Report No 10

Annual Report 1989

NZLC R10

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Report of the

LAW COMMISSION
for the year ended
31 March 1989

Presented to the House of Representatives pursuant to section 17 of the Law Commission Act 1985

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14 July 1989

Rt Hon Geoffrey Palmer
Minister of Justice
Parliament Buildings
Wellington

Dear Minister

I have the honour to transmit to you the annual report of the Law Commission for the year ended 31 March 1989.

This report is prepared pursuant to section 17 of the Law Commission Act 1985.

Yours sincerely
A O WOODHOUSE
President

INTRODUCTION

The Law Commission was established by the Law Commission Act 1985 and came into existence on 1 February 1986. This report covers the third full year of its operation.

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

1988 - AN OVERVIEW

The salient feature of a busy year was the major progress made on the portfolio of references the Law Commission received from the Minister of Justice in 1986 and 1987. Final reports were published on the review of the accident compensation scheme, on limitation defences in civil cases, and on the structure of the Courts. A related question within that reference - access to the Courts - was to a minor extent dealt with in this report. Its future course will be influenced by the Government's decision whether to proceed with a Legal Services Bill that has been in preparation for some time to replace the Offenders Legal Act 1954 and the Legal Aid Act 1969.

Two other studies on matters which the Minister of Justice referred to the Commission were nearing completion by 31 March 1989 - on Maori fisheries (a background paper) and on company law, including the topic of chattels securities which had grown out of it. The only other remaining reference was legislation, which of its nature is an ongoing subject. The Commission's decision to concentrate its resources on its Courts and Companies references slowed progress on this. However a good deal of work was done towards one aspect, recommendations for a new Acts Interpretation Act.

By 31 March 1989 therefore the Law Commission was looking forward to the virtual completion of its first phase. It will be able to give greater attention to other existing projects and perhaps to add some new ones to its programme. The policy is to cover a variety of fields of law and to prefer broader topics that are causing practical difficulties.

It is apparent to the Commission that its work on a particular project will often not end with the making of a ``final report''. Except where the Government may reject a report (it has not done so yet), the Commission could well be closely involved in discussions on implementation and follow-up work generally. Indeed this has already happened. This role, sometimes referred to as “after care”, is an important and, as the Commission sees it, an appropriate one. It will however have to be taken account of when the Commission is deciding its annual programmes.

Three Commissioners, including the President and the Deputy President, together with the Director, attended the annual Australasian Law Reform Agencies Conference in Canberra in September. The President delivered a paper on the implications of CER for the law reform agencies of the two

countries. The conference decided to set up a liaison committee to consider ways in which the agencies could assist in the process of harmonising business law. This is potentially a significant step towards co-operative law reform across the Tasman.

In April 1990 the New Zealand Law Commission will host a conference of Commonwealth law reform agencies in conjunction with the Commonwealth Law Conference in Auckland. Planning for this important event has begun.

The Law Commission is now settled in accommodation which is suitable long-term. The turnover of research officers has been low, and the amount and the quality of their work have been excellent.

The Commission's membership and staff as at 31 March 1989 are listed in Appendix B.

THE SCOPE OF LAW REFORM

How far should the main thrust of law reform be towards the curing of specific and relatively small defects and anomalies in the law, and how far towards the revision and restatement of broader areas of the law?

The answer might be suggested that both are appropriate and useful, and that law reform policy should not pursue one to the exclusion of the other. This is true. There is always a need, so far as is practicable, for a specific response to a particular defect - what might be called fine tuning legislation. Much of New Zealand's law reform legislation in the recent past has been of this character. Indeed, with the previous machinery, not much more could be attempted outside the area of government policy. There was a multiplication of piecemeal reforms. When something more ambitious was undertaken, the tendency (because of sheer lack of resources) was for the review to be wide and of necessity rather shallow.

Some of the Law Reform Commissions in Australia have initiated comparable small-scale reforms through the useful device of a ``community law reform programme'' under a general Ministerial reference. The term is not altogether accurate, since some of the items are rather legal and technical in character. But they do originate in suggestions from the public or from professional groups - notably of course the legal profession - as distinct from specific Ministerial references. A formal reference of this kind is unnecessary here, because (unlike its Australian counterparts) the New Zealand Law Commission is free to draw up its own programmes. Nonetheless the underlying concept is valid and the Law Commission will not lose sight of it.

Detailed reform of this nature can however have disadvantages unless care is taken. By concentrating on patent defects and specific points of pressure, it can delay or even prevent wider and more coherent change. Unless considered against a wider canvas of principle or doctrine it may give rise to new inconsistencies or anomalies.

