THE HARMONISATION OF NEW ZEALAND AND AUSTRALIAN MARITIME LAWS

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I. INTRODUCTION

The idea of New Zealand and Australia cementing their special relationship into some form of deep, meaningful and permanent union is certainly not new. The first serious attempt at trans-Tasman matchmaking took place just over a century ago, as the Australian colonies were moving towards federation. New Zealand was not only invited to the constitutional conferences which resulted in the establishment of the Commonwealth of Australia in 1901, but was indeed urged to join a "United Australasia". New Zealand's response to these overtures was coy. Sir George Grey, who represented New Zealand at the 1891 Constitutional Convention in Sydney, reminded delegates that New Zealand attended "as a damsel to be wooed without prejudice, but not necessarily to be won".[1]

As we know, the damsel was unmoved, and Australia's proposal of inclusion in the Commonwealth, while still formally on the statute book,[2] has never been taken up by New Zealand. Nor is it likely to be in the foreseeable future.

Instead, early notions of a constitutional relationship have given way to a more modern marriage of economic convenience. The Australian and New Zealand Closer Economic Relations Trade Agreement (ANZCERTA, or, more commonly, CER),[3] is currently in its twelfth year. One of the more significant articles of faith associated with the CER Agreement is an ongoing commitment to identify and remove impediments to free and efficient trans-Tasman trade, and to harmonise New Zealand and Australian business laws.[4] For this reason, it has become usual, indeed almost obligatory, to discuss the issue of harmonisation of New Zealand and Australian laws within the context of CER and its harmonisation programme.

However, the CER process is not the only engine driving harmonisation of New Zealand and Australian maritime laws. In fact, most of the harmonisation and co-ordination in this area has been achieved through other means. This article therefore examines the issue of harmonisation of New Zealand and Australian maritime laws from a more general perspec-

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1 Cited in RR Garran *Prosper the Commonwealth* (Angus & Robertson, Sydney, 1958) 93. On the genesis of the Australian Constitution, see generally J Quick & RR Garran *The annotated Constitution of the Australian Commonwealth* (1901, repr Legal Books, Sydney, 1976); JA La Nauze *The making of the Australian Constitution* (Melbourne University Press, Melbourne, 1972).

2 See the Commonwealth of Australia Constitution Act 1900, s 6, which still includes New Zealand in its definition of the States of the Commonwealth.

3 For the text of the CER Agreement, see 1983 NZTS, (1983) 22 ILM 945.

4 See the Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Harmonisation of Business Law (MOU), 1 July 1988, quoted in JH Farrar "Harmonisation of business law between Australia and New Zealand" (1989) 19 VUWLR 435, 442-445; and the MOU Reports to Governments by Steering Committee of Officials, 21 June 1990, 10 July 1992.

tive. In doing so, it is first necessary to examine what commentators mean by "harmonisation", and to explore some of the ambiguities and tensions apparent in the concept and its use. The current state of New Zealand and Australian maritime laws will then be discussed, to identify those factors which have led to a relatively high level of harmonisation between the two jurisdictions' maritime laws, and to examine some areas of divergence. Finally, some modest predictions will be offered as to potential future harmonisation of New Zealand and Australian maritime laws.

II. "HARMONISATION": A HUMPTY DUMPTY WORD[5]

Many commentaries on international trade law, commercial law, or CER either use the term "harmonisation" indiscriminately, or offer it to the reader, undefined and unexamined, as a familiar coin of known value. One commentator who has examined the concept of harmonisation in some depth, concludes that it "is a very ambiguous concept which describes a political and legal process".[6]

There would seem to be two layers of ambiguity inherent in the concept. The first relates to the formal definition of the harmonisation process itself. The second, underlying layer of ambiguities and tensions has more to do with the ideological connotations, aims, and substantive results of harmonisation. Such debate as there has been about harmonisation, has tended to focus indirectly on this second layer of ambiguity – on the desirability of the harmonisation process, and its political, economic or social implications.

In respect of the definition of the harmonisation process itself, there seems to be general agreement that, while harmonisation can, and often does, involve the reproduction of identical or uniform statutes, it need not do so.[7] Indeed, simply "pushing the laws of one country ... into the mould of [an]other"[8] does not, in itself, guarantee a convergence or co-ordination of results. The apparent substantive convergence of identical laws can easily be undermined by differing statutory interpretations, by the application of conflicts rules which create or exaggerate divergent outcomes,[9] or by variations in the broader social, political or legal constructs of the jurisdictions in question.[10]

5 "When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you *can* make words mean different things." "The question is," said Humpty Dumpty, "which is to be master – that's all." (Lewis Carroll, *Alice Through the Looking-Glass*).

6 See Farrar, above note 4, 445, and 446 (quoting Collinge): "It means what governments like it to mean."

7 See MOU, above note 4, para 8: "Both governments recognise that effective harmonisation does not require replication of laws, although that may be appropriate in some cases"; G Palmer "International trade blocs – New Zealand and Australia: beyond CER" (1990) 1 Public LR 223, 230 (quoting himself): "Harmonisation doesn't mean Australia and New Zealand are identical, nor does it mean New Zealand has to follow blindly, and we won't."

8 KM Vautier, J Farmer & R Baxt (ed) *CER and business competition – Australia and New Zealand in a global economy* (CCH, Auckland, 1990) 7.

9 See, e.g., *The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655 (CA), discussed in PA Myburgh "Recognition and priority of foreign ship mortgages" [1992] LMCLQ 155; W Tetley *International Conflict of Laws: Common, Civil and Maritime* (Editions Blais, Montreal, 1994) 576-578.

10 For example, although New Zealand and Australia have very similar provisions regarding liability, and limitation of liability, for personal injury claims in the maritime context, the impact of the New Zealand provisions is significantly affected by our accident compensation regime. See the Ministry of Transport *Review of the Shipping and Seamen Act 1952* (Wellington, 1992) 90, regarding ACC and the Convention on Limitation of Liability for Maritime Claims 1976.

Apart from this clear consensus that harmonisation need not involve exact uniformity or equivalence of laws, commentators have also put forward a range of narratives about what harmonisation does, or should involve. These include notions of complementarity of laws, approximation of laws, co-ordination of laws, reciprocal recognition of formal validity and substantive outcomes, the minimisation of trade distortions, and the creation of a mutually beneficial commercial environment.[11] All of these characterisations would seem to be informed by a broad utilitarian principle – that harmonisation includes any process which maximises the mutual benefit of transnational activity or contact by eliminating the effects of national boundaries, or at least by reducing the shock of the foreign, the unexpected or the arbitrary. As Palmer puts it, successfully harmonised laws "should be sufficiently comparable so there's no dissonance or great inconvenience".[12]

Defining harmonisation purely in terms of an abstract utilitarian principle of maximising the benefits of transnational activity, however, begs the question of how those benefits are defined and measured. It also ignores the political reality that harmonisation is usually pursued by governments to achieve a broader political and economic agenda. In the context of CER, of course, the primary agenda is the liberalisation of trans-Tasman trade:[13]

> Harmonisation is simply a means to an end. In the case of CER the end is the establishment of a free trade area. Steps must be taken to eliminate obstacles to the establishment of this. It is a question of fact as to whether a particular law constitutes such an obstacle.

