# Frank Stewart Dethridge Memorial Address 1990

**Rt Hon Sir Owen Woodhouse***

*In this address to the 1990 Annual Conference of the Maritime Law Association of Australia and New Zealand Sir Owen notes the effort being made in various parts of the world and by various means to keep laws abreast of contemporary social and commercial needs at both the domestic and international level, and the Australian and New Zealand Closer Economic Relations Agreement in particular.*

It is now fourteen years since the death of the founding President of the Maritime Law Association of Australia and New Zealand. It says a great deal about the quality of the man that each year since then he has been directly remembered by a memorial address delivered at your annual conference. It says something, too, about the steady affection of his friends and colleagues and their continuing appreciation of his work. Be sure that the invitation to deliver the 1990 Frank Stewart Dethridge address is a compliment which I value.

It would be superfluous and even unwise if I were to attempt this morning to shed new light on any of those arcane areas of maritime law which are the natural bread and butter of members of this Association — perhaps I might add, and their natural bedtime reading. So I put aside such fascinations as salvage and bottomry and deviation and the navigational rights of the yacht under sail as against the stolid claims of the dumb barge under tow. Instead, I would like to say something about two topics which in a way are related.

The first concerns the efforts being made in various parts of the world and by various means to keep laws abreast of contemporary social and commercial needs. These movements are at work both at the domestic level, within the jurisdiction of various countries; and also on a wider basis where the task is to achieve unified laws across national boundaries. Their importance cannot be overstated since good law provides the kind of assurance by which people and nations are able to live and to work comfortably together.

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The related topic I have in mind is the fact that here, at home, Australia and New Zealand have been working closely to achieve the common objectives of the Closer Economic Relations Agreement (CER) they entered into in 1983. With the removal on July 1 of this year of final barriers to free trade in goods, a vigorous effort is being made not only to open the way to free trade in services but by a process of law reform to find the mutually acceptable laws which will support all these wide-ranging commercial objectives. You will be relieved to have me say that I propose to deal rather generally with these various matters.

I have mentioned that the influences in favour of law reform are by no means confined to merely domestic objectives. There are, of course, important international organisations which in some instances have been hard at work for a long period. Indeed, there is the notable example of the Comité Maritime Internationale (CMI) with which your Association is affiliated. For many years it has been directly concerned to promote maritime law which will be recognised by all nations engaged in the carriage of goods by sea. I do not need to remind this audience that the CMI, soon to celebrate its centenary, had a leading role in 1923 in formulating the Hague Rules relating to bills of lading; and in 1968 with their subsequent Visby revision.

Then there are the various international organs such as Uncitral and Unidroit which have as their objective unified codes which will gain general acceptance round the world. Their aim is to bring order and certainty and confidence into such matters as international arbitration, the international sale of goods, products liability, electronic data interchange, and credit transfers.

A different factor which has begun to operate more recently is the need for those groups of countries which have been moving towards single trading blocs to find a compatible legal infrastructure. There is the striking example of the European Economic Community. Already its members have decided that community laws must have primacy in certain wide and basic areas of their respective legal systems. There is general acceptance that the concept described as "direct application" of community regulations is to apply in such a way that a regulation will automatically become law within each of the member countries immediately it is adopted by the relevant community institution. By means of this principle there will be both uniform and simultaneous application of a relevant regulation across the whole community.

A recent application of the principle by the European Court of Justice (the decision was given on 19 June 1990)[1] has caused the courts

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[1] *Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others,* Case C-213/89, European Law Report *The Independent* 20 June 1990; *The Times,* 20 June 1990.

of Great Britain to suspend an Act of Parliament. The provision is within the Merchant Shipping Act 1988 and is aimed at stopping the "quota-hopping" of British fishing quotas by non-British European operators flying British flags but with no real links with Britain.

> The decision of the European Court produced an excited headline in the Independent newspaper. "The Community Rewrites British Constitution" it reads.[2] But that kind of overriding effect of community law is really "no surprise package", as William Rawlinson (an English barrister) said at the time[3]. Indeed the issue has now been returned to the House of Lords where it was made plain in speeches delivered only a few days ago that it was the duty of a United Kingdom court to override any rule of the country's national law which was found to be in conflict with a relevant enforceable rule of community law.[4]

Then there are the multilateral arrangements at present being hammered out in the final stage of the Uruguay Round of the General Agreement on Tariffs and Trade. They are by no means confined to trade in goods such as the meat and dairy products of concern to producers in this part of the world. A good deal of attention is being given to such matters as rights in intellectual property, for example, while New Zealand has given its support to the establishment of multilateral rules which will support freer trade in all services. The proposed services regime has been given, I understand, the charming acronym "GATT".

