POLICY ISSUES FOR TRADE LAW REFORM

BY

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1. Introduction

In a report released in May 1996 the New Zealand Law Commission said:[2]

> We live in an increasingly globalised world. This is a trend which has been clear for some years in travel and telecommunications. Where in 1955 only some 50,000 passengers flew into and out of New Zealand, nowadays, over 3,000,000 people do so each year. And where in 1950 New Zealanders made only about 20 international telephone calls a day, they now make nearly 100,000.
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> But there is another, perhaps more significant respect in which the world is becoming globalised, and that is in the international dissemination of information by electronic means. Consider access to library resources (of which the legal database LEXIS is just one powerful example) or the world financial markets, where the almost instantaneous foreign exchange trading now amounts to many times the value of the international trade in goods.
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> The consequences of these developments, as Kenichi Ohmae[3] sums it up, is that "Nothing is 'overseas' any longer". The implications are wide ranging. National power and authority are becoming less and less effective. Already the international community is showing less reluctance to intervene in conflicts which might once have been seen as purely internal – as in the former Yugoslavia[4] or Somalia, for instance. But it is perhaps in the growing realisation that environmental problems can only be tackled by the co-ordinated action of a number of states that the concept of national sovereignty is being most severely challenged.
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> Whether they relate to telecommunications or to reducing the depletion of the ozone layer, transnational activities cannot function effectively without a degree of regulation and standardisation. This means that there must be subject to international agreements or laws which bind members of the community of nations....

It can be seen from that extract that even as recently as May 1996 the full impact of the Internet was yet to be recognised in the context of the "globalisation" debate. Indeed, it was not until 16 December 1996 that the General Assembly of the United Nations resolved to adopt the Model Law on Electronic Commerce which had been recommended by the United Nations Commission on International Trade Law [UNCITRAL].[5] The Resolution noted that -

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1 The views expressed in this paper do not necessarily reflect the views of all members of the New Zealand Law Commission.

2 *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

3 *The Borderless World* (Fontana, London, 1991) ix.

4 Those comments were, of course, written before the most recent intervention of the international community in Kosovo.

> an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information.[6]

The dilemma created by the use of a single technology throughout a world in which legal jurisdiction is based squarely on territoriality was described vividly by Hon Justice Kirby (now of the High Court of Australia) as:

> Universal, pervasive technology. Local, diverse law. The interaction of these apparently incompatible forces provides a challenge not only to the intellect but also to business necessity, political progress and institutional arrangements.[7]

Similar themes were advanced last year in a speech given to the APEC[8] Task Force on Electronic Commerce by the President of the New Zealand Law Commission, Hon Justice Baragwanath. His Honour said:

> Three weeks ago the New Zealand Law Commission issued its *Report 50 Electronic Commerce Part One: A Guide for the Legal and Business Community.*[9] Since then it has been my privilege to consider aspects of aviation safety first at the International Civil Aviation Authority in Montreal and then at the Aviation Study Group in Oxford, in Ottawa to attend OECD Ministerial conference on Electronic Commerce, in New York to visit UNCITRAL and the paperless world of the US Bankruptcy Court, and now to return to this important conference in my own part of the world. I have come away with a double message.
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> The first is of a vision of a better future. There is general consensus that a borderless world of electronic commerce is both technically attainable and essential to the optimal social and economic development of the world. If properly managed, enhanced commerce and education, aviation safety and culture are among the benefits that can emerge, to the considerable advantage of the world community. Importantly, the needs of developing nations are emphasised; radical reduction in the cost of communications will, if properly managed, allow the developing world to take full advantage of the advanced systems, bringing opportunities for beneficial substantive results, both of which are at present largely closed to them.

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5 Resolution 51/162

6 Ibid

7 Hon Justice Kirby, *Informatics, Transborder Data Flows and Law – The New Challenges* [1988] NZLJ 381 at 382.

8 Asia-Pacific Economic Co-operation

9 NZLC 50, October 1998

> The second message has a discordant note: of risk that the opportunity will be lost by our generation. That is because the legal systems of most of the 185 states are incompatible with one another and there are no adequate plans in place to deal with that problem. My thesis is that APEC should ensure that the opportunities the scientists and engineers now offer the world community are grasped, not lost because of lack of vision in dealing with the legal obstacles. I invite you to consider whether there should be established a group of experts to advise both APEC and its members and also the world community as to how the legal impediments to progress can be removed in a manner consistent with the proper protection of national interests.[10]