Underlying the issue is the philosophy of statutory law reform. Traditionally, most lawyers have seen legislation of any kind as essentially interstitial, a gloss on ``the law'', by which was meant the common law. This is no longer realistic or sensible. For at least 100 years in New Zealand, statutes have been a major source of legal development. Despite the continued creativeness of the Courts this seems unlikely to change.

The implications are important and should be recognised. Statute law needs to be treated as an integral part of an organic body of law. This has lessons for those who prepare legislation. It does not imply a diminished role for the Courts. The law contained in statutes, particularly if it is broadly expressed in terms of principles, will require interpretation and development by the Courts using the techniques and principles of the common law. An interplay between statute and judge-made law may well occur.

The Commission's preference is strongly towards a wide approach to legislative law reform as more in keeping with its duty to keep the whole law under review and make recommendations for its reform and development. The ability to go behind particular rules and examine principles, testing their applicability to modern circumstances and their relation with other developments, is we believe an important if not essential characteristic of a full-time Commission such as ours. This advantage should not be neglected. In its work the Law Commission has generally taken or proposes to take the opportunity to reappraise principles and their implications. Examples are the report on limitation defences in civil proceedings and the nearly finished report on company law.

CLOSER ECONOMIC RELATIONS WITH AUSTRALIA (CER)

The Memorandum of Understanding entered into between Australia and New Zealand in June 1988 as part of the revised CER arrangements is likely to have an important although as yet uncertain effect on the development of commercial law in the widest sense.

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

The specific areas mentioned in the Memorandum illustrate its very wide scope:

- companies securities and futures laws including cross-recognition of core company legislation; fund raising; disclosure of operations and shareholding interests; security industry regulation including takeover law, insider trading and licensing requirements; and insolvency;
- reliance on competition law to redress predatory trade between the two countries;
- consumer protection and the law relating to the sale of goods and services between the two countries;
- copyright law;
- commercial arbitration;
- mutual assistance between the regulatory agencies in the administration and enforcement of business laws;

- further recognition and reciprocal enforcement of court decisions in each country including injunctions, orders for specific performance and revenue judgments.

The goal is clear, but the manner of its achievement is not yet so certain. Harmonisation is a word of imprecise meaning. In a statement at the time, the New Zealand Deputy Prime Minister referred to "compatible" laws and added that both sides clearly understood that it would not be a matter of one country following or copying the other's laws. Nevertheless there will inevitably be a drawing together of laws; they will be designed at least to fit with each other. And in some cases uniform law will be the sensible answer. The Memorandum itself states that effective harmonisation "does not require replication of laws although that may be appropriate in some cases".

What is important is that common legislation should not crystallise around an existing inadequate or unsatisfactory law. Reform should not be frozen by the supposed goal of uniformity. On various topics either Australia or New Zealand might take the lead - one adopting or adapting more advanced legislation enacted in the other. Sometimes the two countries should co-operate in devising a new answer. Conversely, there will be need to avoid legislation that is merely the mean point of two presently separate pieces of law. Compromise solutions are often no solutions at all.

One good example of possible implications (though with a wider ambit than the Australia/New Zealand relationship) concerns the law governing the sale of goods. Australia has recently acceded to the 1980 Convention on Contracts for the International Sale of Goods. New Zealand is now considering whether to adopt this convention and indeed that will be necessary to ensure a uniform law for trans-Tasman transactions. In many respects the regime under the convention differs considerably from the existing New Zealand domestic law, which is contained in the Sale of Goods Act 1908. There is very similar legislation in the States of Australia. The adequacy and relevance of the Sale of Goods Act, which is essentially a codification of the nineteenth-century common law, to modern circumstances has often been doubted. A new trans-Tasman law on the subject must raise the question whether New Zealand domestic law reform (and that of the Australian States) should not be built around it.

The challenge for the Law Commission is to accommodate this dimension in all its work in the commercial law field and to co-operate with Australian law reform agencies in working out common or consistent changes in appropriate areas. CER has already been an important issue in the company law project - although the consensus among those who have expressed their views to the Commission is that New Zealand's core company law should not be oriented to the existing Australian law. Indeed, this view has also been taken in responses received from Australia. But with some aspects - corporate insolvency is one - work done in Australia has had a strong influence on the Commission's approach.

The various law reform agencies could well have a helpful part to play in implementing the CER commitment. In this belief the Australasian Law Reform Agencies Conference at Canberra in September 1988 decided to set up a liaison committee to consider ways in which the law reform agencies of Australia and New Zealand can assist with the process of harmonising business law in terms of the Memorandum of Understanding of the two governments signed at Darwin on 1 July 1988.

