CLOSER ECONOMIC RELATIONS WITH NEW ZEALAND

and

IMPLICATIONS FOR TRADE PRACTICES AND CORPORATE LAW

Prof. Robert Baxt

Chairman, Trade Practices Commission

Proceedings of Seminar

Sponsored by

NSW Business Deregulation & Licence Reduction Unit

Trade Law Committee of the International Law Association

The talk today is one that I welcome the opportunity of delivering but I issue a caveat in relation to it. The Trade Practices Commission obviously has a very real interest in ensuring that in the context of harmonisation, especially as it reaches into the area of Trade Practices Law, we play a part in ensuring that as Governments develop guidelines in this area, that we are consulted and that our input is provided to ensure that any laws brought down are meaningful and will not create greater burdens than already exist for the business community generally.

I have chosen the area of Trade Practices Law and Company Law because I know a little bit about both. But of course the Agreement that was signed between Mr Bowen and his opposite number recently covers a wide range of commercial law and whilst I would be happy to try to deal with some of those other areas, I am afraid I cannot say very much in relation to them.

There are perhaps two reasons why it was thought appropriate to invite a representative of the Trade Practices Commission here to address you. One is that recently we handed down an important decision in an authorisation application involving the Fletcher Challenge Company which applied for authorisation to permit its acquisition of a 50% interest in Australian Newsprint Mills. The second relates to our recent visit to New Zealand.

The Fletcher Challenge matter was a fascinating one. It was one of the first things I had to deal with in the Trade Practices Commission. We were asked to consider the implications of Closer Economic Relations in the context of a very difficult matter that faced us.

Bill Coad and I recently visited New Zealand, talked to our counterparts in New Zealand, the New Zealand Commerce Commission, to work out issues which we had already picked up in our Trade Practices Commission and which no doubt they had as well, in terms of differences in approach between the two Commissions, and how we might try to rationalise and ensure that there is as close accommodation between the two Commissions as possible in dealing with matters that have a trans Tasman effect on clients, companies, etc.

In my paper I will discuss those areas where we feel that the experience and knowledge of the Trade Practices Commission might have some bearing on the way in which the law might develop.

It is important to note that the two laws, the Australian Trade Practices Act and the New Zealand Commerce Act and Fair Trading Act are very similar already. There was a clear decision made by the New Zealand Government to base its legislation on the Australian Trade Practices legislation; that was no doubt influenced to a large extent by the fact that CER was well on its way. But there are a number of differences between the two pieces of legislation, or the New Zealand package and the Australian package; I will be commenting on some of those in the context of the issues that we discussed in New Zealand during our recent visit. These may have implications with the removal of the anti-dumping laws in the two countries which will come into effect from the 1st July, 1990. This will require, in our view, some very hard thinking about amendment to the Trade Practices legislation and the Commerce Act to accommodate the problems that may arise.

It is also important to note that New Zealand is going through a very interesting and difficult time at this stage. You will all be aware of the fact that it has gone through a very massive dose of deregulation and perhaps a time has arrived now where some questions are being asked as to how far these deregulatory moves will go. Rogernomics is very powerful over there - that was clear to us in our very short visit - and we at the Trade Practices Commission have some reservations about the importation into this country of Rogernomics in dealing with some of our problems.

Joint Meetings of the Two Commissions and other Matters:

I would like to outline a little about the visit that Bill Coad and I had to New Zealand, about some of the issues that we believe are important in the context of the harmonisation of the two laws. For a start we discovered on the eve of our departure, that all the three Commissioners couldn't go. Bill Coad, Alan Asher and I planned this visit almost four months ago, (after I had spoken to the Attorney General and he had given us his blessing to go). The reason for this sudden change was that if we had all gone, there would have been no Trade Practices Commission in Australia and there would have been serious difficulties for the Government and perhaps some political embarrassment. Our Act is drafted in such a way that requires at least one Commissioner to be present in Australia at any time. Now we found when we got to New Zealand that the New Zealanders did not have the same problem. All the New Zealand Commissioners could be in Australia at the one time because they regard Australia as part of New Zealand for the purposes of their legislation, at least in the context of administration. This is a matter we have asked the Government to look at because it seems clear that there will be one or two occasions a year when it may be necessary for the Commissions to meet en block.

The next thing that we discovered in relation to our visit to New Zealand was the difference between the administration of their law and our law. Bill Coad, who has been with the Trade Practices Commission for 21 years commented on the fact that, this experience threw him back about 15 years in time, because what was happening in New Zealand reflected on what happened in Australia shortly after the introduction of the 1974 Trade Practices Act. They appear to be spending 75-80% of their time and resources in dealing with mergers. Because of the way in which the New Zealand law is drafted, every merger over a certain value, has to be notified and then the New Zealand Commission has to go through the process of either clearing or authorising the merger (in the context of the wishes of the parties). This process takes up an enormous amount of energy and resources. The Commission has 20 days to deal with the matter at first instance and then a further 80 days to deal with the matter if they feel that there are competition implications.