Since deregulation of financial markets occurred in New Zealand in 1984 – 1985, New Zealand courts have been called on to determine a range of disputes which involve consideration being given to international instruments or to principles of comity. The Court of Appeal has made it clear that in approaching any question of statutory interpretation in New Zealand the courts must:

> ...begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, eg *Rajan v. Minister of Immigration* [1996] 3 NZLR 543 at 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So this court in interpreting guardianship legislation enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction has said that it is incumbent on it to construe the Act in a manner that will as far as policy give effect to that purpose, *Gross v. Boda* [1995] 1 NZLR 569 at 573 and 574. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the employment court as not over-riding the customary international law of sovereign immunity. In the absence of such an approach, almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, *Governor of Pitcairn and Associated Islands v. Sutton* [1995] 1 NZLR 426 at 430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. A related instance appears in the references to good faith compliance with obligations in the Charter of the United Nations and the Vienna Convention on the Law of Treaties in *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 at 682; see also *Commissioner of Inland Revenue v. JFP Energy Inc* [1990] 3 NZLR 536 at 540.[11]

The topic of my address today is "Policy Issues for Trade Law Reform". It is my thesis that countries which are heavily reliant on export earnings (such as New Zealand) cannot now make

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10 Hon Justice Baragwanath, *A Call for Joint Action to Make Changes in International and Domestic Law which are Critical to a Borderless world of Electronic Commerce* (address to APEC conference, Kuala Lumpur, 21 October 1998). The text of this speech is available at the New Zealand Law Commission's website: http://www.lawcom.govt.nz/speeches/apececom211098.htm

11 *New Zealand Air Line Pilots' Association Inc. v. Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J, delivering the judgment of the Court of Appeal.

trade laws without regard to the commercial norms and laws of major trading partners. Domestic laws on trade must, I suggest, reflect international norms to be effective.

2. Global Rules for Global Trade: An Introduction to The Issues

As long ago as the 14th century the celebrated *Consulato del Mare* formulated a regional law based on customary practice which met the needs of sailors and merchants in the Western Mediterranean.[12] And, in 1759, Lord Mansfield was saying, in relation to a maritime case, that it –

> was desirous to have a case made of it, in order to settle the point more deliberately, solemnly and notoriously; as it was of so extensive a nature; and especially as the Maritime Law is not the law of a particular country, but the general law of nations:...[13]

Lord Mansfield then referred to Cicero who had said:

> Nor will it be one law at Rome and a different one at Athens, nor otherwise tomorrow than it is today: but one and the same law will bind all peoples and all ages.[14]

As Sir Kenneth Keith, of New Zealand's Court of Appeal, observed in an unpublished paper given to the International Law Commission in New York in 1997:

> [Lord Mansfield] was not agreeing with Cicero that the law was unchanging but he was saying that we must concentrate on the essence of our time and understand present conditions and future needs. The dictates of common sense should be heard in the language of recorded experience.[15]

The rules developed by the common law recognised the fact that maritime cases tended to deal with international issues which required a cohesive approach.[16] The failure of courts in different

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12 See, for example, Tetley, *Maritime Liens and Claims* (International Shipping Publications, Montreal, 1989) at 1 and Redfern & Hunter, *The Law and Practice of International Commercial Arbitration* (2nd ed, 1991, Sweet & Maxwell, London) at pages 117-121

13 *Luke v. Lyde* (1759) 2 Burr 822, 97 ER 614.

14 De Republica 3.22.33

15 Sir Kenneth Keith, *The International Law Commissions Work: The Shaping of International Law* (Colloquium on Progressive Development and Codification of International Law, New York, October 1997).

16 Recent examples of cases in New Zealand supporting this proposition can be found in *Baltic Shipping Co Limited v. Pegasus Lines SA* [1996] 3 NZLR 641 (CA) in relation to the onus and standard of proof of "ownership" preconditions set out in s 5(2) of the Admiralty Act 1973 and two recent judgments, in the same litigation, by Young J in the High Court which have declined to follow contrary High Court decisions on this issue preferring an interpretation of the *Baltic Shipping Co Limited* case which is in accordance with the overwhelming preponderance of overseas authority: see *Wallace & Cooper Engineering Limited v. FV Orlovka* (Unreported, High Court, Christchurch, AD93-99/98, 19 July 1999 and 20 July 1999, Young J).

countries to adopt a cohesive approach could have brought the law into disrepute amongst its users. Thus, it was soon recognised that any legal system which adopted a cohesive approach to cross-border problems was likely to engender the confidence of traders. That confidence was likely to result in increased trade which, in turn, would develop the economy of the country in which the courts were based. Over time, international arbitration found favour as a means of resolving cross-border disputes. But the chosen law by which the arbitral tribunal would resolve the dispute was usually linked to a legal system in which the participants reposed confidence.

