notes, substantive company law reform:[22]

> [w]as held in abeyance after 1987 with efforts concentrated simply upon reshaping the institutional and constitutional structure of company law. (The majoritarian decision making structure of the co-operative scheme itself inhibited vigorous non-technical reforms and those set in train by the Whitlam government lapsed with its dismissal.)

16 Ibid at 59. For a discussion of the establishment of the NCSC see Whitehouse G, "National Companies and Securities Commission" in Stewart (ed), *Government and Business Relations in Australia* (Allen & Unwin, 1994) at 178.

17 Redmond, supra n7 at 62, citing the Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament in Relation to the National Companies Scheme,* 1987. For a discussion of the regulatory performance of both the NCSC and the State Corporate Affairs Commissioners see Grabosky & Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne, Oxford University Press, 1986).

18 Whitehouse notes that the NCSC was in fact part of the scheme agreed to by the states in order to bypass federalism of corporate law, and as a consequence it was more politically independent than it would have been if it was subject to the direct control of the Federal Government (see Whitehouse, supra n16 at 178).

19 Redmond notes that there was dissatisfaction "on both sides of the Commonwealth Parliament with the constrained role played by Parliament . . . in the review of Bills introducing amendments to the co-operative scheme legislation" (Redmond, supra n7 at 62).

20 MacPherson, "The Role of the National Companies and Securities Commission in a Climate of Deregulation" in Head and McCoy (ed) *Deregulation or Better Regulation?* (The Centre for Australian Public Sector Management, Brisbane, 1991) at 96-97.

21 McQueen, supra n2 at 27.

22 Redmond, supra n7 at 79, note 1.

Therefore at the time this review was set up the move for reform was based upon political motives arising from Australia's federal system of government, and did not arise from corporate collapses or fraud. However, the stockmarket crash in 1987 and the resulting economic downturn brought with it the exposure of corporate fraud and "a clamour for more effective control of corporate behaviour".[23] The response to this can be seen in the effect upon the powers of the Australian Securities Commission ("the ASC"), which replaced the NCSC.[24] While in a limited number of instances powers held by the NCSC were removed from the ASC,[25] the ASC was given "extensive powers to investigate breaches of the scheme law, take civil enforcement action, initiate criminal prosecutions and exercise some adjudicative powers".[26]

Corporate law reform in Australia from the 1960s onwards was largely driven by corporate fraud or collapses, or political considerations related to the federal system of government in Australia. Although securities law reform in New Zealand would be affected by corporate collapses and fraud in the late 1970s and 80s,[27] New Zealand corporate law reform would be

23 MacPherson, supra n20 at 89. See also Tomasic and Bottomley, *Directing the Top 500: Corporate Governance and accountability in Australian companies* (1993), particularly ch 1, "The Corporate Excesses of the 1980s".

24 McQueen, supra n2 at 28, argued that the creation of a truly national body which was not reliant upon the state corporate affairs commissions represented a "rupture" with the past and created "the *pre-conditions* for a more efficacious system of corporate regulation than that which ha[d] previously applied in Australia" (ibid at 29).

25 The NCSC had the function of reviewing the adequacy of the scheme legislation (which is now undertaken by the Companies and Securities Advisory Committee) and the power to declare an acquisition of shares or conduct unacceptable. These powers were given to the Corporations and Securities Panel (see Remond, supra n7 at 931). See also Menzies S, "The Australian Securities Commission and the Prevention of Fraud" in Grabosky (ed), *Complex Commercial Fraud* (Australian Institute of Criminology, 1992).

26 A number of examples in relation to the ASC's civil enforcement powers will serve to show the increased powers of the ASC to regulate and intervene in the corporate and securities markets. The powers here include the power:
(a) to apply to the court for an injunction under section 1324 of the Corporations Law to restrain conduct which is in breach of the Corporations Law, or would be, or conduct which is ancillary to such a breach (which is a wider power than under the Companies Code) which, if granted, would allow "the ASC great flexibility in directing the particular affairs of a corporation without relieving it of its management" (Menzies, ibid at 31);
(b) to apply to the court for the appointment of a receiver under section 1323(1)(h);
(c) to apply to the court for the recovery of property on behalf of an individual or company (including an express power to proceed against company officers, and to seek an order with respect to oppressive or unfairly prejudicial conduct);
(d) to apply to the court for an order for compensation or damages by bringing an action in the name of a company (even without the company's consent) or in the name of an individual where ASC considers it is in the public interest to do so after an investigation or record of examination;
(e) to assist private litigants by supplying them with information obtained during an investigation (see generally Redmond, supra n7 at 947).

27 For a discussion of securities law reform in New Zealand see Fitzsimons, "The New Zealand Securities Commission: The Rise and Fall of a Law Reform Body" (1994) 2 Waikato Law Review (forthcoming).

comparatively untouched by these factors. These differences formed the basis for a divergence of the two countries' corporate laws.

III Company Law Reform in New Zealand and the Companies Act 1955

The company law reforms that took place in New Zealand in the early 1950s and which led to the Companies Act 1955 focused on reforms related to the regulation of companies. The reforms were relatively limited, and no attempt was made to re-examine the fundamental principles of company law during this review.

1 The motivation for reform

Companies legislation in New Zealand traditionally followed the English legislation.[28] For example, during the enactment of the Companies Act 1933 the government explicitly stated its desire to maintain the uniformity of New Zealand company law within the British Commonwealth (which in reality meant uniformity with the company law legislation in the United Kingdom). The desire to be able to continue to rely upon English courts' decisions was one of the main reasons advanced for the need for uniformity.[29]

The New Zealand government's attitude towards regulation of companies in the early 1950s continued to be to seek uniformity with the United Kingdom. In parliamentary discussions regarding the new Companies Bill it was readily acknowledged that there had been ". . . no large scale losses by creditors or members through misfeasance or through wrong action on the part of those charged with the administration of companies",[30] which required the introduction of the Bill, but rather "[I]t was thought wise to revise this very important section of the legislation of our country".[31] This revision followed after the Cohen Committee report,[32] and the introduction of the Companies Act 1948 (UK). When the Bill was finally passed Halstead was moved to say:[33]

> "I would like also to congratulate the Law Draftsman, and the committee which assisted in the drafting of this Bill. They have succeeded in adapting the British Act to New Zealand conditions . . . ."

28 See MacArthur Committee, *Interim Report of the Special Committee to Review the Companies Act,* 1971 at 7 (MacArthur Committee Interim Report). In NZ Parliamentary Debates, Vol 298, at 1841 there is a discussion of the history of English and New Zealand companies legislation and it is noted that the New Zealand Acts of 1908, 1933, and the Bill under discussion followed the English Acts of 1908, 1929 and 1948.

29 The Explanatory Memorandum to the Companies Act 1933 quoted in Darvell and Clarke, *Securities Law in New Zealand* (1983), para 1.07. The Explanatory Memorandum also pointed out that the government's intention to amend the New Zealand Act whenever the Imperial Act was amended.

30 Bowden, NZ Parliamentary Debates, Vol 298, at 1823.

31 Idem.

32 *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945).