Once free trans-Tasman trade in goods was achieved in 1990, however, the focus of the CER harmonisation programme was broadened to include liberalisation of New Zealand and Australian domestic business laws. In line with this view, the MOU Steering Committee of Officials stated in its 1990 Report[14] that harmonisation also called for:

> assessment of what has traditionally been considered 'domestic' regulation ... . Achieving greater compatibility between these regulatory regimes is becoming increasingly important as New Zealand and Australia become one market. If commercial laws are incompatible, businesses operating or trading in both countries will face higher transaction and compliance costs. ... The Steering Committee has therefore understood the harmonisation exercise to be a process of examining business laws with a view to identifying firstly, those areas of law where differences have lead to increased transaction costs and, secondly, those where harmonisation would achieve a significant reduction in transaction costs.

In other words, the goal of the CER harmonisation process is not uniformity for its own sake, but the enhancement of competition and efficiency through liberalisation of both the domestic and international commercial laws of New Zealand and Australia.

From a liberal perspective, there would seem to be no tension between the vaguely expressed utilitarian principle implicit in the harmonisation

11 See, e.g. Farrar, above note 4, 445-447; Ministry of Commerce *Impediments to trans-Tasman trade* (Wellington, 1989) 2; MOU Steering Committee Report 1990, above note 4, p 4, para 4.01; Palmer, above note 7, 229-230.

12 Palmer, above note 7, 230.

13 Farrar, above note 4, 445; GA Hughes "Redirecting CER and the harmonisation of competition law" (1995) 7 Auckland University LR 1039, 1046-1049.

14 Above note 4, paras 4.03, 4.04; and see J Farmer "The harmonisation of Australian and New Zealand business laws" in Vautier et al, above note 8, 48-49, for a cogent critique of these statements.

process, and the ultimate goal of domestic and regional trade liberalisation. Harmonisation of business laws resulting in trade liberalisation should facilitate greater trade, which should in turn result in greater economic welfare for New Zealand and Australian citizens.[15] Taking this argument one step further, if regional harmonisation and regional trade liberalisation can be plugged into current international trends towards global liberalisation of trade, the resulting synergy should produce some sort of economic Utopia:[16]

> Convergence of international trade rules and regimes is seen by most as a desirable phenomenon for various reasons. International trade is seen as having both an economic and political importance. From the economic perspective, without international trade, most countries are unable to overcome the relative scarcity of certain natural resource endowments and are unable to attract the benefit of economies of scale of production or the efficiencies that evolve from reliance on those areas of production where they have the greatest comparative advantage. Because the aim of trade is to provide greatest consumer satisfaction at the lowest cost, and because free trade will allow production to move to the area of lowest cost, including labour costs, free trade should in theory increase individual welfare and help eliminate poverty in the developing world.

In terms of liberal theory, then, the concepts of harmonisation of laws, liberalisation of trade and internationalisation of commercial law conflate into a single desideratum.

Critics of the liberal agenda, on the other hand, have argued that this blurring of concepts results in a simplistic analysis which fails to take account of, for example, potential conflicts of interest between trade blocs, which are the desired result of regional harmonisation, and the dictates of global free trade.[17] The liberal analysis of harmonisation/liberalisation has also been accused of being "one-eyed" in its focus on the economy; of excluding from its cost-benefit analysis the human suffering and social dislocation of communities caused by trade liberalisation measures; and of consistently failing to come to grips with the broader political and constitutional implications of harmonisation of laws – in particular, the concern that harmonisation of trade laws is simply a stalking-horse for the eventual surrender of sovereign autonomy.[18]

Some commentators on CER candidly advocate the translation of harmonisation into an even closer judicial or political union: see MD Kirby "Closer Economic Relations between Australia and New Zealand" (1984) 58 Australian LJ 383; MD Kirby "Integration of judicial systems" in Vautier et al, above note 8, 15; MD Kirby "CER, trans-Tasman courts and Australasia" [1983] NZLJ 304; Palmer, above note 7, 233: "I do see a need

15 See Vautier et al, above note 8, 7, who warn that "the causal nexus is not necessarily that obvious".

16 J Waincymer "The internationalisation of Australia's trade laws" (1995) 17 Sydney LR 298, 299-300; also see MA Chandler, MJ Trebilcock & R Howse "Trade restrictive policies and democratic politics: a proposal for reform" (1990) 1 Public LR 234 on the economic theory of, and ethical justifications for, global trade liberalisation.

17 See, e.g., J Kelsey *Rolling back the state: privatisation of power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) 120-122.

18 See generally W Rosenberg *CER: Sanity or sell-out?* (New Zealand Monthly Review Society Inc, Christchurch, 1982); Kelsey, above note 17, chapters 7, 27; J Orsborn *The constitutional and legal implications of the Closer Economic Relations Agreement between Australia and New Zealand* (Unpublished LLB(Hons) dissertation, University of Auckland, 1993). In the New Zealand context, concern about surrender of sovereign autonomy relates to both the regional level (the so-called "Dame Edna and Madge Allsop" syndrome; on which, see V Small "Open skies – NZ tires of holding pattern" Business Review Weekly, 11 July 1994, 30), and the global level. For a comparable debate in respect of the USA and Canada, see Chandler et al, above note 16, 238-243.

to develop an Australian/New Zealand polity, and as part of that process, to construct institutions to clothe the bare facts of our economic relationship."

A detailed examination of this complex and highly controversial debate falls beyond the scope of this article. It is probably sufficient for present purposes to conclude that any examination of harmonisation should take into account both the concept's fluid, ideological nature, and the political reality that – at least while liberal economic theory remains in vogue – harmonisation will be actively employed to achieve the linked agendas of domestic and regional liberalisation, and globalisation of commercial law.[19]

III. Harmonisation of Maritime Laws: The Score-Card So Far

A relatively high degree of convergence and co-ordination already exists between New Zealand and Australian maritime laws. This would appear to be the product of four factors. The first is the historical process of "harmonisation" which was a natural consequence of British colonisation of New Zealand and Australia. The second factor which has created convergence is parallel comparative law reform, where both New Zealand and Australia have looked to the same foreign jurisdiction for solutions to similar legal problems. The third factor, which has already been alluded to, is CER and the harmonisation of business laws programme. The fourth factor is the increasing standardisation of all domestic maritime laws as a direct result of the globalisation of commercial law. The significance of each of these four factors will now be considered in turn.

3.1 Past harmonies: "the crimson thread of kinship"[20] and all that

Colonisation can be seen as a particularly dramatic form of instant harmonisation.[21] When they became British colonies, Australia and New Zealand were handed down a ready-made, identical set of maritime laws, in the interests of uniform and efficient Imperial administration. As fledgling nation states, the British model would still remain paramount, this time in the interests of comity amongst Commonwealth nations. The evidence of this common heritage is, or was until relatively recently, still very evident in New Zealand and Australian maritime laws.