A similar approach, also developed in maritime law, can be found in the piracy case, *Re Piracy Jure Gentium*[17] decided by the Privy Council and in the extensive use made of principles of comity where cross-border issues arise.[18]

In more recent times, sophisticated rules have been devised internationally to deal with cases involving the international carriage of goods by sea.[19] Similarly, it has been necessary to develop rules dealing with the international carriage of goods by air.[20] These rules, developed by international negotiation, given international force by the making of a Treaty or a Convention or by the adoption by the General Assembly of the United Nations of an UNCITRAL Model Law and then given force of law by being enacted into the domestic law of a sovereign State, are no more than norms or principles which are regarded as an acceptable basis upon which traders are prepared to do business internationally. Conflict of law problems are removed, or at least reduced significantly, through the adoption of common rules. Statutes with a commercial flavour which have been enacted in New Zealand since 1985 and based on international conventions or model

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17 [1934] AC 586 at 588-589 per Lord Sankey LC.

18 For a discussion of the principles of comity in the context of cross-border insolvency see *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (NZLC R52 February 1999) paras 20 – 24 and 54 – 58. Note in particular the two recent decisions of the High Court in New Zealand in cross border insolvency cases involving Maritime Law: *Fournier v. The Ship "Margaret Z"* [1997] 1 NZLR 629 and *Turners & Growers Exporters Limited v. The Ship "Cornelis Verolme"* [1997] 2 NZLR 110.

19 Examples can be found in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 24 August 1924 (Hague Rules) as amended by the Protocol of 23 February 1968 (Visby Rules) which are, for convenience, referred to as the Hague-Visby Rules. These rules have force of law in New Zealand by operation of s 209 of the Maritime Transport Act 1994.

20 See the Convention for the Unification of Certain Rules Relating to International Carriage by Air as amended by the Hague Protocol of 1955 (the Warsaw Convention) and the supplement to that Convention (the Guadalajara Convention) which have force of law in New Zealand by s 7 of the Carriage by Air Act 1967. See also *Emery Air Freight Corporation v. Nerine Nurseries Limited* [1997] 3 NZLR 723 (CA).

laws are the Radiocommunications Act 1989,[21] the Civil Aviation Act 1990,[22] the Maritime Transport Act 1994,[23] the Sale of Goods (United Nations Convention) Act 1994[24] and the Arbitration Act 1996.[25]

These "common rules" may be seen in different ways. Some may regard these "common rules" as *common law*. Others might regard them as a form of codified trade custom which have merely become actionable under a statute rather than as a proved trade custom which is implied as a term into a contract. Yet others, perhaps more romantically, might regard the common rules as a new form of *lex mercatoria.*[26]

The proposition which flows from all of this seems deceptively simple. It is necessary to find international solutions for international problems. A localised solution to a global problem is simply unworkable. When expressed in simplified form it is difficult to disagree with the proposition. The difficulty lies in the application of the proposition to particular circumstances.

The problem in applying the proposition is that the countries of the world have such markedly different histories (both secular and religious), cultures, social expectations and mores that finding a common bond to underpin the common rule is often difficult to achieve.

Even countries as closely linked as Australia and New Zealand cannot reach agreement on something as fundamental as the test used to determine questions of *forum conveniens*. The result is a silly Trans-Tasman stalemate. While New Zealand courts must determine the most appropriate *forum* to resolve the issues in dispute,[27] Australian courts will assume jurisdiction unless the defendant persuades the court that Australia is "clearly inappropriate" as a *forum* to resolve the

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21 Based on the Convention on International Civil Aviation signed on behalf of the Government of New Zealand in Chicago on 7 December 1944, the International Convention for the Safety of Life at Sea signed in London on 1 November 1974 and the International Radio Regulations signed in Nairobi in 1982.

22 Implementing the Conventions to which reference is made in fn 20.

23 Based on the Conventions to which reference is made in fn 19 above. It also implements the 1989 International Convention on Salvage.