It was stated that this pre-notification procedure was adopted in New Zealand because they have no takeover legislation equivalent to our Companies & Securities Takeover legislation and they were concerned that without this pre-notification that there was no ability on the part of the New Zealand Government to keep track of what was happening in the takeover area.

Recently a discussion paper has been issued by the New Zealand Department of Trade and Commerce on the Commerce Act; this was a promise that was made when the Act was introduced; and there are some proposals for changes in the way in which mergers are to be dealt with in New Zealand, but these are not very major changes in the context of the overall obligations of the Commerce Commission to deal with mergers.

When we talk about harmonisation, one of the points that Bill Coad and I wanted to make clear to our New Zealand colleagues, is that we did not want that process of formal pre-notification of being introduced into Australia. We have a process - many of you would be aware of the informal clearance of mergers that might be borderline by the Trade

Practices Commission. We wish to retain this. We certainly do not want to return to the pre-1977 situation where mergers could be cleared, we are not arguing for any pre-notification procedure here. It will be interesting to see how the Governments deal with the differences in the legislation and how harmonisation is interpreted in the context of making the legislation mirror images of each other. My understanding is that they won't do so and that there may well be some differences of this kind that will remain.

Another issue that we raised with our New Zealand colleagues (and this was thrown up specifically by the Fletcher Challenge matter), was the issue of whether we could have on our Commission and visa versa, associate commissioners from the New Zealand Commission. We found it very important to get some information from New Zealand. It would have been useful to have had a New Zealand Commissioner involved in that merger.

There were arguments raised in that matter that Closer Economic Relations was a public benefit that had to be considered in the context of the merger. We would have liked to have been able to have discussed that more in greater detail with our New Zealand colleagues. They have indicated to us that there have been mergers, or authorisation matters where they have considered trans-Tasman implications where they would have liked to have had the presence of an Australian Commissioner on their Commission. What we are suggesting to the Attorney General is that he and his New Zealand colleague consider the possible appointment of all the Commissioners of each Commission as Associate Commissioners on the other Commission or alternatively, and this will be more difficult, to amend the legislation to permit joint sittings of the two Commissions in the matters that have trans Tasman implications. Those are matters that we will be pursuing.

The two Commissions decided that in the short term, (and this will be a long term benefit as well), we would appoint a joint working party to work out ways and means of ensuring that the administration of the two pieces of legislation can be harmonised as much as possible, bearing in mind that there are some differences between the two pieces of legislation. It is our aim to appoint to these working parties, practitioners and business people to assist in the work of the relevant Commissions. We believe that the community at large, the business community, the legal community and others can assist in the development of guidelines in the recognition of pitfalls and difficulties and obvious mistakes that are being made by the Commission and the Commission in New Zealand in the way in which we administer the legislation. We hope we will have a joint meeting of the working parties once a year.

Markets

We agree that we will try to hold joint meetings or annual meetings between the two Commissions. We would hold a seminar or a workshop in conjunction with that. As our first task of cooperation, we would have agreed to produce a joint paper, which would be publicly exposed, on the definition of "market". The definition of "market" is something that is obviously crucial to the operation of both pieces of legislation. I am pleased to advise that Kerryn Vautier who is one of the Commissioners in New Zealand and David Round who is an Associate Commissioner of the Australian Commission (who happens to be in New Zealand at the moment on leave), are working on the discussion paper.

In the Fletcher Challenge application for authorisation we recognised the fact that even though the two pieces of legislation and in particular, the Australian Act, defined "market" in the context of the Australian market, it was not inappropriate to look at the New Zealand market as well. Now it may well be, if someone had wished to challenge our decision, that could have been taken to the Courts but we believe we

adopted a common sense approach, one which has been welcomed, not only by the parties who applied for the authorisation, but a very large group within the community who have commented to us about the authorisation since it has been published.

The Status of the Commissions

One of the things that we discovered in New Zealand about their Commission which did surprise us a little, is the fact that the Commissions are different in the context of their independence. Now both are independent Commissions - that is clear from the legislation. But a nod is as good as a wink in many situations and of course in the Australian legislation, there are specific provision, namely sections 28 and 29 which give the Government some power in dealing with the Trade Practices Commission. The Government could issue directions for example to us to do certain things and the Government can, in certain matters, ask us to take into account - give special weight - to certain matters in the context of the particular matter that we are considering. We invited the Government to adopt that approach, for example in dealing with the question of Telecom when it consulted us as to how Telecom should be regulated. We suggested that it should be brought wholly within the operation of the Trade Practices Act in the context of the competition issues and that where appropriate (eg: Telecom applied for authorisation for a particular practice), the Government might issue directions as to what special items should be taken into account in dealing with the authorisation. We will see in due course just what implications flow from the way Telecom will be dealt with under the Law.