The key Australian maritime law statute, the Navigation Act 1912 (Cth), is directly derived from the Merchant Shipping Act 1894 (Imp), although the traces of this heritage grow fainter with each year's amendments. Its

19 Cf R Goode ("Reflections on the harmonization of commercial law" in R Cranston & R Goode *Commercial and consumer law: national and international dimensions* (Clarendon Press, Oxford, 1993) 3-4), who argues that a fundamental conceptual distinction can be drawn between the harmonisation of domestic laws in regional trade blocs like the EU, and the harmonisation of international commercial transactions by international Conventions, but nonetheless has to concede that these two processes "possess a certain symbiosis".

20 Sir Henry Parkes, at the 1890 Constitutional Convention in Melbourne, quoted in Garran, above note 1, 91. For other testimonials to our common heritage, see MD Kirby "Closer Economic Relations between Australia and New Zealand" (1984) 58 Australian LJ 383; Farrar, above note 4, 435-440; Palmer, above note 7, 223-225.

21 Cf Goode, above note 19, 3, who argues that colonisation is merely *ersatz* harmonisation, because it "remains purely internal. Colonization involves merely a geographical extension of domestic law; [it] does not have as its objective the facilitation of a common market or of inter-State commerce." In some contexts, however, colonisation involves far more elaborate mechanisms than simply the "extension of domestic law". For example, by the mid-nineteenth century there had arguably developed a body of Imperial shipping law which was, in many respects, quite distinct from British shipping law.

New Zealand equivalent, the Shipping and Seamen Act 1952, was also based on the 1894 Imperial Act. The 1952 Act was repealed on 1 February 1995, when the Maritime Transport Act 1994 came into effect.

Our bills of lading statutes were, or still are, virtually identical copies of the English Bills of Lading Act 1855.[22]

We both retained the Colonial Courts of Admiralty Act 1890 (Imp), with all of its shortcomings and quirks, long after the sun had set on the Empire, and admiralty proctors had ceased to be paid in shillings. New Zealand only divested itself of its colonial admiralty jurisdiction in 1976, replacing it with a slightly less flawed English model.[23] After considerable deliberation and research, Australia followed suit in 1988, to arguably better effect.[24]

Our ship registration regimes also retained a common Imperial imprint until relatively recently – major reform took place in Australia in 1981, with the enactment of the Shipping Registration Act (Cth), and, nearly ten years later, New Zealand passed an equivalent measure, the Ship Registration Act 1992. Prior to 1992, New Zealand's ship registration regime was still notionally an extension of the Imperial ship register under the Merchant Shipping Act 1894 (Imp).[25] Accordingly, until 1992, section 385 of the Shipping and Seamen Act 1952 still provided that:

> a ship shall not be registered in New Zealand under this Act unless she is owned by persons of the following descriptions ... namely:
> (a) British subjects:
> (b) Corporate bodies established under and subject to the law of a Commonwealth country and having their principal place of business in a Commonwealth country.

Our marine insurance statutes, the Marine Insurance Act 1908, and the Marine Insurance Act 1909 (Cth), which are both carbon copies of the Marine Insurance Act 1906 (UK), perhaps offer the best "living" example of this phenomenon.

It should not surprise us that New Zealand and Australian maritime laws (and indeed the maritime laws of most of the other former British colonies) have retained vivid vestiges of this common heritage for so long. The Imperial shipping codes were extremely successful in providing a uniform, stable and clear legal framework; and the Commonwealth Merchant Shipping Agreement of 1931, which finally ran its course in 1978, served to maintain this uniformity, helped to avoid increasingly problematic conflict of laws issues,

22 See the Mercantile Law Act 1908, s 13 (original version – repealed on 1 February 1995); and the relevant provisions of the Australian statutes (Bills of Lading Act 1859 (NT), Sale of Goods Act 1923, Mercantile Act 1936 (SA), Bill of Lading Act 1857 (Tas), Goods Act 1958 (Vic), Act to Amend the Law Relating to Bills of Lading 1856 (WA)). For reform in this area in England, New Zealand and Australia, see text at note 28 below.

23 The Admiralty Act 1973 is still largely based on the Administration of Justice Act 1956 (UK), which has since been repealed by the Supreme Court Act 1981 (UK). On the Admiralty Act 1973 and the Admiralty Rules, see generally the Special Law Reform Committee's *Report on Admiralty Jurisdiction* (Wellington, 1972); J Beattie "The Admiralty Act 1973" [1976] NZLJ 365; IM Mackay "The Admiralty Act 1973 – Part II" [1976] NZLJ 387; JT Eichelbaum & TJ Broadmore "The Admiralty Rules 1976" [1976] NZLJ 538.

24 See the Admiralty Act 1988 (Cth), and the outstanding Australian Law Reform Commission Report No 33: *Civil Admiralty Jurisdiction* (AGPS, Canberra, 1986).

25 Notionally, because the last vestiges of the Imperial registration system seem to have already disappeared in 1988, when the United Kingdom redefined its registration provisions in recognition of the fact that the Imperial system had become an anachronism following the abandonment of the Commonwealth Merchant Shipping Agreement: see NJJ Gaskell "The Merchant Shipping Act 1988" [1989] LMCLQ 133.

and ensured reciprocity amongst Commonwealth members.[26] And, of course, retention of Imperial statutes and concepts is not unique to maritime law: several other areas of our contract and commercial laws still utilise a conceptual vocabulary which was framed in the previous century.

However, while enough antique trappings remain to impart a "sense ... of romance and of the exotic"[27] to our maritime laws, their significance as a source of continuing harmonisation should not be overstated. As the above list of examples shows, most areas of our maritime laws have undergone some reform or modernisation during the last twenty years. New Zealand, in particular, has broken with the past fairly dramatically with the Maritime Transport Act 1994, which (apart from a few transitional savings from the Shipping and Seamen Act 1952, which will be phased out within the next few years) is a thoroughly modern creature.

3.2 Importing harmony: comparative law reform

In the past, comparative law reform of New Zealand and Australian maritime laws has usually meant little more than looking to London for solutions to adopt. Even today, looking to London when reforming our maritime laws makes good sense, not least because an English transplant should, in theory, be grafted onto its Imperial stock without difficulty.

An example of recent comparative law reform in New Zealand and Australian maritime laws involving an English model, is the adoption of new rules relating to transfer of rights and liabilities under bills of lading and other shipping documents. As mentioned above, the Antipodean bills of lading statutes were modelled on the Bills of Lading Act 1855 (UK), legislation which had long since outlived its usefulness. The United Kingdom repealed the Bills of Lading Act with its enactment of the Carriage of Goods by Sea Act 1992 (UK). New Zealand has incorporated most of the provisions of the 1992 UK Act into the Mercantile Law Amendment Act 1994. Australia is likely to adopt similar provisions in the near future.[28]

This common adoption of the English Carriage of Goods by Sea Act regime should largely preserve uniformity between the jurisdictions, as well as modernise the law relating to bills of lading and other shipping documents. It also illustrates, however, the obvious weaknesses of parallel comparative law reform as a harmonisation method – unless New Zealand and Australia adopt the same foreign statute without alteration, or at least co-ordinate a joint law reform exercise, there is potential for unnecessary divergence.