This decision was a response to an address by the President of the New Zealand Law Commission, which stressed the importance of the CER arrangements to the development of the law in both countries. Extracts from the address are contained in Appendix A to this report.

PARTICIPATION AND CONSULTATION

Before the Law Commission was established, there was concern that it might lose one advantage of the part-time committee system - the participation in the law reform process of substantial numbers of practising lawyers and, latterly, judges. There was a corresponding fear that the professional law reformer might become remote from the realities of law in practice. The advantage was a real one, but the Law Commission has deliberately operated so as to preserve and indeed enhance it. The Commission has consulted widely both in gathering suggestions for topics that might justify examination and in seeking responses to discussion papers. Beyond that, however, the Commission has been assisted on almost every project by an advisory group. Policies and proposals have been developed with its members who have commented in detail on drafts. The time and effort spent far exceeds that under the previous system. This interaction is an improvement on that system in two respects. Membership can be adapted to each topic and professionals other than lawyers can be brought in. The Law Commission is deeply indebted to the many senior and busy professional people who have generously given a great deal of their time to help it.

Conversely, Law Commissioners have taken part in a number of public activities that pertain to legal change. Thus for example the Deputy President, Sir Kenneth Keith, is a member of the Legislation Advisory Committee whose task is to scrutinise, advise and report on aspects of bills and legislative proposals affecting public law or raising public law issues. During the year the Committee published reports on administrative tribunals (proposing their reorganisation and simplification) and on departmental statutes (proposing a more principled approach to such legislation, which is often in fact constitutionally unnecessary). The first report related closely to the Law Commission's report on the structure of the Courts and the second to its work on legislation. The Committee made a number of submissions on particular legislative proposals and bills aimed at the goal of ensuring that legislation is consistent with principle and is comprehensible and accessible.

Three Commissioners took part in a working group convened by the Department of Justice at Cabinet direction to review the Matrimonial Property Act 1976 and its application on the death of a spouse and to de facto spouses. Two Commissioners have been associated with a committee which the Minister set up to advise him on aspects of the Bill of Rights. This group and a parallel Maori group were subsequently invited to reorient their work to consider legal and constitutional aspects of the Treaty of Waitangi. One Commissioner was convenor of a working group on equal pay and equal employment opportunities which reported to the Government in November 1988. She has since been appointed as a member of the Implementation Committee on Employment Equity. And a Commissioner was convenor of two working groups formed to assist the Government to develop and give effect to proposals in the area of tertiary education and “learning for life”.

These are merely examples of the association of Commissioners with the reform of the law in its widest perspective.

The Commission itself is being increasingly looked to for advice and help by other government and public agencies. This is foreshadowed in s 5(1)(c) of the Law Commission Act, which makes it one of the principal functions of the Commission to advise on the review of an aspect of the law conducted by a department or organisation and on proposals made as a result of the review. And s 6(2)(d) empowers the Commission to provide advice and assistance to a government department or organisation considering the review, reform or development of the law.

The Commission has for example been consulted on techniques of drafting legislation in plain English, on incorporating statements of governing principle in legislation, on the review of occupational licensing and on the best way to provide for binding standards that may nonetheless be modified speedily by the responsible body when the need arises.

PROGRAMME

ACCIDENT COMPENSATION

[Reference from the Minister of Justice 10/3/87]

> The Commission is asked to review that part of the Accident Compensation Act 1982 which recognises and is intended to promote the general principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and in particular administrative efficiency as propounded by the 1967 Royal Commission Report on Personal Injury in New Zealand. Those principles are to be taken as broadly acceptable and deserving of support.
>
> The basis upon which the Accident Compensation Corporation or its predecessor has made provision from time to time for the annual amounts needed by the accident compensation scheme for benefits, administration and contingency or other reserves together with the principles and methods applied in their allocation or distribution forms part of the overall inquiry.

Following the publication of a discussion paper (NZLC PP2) and an interim report (NZLC R3) in 1987, the Commission presented its final report (NZLC R4) to the Minister in May 1988. It took account of a very large number of submissions and had extensive consultations with those interested. The thrust of that report was to reinforce the role of individual responsibility and to concentrate on serious disability. Proposed changes included equality of health benefits for people incapacitated by injury or by illness; replacing lump sums with a periodic payment for significant permanent disability; extending the waiting period for earnings related compensation to 2 weeks; and a flat rate levy on employers as recommended in the Commission's earlier interim report.

The Commission has had a continuing role in the development of the draft legislation which was appended to the report and the costing of the proposal. At the Government's request, Sir Owen Woodhouse and Sir Kenneth Keith have been involved in a wider inquiry into the feasibility of an extended incapacity scheme.