Another interesting thing about the New Zealand Commission is that there is no equivalent provision to our Section 28. Section 26 of the New Zealand Commerce Act is not in the same terms. It indicates to the New Zealand Commerce Commission that it should be aware of the policies of the New Zealand Government in relation to economic development, but it is different from allowing the Government to issue directions to the

Commission in dealing with specific matters. In the discussion paper to which I have referred, there is some consideration given as to whether their legislation should contain a similar provision to ours - but no conclusion is drawn.

A most interesting matter about the N.Z. Commissions is the question of the staff. The New Zealand Commission's staff are not really the Commission's staff; they are all staff of the Department; this creates a really interesting tension between the Commission and the staff. In a sense, the staff and the Commission can be working towards different goals, or at least be putting forward different views about particular issues and this creates a rather interesting problem which we believe we are lucky not to have confronting us. It may be something that cannot be dealt with and should not be dealt with in the context of harmonisation, but it is a matter that can create difficulties for the New Zealand Commerce Commission.

The discussion paper calls for submissions to be provided; we were advised by Mr Caygill, the New Zealand Minister, that he would welcome Australian input. I would encourage any of you who have experience or knowledge of the New Zealand Act to take that invitation up and to comment on the operation of the Act - those comments will be welcomed.

Changes to the Law - The Griffiths Enquiry

At the same time in Australia we have two inquiries that are proceeding in relation to the possible operation of our Act. The one that has received all the attention is the Griffiths Enquiry - the House of Representatives Committee - into Mergers and Monopolies. It has taken quite a number of submissions including submissions from us, the Law Council, the Business Council and various other groups. It will, I believe, hold a workshop shortly at which representatives of different organisations can debate with each other some of the issues that have been put forward.

But there's another inquiry going on at the moment. It has not yet held any public hearings and it probably hasn't received much publicity but I think it has a fairly significant part to play in the possible reform of our law and this ties into the possible changes to the New Zealand law, and that's the inquiry by the House of Representatives Committee into Small Business. We have made a submission to that particular House Committee and will be no doubt asked to appear before it.

One of the issues that comes up for consideration in that particular context is the protection of small business, and the issue of whether the Trade Practices legislation in both countries provides sufficient protection to small business.

Mergers

We have made it clear to the Griffith Committee that we do not wish the Trade Practices Act to be amended in relation to section 50 (that is the section dealing with mergers). We believe that the Act needs some time to settle down. In effect only two decided cases have been given on section 50 - the Ansett Avis case and now the Australian Meat Holdings case. The latter has gone on to appeal and the story that we have been told is that it will go all the way to the High Court if the unsuccessful party in the trial is not successful on appeal; the Trade Practices Commission might well take a different view if we lose the appeal. It might be some time before we get a further case on mergers and we think it is inappropriate unless there are some clear difficulties being shown with the Trade Practices Act at the moment, for that section to be amended.

The New Zealand Act is based on similar tests of dominance but as I have indicated earlier, many more mergers have to be considered by the Commerce Commission on a formal basis and it is a difficult area in which to see how we are going to harmonise the two pieces of legislation and the administration of the two Acts. I think this is an area where we will have to move very carefully and I do not believe that the business

community would welcome too much change in an area which they would see as pretty vital in allowing the natural progression of some businesses. We do however have to be careful that we do not get carried away too much by the current policy in both countries of - yes, we want to see shiny new factories, we want to see rationalisation, we want to see concentration to allow Australian and New Zealand companies to compete with companies in the international scene. There is a price to be paid for that and that price is sometimes very difficult to measure, and it's called consumer benefit and it is a matter that this Trade Practices Commission and the New Zealand Commission are very aware of, and there is quite a significant amount of pressure on us to weigh up these issues very carefully.

We indicated to our New Zealand colleagues that we do not think it is appropriate for our legislation to be amended to allow for notification. We are satisfied at this stage in the way in which parties are coming to us and seeking our advice on mergers that are close to the borderline, and we think that that is working well and there is no need for any change. Just what will happen in the long term is a more difficult matter to predict.

Authorisation and Public Benefit

In the context of mergers, and generally in the context of authorisation - and this applies, not only to mergers but also to other restrictive practices - an issue that came up in the Fletcher Challenge matter which we discussed in New Zealand and wich is relevant in the context of harmonisation, is what do we mean by "public benefit". Here we have some fascinating tensions that exist between New Zealand and Australia.

The New Zealand economy is driven very much by what is called Rogernomics or economic efficiency. If you go over there and speak to people from Government, you will see that at times this is seen as being the most important issue that should be considered by the Commission. Now the New

Zealand Commerce Commission has been criticised in the past for some of the decisions it has taken, where it has perhaps given greater weight to other issues than to economic efficiency. Deregulation is occurring at a great pace and at times there is, at least in the views of Bill Coad and myself and others to whom we have talked, insufficient attention has been given to the protection of the consumer in dealing with these particular matters.