If all these objectives are achieved there must, of course, be inevitable repercussions on relevant parts of the domestic legislation of each of the countries affected.

I move to law reform at the domestic level. In Australia the need for renewal and development of the law has found expression in the several valuable and effective federal and state law reform commission. The New South Wales Law Reform Commission was the first to be established. It began to operate almost 25 years ago, on 1 January 1966. Its first chairman was that distinguished Judge of the New South Wales Court of Appeal, Mr Justice (later Sir Kenneth) Manning. Queensland followed in 1968 and the other states all set up Commissions in the early 1970s. The Federal Commission was established first as an agency of the Australian Capital Territory on 20 May 1971 but soon after became the Law Reform Commission of Australia.

Here in New Zealand the permanent Law Commission was established in 1986 although at that time it replaced several part-time committees which had been operating for a good many years. The nature of and the need for the permanent body is not as yet generally

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[2] *The Independent*, 3 July 1990, p1.
[3] *Ibid*, p34.
[4] *The Times*, 12 October 1990, pp3 and 31.
[4] Section 5 (1) (a).

understood. May I make a few comments about its purposes and its work.

The value of organised law reform was recognised in New Zealand as far back as 1936. In that year an enlightened Attorney-General, the Honourable Rex Mason, took swift action to give effect to a unanimous recommendation of a recent Dominion Law Conference. He set up a part-time Law Revision Commission to examine matters which would be referred to it by the Minister of Justice. Then, quite a number of years later, its work was distributed for greater efficiency among several part-time law reform committees, each being given a particular area of the law as its province. For example, there was a property law reform committee. Another was concerned with evidence. Others dealt with contract law and with administrative law. Yet another kept criminal law under review.

Like the earlier Law Revision Commission these committees were serviced by a research division of the Department of Justice and the high quality of the work produced during almost half a century by the Commission and by the committees can be found reflected in various parts of the statute book. But it had not been possible for major projects to be undertaken by busy practising and academic lawyers, working on a part-time basis and coming together only at intervals. Nor could they respond to all the numerous needs arising from an increasingly complex social and commercial environment. So it was felt there should be a permanent body; and the Law Commission began to operate in 1986 as a kind of standing commission of inquiry.

The Law Commission Act 1985 describes the Commission in its long title as "a central advisory body for the review, reform, and development of the law of New Zealand". And that general statutory purpose is underlined by the spacious language used by Parliament to define its principal functions. They open with an instruction to the Commission "To take and keep under review in a systematic way the law of New Zealand."[4] It is "To make recommendations for the reform and development of the law of New Zealand."[5] It is instructed as well "To advise on the review of any aspect of the law of New Zealand conducted by any Government department or organisation... and on proposals made as a result of the review"[6].

All this may be described as an arresting mission. I suppose I can be excused for the adjective. The instruction, after all, is for attention to the entire field of the law of New Zealand — although not, one might hope, all at the very same time.

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[5] Section 5 (1) (b).
[6] Section 5 (1) (c).

It may be a criticism of the statutory system that there is no provision for any decision to be announced as to whether the Commission's proposals are to be implemented or not — with or without amendment. And there may not be sufficient legislative restraint upon a bureaucratic tendency for some officials in the departments to wish to second-guess the professional work of the Commission. However, there is an express statutory requirement that all its reports are to be published and that copies are to be laid before Parliament.

It should be mentioned, too, that its powers are not hedged about by the need to obtain ministerial approval before it embarks upon any topic. On the contrary, it is authorised quite explicitly by Parliament "To initiate proposals for the review, reform, or development of any aspect of the law"[7]. On an earlier occasion I remarked about this power.[8]

> That is not only an unusual expression of Parliamentary trust. It may well be unique in the Commonwealth. In other countries, [usually if not invariably] a proposal for review by a statutory law reform body is made subject to some form of Ministerial approval.

So the Act contains far-reaching provisions. In essence they put in place an independent, non-political authority able not only to review and watch over the development of the law but, of its own motion, to assess any proposals for new legislation. For New Zealand, a country with a unicameral parliament, that is a function which might be used on a sudden, future occasion to help persuade some hurrying over-zealous legislator to pull back — or at lease to pause a little, to recognise there can be wisdom in second thoughts.