24 Implementing the United Nations Convention on Contracts for the International Sale of Goods signed at Vienna on 11 April 1980.

25 Based on the UNCITRAL Model Law on International Commercial Arbitration and giving effect to obligations under the New York Convention in relation to the execution, recognition and enforcement of foreign awards.

26 This aspect of *lex mercatoria* is discussed by Lord Justice Mustill (as he then was) in *The New Lex Mercatoria: The First Twenty-five Years* (1988) 4 Arbitration International 86 at 94.

27 *Club Mediterrannee NZ v Wendell* [1989] 1 NZLR 216 (CA)

dispute.[28] I resist the temptation to say that Australia should follow New Zealand's approach. I content myself by noting only that the problem would be exacerbated if New Zealand adopted the Australian rule as more stalemates would result from the courts of each country being more likely to assume jurisdiction.[29]

There are significant hurdles to overcome when attempts are made to harmonise or unify laws. The learned Secretary of UNCITRAL (Dr Gerold Herrmann) has identified obstacles to harmonisation and unification of trade law as being[30]:

- Different ideas of justice;
- Different legal concepts and techniques;
- Preference of the "known devil" over the "unknown angel";
- Rejection of a novel law on the grounds that it is likely to be a compromise based on "lowest common denominator" notions;
- Aversion by special interest groups who fear being disadvantaged.

Furthermore, while one would expect recent technological developments *to increase* incentives for countries to review their trade laws in light of international, rather than purely domestic, considerations, the paradox is that community demands for self determination seem to have increased simultaneously with the technological shrinking of the world.

The former Soviet Union is now, in effect, a number of self-governing and sovereign republics. The former Yugoslavia has splintered into a number of different geographic regions. Each has its own constitutional arrangements. The ethnic problems are well documented. Devolution of power within the United Kingdom has become a reality: at least, at this stage, for the Scots and the Welsh.

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28 *Henry v Henry* (1996) 135 ALR 564 (HCA) applying *Voth v Manildra Flower Mills* (1990) 171 CLR 538 (HCA).

29 For example, see *Gilmore v Gilmore* (1993) 10 FRNZ 469.

The peace process underway in Northern Ireland will (hopefully) lead to a different (and better) form of governance. In Canada there has been an attempt by the Provincial Government of Quebec to seek a mandate from the population to secede from Canada. The manifestation of that suggestion resulted in a reference by the Canadian (Federal) Attorney-General to the Supreme Court of Canada in which the Court was asked to rule on the constitutionality of any purported secession.[31] And, in our own region there have been developments in the quest for East Timor to gain full independence from Indonesia. In all of these examples it can be seen that the desire for self-determination stems from ethnic, religious or economic considerations.

3. The Questions

In light of all these developments how should individual countries approach the question of trade law reform? Should the policy goals be domestic or international ones? Or, perhaps, both?

It is likely that the answer to those questions will vary from State to State.

We, at the New Zealand Law Commission, recently had cause to reflect on how to answer these questions when considering the topics of electronic commerce[32] (including the broader criminal law issues relating to computer "hacking") and cross-border insolvency[33]. I draw on those experiences later. But, first, I make some general comments on the policy issues involved.

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30 Reported by Shapira, *UNCITRAL and its Work: Harmonisation and Unification of International Trade Law* [1992] NZLJ 309 at 314

31 See *Reference re Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada)

32 See *Electronic Commerce Part 1: A Guide for the Legal and Business Community* (NZLC R50 1998); *Dishonestly Procuring Valuable Benefits* (NZLC R51, 1998); *Computer Misuse* (NZLC R54, 1999) and *Electronic Commerce Part 2: A Basic Legal Infrastructure* (to be published in October 1999).

33 *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (NZLC R52, 1999.)

4. The Policy Considerations:

In an updated edition of his acclaimed text, *The Nation State and National Self-Determination*[34], Professor Alfred Cobban made the following observations about national independence and economic inter-dependence:

> But before we proceed to consider how far self-determination for small states is a political possibility, we must discuss the economic conditions in which it has to operate, since political independence is usually taken to involve independent control of economic policy. A common criticism of small states is the assertion that self-determination for the smaller communities has as its concomitant the adoption of policies of economic nationalism, which are harmful to those they are suppose to benefit and deleterious to world prosperity. If self-determination for small nations means a suicidal economic nationalism, the less we have of it the better…the verdict of the League of Nations Economic Committee in September 1937 was that "Every country seeks, and seeks rightly, to protect its own economy".[35] Economic nationalism, indeed, is merely the contemporary form of a universal phenomenon. Separate societies have always competed with one another in the economic field since the days when primitive tribes fought for the better hunting grounds or the more fertile pastures. If economic nationalism was less marked between states in the Middle Ages than it became later, this was only because they had hardly reached self consciousness as economic units. With the rise of the modern state, economic nationalism,…developed….
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> Adam Smith equally admitted the basic fact of political rivalry between states, but unlike Colbert, he held it was possible to dissociate international trade partially from the struggle for power. Except where considerations of national defence complicated the issue, trade, he believed, was normally advantageous to both parties, instead of being a rivalry in which one side must necessarily lose and the other gain. [36]

Professor Cobban's views were first written at the end of World War II. Much has changed in the world since then but much has also remained the same.

Generally speaking, trade will benefit both parties to it. But, there remain political issues that can upset the free flow of trade.

An example is the complex relationship between the United States of America and the Peoples' Republic of China which has sometimes seen free trade issues debated in the same context as

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34 Cobban, *The Nation State and National Self-Determination* (Collins, Fontana, London 1969).
35 Survey of International Affairs, 1937, I.73.
36 Cobban, *The Nation State and National Self-Determination* at pp 271 – 273.

human rights. When those debates occur, (rightly or wrongly), the potential benefits of greater trade are subjected to a political trade off.

A second example is the strained relationship between New Zealand and France following the bombing of the *Rainbow Warrior* in 1985. Only after an international arbitration were trading links redeveloped. New Zealand, the smaller country more reliant on export earnings, faced trade sanctions if it continued to adhere to a principled stand about the application of the rule of law. Should a country risk trade sanctions because of high principles? Different people will have different views on that subject.

The mix of political considerations is likely to change from time to time.[37] Those types of political decisions cannot be considered by those engaged in law reform. In my view, law reformers must consider the logical and necessary results of changes to the law and make recommendations accordingly. Political considerations may well end up militating against adoption of a law which may otherwise have a perfectly sound legal base.

The considerations which should be taken into account by law reformers are discussed below by reference to the recent experience of the New Zealand Law Commission with its electronic commerce and cross-border insolvency projects.

5. The Law Commission Experience

Electronic Commerce

For a country as small and geographically isolated as New Zealand the technological developments involved in electronic commerce have huge potential. It is now possible to trade without the twin barriers of distance and time proving to be unconquerable. Because of business benefits to be gained from using electronic commerce it was clear to us that New Zealand should remove legal

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37 Some considerations may be characterised as "new" or "novel". Many others may be regarded as static. A good example of this is the failure of the European Union to adopt its Convention on Insolvency Proceedings due to ramifications resulting from the ban on English meat exports following "mad cow" disease. See Borch, *The EU Convention on Insolvency Proceedings and Mad Cow Disease* (*International Who's Who of Insolvency and Restructuring Lawyers* (Law Business Research, 1998)).

impediments to trade and facilitate such commerce so far as possible. Obviously, any countervailing public interest considerations had to be taken into account in determining the nature and scope of reforms to the law.

We developed four guiding principles to our reform of this area of the law. They were:

- To ensure that business people can choose whether to do business through the use of paper documentation or by electronic means without any avoidable uncertainty arising out of the use of electronic means of communication.

- To ensure that fundamental principles underlying the law of contract and tort remain untouched save to the extent that adaptation is required to meet the needs of electronic commerce.

- To ensure that any laws which are enacted to adapt the law of contract or the law of torts to the use of electronic commerce are expressed in a technologically neutral manner so that changes to the law are not restricted to existing technology and can apply equally to technology yet to be invented.

- To ensure compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners.[38]

Those guiding principles were all supported in submissions made to us in response to our *Electronic Commerce* report. Those making submissions also suggested a further principle: i.e. that the private sector should lead development in this area and the government's role should be confined to the removal of barriers to electronic commerce and to the general facilitation of trade which is carried on through electronic means. We will be adopting that principle in our second *Electronic Commerce* report due to be released next month.

Two particular aspects need to be emphasised. The first is the unqualified acceptance of our fourth guiding principle: i.e. the principle of compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners. The

second is the emphasis placed by all submitters on the need for Government to facilitate international trade. Those are important community reactions when assessing how those engaged in law reform should approach their task. They suggest that xenophobia may no longer be a problem.