In this case, New Zealand redrafted and reordered some of the sections of the 1992 UK Act, and failed to adopt an equivalent provision to section 4 of the UK Act, which finally did away with the rule in *Grant v Norway*.[29] I believe that the proposed Australian legislation adopting the UK Act

26 See *General Bills Ltd v The Ship "Betty Ott"* [1990] 3 NZLR 715 (HC), 722, per Ellis J: "The Imperial [ship registration] legislation is reflected in most if not all Commonwealth legislation and provides a uniform and international system of registration and registered mortgages. It would therefore fly in the face of the overall system if a mortgage registered in one Commonwealth country should be treated differently in another Commonwealth country on a question of priorities"; but cf *The Ship "Betty Ott" v General Bills Ltd* (CA), above note 9, 668.

27 MWD White (ed) *Australian Maritime Law* (Federation Press, Annandale, 1991), iii.

28 Waincymer, above note 16, 313.

29 (1851) 10 CB 665; see PA Myburgh "Maritime transport and marine pollution: Law reform in New Zealand" [1995] LMCLQ 167, 170; CC Nicoll "Significant carriage of goods by sea reform in New Zealand" (1995) 26 JMLC 443.

redrafts it as well, but differently, and that it includes an equivalent to section 4 of the UK Act. Such drafting variations may be a welcome potential source of income for maritime and conflicts lawyers, but they do little to advance the goal of trans-Tasman harmonisation.[30]

In future, as English maritime law inevitably becomes more Anglo-European in style and content,[31] traditional comparative law reform involving an English model will be perceived as less attractive. This is likely to result in increased emphasis being placed on the reform programmes of international and regional organisations, as a far more effective means of producing a general framework of uniform, modern maritime laws for New Zealand and Australia.

3.3 CER and the harmonisation of business laws programme

The primary objectives of the CER Agreement are:[32]

(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) to develop trade between New Zealand and Australia under conditions of free competition.

In addition to these primary issues of free trade and the "broader relationship" between the two countries, Article 22 of the CER Agreement required New Zealand and Australia to consider a number of "second generation" issues in a general Review of the CER Agreement in 1988.

The 1988 Review resulted in the signing of a Memorandum of Understanding or MOU on the harmonisation of business law, a document "noted more for its brevity than its illumination".[33] The MOU recognised the importance of "accelerating, deepening and widening" the trans-Tasman trade relationship, noted that differences in the laws and regulatory practices relating to business might impede the enhancement of that relationship, and concluded that it was desirable to implement a programme of harmonisation of business laws and regulatory practices. The MOU listed eight broad commercial law topics which were to be targeted in this programme: companies, securities and futures, competition law, consumer

30 Two further points should perhaps be noted. First, the apparent harmonisation achieved by New Zealand and Australia's adoption of the UK Act may be undermined in some instances by conflict of laws problems; conflicts issues are not expressly addressed in the UK Act, or in its Antipodean counterparts: on this, see TK Sing "Conflict of laws implications of the Carriage of Goods by Sea Act 1992" [1994] LMCLQ 280. Secondly, in New Zealand the Contracts (Privity) Act 1982 offers an alternative means by which rights and obligations under a bill of lading or other shipping document can be transferred to third parties in certain instances: see Myburgh, above note 29, 170-171; Nicoll, above note 29, 456-459.

31 Cf BH Giles "The development of international commercial arbitration through the UNIDROIT Principles of International Commercial Contracts: a commentary" (The Changing Law of Contract: Sixth Annual Journal of Contract Law Conference, Auckland, 1995) para 2: "[A]s the degree of harmonisation between Britain and Europe has progressed there is no longer the same 'common heritage' as between English law and New Zealand law. Cultural differences and the marriage of the common law precedent system with the civil law heritage has changed the nature of English law as we view it."

32 CER Agreement, above note 3, art 1.

33 Farmer in Vautier et al, above note 8, 46; also see Farrar, above note 4, 442 et seq; Palmer, above note 7, 228-230; I Barker and BA Beaumont "Trans-Tasman legal relations – some recent and future developments" (1992) 66 Australian LJ 566 et seq; C Elliott "CER at the cross-roads: business law harmonisation – where to now?" [1995] NZLJ 47, 48 et seq.

protection, copyright law, commercial arbitration, international sale of goods and services, mutual assistance between regulatory agencies in the administration and enforcement of business laws, and recognition and reciprocal enforcement of judgments in commercial matters.

In spite of a history of concern over trans-Tasman freight costs which stretched back well before CER,[34] heated debate over the maritime unions' accord which effectively reserved trans-Tasman trade for New Zealand and Australian crewed vessels,[35] and repeated statements from business lobby groups that reform of trans-Tasman shipping services was vital to the continued success of CER,[36] this contentious topic was not included in the MOU's harmonisation programme. Instead, a joint communique was issued, stating that it was vital to pursue measures which would reduce trans-Tasman shipping costs, particularly to complement the elimination of trade barriers agreed to in the 1988 Review.[37] Little tangible progress resulted.

The assessment of progress in free trade at the 1988 Review led to the adoption of three CER Protocols. The first, on Acceleration of Free Trade in Goods, resulted in free trade in goods originating in one country and imported into the other, and the abolition of anti-dumping measures, as from 1 July 1990 – five years ahead of the schedule contemplated in article 22(3)(d).[38] The second Protocol dealt with trade in services between New Zealand and Australia, which guaranteed mutually favourable access rights to each other's markets. Both countries excluded aviation and coastal shipping from the ambit of the Protocol, however, and New Zealand excluded stevedoring services.[39] The third Protocol dealt with harmonisation and co-operation on quarantine administrative procedures.

34 "Transport across the Tasman has been the subject of frequent study and accusation – descriptions such as 'the dearest stretch of water in the world' spring easily to mind": KD Williams "Regulations a problem" (ANZBC Conference, CER: The Way Ahead, 1985) 11. For the debate, see generally Bureau of Transport Economics, Australia/Ministry of Transport, New Zealand Trans-Tasman Shipping (AGPS, Canberra, 1980); Australia-New Zealand Businessmen's Council Ltd Trans Tasman Freight and Shipping Services (Canberra, 1980); JN Keegan "Sea Transport – present issues in perspective", D Morgan "Sea transport: a trade union viewpoint", P Geraghty "Sea transport: issues for the 1980s", SP Jennings "Industrial relations and trans-Tasman shipping" in R & A Burnett (ed) Australia-New Zealand Economic Relations – issues for the 1980s (ANU, Canberra, 1981); C Williams New Zealand transport policy and Closer Economic Relations with Australia (Institute of Policy Studies, Wellington, 1985), Chapter 4; Bureau of Transport Economics, Australia/Ministry of Transport, New Zealand Review of Trans-Tasman shipping (AGPS, Canberra, 1987); D Trebeck & P Barnard "Ports and trans-Tasman shipping" in Vautier et al, above note 8, 191-192; Swan Consultants Reforming Trans-Tasman shipping (Canberra, 1992).