Since the Law Commission began its work about four years ago it has managed to tackle varied subjects. It has reviewed the universal accident compensation scheme and made proposals for the extension of the scheme to sickness. Changes to the structure and jurisdiction of the courts have been recommended. With supporting draft legislation it has recommended major changes in the law affecting companies, a comprehensive system for the registration of securities over all kinds of personal property and a co-ordinated approach to limitation defences in civil actions.

Proposals have been made as to whether or not there should be legislation in place to enable action in the event of sudden disaster, or war or other emergency. Attention is being given to the interpretation, form and drafting of legislation, to the international sale of goods, to arbitration, to the issue of contribution in the field of damages, to rights in intellectual property and to the problem of what may be described as "unfair" or unconscionable contracts.

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[7] Section 6 (2) (a).
[8] [1986] NZLJ 107, 109.

A different project under way concerns codification of the law of evidence, including the wisdom of modifying or abandoning the hearsay rule. Another is a thorough-going review of the Property Law Act 1952. In the area of criminal law proposals have been made for pretrial disclosure and for a more convenient process of committal in the case of jury trials. Work has commenced which will eventually encompass all aspects of criminal procedure from the prosecution process and the nature of police powers to such matters as problems related to identification evidence and confessional statements.

It is appropriate to add that working together with the Australian Law Reform Commission, an assessment is in progress designed to clarify choice of law problems in the field of conflict of laws — which of two or more systems is to apply when there seem to be differing jurisdictional claims. It is an instance of the valuable liaison enjoyed by the law reform agencies of Australia and New Zealand. They meet together in a formal way at regular intervals. In addition there is frequent communication and discussion among commissioners and staff.

In a wider sense this typifies a relationship between Australia and New Zealand which may almost seem to be part of a natural order of things. It would be surprising if medical men in either country spent time wondering whether it were wise to share with colleagues across the Tasman membership of the Australasian College of Surgeons or its sister College of Physicians. I need look no further than your own maritime association. It began life, of course, under the stimulus of Australian lawyers gathered in Sydney. But it was only a year or two before they took their New Zealand colleagues aboard.

On a political level it is certainly true that New Zealand let the opportunity go by of joining the move to federation during the Australasian Convention of 1891. But clause 6 of the Australian Constitution still reads —

> "The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia... as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States...

However, it is the situation today that matters; and in practical terms, the New Zealand Prime Minister was able recently to give as an example of Government contacts the fact that New Zealand participates in more than 20 Standing Councils of Federal and State Ministers.[9] In addition there is now a regular programme of meetings between Select Committees of each Parliament.

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[9] Address by Rt Hon Geoffrey Palmer to 9th Commonwealth Law Conference at Auckland, 20 April 1990.

A book on this general subject matter, published in 1978 is entitled by its authors, Alan and Robin Burnett, "The Australia and New Zealand Nexus".[10] It is an apt word to describe an important relationship. And it takes me to the Australia and New Zealand Closer Economic Relations Agreement of 1983.

The CER Agreement is a treaty between the two countries which is designed to achieve an area of completely free trade. And as I said earlier, by 1 July of this year, five years sooner than the original target date, it became possible to remove all frontier barriers to free trade in goods. Now, there is energetic planning to achieve a regime of free trade in all service — communications, sea and air transport, investment, professional activity. In addition, as in the case of the European Economic Community, attention is being given to the provision of the congenial legal environment which the whole operation will need if it is to bring the benefits to our two countries which are expected of it.

The general message of the CER Agreement is spelled out in the preamble. There is reference to the "longstanding and close historic, political, economic, and geographic relationship" of Australia and New Zealand. It states that "further development of this relationship will be served by the expansion of trade and the strengthening and fostering of links and co-operation in such fields as investment, marketing, movement of people, tourism and transport". It also emphasises that the two countries have a "commitment to an outward looking approach to trade" as a means of strengthening their ability to develop international trading relationships.

The earlier New Zealand Australia Free Trade Agreement of 1965 (NAFTA) had been intended to point the way to an eventual free trade area. But the chosen method was not by a general acceptance of goods to be free of duties, with appropriate named exceptions. It was done by cautiously listing items to be accepted with a provision for agreed additions to the list. In the event there were few such agreed additions. The growing need for a different approach led eventually to the CER Agreement. It acts on a much wider principle: that subject to some named exceptions virtually all impediments to all trade between Australia and New Zealand should be eliminated within an agreed time scale.