33 Bowden, NZ Parliamentary Debates, Vol 298, at 1841.

The underlying philosophy of the Bill was expressed as the protection of investors and creditors.[34] However, as noted above, the driving force behind the legislation was the desire to retain parity of legislation with the United Kingdom, while a subordinate purpose was the prevention of potential abuses.[35] Although mention was made of the company as a great vehicle of capitalism,[36] and the government made it clear that the Bill was not meant to "stultify enterprise in any way",[37] the introduction of the Bill was not motivated by an economic agenda.[38]

2 Reform of the regulatory structure

Regulation was provided in a number of forms, but did not include a regulatory agency or greater powers for the Registrar of Companies. Like Australia the Companies Office was located within another government department, in this case the Lands and Deeds Division of the Department of Justice.[39] The Companies Office's main function was the maintenance of public records relating to the structure and operation of companies "for the benefit of creditors and shareholders".[40]

The major themes under the Bill in relation to company regulation can be divided into two areas. The first area is the provision of specific provisions to enable investors and creditors to protect themselves. In particular the Bill increased the requirements for disclosure of company information (particularly for accounts and prospectuses),[41] on the premise that the more information was available the less likely it was that fraud could be perpetrated upon the investing public.[42] The Bill also attempted to provide shareholders with greater powers to control the management of a corporation, particularly in relation to "procedures for the holding of meetings, voting, and for the appointment or removal of directors".[43]

34 Nash and Bowden, ibid at 1831; and Bowden, ibid at 1933.

35 The "problems" cited in the company and securities area arose overseas (see Lake, ibid at 1833).

36 Nash and Lake, ibid at 1833.

37 Lake, idem; see also Mathison (ibid at 1865) who notes: "The Bill makes provision for the protection of the community and of the people who put their money into companies, but need not *necessarily* destroy those companies" (emphasis added).

38 Mason (ibid at 1839) specifically made the point that the government could only provide the administrative framework and not the energy for the "great enterprises done by companies".

39 MacArthur Committee Interim Report, supra n28 at 19. After the publication of this Report the government set up the Commercial Affairs Division as a separate division of the Department of Justice (see MacArthur Committee Final Report, supra n2 at 24). In relation to the situation prevailing in Australia see McQueen, supra n2.

40 MacArthur Committee Final Report, supra n2 at 7.

41 Nash and Bowden, NZ Parliamentary Debates, Vol 298 at 1833; Rae, ibid at 1861-1863.

42 Nash, ibid at 1833. He commented: "As I see them, the results that we desire are to ensure that everybody who puts money into companies will know what is happening to his money; that he will know all that can reasonably be known about the company's affairs . . . . The more publicity that is given in the Press and in the financial papers, the better it will be for shareholders and for the country generally."

43 Ibid at 1863.

The second area of regulation provided for in the new Act involved the reliance upon third parties. Under this category came auditors,[44] the Stock Exchange (which was held in high esteem by the New Zealand government),[45] the Attorney-General and the courts (who were both to be given the power to order an inspection of a company where an offence was suspected).[46] This last provision did not go ahead in this form, as the Act empowered only the court to order an inspection on a number of grounds.[47] The Registrar of Companies was not an enforcer and regulator since the only power to enforce the provisions of the Companies Act was under section 11 which required an application to the court.[48] The Registrar could not appoint an inspector of a company nor could the Registrar make an application for such an appointment under sections 168 or 169.

The discussion surrounding the introduction of the Bill demonstrated that the New Zealand government did not see a place for a regulatory body or a high level of State intervention. The Registrar's role was maintained as one of administration. Enforcement or regulation under this Act was to come from the strengthening of individual rights (in particular shareholders' rights), reliance upon disclosure (with the Act providing specific provisions regarding accounts and prospectuses), and third parties (auditors and the Stock Exchanges) to aid disclosures. This particular stance was justifiable since the new legislation was not prompted by large corporate frauds or failures. In contrast the introduction of a strong regulatory agency in the United States was preceded by the stock market crash of 1929 and the occurrence of the depression,[49] and, as already noted, Australian reforms during the 1960s, 1970s and 1990s had been prompted by corporate collapses.

44 See Bowden, ibid at 1827 and Mason, ibid at 1839.

45 See Bowden, idem and also Mathison, ibid at 1823.

46 Clause 460 (ibid at 1837).

47 Companies Act 1955, ss 168-179. The Attorney-General's role was to consider consenting to a prosecution arising out of an inspector's report after the matter had been referred to the Attorney-General by the court (section 173(1)). The court had additional powers under sections 263 (to order a public examination of a promoter or officer of a company) and 321 (to make an order for the payment of damages against directors or officers where moneys had been misapplied or was guilty of "any misfeasance or breach of trust in relation to the company").

48 In the MacArthur Committee Interim Report, supra n28 at 10, it is noted that the Registrar told the committee that section 11 proceedings were "found to be cumbersome, costly and unsatisfactory" and that "no application under any of these three sections had been made for at least 10 years". The report notes surprise at this statement as the UK experience had been quite favourable in relation to this provision. Perhaps the view of the New Zealand registrar reflected a desire to avoid an enforcement role (which would put the registrar in a similar mould to some, if not all, of the Australian equivalents – see Grabosky & Braithwaite, supra n17).

49 Anderson considered the introduction of the US Securities Act 1933 and argued that its introduction and its philosophy of disclosure was the result of the government's desire to restore the public's confidence in the securities market after the great depression (see Anderson A G, "The Disclosure Process in Federal Securities Regulation: A Brief Review, (1974), 25 Hastings Law Journal, 311 at 319).

IV The MacArthur Committee and New Zealand Company Law Reform in the 1970s

1 The Basis of the Review

The next stage in the reform of company law in New Zealand was the appointment of a special committee ("the MacArthur Committee") to review and report on the Companies Act 1955 "and to recommend what changes in the law are desirable".[50] Like the Companies Act 1955 the impetus for this review came from the United Kingdom. The establishment of the MacArthur Committee followed the establishment of the Jenkins Committee in the United Kingdom, which had produced a report in 1962 on company law reform.[51]

Although the United Kingdom had provided the impetus for the review of the company law, this time it did not provide the substance for the proposed reforms. As Farrar noted: "[The MacArthur Committee's] broad policy was to align New Zealand company law with that of the Australian uniform companies' legislation."[52] The MacArthur Committee itself commented:[53]

> As far as our present inquiry is concerned we have found that the Australian legislation provides the best solution for a good many of our problems. Our recommendations include the acceptance of much, although not all, of that legislation; and if in due course our recommendations are implemented the New Zealand Act will be very close to the Uniform Companies Act as amended in 1971. This result would in our view be wholly beneficial.

The move away from a consideration of English company law and toward an Australian model reflects to a certain extent the change in New Zealand's political and economic position with respect to both those countries. Discussions surrounding trade agreements between Australia and New Zealand during the 1960s had culminated in the New Zealand Free Trade Agreement in 1965.[54] During this same period the level of trade with the United Kingdom declined markedly, while trade between Australia and New Zealand had increased.[55] Politically both countries had a much more regional focus. For example, both contributed members of their respective armed forces to fight in Vietnam, whereas the United Kingdom refused to contribute troops to that conflict. Accordingly it is not

50 MacArthur Committee Interim Report, supra n28 at 3. One major piece of amending legislation which preceded the reports of the MacArthur Committee was the Companies Amendment Act 1963 which provided for (partial) control of the takeover process. There was no provision for regulation, or enforcement, of this process and the only role for the Registrar was to accept for filing documents required to be produced in relation to a takeover offer or scheme (section 7). In terms of liability, the Act provided for civil liability for documents issued during a takeover offer or scheme in the same manner as provided for under sections 56 and 57 of the Securities Act 1978.