We have taken the view that in dealing with public benefit there are a number of issues that should be taken into account and weighed against the anti-competitive detriments that may flow from a merger or an anti-competitive practice, and we would not be persuaded by arguments that it was simply thrown up on the basis "this is economically efficient". We would want that proposal tested, we would want it developed, we want it spelt out in greater detail; there may be an interesting difference here between the two Commissions if their Courts, as a result of the way in which the legislation is drafted, decide to read public benefit in that context more narrowly than perhaps we would.

The other issue in relation to public benefit is - can we consider a public benefit occurring in New Zealand when dealing with an Australian authorisation? We did not have to consider that in the Fletcher Challenge matter but it is a matter that will no doubt arise one day - a particular merger or a particular matter will throw up benefits that will occur in New Zealand and not necessarily in Australia or visa versa. How does one weigh that in determining whether to authorise the particular merger or the particular practice? This is the matter that the two Commissions will have to do some work on, and the Governments of both countries will also have to work on it.

Monopolisation or Misuse of Market Power

Perhaps the most difficult area that we will have to face up to in the next year or two, apart from the area of mergers and especially after the

1st July, 1990, is the question of section 46 and section 36 of the respective Acts. The removal of the anti-dumping legislation in the two countries will create some interesting tensions on how the two "monopolisation" sections will operate. There are matters relating to market, there are matters relating to just how you evaluate the misuse of power in markets to damage competitors or potential competitors in other markets; there will be some interesting matters relating to events that occur in New Zealand that have an impact on Australia and visa versa. It will be important for the two Governments (and they have already signalled that they are working towards this) to tackle this particular issue. There is an interesting paper in the New Zealand Discussion Paper as an appendix, (which I think is available from the Attorney General's Department as well), which deals with this issue specifically and raises some of the questions that need to be considered.

I would like to make a couple of comments in the way in which their Courts and our Courts have handled issues that arise in the monopolisation area. For a start, I think it is clear that the New Zealand Courts seem to be more inclined to give weight to policy in interpreting legislation. This is a trend that has developed over the years because of some statutory interpretation provisions in New Zealand legislation; it is interesting to compare the decision of Mr Justice Barker - ARA vs Auckland Airport Limited - decided in 1986 and the decision in the Federal Court in the Queensland Wire case.

In the ARA case, Mr Justice Barker held that the essential facilities doctrine should be recognised as part of the Law. This doctrine deals with the issue that where you have a scarcity of resources as a result of someone controlling a particular product (or in this case, the airport was controlled in terms of people being able to operate car rental systems from the airport), is there a potential breach of the monopolisation section where that person refuses to supply, etc the scarce product.

In the Queensland Wire case, we had a situation where BHP controlled the supply of feedstock in relation to the production of a product, and refused to deal with Queensland Wire or at least only on very unfavourable terms. The Full Federal Court dismissed the essential services doctrine - very, very quickly. I perceive that the New Zealand Courts might well interpret their monopolisation section in a different way to the way we will interpret ours including a recognition of that doctrine.

This might create some interesting difficulties in handling the problems that will arise out of the possible misuse of power in the anti-dumping situation. I foresee some interesting times ahead, not only for the Trade Practices Commission and the Commerce Commission, but for any of you who practice in this particular area. Already I note that the business community has expressed some concern as to what will replace the anti-dumping legislation in the context of the Trade Practices Act - will there be sufficient protection in the Trade Practices Act to deal with these issues.

The courts

I want to turn next to the question of the Courts. There is a very real difference between the New Zealand scene and the Australian scene in this regard. Apart from the approach to interpretation which I mentioned earlier, the New Zealand Court can add to the High Court in consideration of monopolies matters, or other matters listed in section 78 of the New Zealand Commerce Act, lay members. That's an interesting scenario.

The Canadian legislation by the way creates a Court which is a specialist court to deal with these matters of economic law and I am reminded of the fact that Sir Garfield Barwick, when he was drafting the first modern Australian Trade Practices Act, suggested that it would be very dangerous

to allow lawyers too much room to play in dealing with economic law. We have already signalled to the Griffith Committee that we are concerned about the way in which Courts are handling some of these Trade Practices matters. We worry about the fact that judges trained in the traditional fashion perhaps may not deal adequately with economic issues; this is an economic law that we are dealing with. In a symposium that was run at the Australian National University in 1975 on the Trade Practices Act, there were warnings issued by a number of people, including Mr Justice Deane - he was then Mr Deane QC - about the time that it would take for lawyers to come to grips with economic issues and the interpretation of the Act - he talked about a generation before this would become so. Sir Richard Eggleston, the first President of the Trade Practices Tribunal issued a similar warning. Maureen Brunt's paper which was the basis of the discussion, also expressed some concerns in relation to that issue. This is a concern that we have commented on publicly and one that I think will not go away in the short term. The ability to add specialists in the New Zealand Courts is something that we will watch with a great deal of interest just to see how it operates. It may well be a solution if we can get around the Constitutional issues that might be appropriate for Australia as well.