Other policy issues are also coming into play when assessing electronic commerce issues. For example:

- the difficulties of identifying the correct location and legal personality of those who trade on the Internet; and

- the ability of small to medium size enterprises and consumers to become involved in international dealings to an extent not previously known.

These issues have particular significance to questions of private international law. *First*, while territory has always been the bedrock for determining basic jurisdiction (ie whether the court possesses authority to determine a dispute[39]) the Internet is not territorially based. This means that it is necessary to reconsider the adequacy of existing tests for establishing (for example) the proper law of a contract or the place where the dispute will be resolved. *Second,* it is a fact of life that many consumers and many people running small to medium sized business enterprises have had little or no involvement with international business transactions and will lack understanding both of the relevant laws and from whom appropriate legal advice could be sought.

In our *Computer Misuse* report we said:

> There is an essential public interest in the use of computers. The use of computers should be encouraged. Computers allow information to be processed, recorded and transferred quickly and efficiently, and have revolutionised the way people learn, travel, interact and conduct business. Computers are now an accepted part of life in almost all parts of the world. Given the importance of computers in our society today, it is imperative that New Zealand keep pace with the rest of world in the use of new technology. To give effect to the public interest factors identified, it is necessary both to facilitate the use of computer technology (including the removal of barriers from its use) and to provide strong sanctions against reprehensible conduct which, if unchecked, is likely to inhibit the use of computers.

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38 *Electronic Commerce Part 1: A Guide for the Legal and Business Community* (NZLC R50 1998) at para E4.

39 *Electronic Commerce Part 1: A Guide for the Legal and Business Community* (NZLC R50 1998) at para 276.

> It is necessary to ensure that computer systems are not used to cause harm to others. Computers are relied on to perform vital functions in many sectors of our society. They are used to administer banking and financial systems, transport control systems, communication systems, hospitals and a variety of other complex operations. A person who gains unauthorised access to a computer can cause major disruption. Computer misuse can cause extensive economic loss, not only to an individual company but also on a nation wide scale; it can put lives in danger. Unauthorised interference with an airport control system or computers in a hospital are examples of the latter.[40]

As we have progressed our work on electronic commerce, we have become more and more convinced of the need for both a seamless international legal regime of civil law to facilitate electronic commerce[41] and a sufficiently strong international criminal law system to deal with the cross-border crime which can so easily result from unlawful interference with computer systems from a distance. The technology has removed physical barriers; the law needs to remove legal barriers to both civil and criminal law systems.

I have already referred to an address made to APEC at its 1998 meeting in Kuala Lumpur by the President of our Commission, Hon Justice Baragwanath. The President has recently addressed another APEC meeting in Auckland. This time, His Honour placed emphasis on the need for an international computer crime regime. The judge said:

> The crimes which have traditionally been dealt with by international law, and now by the new international tribunals, are crimes of serious violence which are universally morally condemned. Computer crimes appear primarily economic, but they may be much more than that; for example, a hacker could damage computer systems belonging to a hospital, or a large dam, or a defence facility, causing not only economic damage but injury or even death. The borderless nature of these crimes, and their potential for vast economic loss and physical damage, cry out for international measures to be taken against them.
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> There are a number of different ways to approach the practical measures to deal with computer crimes:
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> - a model criminal law, which would be available to be used by any country as a template for domestic legislation. It would respond to hacking whenever committed, recognising that international computer misuse is an affront to international order;
> - a multilateral treaty under which each state would undertake to enact domestic legislation. This is a method already used in the commercial sphere (for example, the Vienna Convention on Contracts for the International Sale of Goods, which has been implemented in New Zealand by the Sale of Goods (United Nations

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40 *Computer Misuse* paras 34 and 35.