51 *Report of the Company Law Committee,* Cmnd 1749, 1962) (Jenkins Committee).

52 Farrar, "The Securities Act 1978" (1979) 8 NZULR 301.

53 MacArthur Committee Final Report, supra n2 at 27.

54 NZIER, *Closer Economic Relations: A view from both sides of the Tasman* (1985), 17ff.

55 Ibid at 18.

surprising that, in contrast to the discussions surrounding the Companies Act 1955 where Australia was not mentioned, Australia in the late 1960s and early 1970s became the model for New Zealand company law.

The MacArthur Committee noted that the reforms in Australia, although having to a certain extent their origin in the Jenkins Committee's recommendations, were, in the main, the result of the work of the Eggleston Committee.[56] It also noted that significant Australian reforms included in the Companies (Amendment) Act 1971 (NSW) related to substantial shareholdings, disclosure of directors' interests, and a new takeovers code.[57]

2 Proposed reforms to the Regulatory Structure

Regulation of corporate affairs was once again a major issue, particularly in relation to the role of the Companies Office and the regulation of companies. The Registrar of Companies advised the MacArthur Committee of problems in relation to enforcement of the provisions of the Companies Act for filing of returns,[58] and the MacArthur Committee noted that the Registrar did not have the role of ascertaining and prosecuting breaches of the Act.[59] It also referred to the Registrar's lack of power to inspect the books and records of the company in order to ascertain whether or not a company was complying with the Act.[60]

Not only did the Secretary for Justice support the Registrar's submissions that the powers of the Registrar should be widened,[61] but he also went further and stated his view that there was a need for:[62]

> ". . . a Companies Office (or some other agency) which would be empowered and equipped to police the Act – in other words, to investigate suspected breaches of the law, whether in relation to the formation or *management* of companies, and to take steps by way of prosecution or otherwise as may be found appropriate."

The MacArthur Committee accepted that the Registrar should have wider functions,[63] and that there should be "skilled investigators appointed to the staff of the Companies Office" to aid in carrying out investigations.[64] To this end they suggested a provision that allowed the Registrar to in-

56 Ibid at 22.
57 MacArthur Committee Final Report, supra n2 at 27. Unlike the Eggleston Committee, the MacArthur Committee was limited to examining and making recommendations in relation to company law. The regulation of the securities industry in New Zealand was outside its terms of reference. As a result securities regulation would not be the subject of reform in New Zealand until the late 1970s.
58 MacArthur Committee Interim Report, supra n28 at 9.
59 Ibid at 15.
60 Idem.
61 Ibid at 8.
62 Ibid at 9 (emphasis added).
63 Ibid at 16.
64 Idem.

spect the books or documents of a company "[F]or the purpose of ascertaining whether a company is complying with the provisions of [the] Act".[65] The MacArthur Committee did not refer to the Secretary of Justice's suggestion that the Registrar should have a wide power that enabled the Registrar to investigate breaches relating to the "management" of a company.

Another submission received by the MacArthur Committee from the New Zealand Society of Accountants called for the establishment of a Companies Commission.[66] The submission suggested that such a commission should have as its principal function the role of constantly reviewing the operation of the Companies Act, dealing with requests for dispensation from provisions of the Companies Act (particularly those relating to the contents of accounts).[67] The MacArthur Committee, after a discussion of the Eggleston Committee in Australia (which recommended the establishment of an Australian-wide Companies Commission),[68] accepted the New Zealand Society of Accountants' suggestion and proposed that a Companies Commission be established.[69] The functions of the Commission were to include continual review of the Companies Act, recommending amendments to the Companies Act (and the schedules to the Act), and granting exemptions from the provisions of the Act.[70] These recommendations were repeated in the MacArthur Committee's final report.[71] While the recommendations provided for an expansion of the regulatory regime in relation to companies they were still quite limited in nature, and avoided direct State regulation of companies.

The Government, after receiving the MacArthur Committee Final Report, implemented the proposals to widen the Registrar's powers and to make it clear that the Registrar's position was more than a keeper of records, with the Registrar to have primary responsibility for compliance with the Act.[72] This manifested itself in section 3(2) (which provided that the Registrar was charged with the administration of the Act) and section 9A (which gave the Registrar powers of inspection).[73]

However, the Government did not take up the MacArthur Committee's recommendation for the creation of a Companies Commission. A number of reasons can be put forward to explain why it did not proceed with

65 Idem. They also thought that the Registrar should have primary responsibility for bringing proceedings for any offences under the Act (ibid at 17).

66 Ibid at 21.

67 Idem.

68 Ibid at 23.

69 Ibid at 25. The MacArthur Committee noted (ibid at 22) that under the Companies Act 1955, s472, the Company Law Advisory Committee had been set up to advise the Minister of Justice. However the MacArthur Committee argued that it suffered from only being able to consider those matters referred to it by the Minister and that it held office at the pleasure of the Minister and accordingly lacked independence.

70 Ibid at 25 to 26.

71 Ibid at 24 and 29.

72 See discussion in *Barr Burgess & Stewart* v *Registrar of Companies* (1985) 2 NZCLC 99,432 at 99,434.

73 For a brief discussion of the history of section 9A see *Barr Burgess & Stewart,* idem.

this reform. First, the setting up of a separate Companies Commission (with the powers proposed by the MacArthur Committee) would involve, at least partially, the loss of control over company law reform. Second, the MacArthur Committee's reason for recommending a separate commission was that the Company Law Advisory Committee lacked independence. No evidence was led to justify such a claim and the acceptance of the proposal for an independent Companies Commission by the Government may have been interpreted as a sign of admission that such claims were true.

Third, the MacArthur Committee's recommendations for a separate Companies Commission were unsupported by evidence of large scale fraud or management misfeasance. There were no grounds to justify such a radical departure from viewing company legislation as purely enabling or facilitative,[74] with protection for investors and creditors provided by individual statutory rights, disclosure, and third party intervention.

3 Overall approach of proposed reforms

Another feature of the MacArthur Committee's report was the failure to address fundamental questions related to company law. The reforms proposed by the MacArthur Committee were criticised as largely of a technical nature and also that they failed to provide a basis upon which to build "a whole new Companies Act".[75] The Committee stated that it did not think there was "any need to make fundamental changes in the framework of the Act".[76] An explanation for the Committee's approach may lie in New Zealand's economic position during the time the Committee was conducting its enquiries. At this time New Zealand, although it had started to slip from its economic high point of the 1950s and 1960s, was still relatively affluent, and as a result there would have been little incentive to embark upon a fundamental re-examination of company legislation. As a consequence the reforms were largely aimed at promoting investor protection (along the lines proposed in Australia) and were not particularly concerned with improving the efficient operations of companies. Ultimately a number of the reforms proposed were incorporated into the Companies Act 1955 over a period of time,[77] but the report did not have a profound effect upon company law reform over the next decade.

In summary, the enactment of the Companies Act 1955 took place at a time when there were no major frauds or corporate collapses in New Zealand. In effect, it was largely a reform to ensure that company law was kept in parity with English company law. Similarly the review undertaken by the MacArthur Committee took place relatively shortly after a further English report on company law reform in 1962,[78] and no widespread company malaise in New Zealand was identified by the Mac-

74 See Mason, NZ Parliamentary Debates, Vol 298, at 1839.
75 Russell M, "Book Review" [1988] NZLJ 72.
76 MacArthur Committee Final Report, supra n2 at 25.
77 Russell, supra n75.
78 Jenkins Committee, supra n51.