35 For the test of the maritime unions' accord, see Burnett, above note 34, 102-103; for a history of the accord and discussion of its legal status, see Trebeck & Barnard in Vautier et al, above note 8, 204-206.

36 See, e.g., ANZBC Conference Report *CER: Towards one market* [1989] International Marketing Journal, 22-28; "CER working well and should be extended: Business Councils" Australian Financial Review, 10 November 1986; "Transport inefficiencies seen as major CER problem" Reuters, 4 November 1988.

37 New Zealand Ministry of External Relations and Trade *Australia – New Zealand Closer Economic Relations*, Information Bulletin No 25, 1989, 11; C MacLennan "ANZAC partners in economic two-step" National Business Review, 22 February 1990, 8.

38 This date was largely symbolic, however, as most trade barriers had already been dismantled. See Palmer, above note 7, 227; J Waincymer "International Trade and Investment" [1990] Australian Business LR 267; Barker & Beaumont, above note 33, 567; MacLennan, above note 37, 8.

39 See R Burnett "ANZCERTA Protocol on Trade in Services between Australia and New Zealand" [1988] Australian Current Law 38081-38084; Palmer, above note 7, 227; MacLennan, above note 37, 8.

The 1990 Review broadened the scope of CER yet further, with the two Governments committing themselves to a review of the trade in services Protocol and to discussions on further liberalisation of aviation. In May 1990 the New Zealand and Australian Ministers of Transport discussed trans-Tasman shipping, but no agreement was reached. The joint communique issued in July after the Prime Ministerial review included a commitment to "continue to assess costs, freight rates and levels of service of trans-Tasman shipping to determine what further measures may be necessary to improve efficiency and competition in the trade".[40] In the same year, the MOU Steering Committee of Officials reported back on the progress of the harmonisation programme, with recommendations for specific follow-up action or monitoring of developments.

The 1992 Review, by contrast, was a more tightly focused, cautious and pragmatic assessment of progress so far.[41] The two Governments agreed to work towards the full integration of aviation markets, to harmonise customs and quarantine regulations, to achieve more efficient trans-Tasman shipping, and to recognise mutual standards and occupational qualifications. Australia agreed to bring construction, engineering and banking services under the Agreement, while New Zealand agreed that it would remove stevedoring and specified aspects of broadcasting and airways services from its exempt list.[42] Once again, however, the issue of the maritime accord was effectively sidestepped.

Since 1992, due to several well-known political and economic factors, the pace of reform under CER has, depending on one's perspective, either become hopelessly bogged down, or reached "a natural plateau after breakneck progress".[43] In the meanwhile, New Zealand has unilaterally made the running, by comprehensively deregulating its waterfront,[44] paring down regulation and state protection in the area of employment of New Zealand seafarers to the absolute minimum required by New Zealand's existing international obligations under relevant ILO Conventions,[45] and abolishing cabotage with the "transit option" in section 198 of the Maritime Transport Act 1994, which allows foreign transiting vessels to carry domestic cargo and passengers on the New Zealand coast.[46] Australia has

40 Trebeck & Barnard in Vautier et al, above note 8, 211.

41 PJ Lloyd *The future of CER: a single market for Australia and New Zealand* (Institute of Policy Studies, Wellington, 1991) 16-17; J Gray "Government to talk to New Zealand on trans-Tasman shipping cartel" Australian Financial Review, 4 April 1991, 5; D Barber "Trans-Tasman trade deal coming up for review" National Business Review, 12 April 1991, 19; "Foreign shippers await decision" National Business Review, 3 April 1992, 36; J Gray "First wave of reforms, but there's a lot that needs to be achieved" Australian Financial Review, 2 March 1992, 31.

42 "Tax called top priority for CER discussions" New Zealand Herald, 19 May 1993; Elliott, above note 33, 49.

43 G Ansley "Australians begin to question value of CER", New Zealand Herald, 2 October 1995, 7; also see Small, above note 18, 30.

44 For an overview and comparison of waterfront reform in New Zealand and Australia, see Trebeck & Barnard in Vautier et al, above note 8, 192-204.

45 See the Ministry of Transport *Review*, above note 10, 57: "labour law, not shipping law, should be the primary arbiter of seafaring employment arrangements."

46 For a brief summary of the coastal shipping debate, see the New Zealand House of Representatives *Report of the Transport Committee on the Maritime Transport Bill* (Wellington, 1994) 16-24. Also see the New Zealand Business Roundtable *Liberalisation of coastal shipping* – submission to the MOT in response to *A new course for coastal shipping?* (Wellington, 1990); the New Zealand Seafarer's Union *Submissions on Transport Law Reform Bill 1993*, para 1.1: "[W]e would support the coast being reserved for NZ and Australian vessels under a joint cabotage, negotiated within the CER framework, applying to both the Australian and New Zealand coasts"; "Coastal trade controversy" National Business Review, 12 November 1993, 43; RY Cavana *Coastal shipping*

not been prepared to make a commitment to such swift and extreme liberalisation; nor is it likely to do so, unless there is a change in the Australian political scene.

Given that New Zealand and Australian maritime laws have not been included in the MOU's harmonisation of business laws programme, and that CER has resulted in "much talk but comparatively little action, especially on the Australian side"[47] in respect of trans-Tasman shipping reform, a disciple of deregulation might be forgiven for concluding that CER is completely irrelevant.

Such a conclusion would, however, ignore the fact that CER has played a vital harmonising role in respect of a number of other legal issues which impact on maritime law: international sale of goods, commercial arbitration, competition law and reciprocal enforcement of judgments, to name but a few.

In addition, the principles and objectives of CER and the harmonisation programme have influenced New Zealand's decision to bring several of its maritime law measures into line with existing Australian statutes. So, for example, in the context of New Zealand's adoption of the Hague-Visby Rules in the Maritime Transport Act 1994, the Ministry of Transport noted that "Australian policy in this respect is pertinent to New Zealand, not only because CER commerce is our largest bilateral trade flow but also because of the moves being made to harmonise laws affecting trans-Tasman business."[48]

Another example of relatively recent New Zealand maritime law reform, the Ship Registration Act 1992, would, at first blush, also seem to have been inspired by the ideal of trans-Tasman harmonisation. The Ship Registration Act 1992 is a textbook example of replication of laws – except for a few drafting and structural differences, it is largely a reprint of the Shipping Registration Act 1981 (Cth).[49] However, no reference was made to the objectives of CER and harmonisation of laws in the Parliamentary Debates on the Ship Registration Bill, and its subject matter is not exactly an obvious topic for trans-Tasman harmonisation. In fact, as a submission to the Select Committee on the Ship Registration Bill argued, the new regime could be seen as representing a step backwards, when compared with the old uniform Commonwealth system of registration:[50]

> The Committee might think that because the Bill largely follows the structure and wording of the Shipping Registration Act 1981 (Australia), its enactment will contribute to harmonisation of trans-Tasman legislation in accordance with the broad thrust of ANZCERTA. Such an assumption would be misconceived. Essentially, were New Zealand to enact a

policy in New Zealand: economy wide implications (Victoria University of Wellington, Wellington, 1993); RY Cavana *Policy issues relating to coastal and international shipping in New Zealand* (Victoria University of Wellington, Wellington, 1995).