Consumer Protection

I next deal briefly with consumer protection issues. There is no section 52A in the New Zealand Fair Trading Act - that is the unconscionable conduct provision. Generally speaking there has been a lack of attention to the consumer protection area in New Zealand to date. One of these things that we learnt in New Zealand is that the New Zealand Commission in having so much of its time taken up in the administration of the merger provisions that they had to appoint a special Associate Commissioner - a partner in one of the leading firms over there - to be responsible for enforcement of the consumer protection provisions.

We believe that the move by Governments both there and here, (indeed at all levels throughout Australia), to deregulate business activities, has been motivated in part by pressures to restrain public sector expenditure and resource use. They want of course to ensure that we have greater rationalisation, more efficient industry and an ability to compete effectively. The elimination or simplification of many of these industries or product specific regulations, together with raised barriers to competition associated with the structural change that is occurring, can reduce unnecessary private sector costs and provide business with the freedom and incentive to innovate. But at the same time, we have to watch out for the accumulation of market power and we have to watch out for the fact that the consumers themselves may be left without adequate protection as a result of the dismantling of the regulatory framework.

If consumers are exposed to unfair business practices, insufficient or misleading market information, limited choice of alternative supplies of products or a weakened bargaining position, vis-a-vis, the producers or the supplies, then the price that we are paying may be too high. We have signalled this to the Attorney General and to Government generally in the context of our Priorities Paper which was issued in May of this year and it is a view that is shared by our colleagues in the Commerce Commission in New Zealand. Whilst we welcome the public benefits that flow from enhanced competition and efficiency, we believe that a good deal of care needs to be taken to ensure that industries identified for deregulation have market structures and characteristics which will be conducive to effective competition and to fair market conduct following deregulation, because that is the only way that you will ensure that net benefits come to the community at large.

There will need to be some safeguards which are introduced for consumers and for small business and this brings to me to the question of unconscionable conduct in section 52A of the Trade Practices Act. I indicated before that New Zealand has no equivalent provision and in our submission to the House of Representatives Inquiry into Small Business,

we have raised for discussion - and no more than that - the issue of whether it might not be appropriate to reconsider the decision that was taken in 1986 to remove from the persons who are the subject of protection under the unconscionable conduct provisions, small business. They are included in a limited way in the NSW Unfair Contracts Act; there was a unanimous view at the SCOCAM meeting of Consumer Affairs Ministers recently to try to include some provisions in the Consumer Credit legislation to deal with this; and it is a matter which I think will be considered as a high priority area by certain Ministers in the Australian and New Zealand Governments in the months ahead. So it is an area in which, if you have any views, I am sure that we would, and the Government would, be very happy to receive them.

As I say we have not formulated a final view, we just believe it is a matter that needs to be considered especially in the context of greater concentration of power; the question of whether Section 46 delivers the necessary remedies to the market place and whether the consumers generally are adequately protected in this particular area.

The other factor in relation to deregulation in New Zealand is the fact that they are not as well advanced (and perhaps we are not advanced either), on self-regulation or co-regulation. We have in place in this country, a well thought out report by the Trade Practices Commission on many aspects of co-regulation or self-regulation. The Trade Practices Commission is pleased to be assisting the New South Wales Deregulation Unit in its search for solutions in this particular area. Self-regulation or co-regulation can be an effective solution in certain industries or certain areas; they do not provide the complete answer and it may well be that you will need strong regulations in certain areas. But in New Zealand the situation got to the stage where, for example, we were told that dentists would be completely deregulated and as long as you do not call yourself a dentist, any person at all could practice dentistry which is just mind boggling. It is a worry that deregulation can move so quickly in so many ways and we have to be careful that adequate protection is provided.

What I have done in my address to you on the Trade Practices Act is to list some of the areas where we will be certainly giving our attention to the way in which our Act and the New Zealand Act may be harmonised or might be administered more effectively and in unison. We do not have a policy role directly, we have one indirectly. We will certainly be encouraging Government to do what we have been trying to do at the Trade Practices Commission and that is to issue discussion papers, to involve the community very early in the preparation of any new initiatives in this area so that we don't get hardened views about the way legislation should move. That is why we're throwing up these issues about whether section 52A should be extended to small business. We want it to be discussed openly; we want these views debated without being contained in the framework of some legislation that has already been drafted. Often politicians are afraid to move away for various reasons from a draft piece of legislation that has been produced. Discussion papers, if they are shown to be going down the wrong track, can be quickly skittled and the fact that we may have spent some unnecessary time on them is not completely wasteful because we learn a great deal in the exchange of views between us and the community at large and the New Zealand Commerce Commission has a similar view.

Company Law

You will be interested to know that the New Zealand Law Commission, (that is the equivalent of the Law Reform Commission), has issued a fascinating discussion paper on Company Law reform. It is very deregulatory in its thrust - in fact it is quite revolutionary. It calls for the doing away of many of the protections that we know in our company law, in terms of prospectus registration, etc. It calls for what is almost a Chicago style approach to the way in which company law should be administered. It does not go all the way; it is tentative in certain parts, but nevertheless it certainly throws up some fascinating options for consideration in that particular context.