Arthur Committee.[79] Therefore, the government that passed the Companies Act 1955, and the government(s) that received the MacArthur Committee's interim and final reports, did not face political pressure (in the form of concern regarding corporate fraud or misfeasance) that required these governments to depart from relying upon private enforcement rights, disclosure and non-government third party "regulators" as the means of protecting investors and creditors. On previous occasions the governments had responded with special legislation when confronted with a major corporate collapse, legislation which was normally limited in scope,[80] but in the early 1970s they did not face a situation which required major amendments to the main companies legislation.[81] The granting of further powers to the Registrar could be viewed as a form of compromise between taking no action at all and the setting up of a Companies Commission. At the end of the day all that this reform ensured was that the administrator of the companies register could carry out his or her role more effectively.

V New Zealand Company Law Reform in the 1980s and 1990s

The 1980s and 90s would see significant changes in Australian and New Zealand corporate law. During the early 1980s Australia and New Zealand signed the Closer Economic Agreement ("CER"), which included a commitment to harmonising company law, trade practices and accounting standards.[82] However, rather than a harmonisation of corporate laws, the two countries' corporate regimes would be substantially different by the time the Companies Act 1993 was enacted. This part will discuss why Australia and New Zealand have failed to harmonise their corporate law.

1 Rejection of the Australian approach

In 1986, with the New Zealand Government's deregulatory drive in full swing,[83] the Government requested reports on reform for companies and securities law. The New Zealand Government followed the pattern set in

79 See MacArthur Committee Interim Report, supra n28 at 3, where the terms of appointment are specified and it is merely noted that "Our instructions were that the Government required a report in depth, which could be treated in due course as the basis for a new Companies Act" without identifying any particular areas of concern.

80 For example the Companies (Special Investigations) Act 1934 which was directed at the 15 companies listed in the schedule to the Act which after a revision became the Companies (Special Investigations) Act 1958 – see *Wilson* v *Aurora Group Limited: Annan* v *Aurora Group* (1989) 4 NZCLC 65,275; and the Cornish Companies Management Act 1974.

81 The Cornish Companies Management Act 1974 referred to above is an example of a limited response to corporate collapse. Thomson responding to a question about the Securitibank group collapse said: "I think it is proper to remind honourable members that the Cornish Companies Management Act was passed, not because of the size of the collapse, but because the general law could not correspond to the situation where Mr Cornish's personal assets were inextricably interwoven with those of his companies" (NZ Parliamentary Debates, Vol 408, at 4783 to 4784).

82 See NZIER, supra n54 at 48.

83 See Walker G, "The New Zealand National Interest in Securities Regulation" (1992) 11 JIBL 452 at 454 for a discussion of the New Zealand government's deregulatory programmes.

the 1960s by requesting the Law Commission to consider company law reforms in isolation from securities law reform.[84] This request was significant in that this was the first New Zealand company law review which had not been prompted by a similar English review. As a result the way was open for the Law Commission to consider company law without the presumption that the English position presented a necessary reference point.

When the Law Commission put forward a draft Companies Act for discussion,[85] it considered the meaning of harmonisation under CER in relation to company law reform.[86] While seeing conformity in business law as "desirable", the Law Commission rejected the Australian legislation then in force as an acceptable model for reform on a number of grounds.

First, the Australian legislation was seen as "outdated and dense in form",[87] and "complex and difficult legislation" the adoption of which "would run counter to a major aim of the reform – to make company law intelligible to non-lawyers".[88] This comment was not without justifi-

84 New Zealand Law Commission, *Company Law Reform and Restatement,* NZLC R9, Wellington, 1989, at viii. In the previous month the Minister of Justice had requested the NZSC to concentrate on takeover law reform and insider trading (Woollaston, NZ Parliamentary Debates, Vol 495, at 8550), and to report to him with proposals for reform (NZ Parliamentary Debates, Vol 484, at 745).

85 New Zealand Law Commission, supra n84 at 86. This part will not discuss in detail the reforms proposed by the Law Commission, the Companies Bill 1990, or the Companies Act 1993. For details of the major reforms see Wishart D, "Reform of New Zealand Companies and Securities Law" (1992) 2 Aust Jnl of Corp Law 30, at 39-47; McKenzie, "Corporate Law Reform – The New Zealand Experience" (1994) 4 Aust Jnl of Corp Law 129; and Tompkins, "Directing the Directors" (1994) 2 Waikato Law Review (forthcoming).

86 For a discussion of the Law Commission's view of harmonisation see: Farmer, "The Harmonisation of Australian and New Zealand Business Laws" in Vautier, Farmer & Baxt (eds), *CER and Business Competition in a Global Economy,* CCH, 1990, at 52ff; Hodder, "Harmonisation with Australia on Directorships – Current Difficulties and Future Problems", IIR Conference, 1992. Hodder was one of the Law Commissioners involved in the Company Law Reform project.

87 New Zealand Law Commission, supra n84 at 11. Farmer gives an example of the difference between the Australian and New Zealand provisions. He points out that the New Zealand provision dealing with the provision of financial assistance with the purchase of a company's shares is set out in five subsections which occupy less than two pages, while the Australian equivalent runs to 17 subsections and occupies nearly seven pages (Farmer, supra n86 at 53). McKenzie also illustrates the same point when he points out that, while the New Zealand legislation ultimately contained 397 sections covering 251 pages, the equivalent Australian provisions run for "727 sections, three schedules and an extensive set of regulations comprising over 1000 pages of statute" (McKenzie, supra n85 at 134). These figures do not include material published by the ASC to advise the commercial world how it would administer the corporate and securities regime – for example, Cameron, the current head of the ASC, stated that a digest would be published early in 1994 with "*over 800 pages* of new information directly affecting the Commission and the user of the Commission and the Corporations Law" (Cameron, "Enforcement, Getting the Regulatory Mix Right" (1994) 4 Aust Jnl of Corp Law 121 at 125 (emphasis added).

88 New Zealand Law Commission, supra n84 at 38.

cation as the complexity and poor drafting of the Australian legislation had also been criticised in Australia. For example, the editor of the Companies and Securities Law Journal made the following point in relation to the Corporate Law Reform Bill (1992):[89]

> The drafting is dense and difficult to comprehend; when legislation needs over 90 words to define the word "give", and we need dozens of sections to deal with an area that is dealt with in other legislation in three or four pages one must wonder whether there is something peculiar about our system of justice which requires such language to be used. Or is it the nature of the administration and policy making in this area? I for one believe that we have gone overboard in our drafting technique, and that citizens of this country need to stand up and say enough is enough.

More recently the Commonwealth Attorney-General asked the Joint Parliamentary Committee on Corporate Law "to assess if and how the Corporations Law may be modified and, if possible, reformed so as to reduce the excessive costs on business".[90] The Commonwealth government has now decided to "rewrite parts of the Corporations Law to make it more 'user-friendly' ".[91] The sheer size and complexity of the Australian statute alone would be sufficient reason for the Law Commission to look upon duplication of Australia's corporate law as a backward rather than forward step.