ARBITRATION

A discussion paper (NZLC PP7) was published in November 1988. The tentative proposal was that the UNCITRAL Model Law on International Arbitration should be adopted for international arbitration and, perhaps with amendments, for domestic arbitration as well. Particular emphasis was placed on the fact that Australia was already committed to adopting the Model Law for international arbitration and that arbitration is one of the topics mentioned for harmonisation in the Memorandum of Understanding.

A number of written submissions and comments have been received. These show a fair degree of support for the Commission's tentative proposals. The discussion paper was also noted by the Court of Appeal in the recent case: CBI New Zealand Limited v Badger BV (CA 185/88, 8 December 1988).

The Commission hopes to publish a final report during the year.

COMPANY LAW

[Reference from the Minister of Justice 5/9/86]

> The Law Commission is asked to examine and review the law relating to bodies incorporated under the Companies Act 1955, and to report on the form and content of a new Companies Act.
>
> The continuing work of the Securities Commission in the fields of takeovers, insider trading, and company accounts will form part of this overall inquiry. Also related to this reference is the review being conducted by the Department of Justice of the law and practice of company liquidations and individual insolvency.

Over 60 submissions were received in response to the discussion paper published in December 1987. Generally they were supportive of the approach of the discussion paper. An extensive process of consultation took place.

The Commission decided that the final report should include a draft Act. The early part of 1989 was taken up with drafting and the consequent refining of policy that goes with that process.

The Commission sponsored a number of seminars on insolvency law reform as it affected companies, and sought and received a very detailed and helpful submission on this topic from the New Zealand Society of Accountants.

Arising from the company law reference and in conjunction with it, the Commission published a report on new personal property securities legislation by Professor John Farrar and Mark O'Regan following their visit to North America (see 1988 Annual Report). The report, the general thrust of which was endorsed by the Commission, proposed new legislation on the model of the British Columbia Act, which is itself an adaptation to Canadian circumstances of article 9 of the US Uniform Commercial Code. Informed response to these proposals both within New Zealand and interestingly in Australia was most favourable, even enthusiastic. In its further consideration of the topic the Commission was much helped by discussions with two overseas authorities on chattel securities legislation - Professor Roy Goode, of Queen Mary College, University of London, and Professor Ron Cumming QC of the University of Saskatoon, Canada.

It was expected that a final report could be issued soon after the year's end.

CONTRACTS

In May 1988 the Commission conducted a seminar with invited participants on recent developments in contract law, the operation of the contracts legislation of the 1970s, and topics and directions for possible study.

This discussion proved very worthwhile. Subsequently the Commission has decided to review the topic of unconscionability in relation to contract. The present law is a mixture of general common law and some specific legislation, notably on credit contracts. In this examination the Commission is co-operating with the Ministry of Consumer Affairs, the Department of Justice and the Ministry of Commerce, and has set up an advisory group.

A discussion paper is being prepared.

CONTRIBUTION IN CIVIL CASES

This project is concerned with rights to contribution between parties to civil actions which concern losses attributable to the fault of more than one person. Consultation and research are presently being carried out and a discussion paper will be published during the year.

COURTS

[Reference from the Minister of Justice 29/4/86]

> The purposes of this reference are to determine the most desirable structure of the judicial system of New Zealand in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand, to ascertain what changes may be necessary or desirable in the composition, jurisdiction and operation of the various courts in order to facilitate further the prompt and efficient despatch of their business; similarly to ascertain what further changes, if any, are desirable to ensure the ready access to the courts of the people of New Zealand.
>
> With these purposes in mind the Commission is asked to review the structure of the judicial system of New Zealand, including the composition, jurisdiction and operation of the various courts, having regard among other matters to any changes in law and practice consequent upon the recommendations of the Royal Commission on the Courts and to make recommendations accordingly.

A discussion paper on the structure of the Courts was published in December 1987 (NZLC PP4), inviting responses by 1 April 1988. The Commission received a number of valuable submissions and the assistance of consultants. It also discussed the major issues with those interested. It published its final report in March 1989. Broadly it recommended that there should be 3 Courts of general jurisdiction - the District Court (including the Family Court), the High Court, and the Supreme Court (the present Court of Appeal). The District Court and High Court would continue to be the Courts of original jurisdiction with the former having a more extensive jurisdiction (much of it concurrent with the High Court). Some of the business of District Court Judges should be handled by others or diverted to other processes.