In Australia we have the Federal Government announcing quite bravely and aggressively that it wishes to introduce national legislation which will replace the present national cooperative legislation in the area of company law. Some would have suggested that they might have simply replaced the present scheme with a Federal law and then worried about some of the hard detail. But in the foot high draft legislation which many of you will have seen, they have also shown a very strong deregulatory thrust in the area of company law. This throws up the question of whether we should support this approach. In the area of prospectuses and documents which invite the public to subscribe for shares, interests, etc in companies, the reliance is going to be on a section 52 - Trade Practices Act approach - to obtain remedies. The Corporate Affairs Commission or the equivalent bodies, will not vet prospectuses to ensure that they are in the proper form, etc, nor will they take (except in very rare cases if the legislation goes through in its current form), a protective role in bringing action against people except in the most blatant cases. Rather the philosophy of the legislation in both countries, if the two drafts are taken up, is to require the individual, the consumer, the investor, to seek his, her or its remedy in the Courts. We all know that the cost of litigation is monumental. We all know that litigation can be used as a very effective tool in destroying corporate plans, in takeovers and in other areas. We know that it is a very important safety device. I believe that before we go down that route too far, we really have to take a grip of the issue of just how do we deal with the question of remedies.

In Victoria, the Law Institute, has issued a very fascinating paper on the introduction of contingency fees. This is an important initiative. We also have to look at the cost rules, we have to look at the Courts; are the Federal Courts and the State Supreme Courts the most effective bodies to deal with this kind of litigation. Section 52 of the Trade Practices Act, a consumer protection provision, has been one of the greatest boons to legal business in this country. It has also been used by business as a very effective tool in dealing with competitors.

The other interesting suggestion in the New Zealand paper which has its mirror in part in Australia, is the attempt to codify directors' duties. New Zealand law in this area has been based on common law. In fact they have had very few statutory rules, (they didn't have an insider trading law, they will shortly have one...) and there is the suggestion that they should move towards codification of directors' duties.

We already have some codification of directors' duties in our companies legislation, but there is another Parliamentary committee that is sitting at the moment or about to sit, called the Senate Standing Committee on Constitutional and Legal Affairs which is looking at the issue of social and fiduciary duties of directors. There is a fear that they will come down with some further ideas for regulation in the area of directors' duties. It seems to me that there is a danger of moving down that track. If one did a very quick check of the number of pieces of legislation that directors have to comply with without looking at the Companies Act in particular, you would be quite horrified at the considerable burdens that are imposed on company directors. It seems to me that that is an area where the two countries need to be careful that in dealing with harmonisation that we do not have a lowest common denominator approach to an area where already the costs and impediments on business are quite significant. That does not mean that we do not need strong insider trading laws and we do not need a Commission properly resourced to be able to ensure that existing laws are appropriately enforced.

Part of the problem in Australia in my view has been inadequate attention to resources available to organisations. Here you have a bit of special pleading. The Trade Practices Commission have been criticised for not bringing enough cases or catching enough people who are in breach of the legislation. This could lead to an impression that the law is ineffectual. This often results in changes to legislation adding to the costs of the community. It seems to me that that is the wrong approach; if we are going to have institutions such as Corporate Affairs

Commissions, etc, we should ensure that they are resourced adequately to administer the law. We should ensure that they administer the existing law to the fullest and if it is then found to be inadequate, then is the time to move to reform it.

We are at a time in our history where the internationalisation of securities markets is occurring very fast. The Trade Practices Commission believes that the internationalisation of the economies is an important matter that we have to take into account. We think that this is a most challenging time, we think that CER is going to give us a wonderful opportunity to further develop the work of the Trade Practices Commission in facilitating business activities and certainly the business and legal communities at large have, I believe, an obligation to become involved very early in the drafting of policies in this particular area. We must move quickly to ensure that Governments do not harden their veins before we provide an input!!

Questions:

Prof. David Flint, University of Technology, Sydney.

Thank you Professor Baxt. Before we move to refreshments outside, we move to our discussion period and I therefore invite you to put forward questions for Professor Baxt to answer. As you know, the proceedings are being recorded with a view to their publication and assuming that all men and women desire immortality, may I suggest that you announce your names and affiliation if you wish before you ask your questions.

There are two microphones located on either aisle at the bottom of either aisle and therefore now the floor is open to questions. If I may begin to warm things up, I noticed in the Economist recently Professor, their editorial which suggested that the British legal profession adopt contingency fees as a more effective way of ensuring access to the law but that this approach should be modified somewhat by retaining the British tradition of costs following the action and that this would inhibit unnecessary actions. I wonder if the Trade Practices Commission has a view on that?