47 Trebeck & Barnard in Vautier et al, above note 8, 189.

48 See Ministry of Transport *Review*, above note 10, 82.

49 See generally PA Myburgh "The New Zealand Ship Registration Act 1992" [1993] LMCLQ 444. While the Australian Act provides for the creation of a single Australian Register of Ships (s 56), and allows for the preservation of State and Territory legislation providing for the recording or registration of ships where this is "for a purpose other than the establishment of title, the transfer of title, the registration of a mortgage, the transfer of a mortgage or the grant of nationality in relation to a ship" (s 79), the New Zealand statute creates a New Zealand Register of Ships with two Parts, A and B (s 65). The difference is more apparent than real, however: Part A is essentially an equivalent of the Australian Register of Ships, whereas Part B fulfils functions comparable to recording or registration under relevant Australian State or Territory laws.

50 J Gresson *Submissions to the Select Committee on the Ship Registration Bill*, 1992, para 1.11.

registration regime along the lines of the Australian model, inter-play between the two jurisdictions would be more restricted. Each of the two trans-Tasman trading partners would, in effect be drawing down the shutters and compelling their own citizens to register their ships in their own jurisdiction, with no degree of mutual recognition between the two quite discrete regimes. ... Rather than pursuing a change to the New Zealand regime, energies might be better directed at encouraging the Australian authorities to loosen their regime, if only to the extent of allowing Australians who can satisfy New Zealand ownership criteria to register their ships in New Zealand.

The CER process, and its associated harmonisation programme, obviously has some part to play in stimulating convergence and co-operation in New Zealand and Australian maritime laws. However, its harmonising role has been, and is likely to continue to be, considerably less significant than that of international initiatives promoting the multilateral harmonisation of maritime laws.[51]

3.4 Globalisation of maritime laws

International institutions, international treaties and international commercial customs have had a massive impact on domestic commercial and trade laws during the period since World War II. These institutions and instruments have been so successful in translating different jurisdictions' divergent legal concepts and practices into an international commercial lingua franca that it has, once again, become fashionable to talk about the evolution of an identifiable body of transnational law merchant; a new lex mercatoria.[52]

Given these global developments, it is hardly surprising that much of the convergence in New Zealand and Australian maritime law and related areas seems to be either directly attributable to, or at least facilitated by, the common adoption and utilisation of international treaties and international commercial customs produced by the likes of the CMI, the ICC, UNCITRAL, UNIDROIT and the IMO.[53]

The following is a list of only some of the more significant examples of the harmonisation achieved through domestic implementation of international Conventions, or model laws, or by voluntary adoption of international commercial customs by individual merchants:

- *Carriage of goods by sea*

  Both jurisdictions have adopted the Hague-Visby Rules and SDR Protocol. Australia took the lead here, with the enactment of the Carriage of Goods by Sea Act 1991 (Cth).[54] New Zealand, after a minor hiccup, followed suit in 1995.[55]

51 The MOU Steering Committee acknowledged in its 1990 Report, above note 4, para 4.05, that harmonisation "of the business laws of the two countries ... needs to take account of moves towards the multilateral harmonisation of many commercial laws, including those under the auspices of the United Nations Commission on International Trade Law ('UNCITRAL') and other international organisations".

52 See, e.g., CM Schmitthoff "The unification of international trade law" in C-J Cheng (ed) *Clive M Schmitthoff's Select Essays on International Trade Law* (Martinus Nijhoff, Deventer, 1988) 220; G Shapira "UNCITRAL and its work – harmonisation and unification of international trade law" [1992] NZLJ 309; A Rosett "Unification, harmonization, restatement, codification, and reform in international commercial law" (1992) 40 American Journal of Comparative Law 683; J Waincymer, above note 16, 298 and articles cited at 298, note 2, 334, notes 107-109.

53 This is, of course, true of many other areas of international commercial law: see e.g. Elliott, above note 33, 47, in respect of intellectual property.

54 See Part 2, and Schedule 1 of the Carriage of Goods by Sea Act 1991 (Cth).

55 See the Maritime Transport Act 1994, s 209, and Schedule 5. There was, however, a rather unfortunate hiatus between 1 February 1995, when the Maritime Transport Act came into effect,

There is, however, some potential for divergence in this area, in that the Australian Act provides for deferred implementation of the Hamburg Rules.[56] Despite predictions that New Zealand would also adopt this "two-tier" approach,[57] the Maritime Transport Act has settled for the comparative safety of the Hague-Visby Rules, and does not even mention the Hamburg Rules. However, the Australian Government has shelved the issue of adopting the Hamburg Rules until 1997. Unless the major maritime jurisdictions develop an enthusiasm for the Hamburg Rules within the next two years, their adoption by Australia seems unlikely.[58]

- *Maritime collisions and safety at sea*

  New Zealand and Australia are signatories to the Convention on the International Regulations for Preventing Collisions at Sea 1972, and have given domestic effect to the Collision Regulations.[59] Both countries apply an apportionment of liability rule in respect of collisions which derives from the Brussels International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels 1910.[60] Both have given domestic effect to the key safety Conventions, such as the International Convention for the Safety of Life at Sea 1974 (SOLAS 74), and the International Convention on Load Lines 1966.[61]

- *Limitation of liability*

  Both countries have given domestic effect to the Convention on Limitation of Liability for Maritime Claims 1976.[62]

repealing the Hague Rules regime of the Sea Carriage of Goods Act 1940, and 20 March 1995, when New Zealand's ratification of the Hague-Visby regime became effective: see Myburgh, above note 29; Nicoll, above note 29; C Spillane *The Maritime Transport Act 1994* (1995) 7 Auckland University LR 1087.

56 See s 2, Part 3 and Schedule 2 of the Carriage of Goods by Sea Act. Canada has adopted a broadly similar approach to the adoption of the Hague-Visby and Hamburg Rules in the Carriage of Goods by Water Act (COGWA) 1993. See HM Kindred "Goodbye to the Hague Rules: will the new Carriage of Goods by Water Act make a difference?" (1995) 24 Canadian Business LJ 404, 405: "Ultimately it was decided to take up the Hague/Visby Rules now and hold the Hamburg Rules at the ready for the future. Thus, the form of the new COGWA is curious, even unique."

57 See Ministry of Transport *Review*, above note 10, 82; SM Thompson "The Hamburg Rules: should they be adopted in Australia and New Zealand?" (1992) 4 Bond LR 168, 179-180; and cf Ministry of Transport *Towards a New Zealand shipping policy* (Wellington, 1983) 116.

58 See M Davies "The Hamburg Rules: what happens in 1997?" (1995) 23 Australian Business LR 235, who warns of the possibility of adoption of the Hamburg Rules by default, with s 2 of the Carriage of Goods by Sea Act triggering their automatic implementation on 19 October 1997. By comparison, the Canadian COGWA 1993 does not contain a trigger provision, but merely requires the Canadian Minister of Transport to report on implementation of the Hamburg Rules to Parliament in 1999, and every five years after that: see Kindred, above note 56, 405.