Appeals from the District Court - including appeals following jury trials there - would be to the High Court (usually consisting of 3 judges). Second appeals or direct appeals from the District

Court would go to the Supreme Court with that Court's leave. These recommendations are based on a decision by the Government to remove the appeal to the Judicial Committee of the Privy Council.

DAMAGES

Research is continuing on aspects of this topic, including exemplary damages and interest on damages. The question of damages for breach of contracts of employment is being dealt with in the context of the Law Commission's Employment Law project.

EMPLOYMENT LAW

The general purpose of this project is to monitor the changes to this area of law as a result of the Labour Relations Act 1987 and the State Sector Act 1988. A background paper is being prepared upon developments in the law of employment contracts - both individual and collective contracts. The Commission hopes to publish the paper about September 1989.

EVIDENCE

On the recommendation of its advisory committee, the Law Commission decided to begin its review of evidence law with the subjects of hearsay evidence, and expert and opinion evidence. The former has seen several amending statutes but the law remains in some respects inconsistent and unsatisfactory. One issue in relation to hearsay evidence is the best approach to further change - whether it should continue to be piecemeal, correcting patent defects and removing uncertainties; or restate the rule and its many exceptions in a coherent and sensible way; or do away with the rule altogether, at least in non-criminal cases.

To this end an options paper is being prepared for issue.

Work on expert and opinion evidence has been confined to the collection of information and material.

IMPERIAL STATUTES

The Imperial Laws Application Act 1988 gave effect in large measure to the Law Commission's report, both in its list of statutes and subordinate legislation that are to be part of the law of New Zealand and in its drafting approach. The Commission is however disappointed that the Act contains a provision concerning the application of the common law that in its opinion is unnecessary, uncertain and unhelpful.

Follow-up work for the Commission, mentioned in its 1988 Annual Report, includes a review of Imperial Acts concerning property, landlord and tenant and habeas corpus that the Act preserved.

INTELLECTUAL PROPERTY

Background research and consultation is continuing on various aspects of this topic. The Law Commission hopes to hold a consultative seminar during 1989.

LEGISLATION

[Reference from the Minister of Justice 29/5/86]

> Purpose: To propose ways of making legislation as understandable and accessible as practicable and of ensuring that it is kept under review in a systematic way. To ascertain what changes, if any, are necessary or desirable in the law relating to the interpretation of legislation.

Papers on approaches to interpretation and on drafting, prepared for the seminar on legislation in March 1988 (see 1988 Annual Report) and other papers delivered by participants were published with a general introduction and a paper raising questions about the approaches to interpretation (see NZLC PP8). A questionnaire, on the issue whether the rule that statutes do not bind the Crown in the absence of express provision should be revised, was issued. The Commission has had valuable responses to the paper and the questionnaire. The Commission expects to publish a report on a new Interpretation Act during 1989.

LIMITATION ACT

[Reference from the Minister of Justice 12/5/86]

> The Commission is asked to examine the Limitation Act 1950 and to make recommendations on what, if any, changes are needed in the Act, taking account in particular of the problem of latent damage.

A final report was presented in October 1988. In essence, it recommended that the standard limitation period for bringing a civil claim should be reduced to 3 years from the date of the act or omission on which the claim is based, but the period should be extended to up to 15 years if the person bringing the proceedings had no knowledge of the act or omission or the harm caused, or was affected by other disabling circumstances.

If these broad proposals are accepted, the draft bill which is appended to the report could be introduced for consideration by Parliament at an early date.

MAORI FISHERIES

[Reference from the Minister of Justice 12/5/86]

> Purpose: To ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper, in the light of the obligations assumed by the Crown in Te Tiriti o Waitangi (the Treaty of Waitangi).
>
> With this purpose in mind the Commission is asked to consider and report on the recognition of Maori fisheries (including lake and river fisheries) in the law, and whether

any, and if so what, changes ought to be made to the law in that regard; what protection Maori fisheries should have in respect of acts or omissions by the Crown, public bodies and other corporations, and individuals; what measures and procedures are necessary or desirable to ensure that legislative proposals in any way affecting Maori fisheries take adequate account of Maori interests; what criteria should be applied in resolving conflicts between Maori interests in respect of fisheries and other public interests.

The pace of political and other developments in this area made the role of the Law Commission an invidious one. It has raised the question whether the Commission did have a useful part to play. To take advantage of the extensive work that had already been done, the Commission decided to complete and publish a background paper on the present law and history of Maori fisheries. This may serve the purpose of providing objective information and perspectives to assist in a reasoned consideration of the very important issues.

NATIONAL EMERGENCIES

In May 1988 the Law Commission was invited to report on the law governing national emergencies as part of the Government's general review of planning for national emergencies, being co-ordinated by the Domestic and External Security Committee.