The second ground is that the Australian legislation was not only outdated and complex, but was also perceived as being "in a state of flux" at the time of the Law Commission's review.[92] Reforms had been proposed to the Australian legislation and the "federalisation" of companies legislation was an issue at this time. That the federalisation of companies legislation posed a problem is ironic when one considers the basis of the reforms proposed by the MacArthur Committee in the early 1970s was an alignment of company law with Australia. At that time there was no CER agreement in place. Some 15 years later, and after the signing of the CER agreement, the Law Commission was clearly against the notion of adopting the Australian model. The very fact that the Commonwealth government was attempting to "federalise" (or appropriate to itself) corporate and securities law, was in itself a factor which caused the Law Commission to reject the Australian approach. At the same time, in Australia, the very issue of "federalisation" of company law precluded immediate discussion of significant reforms to the content of the Australian legislation as the Federal Government attempted to gain control by avoiding contentious policy issues.[93]

89 (1992) 10 C&SLJ 163. See also the editorials at 3 and 235 of the same volume.

90 Editorial (1993) 11 C&SLJ 139. The editor of the Companies and Securities Law Journal hoped that there would be no significant changes to Australian corporate law "although the failure to harmonise our law with that of New Zealand may place some pressure on the Australian Government to expedite the review of the statute" (idem).

91 Idem at 203.

92 New Zealand Law Commission, supra n84 at 11. That this is still the case in 1994 can be seen from Cameron's article where he comments that a person hoping to hang on to their edition of the Corporations Law for more than 12 months would be out of luck and out of dollars "for some time yet" (Cameron, supra n87 at 124).

93 McQueen, supra n2 at 27.

There were other grounds for the Law Commission rejection of the Australian approach. The Law Commission attempted, unlike the MacArthur Committee, a re-examination of the fundamental concepts of company law. Two aspects of this re-examination were the reform of capital rules (and the protection of creditors), and the reform of director accountability and shareholder remedies. The Law Commission proposed the abandonment of the traditional system of nominal capital and par value shares and their replacement with a two limbed solvency test.[94] The second aspect involved reform of directors' duties, a reassessment of the distribution of power within the company and a revision of shareholders' remedies (including a statutory derivative action).[95] The Law Commission felt that to follow the Australian approach would preclude the implementation of these reforms.[96] The Law Commission was also against the Australian practice at that time of using criminal sanctions in relation to directors.[97]

Overall, while the Law Commission acknowledged the superiority of the current Australian legislation over the Companies Act 1955 in certain aspects, it felt the Australian law was not a sufficient advance in relation to capital rules and directors' accountability to justify using it as a model for reform.[98] The Law Commission also viewed company law as very much a domestic concern, and therefore in its view there were less compelling reasons for harmonisation of company law than there were for a harmonised insolvency regime.[99]

Jack Hodder, a former Law Commissioner involved in the Company Law Reform project, provided further reasons for the rejection of the Australian approach. In his view the rejection of the Australian approach in New Zealand could be explained in part by the fact that the commercial community in New Zealand had experienced a heavily regulated environment under the Muldoon administration, and had then faced the deregulatory policies of "Rogernomics" after the 1984 election.[1] The New Zealand commercial community was left "without enthusiasm for a heavily regulatory approach", despite the problems associated with the 1987 crash.[2]

Hodder also pointed out that the Australian approach based around the Australian Securities Commission could be explained by a greater concern for the securities market and publicly listed companies than in New Zealand. This gave rise to detailed drafting which was not a feature of

94 Ibid at 37.
95 Idem.
96 New Zealand Law Commission, supra n84 at 11.
97 Idem.
98 Ibid at 37.
99 Ibid at 38.

1 Hodder, supra n86 at 3. The Law Commission's report noted that most of the submissions to its discussion paper were generally opposed to following Australian company law (New Zealand Law Commission, supra n84 at 11). For a discussion of the economic policies relating to the post-1984 period, and the role of the Treasury in those discussions see Easton, "From Reaganomics to Rogernomics" in NZIER, *The Influence of American Economics on New Zealand Thinking and Policy* (1988).

2 Hodder, supra n86 at 3.

the New Zealand legislation.[3] This concern also contributed to a prescriptive approach to regulation built around the jurisdiction of the Australian Securities Commission.[4] In Hodder's terms New Zealand possessed an enabling regime, in comparison to Australia's regulatory approach.[5] An example of the differences in the approaches to regulation is the role of shareholders and creditors in enforcing rights and ensuring director accountability. In the New Zealand context the Securities Commission does not have power to take action under the Companies Act 1993, but instead this Act provides for new shareholder remedies (such as statutory derivative actions, personal actions by shareholders against directors, and buy-out rights),[6] and explicit directors' duties as the main avenues by which directors would be called to account.[7] While the head of the ASC acknowledged that there is still a "place for private actions by shareholders, creditors and others" to deal with abuses of corporate law,[8] clearly the ASC takes the view that it has the primary role in regulating the corporate and securities markets, and ensuring investors are protected and directors held accountable. An example of this approach is provided by the commencement of a class action by the ASC on behalf of investors in the failed Farrow Finance Corporation Ltd.[9]

The details of the draft Act were not left untouched prior to enactment in 1993.[10] But the amendments did not alter the central planks of the Law Commission's proposals. The Act continued to rely upon directors' duties,[11] the solvency test,[12] and the shareholders' statutory derivative action.[13]

3 Ibid at 4.
4 See Caygill, NZ Parliamentary Debates, Vol 533, at 13,373.
5 Hodder, supra n86 at 4.
6 See sections 165, 169 and 110 Companies Act 1993.
7 Sections 131-138 Companies Act 1993.
8 Cameron, supra n87 at 123.
9 (1993) 11 C&SLJ 203. The ASC has used its power to take actions on behalf of shareholders five times. Its most recent action is against five former directors of Adelaide Steamship Ltd, as well as Deloitte Touche Tohmatsu, the auditors of the company, on the grounds that the former directors failed to properly account for various loans and intercompany transactions, which resulted in an overstated profit in 1990 of $518,981,000 – see "Adsteam – $340m Law Suit", *Australian Financial Review,* 22 April 1994, 1. For a discussion of the ASC's actions see Richardson, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ 418.
10 Ibid at 38. Hodder notes that the Department of Justice undertook a line-by-line rewriting exercise in producing the Bill for introduction into the legislature (Hodder, supra n86 at 3). The Law Commission published a second report at about the same time as the Companies Bill was introduced into Parliament in which it "fine tuned" the draft legislation proposed and introduced further ancillary legislation. The Law Commission noted that its first report had been received favourably and ranked by Dr Len Sealy alongside Gower's report (Ghana, 1961) and the Dickerson report (Federal Canada, 1971) (New Zealand Law Commission, *Company Law Reform: Transition and Revision,* NZLC R16 (1990) at xv and xvi).
11 Companies Act 1993, ss131-138.
12 Ibid, s4 (meaning of "solvency test") and ss52-57 (distributions to shareholders). A number of other provisions in the Act require the solvency test to be met prior to an action being taken (eg, company repurchasing its own shares – s52).
13 Ibid, ss165-168.

However, of the 22 legislative reforms put forward at the same time as the Companies Act 1993, only two of the Acts (the Financial Reporting Act and the Takeovers Act) expressly required harmonisation with Australian law to be taken into account.[14]

2 Adoption of the North American Model

The Law Commission in seeking to determine the appropriate model for company law reform had rejected the Australian approach, and, it should be noted the English approach.[15] Instead, because of New Zealand's political and economic climate during the 1980s, the Law Commission was attracted to some aspects of the North American corporate law.