It is an approach which has succeeded. In practical terms the increasing importance of the CER Agreement to both Australia and New Zealand is that trans-Tasman trade has been increasing by no less than 15% each year. By itself that is an important achievement.

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[10] Australian Institute of International Affairs [and] New Zealand Institute of International Affairs, Canberra, 1978.

The elimination of frontier barriers to trade and incentives which distort fair competition has required effort and co-operation by the two governments and their officials. But most decisions of this kind can be taken at a single practical level. They concern relatively clear-cut hard items like tariffs and quotas, anti-dumping measures and subsidies, bounties and revenue advantages. But when attention is directed to freeing trade in services, rather more complex considerations arise.

In this second, less tangible area most change requires decision not only in the primary or policy sense but as well and beyond that there must be the acceptable legal support which I have mentioned. For example —

- If lawyers are to be free to practice on either side of the Tasman what are to be the qualifications?
- Or the provisions for the regulation of television, communications, radio, postal services?
- And similar considerations will affect air transport and coastal shipping, insurance and banking, and all the numerous provisions which affect commerce and investment including such matters as company law, securities, fund raising and insider trading.

Other issues are related to consumer protection, the sale of goods, copyright law, and commercial arbitration; while in place of anti-dumping provisions to redress trans-Tasman predatory trade there will be reliance on competition law.

And of course there will be a need for enforcement of the decisions of the courts of each country including injunctions, orders for specific performance and revenue judgments. In this regard it is an interesting and unusual fact that legislation enacted recently in each country will enable the respective courts to sit across the Tasman in cases which involve contraventions of the relevant competition legislation.[11]

Then there is the nature and ambit of harmonisation. What is the concept intended to convey? It would seem clear enough that the mere removal of regulatory impediments to trade ought not to be regarded as the sufficient purpose of harmonisation. Instead, the wider, decisive need is for laws which will operate in both countries to give positive support to the CER objectives.

Frequently it is said that effective harmonisation does not require each set of laws to mirror the other: that there is no need for actual identification. It may be that the smaller country, New Zealand, is reluctant to be urged to adopt a precise Australian position in some of

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[11] Judicature Amendment Act 1990 (NZ); Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 (Aus).

these areas. But whatever the reason, one would think that the more it were possible to move from approximation of laws towards actual uniformity then the more reliable and helpful will be the end result. The half-way, consensus type solution may often be no solution at all.

Then again, where there is a need for reform it may be wiser at times to take the high ground by moving away from existing provisions of both countries in favour of an overseas model or something more attuned to modern conditions. Since our two countries have vital trading links with other jurisdictions proper use of the law applicable elsewhere may work in the long term trading interests of both Australia and New Zealand. But whatever the choice, in all cases it must surely be right to aim at the most efficient solution.

Beyond all the immediate trading and commercial aspirations there is the even wider defence and economic strategic significance of the two countries working together to provide a focus of strength and stability for the whole region. For myself, I believe the CER movement will proceed eventually, and it may not be far away, to an effective common market with pegged rates of exchange or as I would anticipate, a shared currency. And as to that last point, I cannot think that acceptance of a common currency would involve any serious derogation of sovereign power for either country.

Indeed, is it really likely that New Zealand and Australia will choose to remain politically separated during all the uncertainties of all the decades which lie ahead? I suspect there are growing numbers of people who have begun to wonder seriously why there should be so much nervous reaction among politicians and others whenever some kind of federation is mentioned as a constitutional possibility. The two countries have interests which derive from their close association historically, from the strong ties of geography, from their similar institutions, from their attachment to human rights and from the regular and unimpeded movement of their citizens back and forth. In the end their common destiny will be determined I think by this background and their mutual contemporary needs.

I add a final word. In any event, and whatever may be the chosen answer, closer than any structural relationship is an instinctive acceptance by large numbers of Australians and New Zealanders that they are part of one extended family. There is a fractious side to their association as in any family. We treat one another with mutual candour on occasions. But it is a candour born of long and comfortable acquaintance and, as I believe, mutual respect.

Like the useful and benign activities of such institutions as the Maritime Law Association of Australia and New Zealand the Closer Economic Relations Agreement is part of a logical and confident progression into the future for both our countries.