This is the first attempt in New Zealand to examine the whole law in relation to national emergencies. It raises such questions as: What is the nature of a national emergency? What executive powers are needed and justified to deal effectively with a national emergency in New Zealand, consistent with our basic constitutional system and traditions? The answer involves a consideration of the different kinds of emergency that can arise; the appropriate powers in respect of each category; and the procedures to bring these powers into effect. Other questions are: What rights and freedoms are not to be derogated from in any emergency? What other safeguards are needed to ensure that emergency powers are not abused? What remedies should be available if the powers are abused?

Work done includes an examination of the history of emergency legislation in New Zealand, an analysis of emergency powers in existing legislation, and consultation with government departments regarding emergency powers in areas for which they are responsible. Laws and practices in other common law jurisdictions have been reviewed.

The Law Commission will be reporting to the Government through the Minister of Justice with recommendations of principle. As in other cases its report will be published, and will be tabled in Parliament.

GENERAL

Other items on the Commission's programme include conversion of goods, the legal status of the Crown, reciprocal enforcement of judgments and State immunity. Faced with the demands of other projects, the Commission was unable to allot resources to these in 1988, apart from the work done on the application of statutes to the Crown. This is noted under “Legislation”.

The completion of several major references will provide an opportunity for the Commission to revise this programme and consider the place of these and other projects.

FINANCE

The Law Commission is funded from money appropriated by Parliament. The accounts of the Commission for the year ended 31 March 1989 are attached.

REPORT OF THE AUDIT OFFICE

The Audit Office, having been appointed in terms of section 15 of the Law Commission Act 1985, has audited the financial statements of the Law Commission.

The audit was conducted in accordance with generally accepted auditing standards and practices.

In the opinion of the Audit Office, the financial statements appearing on pages 17 to 20 fairly reflect the financial position as at 31 March 1989 and the financial results of operations for the year ended on that date.

B F KEARNEY
For Controller and Auditor-General

16 June 1989

BALANCE SHEET AS AT 31 MARCH 1989

	Note	1989	1988
CURRENT ASSETS			
Bank of New Zealand		105,331	-
Short term deposits	2	235,000	1,025,000
BNZ Term deposits	2	700,000	-
Accounts receivable		31,184	795
Interest receivable		4,362	15,996
Prepayments		-	2,640
Goods and Services Tax		33,042	44,219
		1,108,919	1,088,650
Fixed assets	3	1,104,749	964,815
Total assets		$2,213,668	$2,053,465
CURRENT LIABILITIES			
Bank of New Zealand		-	347
Accounts payable		212,592	147,496
		212,592	147,496
ACCUMULATED FUNDS			
	4	2,001,076	1,905,969
Total funds employed		$2,213,668	$2,053,465

Signed on behalf of the Law Commission:

A B Quentin-Baxter
Director

26 May 1989

STATEMENT OF INCOME AND EXPENDITURE
FOR THE YEAR ENDED 31 MARCH 1989

	1989	1988
INCOME		
Government grant	2,811,818	2,218,182
Interest received	282,225	330,119
Rent received	-	16,263
Sales of publications	13,692	1,000
Sundry		
Consultancy fees	57,500	-
Seminar fees	-	13,264

Total income	$3,165,235	$2,578,828
EXPENDITURE		
Personnel		
…..Salaries and wages	1,515,870	1,025,893
…..ACC levy	13,250	5,240
Commission activities		
Advertising	-	2,696
Publications	83,707	79,905
Research and consultation	372,543	101,432
Travel	122,672	89,329
Library		
Library acquisitions	80,338	41,627
Searches – database	4,068	4,169
Computer software	2,312	11,142
Administration		
Audit fees	5,500	5,500
Bank interest charges	435	182
Cleaning	13,263	9,750
Communications	69,207	52,271
Depreciation	231,125	159,831
Electricity	15,320	9,997
Insurance	4,044	-
Other operating	28,081	33,892
Professional services	26,739	38,272
Rent and rates	390,855	214,359
Repairs and maintenance	68,263	36,184
Stationery	22,537	28,326
Total expenditure	$3,070,128	$1,949,997
Excess Income over Expenditure		
Transfer to Accumulated Funds	$95,107	$628,831

NOTES TO THE FINANCIAL STATEMENTS
FOR THE YEAR ENDED 31 MARCH 1989

1 STATEMENT OF ACCOUNTING POLICIES

General accounting principles

The measurement base adopted is that of historical cost. Reliance is placed on the fact that the Commission is a going concern. Accrual accounting is used to match expenses and revenues.