Hodder identified the law and economics debate which came from the United States as a major factor which impacted upon the Law Commission's proposals.[16] As he pointed out the deregulatory environment that existed in New Zealand after 1984 was driven in part by this school of thought.[17] In relation to corporate law this approach is "inherently anti-regulatory, placing its faith in the efficiency of private contractual arrangements and the sanctions resulting from efficient markets and the private interests of market players".[18] This approach had its roots in the policies advocated by the Treasury since the early 1980s.[19]

This third attempt at company law reform in 40 years drew a large measure of inspiration from North American models. The Law Commission indicated this when it stated that it owed "a special debt to the pioneering work in company law reform of the Canadian Dickerson Committee which reported in 1971",[20] and that "[A]lthough the proposals made may seem revolutionary to some, they generally have working models in Canada and the United States".[21]

The North American influence is clearly shown in the solvency test which is an integral part of the Companies Act 1993.[22] The Law Commission put forward this test to replace the capital maintenance rule and was one of the main mechanisms in the Act designed to protect creditors and share-

14 Section 24, Takeovers Act 1993; Section 24, Financial Reporting Act 1993.

15 The Law Commission considered that "United Kingdom company law [is] now increasingly influenced by European law, [and] it no longer provides an obvious model for us" (New Zealand Law Commission, supra n84 at 8).

16 Idem.

17 Idem.

18 Idem. This approach was reflected in at least some of the submissions to the Law Commission – see for example, Wheeler, *Company Law Reform: A Submission to the Law Commission* (1988).

19 See McCoy E, "Deregulation: Public Utilities and New Zealand Economic Reform" in Head & McCoy (ed), *Deregulation or Better Regulation?: Issues for the Public Sector* (Centre for Australian Public Sector Management) 1991 at 57 and 58. See also Walker, supra n83 at 454.

20 New Zealand Law Commission, supra n84 at 9.

21 Idem. Also see Wishart, supra n85 at 38.

22 Section 4(1).

holders. This test was based upon the US Model Business Corporation Act.[23] The North American connection was also shown by the adoption of the Canadian rules for share repurchases (which were allowed for the first time under the Companies Act 1993), rather than the equivalent Australian and English rules.[24]

3 Proposed reforms to the regulatory structure

A further feature of the Law Commission's proposals relates to corporate regulation. As already noted regulation of the corporate sphere relied principally upon shareholders' remedies, disclosure and third parties. At the time the Law Commission was given the task of examining and proposing new company laws the stockmarket crash was still more than 12 months away. When the crash came the Government looked to another body, the Ministerial Committee of Inquiry into the Sharemarket,[25] to advise on what reforms were necessary in order to deal with the problems that became apparent after the crash. Accordingly, even though New Zealand faced for the first time major corporate collapses and possible fraud, this did not have a significant impact upon regulation in the company sphere and the regulatory reforms which were implemented were concentrated upon the securities markets.[26]

In relation to the role of the Registrar, reforms during the 1970s had expanded the Registrar's watchdog role. However, the Law Commission's draft Act omitted any provisions relating to the Registrar's power to investigate companies. It excluded this power on the basis that it preferred to limit investigations to cases where public interest was involved (in which case the Attorney-General would have standing) or where special circumstances existed (as in the Corporations (Investigation and Management) Act 1989).[27] While it left open the possibility of a state agency having the power to access company records and the power to enforce (which was the subject of a review by a separate body at that time),[28] the Law Commission emphasised that there should be an increase in shareholders' remedies.[29]

23 Wishart, supra n85 at 42.

24 McKenzie, supra n85 at 136.

25 *Report of the Ministerial Committee of Inquiry into the Sharemarket* (NZGP, 1989).

26 The legislature passed the Securities Amendment Act 1988 which prohibited insider trading in relation to listed companies, and introduced substantial security holder notification. It also promised to put in place legislation to regulate takeovers (see Fitzsimons, supra n27 for a discussion of the reforms made during this period).

27 New Zealand Law Commission, supra n84 at 135.

28 For the review of the securities market see supra n25 (2nd series). The Committee of Inquiry recommended reforms that were largely based upon an English model and which called for a strong central enforcement agency with overall control of a number of self-regulatory agencies. The recommendations were criticised by the private sector and were never implemented.

29 New Zealand Law Commission, supra n84 at 131ff. The removal of the Registrar's power did not meet with the approval of the Department of Justice which re-introduced these provisions when the matter was referred to it at a later stage (McKenzie, supra n25 (2nd series) at 142).

The Law Commission's reluctance to provide for a greater regulatory role for the Registrar or some other body had at least two bases. The first, as noted earlier, was that the New Zealand commercial sector by the mid 1980s was not in favour of a return to a more heavily regulated environment. The Russell Committee had considered securities law reform around the same time, and had suggested a regulatory regime based on an English model.[30] Although the government indicated it would implement this regime,[31] there was considerable opposition to the proposal in the commercial community and the proposal was finally dropped.[32]

The second basis for rejecting a corporate regulatory body was that the adoption of the North American model for corporate law would naturally lead to an emphasis on private enforcement rights and director accountability. As already noted the Law Commission had proposed that the new Companies Act should include express directors' duties (including shareholders having the right to commence actions against directors in relation to certain duties owed by directors to shareholders, statutory derivative actions, and buyout rights).[33] The greater the emphasis on shareholders' rights and enforcement, the less need there was for a state regulatory agency.

VI Implications of New Zealand's Current Company Law Position

Two main points arise from the discussion above. The first is that the use of Australia and the United Kingdom as reference points for the interpretation of our companies legislation is clearly limited. The second is that our self regulatory company law model emphasises the role of the courts even more than in the past. In this part the implications arising from these points will be briefly addressed.

In relation to the interpretation of our companies legislation the teaching and interpretation of New Zealand's corporate law has largely been based upon the English authorities, supplemented by Australian judgments. This was understandable given the common English heritage of our company law, which we shared with Australia, and our closeness with Australia. However, the Companies Act 1993 with its rejection of the Australian and United Kingdom models and its emphasis on North American principles will necessitate a number of changes to this approach.

The first change relates to teaching of company law. Efforts have to be made to incorporate leading North American cases and to comprehend the North American approach to important parts of the Companies Act 1993 such as the solvency test, minority buyout rights, statutory deriva-

30 See *Report of the Ministerial Committee of Inquiry into the Sharemarket,* supra n25 (2nd series) at 6.

31 Palmer G, "Reforming Securities Regulations in New Zealand", Continuing Legal Education Programme, Auckland District Law Society, Auckland, 1989.

32 *Report of the Ministerial Working Group on Securities Law Reform,* Wellington, Justice Department, 1991 at 19.

33 See sections 165, 169 and 110, Companies Act 1993.

tive actions, and share repurchases.[34] Leading texts are already starting to include this material,[35] but this has to filter down to what is taught to students of company law.[36]

The second change is that in order to have a proper appreciation for North American corporate law there is a need for those involved in corporate law to understand the interplay of law and economics, as this has impacted on the approach towards corporate law in those jurisdictions.[37] In the New Zealand context economic thought has already impacted upon securities regulation, which is a subject closely related to corporate law. In the discussions surrounding takeovers regulation during the past 10 years, arguments against regulation (which were based on economic grounds, particularly efficiency) were directly pitted against arguments based upon traditional legal notions such as fairness and equity.[38] To a certain extent law and economics has started to become the subject of discussion by the New Zealand legal profession. For example, the New Zealand Law Society has already conducted a seminar on law and economics,[39] and a number of sessions at the New Zealand Law Society 1993

34 McKenzie makes the point that North American case law, rather than English or Australian, will become the guide for New Zealand courts (supra n85 at 132).