41 See fn 10 above.

Convention) Act 1994), and the criminal sphere (for example, the United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which has been implemented in New Zealand by the Anti-Personnel Mines Prohibition Act 1998.) Such a treaty could include the principle *aut judicare aut dedere* - so that any state in which an offence was committed would be required either to prosecute the offender or extradite them to a country that would prosecute them;

- ultimately the recognition of computer hacking as a crime at international law. To date the Rome Treaty embraces only genocide and like conduct. There are obvious difficulties in attaining a general international criminal law; a vast range of social and religious norms makes that impracticable. But the mutual interest of economies in ridding their citizens and institutions of exposure to off-shore hacking may lead to a general acceptance of a multilateral treaty of the kind discussed by Schacter *International Law in Theory and Practice* (1991) at page 74:

> ... [a] general multilateral treaty containing provisions which (to quote the International Court) "are of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". Multilateral treaties of this type have been prepared under the aegis of the United Nations and other international organizations. The United Nations organs or conferences called by them have produced about 200 such treaties from 1946 to 1980; the other international organizations have concluded, in the aggregate, many more than that. These treaties are normally open to all States; their rules are general and, in a functional sense, they create law for the parties. They may also develop into general customary law, binding non-parties as well, by virtue of State practice of the non-parties.[42]

These comments were made in the context of a reference to the "more exciting development" of the creation of an International Criminal Court under the Treaty of Rome in 1998[43].

Generally, our work on electronic commerce has shown us that jurisdictional boundaries may exist on maps and may even be enforced (sometimes) by border controls. But, technology has rendered cross-border trade more accessible and has reduced the ability of individual governments to regulate trade where no physical boundaries are actually crossed.

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42 Hon Justice Baragwanath, *Changes in International and Domestic Law which are Critical to a Borderless World of Electronic Commerce: An Update* (APEC Steering Group on Electronic Commerce, 7 September 1999, Auckland).

43 Which will only come into existence once the Rome statute has been ratified by 60 countries.

While the Commission is convinced that it must recommend changes to New Zealand's law which will facilitate electronic commerce, it is equally convinced that safeguards through the criminal law are also necessary. Those safeguards must also be based on international norms. And in striking that balance, it must also be recognised that in some countries criminal law is given primacy over the civil law when protection of intellectual property rights is concerned. There is a marked contrast between the position taken in New Zealand and Japan in that regard. As Hammond J observed recently in *Powerbeat International Limited v. Attorney-General*[44]:

> ...criminal proceedings have not, before the last decade or so, traditionally been part of the armoury used against an infringer of copyright. For instance, in 1984, Cooke J expressed the view in ***Busby v Thorne EMI Video Programmes Ltd*** [1984] 1 NZLR 461, 474, that:
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> > Essentially what are being protected are the private property rights of the plaintiff. The law enforcement agencies of this state have no particular interest in prosecuting the defendant; the public peace and the protection from citizens from violence are not involved.
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> ...
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> That said, it has to be acknowledged that in many legal systems in the world today, the criminal law is given [primacy] even over the civil law in this area. For instance, in a notably high technology economy - that of Japan - the primary line of attack on pirates and infringers *is* through the criminal law (See Doi, *Intellectual Property Protection and Management - Law and Practice in Japan (1992).*

Once again, the balance to be struck between the way in which civil and criminal law operates may well, ultimately, need to be guided by more international considerations than is presently the position.

Cross-Border Insolvency

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44 Unreported, High Court of New Zealand, Hamilton CP 72/98 17 June 1999, at pp 22 – 23.

In approaching the question whether New Zealand should adopt the UNCITRAL Model Law on Cross-Border Insolvency we identified five factors which should be taken into account. They can be summarised as follows:[45]

- **Globalisation factors:** these factors arise from the need to synthesise international commercial law given the nature of global markets in which trading entities operate.

- **Fiscal factors:** these factors impinge upon policy reasons for not discriminating against foreign investors or lenders.

- **Efficiency and fairness factors:** these factors go to the process by which relief can be sought when cross-border insolvency issues arise.

- **Adequacy of existing legislation:** if existing legislation is adequate there may be no need to reform the law.

- **Sovereignty factor:** this factor goes to the question whether it is appropriate for a country to adopt an international regime rather than a domestic regime which may better suit or protect its own citizens.

We were obliged to focus on the fact that New Zealand has a high degree of foreign investment (both equity and debt) and is heavily dependent upon exports for income. Thus, at a practical level, it was likely that New Zealand entities would become more and more embroiled in cross-border insolvency. We took the view that it was preferable for the Government to enact modern cross-border insolvency laws *before* major problems occurred.

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45 *Cross-Border Insolvency,* paras E3 and E4.