B: No the Trade Practices Commission has no view on that. My personal view is that you need to be very careful about having an automatic rule of costs following the result. I would prefer to give a discretion to the Court, let us give the Court the ability to allow the costs to follow the result in an appropriate case. I think there are significant disincentives (and perhaps that is appropriate and perhaps my point of view is incorrect), if you are going to use the Courts as a means of solving the particular problems and remove over large bureaucratic organisations that supervise and regulate, then it seems to me that you should remove legal costs as an impediment to legislation.

Q: Michael Ahrens, Baker Mackenzie. The question of contingency fees I think is raised only fittingly by Professor Baxt but is a very topical important issue. It's been raised as he said by Elizabeth Evertt's Law Reform Commission in the context of class actions and I think as I understand it, your comment was that this should be considered very carefully if the Courts were going to be put in to replace regulatory bodies in the enforcement under Section 52 of a lot of these corporate matters that presently the Corporate Affairs are dealing with. If so, the question of contingency fees will certainly be given added importance. My opinion is that that whole question raises very significant problems, not least of which is ethical problems for the legal profession. I believe that law societies and other bodies should be taking up that issue immediately, not simply regarding it as a question of Court procedure and it is to my mind not an answer to say that the contingency fee would only be charged if approved by the Court. I think that's unduly onerous to put that obligation on a Court, on a Judge, to determine not only in a context of a class action, whether all the members represented are members of the class but as to whether the fee is reasonable and I submit that we ought to be having much more public discussion of this issue as a threshhold question as to whether ethically the legal profession should be sanctioning it before it's propounded as a federal rule.

A: Baxt. My only comment on Michael Ahrens' comment is that I would agree entirely with what he has to say, that it is a matter that requires very careful consideration. It is interesting to note that in the context of the Trade Practices Act there is already room for a representative action under Section 87. The Law Reform Commission was not originally aware of the work that had already been done and our current thinking in relation to this representative action. Most people are not aware for example, that in the Companies Legislation under Section 574, Sub Section 8, there is also a provision which is like a class action. Now this is not a full class action, but it is an interesting ability there for class actions to be brought in the context of a very wide power in the Court, not only to grant injunctions for breaches of the Companies Code but also to award damages in lieu thereof

Q: Brian Jones from Unilever. Professor Baxt, in terms of mergers, it's not difficult to envisage with the progression of CER, trans Tasman mergers which would require the parties to approach the Commissions in both New Zealand and Australia. Those could have unfortunate results if the two Commissions viewed the same particular matter differently and gave different results. How would you foresee that sort of matter being dealt with by the two Commissions.

A: Baxt. Well at this stage of course the only way in which we could deal with them is by informal exchange of views. The New Zealand Act does enable the New Zealand Commission to formally involve "outside views". That was one of the issues that we discussed in New Zealand, and one of the matters that I've raised with the Attorney General. We believe that he should start to think about the issue of joint sittings in dealing with these particular matters. I do not believe that it will be too long before it does arise and in the Fletcher Challenge situation, although it did not arise, there were issues that were not so far removed from that particular context. It is important for some rules to be laid down to deal with it. And indeed there was a matter, the Amcor matter,

I think, in Australia and New Zealand where the two Commissions took very differing views on a merger. I was not involved, but certainly the parties concerned were very upset at the fact that there seemed to be diametrically opposed views adopted in dealing with what appeared to be similar facts.

Q: Mark Rosenberg, Black Dawson Waldron. Is there any reason why section 87 of the Trade Practices Act has not been utilised in the past? Is it simply a lack of circumstances?

A: Baxt. I believe the Commission just simply did not pay enough attention to this section and we have said so publicly in our Priorities Paper. If that is an admission of guilt, well we are not ashamed to say that we were wrong. It has only been there for a short time. There was a representative action in the original Act and then it was taken out and now it is back there. We certainly are looking for appropriate situations where it might be used and there are a couple of cases on foot at the moment.

Q: Marella Caulder from Michellesler & Brown. I have two questions, perhaps the easier one first. The way that you're speaking at the moment and the implications of CER do seem to suggest to me that eventually the profession as a whole ought to be conversant with each other's laws, particularly in the area obviously of trade practices and corporations. Do you see a wholesale admission of New Zealand practitioners interested here and Australian practitioners interested there or do you see they're being protective of positions taken by the various Bars and solicitors admission's boards in the various countries? The second question is it seems to me that what you're saying, if I understand correctly, suggests that the market that one might consider for the purposes of Australian companies and some circumstances will certainly extend to New Zealand and conversely the market over there will be what happens in Australia, as you will know there are certain exemptions under the Trade Practices Act in Part 10 for instance, in relation to the shipping conferences that are presently being looked at with a view to changing the law there.

You will also be aware that under the Commerce Act and the relevant provisions over in New Zealand, there is a, as I understand it, a public interest test which the foreign ship owners need to satisfy in order to be allowed to operate in conferences in the New Zealand market, do you see a natural development where things that hurt Australian ship owners, things that hurt New Zealand ship owners, will be looked at in a context of an overall Australian/New Zealand market and the exemptions will be looked at that way?