Particular accounting policies

The following particular accounting policies which materially affect the measurement of earnings and the financial position have been applied:

- Accounts receivable are stated at their estimated net realisable value.
- Investments are valued at cost.
- Fixed assets are stated at cost less aggregate depreciation. Depreciation has been calculated using the diminishing value method. The rates used are-
  - Computer equipment 20% DV
  - Furniture and fittings 20% DV
  - Office equipment 20% DV
- Goods and Services Tax has been accounted for using the net method.

Changes in accounting policies

There have been no changes in accounting policies. All policies have been applied on bases consistent with those used in previous years.

2 SHORT TERM INVESTMENTS

	Interest rate	Maturity date	1989	1988
BNZ term investments	13.4%	19/4/89	200,000	400,000
	13.4%	19/5/89	200,000	250,000
	13.2%	6/6/89	300,000	350,000
			$700,000	$1,000,000
BNZ Money Market deposits	11.0%	1/4/89	$235,000	$25,000

3 FIXED ASSETS

			Book Value	
	Cost	Aggregate depreciation	1989	1988
Computer equipment	513,136	185,787	327,349	306,841

Foundation library	161,352	-	161,352	144,985
Furniture and fittings	870,480	243,126	564,356	475,016
Office equipment	81,623	29,931	51,692	37,973
	$1,1563,591	$458,843	$1,104,749	$964,815

4 ACCUMULATED FUNDS

	1989	1988
Balance at 1/4/88	1,905,969	1,277,138
Excess income over expenditure	95,107	628,831
Balance at 31/3/89	$2,001,076	$1,905,969

5 COMMITTED EXPENDITURE

As at balance date, the following expenditure had been committed but is not included in these financial statements:

	1989	1988
Capital expenditure	5,500	322,339
Cleaning	-	165
Communications	446	2,727
Consultants' fees	33,000	5,300
Electricity	-	110
Freight	-	1,000
GST	-	28,306
Library acquisitions	1,757	2,388
Publications	-	7,594
Repairs and maintenance	-	13,232
Research	3,915	-
Rent	-	15,690
Stationery	1,393	-
	$46,011	$398,851

APPENDIX A

Extracts from an address by the President of the Law Commission, the Right Honourable Sir Owen Woodhouse KBE DSC, to the Australasian Law Reform Agencies Conference, September 1988, on aspects of the CER agreement.

No more important opportunity lies open to the law reform agencies to contribute to highly significant and wide-ranging issues than is provided by recent watershed decisions of New Zealand and Australia not only to accelerate but to deepen and give new strength to their relationship. The stated objective of the CER concept is to quickly achieve a completely free trade area. In itself this is a considerable movement for both countries. But it is a movement which could well be taken

further - into an effective form of common market. There are the even wider defence and economic purposes of providing a focus of strength and stability for the whole region.

Central to the recent discussions is the call for harmonisation of relevant areas of commercial and business law. There are or will be as well a number of wider issues with a legal content which will need attention. The general exercise will require both expertise and goodwill together with a feeling for the long term significance of the growing relationship as well as the short term advantages. It is a task which surely can only be assisted by the kind of informed and judicial detachment which the law reform bodies consistently bring to any review and which they are particularly careful to apply to socio-economic issues such as this.

The agreement itself was signed on 28 March 1983 with effect from 1 January of that year. By paragraph 3 of Article 22 it provided that its operation during the following five years should be the subject of a general review to take place in 1988.

On 1 July 1988 at Darwin, the Deputy Prime Ministers of each country executed a Memorandum of Understanding aimed at the important goal of harmonisation of business law and regulatory practices. Then on 18 August the Prime Ministers of the two countries signed three protocols to the agreement which, in the words of a joint statement they issued at the time, “contain binding commitments to move towards the creation of a single trans -Tasman market from 1 June 1990 [which] will cover both goods and services”.

The decision to embark upon harmonisation of business laws and regulations is both an essential element in the progress to be made in support of the CER Agreement and a matter which raises practical issues for the law reform agencies. To decide what is involved it will be necessary to appreciate not only what areas of the law need to be examined so that effect may be given to the concept of harmonisation but also what the concept itself is intended to convey.

The CER Agreement was constructed on the principle that virtually all impediments to trade between Australia and New Zealand should be eliminated and that it should be done within an agreed time scale.

Its objects are stated in Article 1 to be-

(a) to strengthen the broader relationship between Australia and New Zealand;
(b) to develop closer economic relations between the member states through a mutually beneficial expansion of free trade between New Zealand and Australia;
(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
(d) (d) to develop trade between New Zealand and Australia under conditions of fair competition.