59 New Zealand: see the Maritime Transport Act 1994, ss 168-170, and the Shipping (Distress Signals and Prevention of Collisions) Regulations 1988, which have been carried over from the Shipping and Seamen Act 1952 and will be replaced by maritime rules; Australia: see the Navigation Act 1912 (Cth), ss 258, 425, and regulations promulgated thereunder (see Halsbury's Laws of Australia, vol 17 (Butterworths, North Ryde, 1994) para 270-1305 for details of the relevant regulations, State and Territory Acts).

60 New Zealand: see the Maritime Transport Act 1994, s 94; Australia: see the Navigation Act 1912 (Cth), s 259.

61 New Zealand: see the Maritime Transport Act 1994, Parts X-XII; Australia: see the Navigation Act 1912 (Cth), Part IV.

62 New Zealand: Maritime Transport Act 1994, Part VII; Australia: Limitation of Liability for Maritime Claims Act 1989 (Cth). Also see *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 131 ALR 465; *Barde AS v ABB Power Systems* (1995) 132 ALR 358, 370.

- *Marine pollution*

This area, which has been standardised by a plethora of international Conventions, provides an excellent example of internationalisation of maritime laws. Relevant Conventions include the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention),[63] the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention),[64] the International Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter 1972 (the London Dumping Convention),[65] the International Convention for the Prevention of Pollution from Ships 1973 and its 1978 Protocol (MARPOL 73/78),[66] and the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (the Basel Convention).[67]

Australia has been considerably more proactive than New Zealand in its adoption and implementation of international marine pollution Conventions.[68] New Zealand's lack of action in this area over the last twenty years is inexplicable,[69] given its long, vulnerable coastline, its professed reputation as a world leader in environmental matters, and its economic reliance on tourism. The major cause of divergence in this area should at least be resolved once New Zealand gives domestic effect to MARPOL 73/78.

- *Salvage*

Both countries have indicated their intention to implement the provisions of the International Convention on Salvage 1989, which will enter into force on 14 July 1996. New Zealand has already enacted

63 New Zealand: currently given domestic effect in the Marine Pollution Act 1974, Part III; to be covered by the Maritime Transport Act 1994, Part XX, which is not yet in force; Australia: Protection of the Sea (Powers of Intervention) Act 1981 (Cth).

64 New Zealand: currently Marine Pollution Act 1974, Part IV; to be covered by the Maritime Transport Act, Part XXV, which is not yet in force; Australia: Protection of the Sea (Civil Liability) Act 1981 (Cth).

65 New Zealand: currently Marine Pollution Act 1974, Part II; to be covered by the Maritime Transport Act 1994, Part XXI, which is not yet in force; Australia: Environment Protection (Sea Dumping) Act 1981 (Cth).

66 In New Zealand, the Marine Pollution Act 1974 still gives effect to the International Convention for the Prevention of Pollution by Sea Oil 1954 (OILPOL 54); MARPOL 73/78 will be given domestic effect by Part XIX of the Maritime Transport Act 1994, which is not yet in force. Marine protection rules which will give domestic effect to Annexes I-V of MARPOL are currently being drafted by the Maritime Safety Authority. In Australia, see the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth).

67 New Zealand: Customs Act 1966; Import Control (Wastes) Conditional Prohibition Order 1994; Australia: Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth).

68 However, both Australia and New Zealand have delayed giving domestic effect to the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 (the Fund Convention). The Convention is still not in force in New Zealand; Australia has given limited domestic effect to the Convention as from 8 January 1995: see the Protection of the Sea (Oil Pollution Compenstation Fund) Act 1993 (Cth); Gov Gaz (Cth) S462/1994.

69 Although MWD White "Oil pollution in the Australian and New Zealand region" (1993) 67 Australian LJ 191, 200 does suggest a "reason closely related to indolence, or some such similar quality".

provisions which will give domestic effect to the Convention, but they are not yet in force.[70] Australia has enacted similar legislation.[71]

Nevertheless, there is significant potential for divergence here, because of differences in the proposed domestic implementation of the Salvage Convention in the two jurisdictions. For example, it would appear that Australia intends to give the Common Understanding regarding the interpretation of Articles 13 and 14 of the Salvage Convention the force of law. New Zealand, on the other hand, has not included the Common Understanding in the Convention text in Schedule 6 of the Maritime Transport Act 1994.[72] This omission will inevitably complicate the courts' task of interpreting the Convention.[73] Australia also appears to intend to exercise its Article 30 right of reservation to exclude the Salvage Convention from applying to:[74]

> ... any salvage operation:
> (a) that takes place in inland waters and that involves vessels all of which are of inland navigation; or
> (b) that takes place in inland waters and does not involve a vessel; or
> (c) to the extent that it involves property:
> (i) that is maritime cultural property of prehistoric, archaeological or historic interest; and
> (ii) that is situated on the seabed.

There is nothing in Part XVII of the Maritime Transport Act 1994, as currently drafted, which suggests that New Zealand intends to exercise its Article 30 right of reservation, despite the fact that a failure to do so, at least in respect of maritime cultural property, would create conflicts with other statutory regimes, such as the Historic Places Act 1993 or the Antiquities Act 1975. This issue, and several other policy issues surrounding domestic implementation of the 1989 Convention, will hopefully receive further consideration before Part XVII of the Maritime Transport Act 1994 comes into force.

The widespread voluntary use of the Lloyd's Open forum (LOF) in salvage situations has also greatly stimulated harmonisation in this area. The current version of LOF includes the 1989 Convention provisions.

70 See the Maritime Transport Act, Part XVII, read with Schedule 6.

71 See the Transport Legislation Amendment Act 1995 (Cth), s 2(8), 2(10), Schedule 1, Part H, 37-54, 58 (Lexis transcript).

72 The Maritime Transport Act 1994, s 216, provides that the "provisions of the Convention shall have the force of law in New Zealand". Section 215 defines "Convention" as meaning "the International Convention on Salvage, 1989, *as set out in the Sixth Schedule to this Act*" (emphasis added). And cf N Gaskell "The enactment of the 1989 Salvage Convention in English law: policy issues" [1990] LMCLQ 352; the Merchant Shipping (Salvage and Pollution) Act 1994 (UK); the Merchant Shipping Act 1995 (UK).

73 See KJ Keith "The changing law of contract: avoiding problems in conflict of laws" Journal of Contract Law Conference, Auckland, 1995, pp 9-10, for a discussion of some other instances where imperfect or incomplete domestic implementation of international Conventions has caused unnecessary difficulties.

74 The Transport Legislation Amendment Act 1995 (Cth), Schedule 1, Part H, item 43 (Lexis transcript).

- *Trade finance*

  The Uniform Customs and Practice for Documentary Credits (UCP)[75] promulgated by the ICC is almost universally incorporated into documentary credits, and provides an outstanding example of successful harmonisation of international commercial law through the voluntary adoption of commercial customs.

- *General average*

  Voluntary incorporation of the York-Antwerp Rules into charter-parties and bills of lading is very common.