35 For example, Jones, *Company Law in New Zealand – A Guide to the Companies Act 1993* (1993) (particularly chapter 8); and Beck and Borrowdale, *Guidebook to New Zealand Companies and Securities Law, 5th ed (1994) (particularly* ¶¶567 to 571).

36 Dugan, *Company Law – A Transactional Approach* (1994) is one text designed for students which attempts to incorporate the relevant North American jurisprudence into the study of company law.

37 For example, see the following books from the United States which seek to give an explicit economic basis to corporate law – Posner and Scott, *Economics of Corporation Law and Securities Regulation* (1980); Easterbrook and Fischel, *The Economic Structure of Corporate Law* (1991); Romano, *Foundations of Corporate Law* (1993).

38 For examples of arguments utilising economics in relation to takeovers, see New Zealand Treasury, *Regulation of Company Takeovers, Treasury Submissions to the Securities Commission* (1984); Gibbs, "The New Zealand Takeover Debate: What *is* it all about?" in New Zealand Business Roundtable, *The Old New Zealand and the New* (1994). For a discussion opposing this line of reasoning, see New Zealand Securities Commission, *Report on Company Takeovers* (1988). For an overall discussion of the interplay of these lines of argument during the 1980s, see Fitzsimons, supra n27.

39 Farmer, Hammond and Vautier, *Economics and the Law – The Application of Economics in Legal Practice,* NZLS (1990).

40 Trebilcock, "Lawyers and Economic Consequences – An Introduction to Economic Approach to Law" (see particularly at 341); Richardson, "Lawyers and Economic Consequences – The Law and Economics – Commentary on paper by Professor Michael Trebilcock"; Franks, "Lawyers and Economic Consequences – Commentary on paper by Professor Michael Trebilcock".

Conference were held on this topic.[40] As well, the judiciary has, in some cases, attempted to incorporate economic principles, [41] and in other instances has attempted to encourage their use.[42] The importance of understanding the law and economics interplay will no doubt continue to grow, particularly in the corporate field.

The trend towards economic analysis will also impact upon the way that corporate law is taught. An understanding of basic concepts of economics will be needed in order to have a full understanding of corporate law as it develops. As far as the author is aware only one law school in New Zealand has provided a separate course on law and economics at an undergraduate level,[43] although similar courses are taught in management/business schools.[44]

The second point which arises from the rejection of the Australian approach, which relies heavily upon a state regulatory agency, is that the role of the court in the regulation of companies in New Zealand has become more central. Although the courts played a part under the Companies Act 1955, this was never portrayed as a central role in corporate regulation in the discussions surrounding the legislation.[45] Rather the legislature focused on auditors, the stock exchange, and shareholder rights in relation to meetings, and the appointment and removal of directors as the mechanisms of regulation to regulate managerial behaviour. The role of the court was effectively limited to appointing an inspector,[46] and

41 See for example, *Willis* v *Castelein* [1993] 3 NZLR 103 where Williams J used an economic approach in finding that an owner/renovator did not owe a duty of care in tort to a subsequent purchaser on the basis that the contract was available to allocate risks efficiently and that economic analysis demonstrated the social cost of imposing a tortious duty; and *South Pacific Manufacturing Co Ltd* v *NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 referred to in Richardson J's paper (ibid at 353). In addition to Richardson J's paper it should be noted that Hammond J (as he now is) was one of those presenting the NZLS seminar referred to above. In relation to the use of economic analysis by the judiciary Macey would argue that, although economic analysis has had a substantial influence on decisions in the past 25 years, it will not replace legal reasoning because legal reasoning is more efficient for a judge than for him or her to try to utilise specialised economic analysis as this type of reasoning will be more time-consuming. He argues that economic analysis should only be employed where the issues require an expert understanding of economics (see Macey, "The Pervasive Influence of Economic Analysis on Legal Decisionmaking" (1994) 17 Harv Jnl of Law & Public Pol 107).

42 See *Attorney-General* v *Williams* [1990] 1 NZLR 646 where Richardson J criticised a lack of economic analysis in relation to imposing a duty of care (see 13 TCL 20/1); and Richardson, "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 50.

43 Faculty of Law, University of Otago, "Law and Economics" (Lexs 436), 1989.

44 For example, School of Management Studies, University of Waikato, "Introduction to Law and Economics" (0345.217A/0345.317A).

45 Section 209, Companies Act 1955 (prior to the amendments effected by the Companies Amendment Act 1993) provided for shareholder actions in relation to oppressive or unfairly prejudicial conduct. However, the section was largely ineffective until it was amended in 1980 (see Farrar and Russell, *Company Law and Securities Regulation in New Zealand* (1985), at 266 to 270).

46 Sections 168 and 169, Companies Act 1955.

attempting to apply complex common law principles to shareholder grievances.[47] However, the role of the court under the Companies Act 1993 has now been made more explicit as shareholders have more statutory remedies under this Act, and greater emphasis has been placed upon these remedies as the mechanism to control directors.[48] The Government had earlier rejected a suggestion by the Ministerial Working Group for a contingency fee system in relation to corporate and securities law.[49] In the absence of such a system the role of the courts in encouraging self enforcement by shareholders becomes even more important.

What approach should the court take to the shareholders' remedies provided in the legislation? New Zealand's judiciary, it should be noted, have a commendable reputation. Wishart, an Australian, praises the New Zealand judiciary whom he feels "are competent and open to a much wider spectrum of argument than most of their counterparts in Australia" and argues that the simpler and clearer drafting style of the New Zealand legislation "is an implicit declaration of faith in the judiciary to make sense of the legislation and to limit and provide, exempt and except as circumstances arise".[50] By contrast, Hodder, a New Zealander, points to the Australian judiciary and the legal profession as having a "more pedantic approach" to statutory interpretation, which increases the need for complex and detailed legislation.[51]

The approach suggested here is for the judiciary to continue to use a purposive approach to the interpretation and application of the Companies Act 1993, particularly for those provisions relating to directors' duties and shareholders' rights. A good example of a broad purposive approach is provided by the Court of Appeal's decision in *City Realties Ltd* v *Securities Commission*.[52] This case involved an application by City Realties to prevent the Securities Commission from undertaking investigations of particular takeovers. The Court of Appeal found the Securities Commission did have the power to investigate particular takeovers by a wide reading of its powers under section 10 of the Securities Act 1978. The Court stated:[53]

> Orthodox doctrines of company law have not in the past been notably effective in protecting shareholders, especially minority shareholders. The takeover vogue of recent years has shown that a number of possible abuses are hard to cope with by detailed legislation. Some examples are unequal treatment of shareholders; withholding of the really crucial information; and exploitation of opportunities to the personal ad-

47 See Farrar and Russell, supra n144 at 258 to 265.

48 For example, see the discussion surrounding the decision by the Government not to proceed with a takeovers code on the basis that shareholders' remedies would protect shareholders from management misbehaviour (Hart, "Delay with reform to July and takeover code out", *New Zealand Herald,* 15 September 1993, Section 3, 1).

49 *Ministerial Working Group,* Executive Summary, supra n131.

50 Wishart, supra n85 at 33.

51 Hodder, supra n86 at 4.

52 [1982] 1 NZLR 74.

53 Ibid at 78.

> vantage of key directors. The Courts would always do what they could, but there is a limit to judicial "legislation" . . . . But it would not be surprising if Parliament had seen fit to set up the Commission with what Quilliam J calls a watchdog role, as well as a law reform one, extending to the review of specific takeovers, whether accomplished or proposed.