The elimination of frontier barriers to trade and incentives which distort fair competition has required effort and co-operation by the two governments and their officials. But virtually all these decisions could be taken at a single practical level - about relatively clear-cut hard items like tariffs, quotas, anti-dumping measures; or subsidies, bounties and revenue advantages. Following this first stage, when attention is directed to freeing the movement of services, investment and finance, rather more complex considerations arise.

In this second area most change requires decision not only in the primary or policy sense but, beyond that, where further and specific agreement will be needed to put in place the necessary legal infrastructure. For example-

- If as a matter of policy physicians, lawyers, architects, accountants are to be free to practice on either side of the Tasman what is to be done about the detailed rules of qualification?

- At present there is little uniformity in the regulation of communications, television, radio, postal services let alone the prior decision to permit free trade in respect of those matters.

- Air transport and coastal shipping, the ability to operate commercially on a trans - Tasman basis, insurance, banking - all these categories of service must be assessed both in terms of policy and then by reference to the law which is to regulate their wider operation.

The Darwin Memorandum of Understanding on harmonisation is basically concerned with the numerous second area questions. Its immediate purpose is the removal of differences in the laws and regulatory practices which impede the growth of trade in goods and services. It provides for consultation if either government believes that such a difference is hindering trade. But this obligation operates independently of a programme (to be completed by 30 June 1990) for systematic examination of the scope of harmonisation on a topic by topic basis.

Clearly the removal of regulatory impediments to trade is not the sole purpose of harmonisation. The contemporary, decisive approach to the closer economic relationship requires at the least the provision of a congenial legal environment - one which can give confidence to those affected by it because it is stable, comprehensible and consistent on both sides of the Tasman.

The Memorandum of Understanding states that “effective harmonisation does not require replication of laws, although that may be appropriate in some cases”. I understand the word “replication” to be used in the sense of “precise identification” and in that sense I suppose the proviso is sensible enough. But I would think problems will arise unless those who embark upon various aspects of this general exercise act on the sensible principle that the more it is possible to move from approximation of laws in the direction of actual uniformity then the more reliable and helpful will be the end result. In saying that I would add that half-way consensus type solutions would usually be no solutions at all.

The requirement for a systematic review of business law in order to achieve harmonisation is a plain commitment to law reform on the part of the two governments. It is bound to identify areas of much needed law reform and should be a spur and a challenge to the law reform agencies. In particular the Memorandum of Understanding foreshadows the emergence of a new body of law to govern commercial transactions between Australia and New Zealand. I have mentioned the direct references to aspects of all this-

- competition law to redress predatory trade

- law relating to the sale of goods and services

- mutual assistance between the regulatory agencies

- further reciprocity in enforcing court decisions.

New trans -Tasman law in this field will need to be uniform, of course, and in my view the law reform agencies have an essential part to play in its formulation. It is an area, too, where co-operation between them is likely to be most effective.

Any report recommending a new law in these areas will have to balance the interests of both countries and where relevant that of the states as well. The harmonisation exercise itself will need to be approached with proper detachment and expert care.

Already the agencies from both sides of the Tasman have met at intervals to consider aspects of law reform and the ways in which their common purposes might be assisted. Unlike the Departments of State they are able to work outside the immediate pressures which departmental and political responsibility must inevitably involve. The way ahead, I would suggest, would be for a liaison committee to be set up by the agencies with the task of examining the harmonisation project and whether and in what areas and by what means they might co-ordinate work upon it.

APPENDIX B

Members of the Law Commission:

The Rt Hon Sir Owen Woodhouse KBE DSC - President
Sir Kenneth Keith KBE - Deputy President
Jim Cameron CMG
Sian Elias QC
Jack Hodder
Margaret A Wilson

Permanent staff of the Law Commission as at 31 March 1989:

Director	Alison Quentin-Baxter
Research Officers	Lisa Atkinson
	Mandy McDonald
	Janet McLean
	Grant Majoribanks
	Prue Oxley
	Melissa Poole
	Megan Richardson
	Phil Shattky
	Nicola White
Librarian	Katrina Young-Drew
Manager	Frank Muller
Senior Administration Officer	Penelope Root
Secretaries	Cheryl Bicknell
	Lynette Bridgeman
	Catherine Burt

	Susan Davies
	Carol Stevenson
	Linda Sundberg
Receptionist	Glenys Bunkall
Systems Operator	Tracy Forde
Office Assistant	Paula McLeod

The office of the Law Commission is at Level 10, Fletcher Challenge House, 87-91 The Terrace, Wellington.
Telephone (04)733 453 Fax (04) 710 959

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