

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

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the new zealand law commission

Institutionally, law reformers are dreamers, creators, thinkers, idealists, imaginers and visionaries, Politicians are, by their very nature, decision-makers, doers, leaders, animators, instigators, sellers, energisers and persuaders. Bureaucrats are implementers, facilitators, stabilizers, adjusters, consensus-builders, warners, admonishers, consultants.

The Hon Mr Justice AM Linden (Canada), *Commonwealth Law Reform Agencies Conference, 1990.*

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

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

The Commission's principal functions are to keep the whole of the law of New Zealand under review in a systematic way; to make recommendations to the Minister of

Justice for the reform or development of particular aspects of the law; to advise on reviews of the law conducted by other government agencies; and to propose ways of making the law as understandable and accessible as is practicable. In making its recommendations the Commission is to take into account te ao Maori (the Maori dimension) and give consideration to the multicultural character of New Zealand society, and to have regard to the desirability of simplifying the expression and content of the law as far as practicable. (Law Commission Report No10, Annual Report 1989.)

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

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

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

Court (including the Family Court), the High Court and the Supreme Court (presently the Court of Appeal). Further recommendations were made about areas of common and exclusive jurisdiction for each court.

company law. In September 1986 the Commission was 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. A completely new Act was drafted and in June 1989 the Commission presented a report to government entitled, *Company Law: Report and Restatement*. Sir Kenneth Keith, the Deputy President of the Commission, said in a letter to the Minister which accompanied the report that

The report proposes a basic law governing the creation, operation and termination of all companies. It recommends to you a draft Companies Act which, with two associated measures, would replace the 1955 Act and have substantially the same scope.

The two associated measures were the proposed Personal Property Securities Act previously recommended by the Commission and amendments to the Property Law Act 1952 (NZ) relating to receivers. The report outlines the most significant proposals as

- enactment of a new Companies Act to replace the 1955 Act
- abolition of the concepts of par value and nominal capital as part of a reform of the rules about share capital and the maintenance of capital
- the enabling of companies to buy their own shares and finance the acquisition of their shares (in reversal of the current law), subject to protections for shareholders and creditors
- a fuller restatement in the statute of the duties and powers of directors
- removal of the law relating to company charges from the Companies Act and its incorporation in a comprehensive Personal Property Securities Act, as recom-

mended in a previous report of the Commission.

The Commission is working with government on the issue of implementation of the far reaching and comprehensive proposals made in the report.

intellectual property. The *Intellectual Property* report published in March 1990 made available to a wider audience a number of papers addressing aspects of the reform of intellectual property laws in New Zealand. The papers were written by experts in the field and delivered at several small seminars organised by the Law Commission.

national emergencies. When national emergencies such as war, nuclear disaster, terrorism or industrial disputes arise, governments have often invoked different laws. Whether this is valid and what these different laws should be are some of the issues being addressed by the Commission in this project. *The First Report on Emergencies:* Use of the Armed Forces, covers the appropriate use of the armed forces in particular situations including during an industrial dispute. An Act dealing with these issues has recently been passed by New Zealand's House of Representatives. The Commission's report was taken into consideration in the drafting of the Bill and also by the Foreign Affairs and Defence Committee which considered the Bill. The Commission's recommendations are reflected in the provisions of the Act. A second report covering general issues including the definition of an emergency and approaches to emergency legislation is in its final stages.

legislation. The NZLC's reference on legislation asks it 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'. A discussion paper on the Acts Interpretation Act 1924 (NZ) and related legislation was published in July 1987. A final report will be published this year. In September 1989, as part of their brief under this reference, the Commission recommended that the Statutory Publications Bill which was then before the House

of Representatives, should be divided into a Publication of Legislation Bill and a Regulations Bill and that the Bills should be re-drafted to make the law more accessible. The Bills were amended to take account of these recommendations.

arbitration. Arbitration is a method of resolving disputes without resorting to litigation. It involves an agreement between the parties to refer their dispute to an independent person or tribunal. The decision can then be enforced through the courts. The tentative proposal made in a discussion paper published in November 1988 was that New Zealand should adopt, with minimal modifications, the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) for both domestic and international arbitrations. Australia has now adopted this Model for international arbitration. The Commission will present its final report later this year. (An article on additional dispute resolution appeared in the October 1989 issue of *Reform*.)