The Court here was using the deficiencies of the common law to justify reading the Securities Commission's investigatory powers widely. The courts, in interpreting the new legislation, should bear in mind the principle emphasised by the Court of Appeal in the *City Realties* case, that is, the common law has failed to protect shareholders, which should lead them to a wide reading of the Companies Act 1993 provisions that deal with shareholders' remedies.

As a result the courts should be wary of refusing to hear applications or refusing to grant orders sought by shareholders. In particular the court should be wary of granting costs against shareholders as the issue of costs alone could be a factor that would deter shareholders from taking actions. A lenient approach to cost awards and a purposive and liberal approach to the interpretation of the legislation will encourage shareholders to take actions, and will help to ensure that management of a company perceive that an effective regulatory regime exists. By providing adequate remedies for shareholders, the courts are more likely to influence directors to conform their behaviour to the standards required of a director.

One remedy that the courts will have to be careful to nurture in its infancy, so as to prevent a premature death, is the statutory derivative action.[54] The aim of this section is to overcome the *Foss* v *Harbottle* rule,[55] and to allow shareholders to take actions in a company's name at the company's expense. This remedy contains a number of features that make it less suitable for a shareholder than an action under section 174 (which deals with oppressive, discriminatory or prejudicial conduct). These features include the requirement that an application for leave to commence the statutory derivative action is the first step,[56] with the costs of the application at the expense of the applicant, whereas for a section 174 action no preliminary application is required. The initial application under section 165(1) could be quite costly if the court requires in essence a trial of the substantive action before allowing the application. In addition, even if the application is granted the court has a discretion under section 166 whether or not to grant an order for costs to the applicant for the conduct of the substantive hearing. A restrictive application of this remedy could discourage shareholders from taking actions, leaving directors largely unfettered in their activities. In Canada the statutory action has failed to have a substantial impact upon Canadian corporate law as shareholders

54 Sections 164-168, Companies Act 1993.
55 (1843) 2 Hare 461.
56 Section 165(1).

have tended to use the oppression remedy despite shareholders facing potential liability for the costs of an action.[57]

The statutory derivative action has a precursor in New Zealand in the form of section 18 of the Securities Amendment Act 1978. Section 18(1) provides that a past or present member of a public issuer may apply to the court for an order that the public issuer's right of action against an insider may be exercised, or continued, by the applicants. If the application is successful, section 18(5) requires the public issuer to pay the costs of the applicants in bringing the proceedings. The court is directed by section 18(2) to grant the application unless the public issuer does not have an arguable case, or there is no good reason for bringing the action.

This provision was considered by the Court of Appeal in *Colonial Mutual Life Assurance Society Ltd* v *Wilson Neill Ltd.*[58] The Court of Appeal dismissed an appeal from the High Court's decision that leave should not be granted for some shareholders to commence an action under section 18. The court looked at a number of factors in reaching this decision,[59] but the relevant point to note was that the court referred to the fact that the applicants were institutional investors and that they remained free to commence an action against the insiders in their own names: "they were free to do so."[60] If the courts were to adopt a similar approach to the statutory derivative action under the Companies Act, where often times shareholders could also use section 174, the courts may be disinclined to grant the application.

The courts will also have to be prepared to overcome their time-honoured reluctance to examine and overturn decisions made in a commercial environment. The emphasis on shareholders' rights and directors' duties means that the courts have precisely that role under the new legislation. A shirking of that role will diminish the rights of shareholders and increase the difficulties they face in attempting to control corporate management.

In addition to the move towards North American principles, the courts will need to be careful to avoid relying upon Australian decisions where the Australian provisions are similar (for example, directors' duties and oppression remedies and the proposed statutory derivative actions).[61] As has been discussed, the Australian corporate legislation is prescriptive and backed by a strong regulatory agency which has the power to commence

57 See Cheffins and Dine, "Shareholder Remedies: Lessons from Canada" (1992) 13 Co Lawyer 89; and in the United States context see Coffee, "The Unfaithful Champion: The Shareholder as Monitor in Shareholder Litigation" (1985) 48 Jnl of Law and Contemporary Problems 5.

58 [1994] 2 NZLR 152 (CA).

59 Ibid at 160.

60 Ibid at 162.

61 There is a proposal to introduce a statutory derivative action into the Australian legislation – see "Corporate Law and Mr Lavarch", *Australian Financial Review,* 2 May 1994, 20.

proceedings on behalf of shareholders, which it has exercised a number of times.[62] Accordingly the New Zealand courts should be careful before adopting Australian judgments as the Australian judiciary would clearly have in mind the ASC's view that shareholders and creditors are to play a minor role in the enforcement of the Australian corporate law.[63] A cautious interpretation of prescriptive legislation, backed by a strong regulatory body, is not the ideal model for the New Zealand judiciary to follow.

If the courts take a cautious, rather than a robust approach to the protection of shareholders' interests, then shareholders will be effectively disenfranchised. On the other hand if the courts take a robust approach then management will be circumspect in its actions and will consider the interests of shareholders more readily. This should also have the effect of encouraging management to dialogue with shareholders, and to take into account their views on the future of the corporation. In the absence of a contingency fee system shareholders will still be relatively cautious in their approach given that the present scheme of awarding costs still leaves them with some measure of liability to their own counsel even if they succeed with an action. In addition, despite the cries of directors to the effect that the Companies Act 1993 goes too far,[64] directors will continue to be protected by their control over information concerning the company which will enable them to control what shareholders are able to find out about the operations of a company.[65]

VIII CONCLUSION

New Zealand has moved away from its English ancestry and has now embraced a North American model. It has not followed the Australian model principally because it has not faced the major corporate collapses and frauds that Australia has faced a number of times over the last 40 years. Together with the move to deregulation in the New Zealand economy and political sphere this has resulted in two countries who share a number of common traits (as well as an agreement to harmonise business law) having substantially different corporate regimes.

At this stage could one contemplate a re-convergence of Australian and New Zealand company law? The answer is no. Even if Australia succeeds in simplifying its corporate legislation, it is unlikely that it will abandon its approach of a strong state enforcement agency. It is equally unlikely

62 See supra n10 (2nd series).

63 See Cameron, supra n87.

64 For example, see comments by Deane, "Besieged by Duties: Will the New Companies Act Work for Directors", NZSA and NZLS Company Law Conference (1994).

65 Section 178 gives shareholders the right to information held by a company. However, it is subject to a number of exceptions in section 178(4) which could be used to deny shareholders access to information. Section 178(6) and (7) provide a right of appeal for a shareholder to the court when the company refuses to supply the information, but this obviously involves time and expense. In the absence of knowledge as to the information held by a company, it will be difficult for a shareholder to determine whether or not to commence an appeal.

that New Zealand will adopt an interventionist regulatory model, unless it too suffers large scale corporate frauds and collapses, and also undergoes a radical change in economic and social policy. A continued reliance upon private enforcement rights and North American models is likely to be the New Zealand pattern.

The practical implications for New Zealand company law are that the interpretation of the legislation has to incorporate relevant North American jurisprudence, including law and economics, and that the New Zealand courts have to recognise their central role in achieving the legislature's aim of self enforcement of the legislation by shareholders. With corporate law in Australia built around a strong central regulatory agency, and the integration of English company law into the EEC framework, both of these jurisdictions will have less importance for the future development of New Zealand's company law.