Economic analysis demonstrates the need for fair treatment of foreign creditors.[46] One of the issues which an investor must address before making a major investment overseas is the ability, if things turn sour, to recover money. If a State in which the investment is made allows its creditors to be given preference over foreign creditors or, alternatively, makes or appears to make it difficult for foreign creditors to receive a just dividend, the investment may not proceed or, if it does, the price to be paid by way of interest may be inflated.[47]

We took the view that the factors in favour of reform outweighed those against adoption of the Model Law. I set out below the reasons which led us to that view:[48]

- The Model Law's option of deference to a local proceeding was a political necessity accepted as part of the UNCITRAL process to accommodate concerns about potentially over-intrusive foreign proceedings dominating local insolvency systems. In short, even if universality is the most desirable underpinning for a cross-border insolvency regime to embody, the value of cross-border insolvency law lies in its adoption by many trading states, which would not be likely to occur if a truly universal approach was proposed;

- There are many economic factors favouring adoption of the Model Law. *First,* there is a need to address cross-border insolvency problems arising from the perpetration of fraud by electronic means[49]. *Second,* fair treatment of foreign creditors is likely to influence foreign investment favourably. *Third,* there is a likelihood that the Model Law will be widely adopted as part of IMF relief packages to states in financial distress. The economic factors to which we referred[50] are likely to reduce transaction costs and promote trade and capital flows thereby improving the economic well-being of the New Zealand economy. *Fourth,* fair treatment of foreign creditors by New Zealand courts is likely to lead the courts of other

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46 Bebchuk and Guzman, *An Economic Analysis of Transnational Bankruptcies* (National Bureau of Economic Research Working Paper 6521 Cambridge 1998) at 19 – 23.

47 *Cross-Border Insolvency* para E8.

48 *Cross-Border Insolvency* para 112.

49 This is the problem to which Lord Millett referred in *Tracing the Proceeds of Fraud* (1991) 107 LQR 71.

50 *Cross-Border Insolvency* paras 76-100.

States with which we trade to adopt a similar approach to New Zealand creditors who are in competition with their domestic creditors;

- It meets the problems identified in the United States National Bankruptcy Commission's Report;[51]

- It is necessary for statute law governing international trade to reflect global trade developments. This has been touched upon by the courts but has been left to the legislature[52].

- Our present domestic law is inadequate, particularly in dealing with corporate insolvencies.[53] Adoption of the Model Law would prove a more satisfactory option as it would align New Zealand with other trading nations who adopt the Model Law.

6. CONCLUSIONS

What conclusions can be drawn from all of this?

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51 See para 19. Para 19 of the report identified the following factors; (1) Reorganisation of an enterprise is difficult or impossible because each uncoordinated local proceeding focuses on maximising returns for local creditors rather than the total pool of creditors: (2) Even in a liquidation, realisations of greater value can be achieved if national borders are ignored. For example, a division of a company may have manufacturing and distribution facilities in several countries with each division being saleable for a higher price as a unit than would be received for each bundle of assets in each state. Nevertheless, existing laws make it very difficult to sell assets in multinational packages; (3) While virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Apart from differing priority rules in different countries, distributions depend on assets seizable in each state at the time of bankruptcy. Thus, there is an element of luck as to the quantum of dividend that is recovered in any particular jurisdiction. Because a few, very sophisticated, international creditors may collect in several proceedings and do very well, while most smaller creditors cannot afford to "play that game", the results are arbitrary and unpredictable. Such unpredictability creates increased transaction costs in international financing. (4) Shrewd debtors can exploit modern technology to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and co-operation with those proceedings is so cumbersome in most countries, it becomes very difficult for administrators or liquidators to pursue and capture the assets for the benefit of all creditors. (5) Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings in another jurisdiction and too often suffer de facto discrimination in those proceedings;

52 See *Gordon Pacific Developments Limited v Conlon* [1993] 3 NZLR 760;

53 See paras 106 – 111.

First, I suggest that there is an increasing need to develop laws which are effective in what is clearly a global market.

Second, States must find ways in which to regulate the borderless economic world efficiently within their sovereign territorial boundaries. In doing so, it is necessary, increasingly, to have regard to the standards and norms of those with which our countries have major trading relationships.

Third, there is a need to strike appropriate balances in the context of civil and criminal law; particularly in the area of electronic commerce. This emphasises the need for development of an international criminal law which can deal adequately with crimes which can readily be committed at a distance and across borders through use of electronic technology.

Fourth, areas of law which will apply to cross-jurisdiction transactions which can be carried out without any border control, must be regulated in an international manner.

The way in which different countries react to the new challenges to which I have referred will be a measure of how effective trade law reformers are seen to be in the 21st century.

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Hamilton, New Zealand
3 September 1999