A: Baxt. I'll deal with the second question first. Can I say this, there was a Committee Report and I think legislation is going to be introduced, if it has not already been introduced, to deal with that particular problem in this country. It is obviously a matter that should be discussed. There have been a number of reports - the Industry Assistance Commission Report in relation to coastal shipping and other reports dealing with shipping, which point to the importance of this issue. We need to involve the community and those who have expertise in that discussion very early. As far as the professions are concerned, I would be disappointed if barriers were introduced to protect professions in either country. Some of the best lawyers I know in this country come from New Zealand and indeed one or two people whom I admire most as academics are New Zealanders who have done remarkably well both here and now in North America. I think the High Court decision in the Street case the other day, should be the portent for the future that we should have less barriers in this particular area. I just might mention something, it might be of interest to some of you, that the Commission in its Priorities Paper has indicated that it would like to look at the impact of the Trade Practices Act on the professions. We know that there are constitutional issues that impinge here. The New Zealand Commerce Commission of course does not face those constitutional problems. We will be issuing a discussion paper on the professions and the Trade Practices Act next year and we would certainly welcome imput from the legal and other professions on the questions of barriers to entry and related factors. But in our view, that wherever possible, the barriers should be minimal if any exist at all.

Q: Linda Vogel, Rosenblum & Partners. I'd like to ask Professor Baxt on his comments on how he sees the laws or the unification of the laws in Europe through the EEC affecting both Australian corporate law and in particular, Trade Practices Law and what issues we should be focussing on so that the Australian business community will be able to deal with its implications in the force that the EEC will bring to bear in the future?

A: Baxt. I'm afraid I can only answer this question very generally. I just don't know enough about the EEC laws generally. I do know that in the context of their competition law that we have been influenced to a large extent in some areas by decisions in the European courts, certainly in the area of monopoly law. Professor Valentine Korah gave a very good paper at a Monash University Trade Practices workshop recently on the impact of EEC law. In the next issue of The Australian Business Law Review, the one that's just about to come out if it hasn't come out, there's an excellent paper by Professor Barry Hawk on the EEC law and comparisons of EEC law and the United States law. The Commission engages in a dialogue with our counterparts in Europe. We had as a visitor to the Australian Legal Convention just a couple of weeks ago, Sydney Freedman, who deals with that particular area for the EEC community. We keep close tabs on that. One should be aware of what goes on there because I think we can learn a great deal from how they are doing things. Not only by the positive things, but by learning not to repeat mistakes that are made over there. Some of the ambitious politicians and indeed some of the ambitious administrators are talking not only of CER Australia re New Zealand, but seeing it developed even more broadly into a Pacific area, a Common Market type regime and certainly the European experience would be invaluable if that ever came about.

Q: Gaire Blunt from Allen Allen Hemsley. Bearing in mind that I think in the Amcor New Zealand forest products merger which you talked about before, the situation was that in the market in Australia, there probably was not going to be any dominance arising out of the merger whereas in the market in New Zealand there very clearly was going to be dominance

arising out of the merger. Would you accept the concept that the Governments could contemplate widening the definition of the possible market to include a market as wide as Australia/New Zealand where such a market might be found to exist so that people don't have to go the authorisation route if it's clear to them that they can go ahead and do the merger because in the total market they wouldn't be dominant at all, whereas they might, if they're artificially constrained to a definition of a local market.

A: Baxt. Yes I think that we've taken the view, and I think this will come out in our paper, it's early days yet but we, I think, would take the view Gaire, that that would be a sensible extension of the definition of "market" to include in the Act as long as it was stated in a permissive way and there were appropriate safeguards included. The problem of course will be in persuading the New Zealanders to move away from that pre-notification of that particular approach which puts a greater onus on New Zealand companies in that context and I do not think that that will occur very easily. But as Gaire Blunt will note because he was the one of the lawyers involved in the Fletcher Challenge case, that whilst we were not persuaded that a world market was the appropriate market in that particular merger, that we were persuaded by the arguments that were put to us by the Fletcher Challenge lawyers and the company in relation to the "definition" of market in our examination of that particular merger.

Q: Phillip Sacks from Black Dawson Waldron and the Trade Hall Committee. Just one small comment Professor Baxt, an invitation to take heart, there's been some recent decisions of the Administrative Appeals Tribunal in the Customs Law area where they've had to decide on.. review decisions determining whether the goods were similar goods and whether there was a significant cross elasticity of demand in relation to those goods. The AAT has effectively ruled that the Customs should take a practical approach to it and if the Courts follow that juncture, that would probably satisfy your concerns.

A: Baxt. Yes, it is very interesting, Phillip, that comment about taking a practical approach because if you look at the definition of market you find in the New Zealand Commerce Act. Then market means "market for goods or services in New Zealand that may distinguished as a matter of fact, and commercial common sense."