- *International sales contracts*

  Both Australia and New Zealand have adopted the UN Convention on the International Sale of Goods (CISG, or the Vienna Sales Convention),[76] and there is widespread voluntary use of the ICC Incoterms in international contracts for sale of goods carried by sea.

- *Arbitration*

  Both countries have given domestic effect to the major conventions on international commercial arbitration. Australia has already adopted the UNCITRAL Model Law on Arbitration. New Zealand intends to do so.[77]

As the above list (which is by no means exhaustive) illustrates, international instruments and customs have exerted an extremely effective and comprehensive harmonising influence on New Zealand and Australian maritime laws. The above discussion also shows up the Achilles' heel of harmonisation through international instruments – its effectiveness is dependent on the quality of the domestic implementation process. If one country lags behind the other in giving domestic effect to key Conventions, or fails to keep the process up to date by giving effect to the latest relevant Protocols, or if different methods of domestic implementation are used, the results are likely to be uneven. Increasingly, there does seem to be a realisation that, in most cases, the less the Convention text is tinkered with, the better.[78] However, problems are still likely to arise in respect of some international instruments, such as the 1989 Salvage Convention, which demand rather more sophisticated techniques of domestic implementation.

75 See, e.g., EP Ellinger "The Uniform Customs and Practice for Documentary Credits – the 1993 Revision" [1994] LMCLQ 377; RP Buckley "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" (1995) 6 Journal of Banking Law & Practice 77.

76 In New Zealand, see the Sale of Goods (United Nations Convention Act 1994) which came into effect on 1 October 1995; in Australia, see the Sale of goods (Vienna Convention) Act 1986 (ACT), (NSW), (Qld), (SA), (WA); Sale of Goods (Vienna Convention) Act 1987 (NT), (Tas), (Vic). Also see Farrar, above note 4, 459-460; B Nicholas "The Vienna Convention on International Sales Law" (1989) 105 LQR 201; the New Zealand Law Commission *Report 23 – The UN Convention on Contracts for the International Sale of Goods: New Zealand's proposed acceptance* (Wellington, 1992); Waincymer, above note 16, 312.

77 See the International Arbitration Amendment Act 1989 (Cth), and see generally the New Zealand Law Commission *Report 20 – Arbitration* (Wellington, 1991) which recommends the adoption of a new Arbitration Act based on the UNCITRAL Model Law.

78 See Keith, above note 73, 9-11.

IV. The Future

Progress under CER is likely to remain slow in the immediate future. Some of the factors contributing to this trend are the continuing fallout from Australia's abrupt withdrawal from the aviation accord; increased sensitivities concerning issues of sovereignty (the real "lion in the path"); and an increased preoccupation with other regional and international trade relationships and structures. In addition, the introduction of MMP is likely to have a significant impact on New Zealand's law-making process. In 1989, Farrar compared "the complexities of Australian federalism ... which have resulted in more conservative law-making" with "the radicalism of some New Zealand legislation, facilitated by the almost indecent speed of the legislative process under a unicameral Parliament operating in a unitary system", and concluded that "New Zealand has been much freer to experiment with legislation than Australia".[79] Depending on the composition of New Zealand's first MMP government, that speed, radicalism and experimentation may be considerably curbed, particularly with regard to highly controversial matters like cabotage and maritime industrial relations.

The extent and timeframe of further trans-Tasman shipping reform essentially depends on political variables on either side of the Tasman. Unless the political climate changes in Australia, the official position in respect of the maritime unions' accord is likely to remain non-committal, and the issue is, therefore, likely to remain unresolved.[80] Even if the political climate were to favour the enforcement of further coastal liberalisation in both countries, the most radical reform package that could be expected in the immediate future is the complete abolition of cabotage in respect of trans-Tasman and coastal shipping in both countries. The next logical step, that of instituting a common coast policy, in terms of which trans-Tasman shipping would be treated as domestic, rather than international carriage, is inextricably linked to more complex customs, quarantine, immigration, security, and ultimately sovereignty issues, and must therefore be some way off.

If our imagination and combined political will ever brings us as far as a common coast, agreement would presumably have to be reached on a uniform carriage regime for all trans-Tasman shipping, as well as coastal shipping on both sides of the Tasman.[81] Integration to this extent would, of course, raise further interesting possibilities regarding the adoption of a common ship register and flag, the rationalisation and integration of trans-Tasman admiralty jurisdiction and procedure, and the establishment of a trans-Tasman tribunal dealing with shipping issues. However, all of

79 Farrar, above note 4, 436.

80 If the accord is put to the test and this results in the "blacking" of certain ships, aggrieved parties may have remedies under the secondary boycott provisions in s 45D of the Trade Practices Act 1974 (Cth), but the position is not entirely straightforward: see generally Barker & Beaumont, above note 33, 575-576; Trebeck & Barnard in Vautier et al, above note 8, 204-206. At times, there have been suggestions that New Zealand would amend the Commerce Act 1986 to allow for equivalent remedies in New Zealand law, but differences in philosophy and implementation of competition law and policy would seem to have precluded this.

81 At present, all New Zealand domestic carriage is governed by the Carriage of Goods Act 1979. In Australia, there are varying regimes for intra-State sea carriage (see the Sea Carriage of Goods (State) Act 1930 (Qld), the Sea-Carriage of Goods (State) Act 1921 (NSW), the Water Carriage Act 1918 (Tas), and the Sea-Carriage of Goods Act 1909 (WA)), and the Hague-Visby Rules apply to inter-State sea carriage: see the Carriage of Goods by Sea Act 1991 (Cth), ss 10, 11.

these possibilities are likely to remain pipedreams for now. A "trans-Tasman *Anschluss*"[82] is not on the cards in the foreseeable future.

In the meanwhile, there are a number of relatively uncontroversial areas of New Zealand and Australian maritime law which could usefully be harmonised or modernised, such as admiralty jurisdiction and procedure, marine insurance, pilotage law and harbours legislation. It goes without saying that the Maritime Law Association of Australia and New Zealand should continue to play an active role in facilitating this type of reform.

However, I believe that we should in future channel much more of our energies and resources into the work of international institutions responsible for developing and reforming international maritime law treaties, customs or rules. The Maritime Law Association already makes an important contribution to the work of the CMI. Australia is also actively involved in most of the relevant international institutions. New Zealand, however, has only a limited involvement in the work of the IMO, and is currently not involved at all in the programmes of other international bodies like UNCITRAL and UNIDROIT. It might be argued that, as a small country, New Zealand cannot afford such involvement. However, given the legal and economic significance of the harmonisation and unification initiatives of these international institutions, the short answer may simply be that we cannot afford *not* to be involved in this process.[83]

82 W Pengilley "On trans-Tasman banter and 'things CER' " [1990] NZLJ 199, 200.

83 See Keith, above note 73, 11-12, who warns that New Zealand's lack of involvement "has several unfortunate consequences: missed opportunities to influence the work of those bodies (both in the setting of their agendas and the preparation of the texts), limitations of knowledge on the development of the texts, limited or delayed acceptances of the texts, technical deficiencies in the legislative implementation of the texts when they are accepted, and texts which discriminate against states which are not members of the relevant organisation or did not participate in the conference which adopted the text."