criminal procedure. Criminal procedure is the first of four relatively new references given to the Commission. The others are evidence, the law relating the crown and habeus corpus. Work has not yet begun on the two last mentioned topics. A report on the discovery procedure in criminal trial is due by June this year. The issue of preliminary hearings is also being considered. Police powers and prosecution decisions will be dealt with next.

evidence. Before receiving the evidence reference, the Commission has already embarked on a review of hearsay evidence and published an Options Paper. Options mentioned in respect of the rule against admission of hearsay evidence included

- piecemeal correction of defects and absurdities
- restatement of the rule in a coherent way
- abolition of the rule, at least in civil cases.

co-operation among commissions. Because Australia and New Zealand both inherited many imperial statutes and have a common law tradition, many of the same subject areas are in need of reform. Law reform agencies usually examine the work of other agencies. This practice has been taken a step further in Australia. Commissions have worked closely on joint projects and produced joint reports. Examples include product liability, a project involving both the Australian and Victorian Law Reform Commissions, and Informed Consent to Medical Treatment which involved the Victorian, Australian and New South Wales Commissions. This practice minimises duplication and presents a united stand on recommendations for reform. Common deficiencies in the law and a commitment to closer economic relations between Australia and New Zealand (See article this issue) make it imperative that law reform bodies and Australia and New Zealand work closely together on any proposals which may affect the other. This is especially important where trade or commerce is involved. The Australian and New Zealand Commissions have recently made a commitment to work together on choice of law rules. The move towards free trade and the frequency of trans-Tasman travel make it imperative that the courts are in no doubt about which law to apply to cases having connections with both countries.

other nzlc reports. Other reports issued by the Commission are:

- Imperial Legislation in Force in New Zealand (1987) (NZLC R1)
- The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987) (NZLC R3)
- Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988) (NZLC R4)
- Limitation Defences in Civil Proceedings (1988) (NZLC R6)
- A Personal Property Securities Act for New Zealand (1989) (NZLC R8)

Reports are available from New Zealand Government Bookshops.

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a new zealand bill of rights

If society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it.

Former Australian High Court
Chief Justice, *Sir Harry Gibbs.*

The recently enacted New Zealand Bill of Rights Act provides a Bill of Rights which covers the right to life and to refuse to undergo medical treatment; freedom from torture and medical or scientific experimentation; electoral rights; freedom of thought, expression, manifesting religion, peaceful assembly and association; freedom from discrimination and rights of minorities; freedom from unreasonable search and seizure and of liberty of the person; rights on being arrested or being detained, rights of persons charged and minimum standards of criminal procedure; prohibition on retroactive penalties and double jeopardy and the right to justice. (*British Institute of International and Comparative Law Bulletin of Legal Developments, April 1990.*)

An Australian Bill of Rights was an election issue at the federal elections in 1984. Legislation for an Australian Bill of Rights was passed by the House of Representatives in 1985.

In one of the lengthiest debates ever in the Australian Senate, the Government argued that the International Covenant on Civil and Political Rights, which had been ratified by Australia's Fraser Government in 1980, specifically committed Australia to adopting legislative measures to give effect to the rights contained in it. However the government was finally forced to postpone further consideration of the Australian Bill of Rights Bill in the Senate in November 1986 after an Opposition Amendment to extend the application of

the Bill to 'acts or practices done by or on behalf of a trade union or a body corporate' was agreed to. The Australian Bill of Rights was discussed in the January 1986 and January 1987 issues of *Reform*.

Arguments against an Australian Bill of Rights have included the following:

- A Bill of Rights is neither necessary nor sufficient to guarantee the preservation of rights.
- It is an attempt by the present generation to limit the power of the next.
- A Bill of Rights would produce endless litigation.
- The common law provides sufficient protection for human rights.

advantages of a bill of rights. Supporters of an Australian Bill of Rights have argued:

- A Bill of Rights would inspire respect for rights by setting them out in a positive declaratory form.
- The common law does not offer clear or wide-ranging statements of rights.
- A Bill of Rights would enable judges to recognise rights which even the best judges have been unable to do at common law.
- It would protect minorities by establishing certain fundamental rights.
- A Bill of Rights would be a clear and definite move to fulfil Australia's international obligations under the International Covenant on Civil and Political Rights.

In 1987 the Legal and Constitutional Committee of the Victorian Parliament produced a report entitled *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*. The Committee examined various systems around the world including the United States and Canadian Systems. It recommended the enactment of an unenforceable Declaration of Rights and Freedoms which would guide Parliament in considering legislation and