TRANS-TASMAN LEGAL CO-ORDINATION – THE NEXT FRONTIERS[*]

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In a paper delivered in Auckland earlier this year, Justice Michael Kirby called for further thought to be given to the future of the trans-Tasman relationship.[1] Justice Kirby encouraged us to be imaginative and constitutionally inventive, and to move beyond the purely economic dimension of the relationship. In this short paper I make a few suggestions in response to that challenge. I fear that by Justice Kirby's standards they will seem unduly timid. But I will do my best.

These suggestions are proffered on the basis of a few core assumptions. First, I assume (as does Justice Kirby) that full political union is unlikely in the foreseeable future. Indeed the case for political union seems to me ever weaker, given the trend towards smaller states based on social and cultural identity, associated together in a range of bilateral and multilateral arrangements and organisations concerned with economic, trade and security matters. Political union is not a prerequisite for single markets, a single currency, or common arrangements for security and foreign policy. So arguments for any of these forms of integration provide no support for moves towards a "Republic of Australasia".

Second, I assume that integration is not to be pursued for its own sake. There needs to be a clear rationale for any given proposal, and the expected benefits must justify both the direct costs and, more importantly, the indirect costs in terms of any effect on tailoring of laws and institutions to local conditions and preferences, participation values, and direct local accountability.

My work on trans-Tasman legal and regulatory issues does however suggest that there are fields where further integration would provide real benefits on both sides of the Tasman. The most obvious front on which to keep working is economic: reducing barriers to trans-Tasman commercial activity should provide further stimulus for growth and economic development in New Zealand and Australia.

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[1] Hon Justice Michael Kirby, "Australia & New Zealand – Past, Passing & To Come?", speech delivered to Knowledge Wave Conference 2003, Auckland, 19 February 2003.

But there is also, it seems to me, the potential for real gains on the human and social fronts. Enhanced freedom of movement for workers and their families, and for students, benefits the individuals concerned, and enriches the societies in which they live and work. And although it seems so obvious as to be trivial, it is worth reminding ourselves that on both sides of the Tasman we rely on the law – civil and criminal – to underpin not only economic activity, but also a wide range of (mostly shared) social values and expectations. If – as I believe is the case – those values and expectations are also relevant to many trans-Tasman dealings, but there are significant barriers to the application of our laws in such cases, our economies are thereby damaged, and our values undermined. Enhanced cooperation on such matters would provide benefits going well beyond the purely economic.

Thus the focus of this paper, legal coordination between Australia and New Zealand, has important implications for both economic and social issues.

1 Trans-Tasman Court proceedings and regulatory enforcement

Civil proceedings – trans-Tasman service and enforcement of judgments

I delivered a paper to the ANZIL/ASIL joint conference three years ago on the subject of cross-border dispute resolution in civil and commercial cases. In that paper I canvassed the highly unsatisfactory state of the law in relation to trans-Tasman court proceedings. Despite the ever-increasing movement of people and assets between the two countries, and ever-deeper business and trade links, we have made little progress towards closer integration of our civil justice systems. We treat each other in this context in essentially the same way as any other foreign country, and apply the standard rules for asserting jurisdiction over persons abroad, and enforcing civil judgments. Some steps have been taken to recognise the frequency with which disputes in one or other country have a trans-Tasman element. There is a simplified regime for taking evidence for use in civil cases (other than family proceedings)[2] and there have been some minor procedural tweaks to the law in relation to enforcement of judgments.[3] But the basic rules on when civil proceedings can be served in the other country, and when we will enforce a judgment from the other country, have not been addressed.

For example, we do not enforce each other's non-money judgments. We do not grant interim relief in support of proceedings in the other country. We do not

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[2] See the Evidence and Procedure (New Zealand) Act 1994 (Cth) and the Evidence Amendment Act 1994 (NZ).

[3] See the Foreign Judgments Act 1991 (Cth), and the 1992 amendments to the Reciprocal Enforcement of Judgments Act 1934 (NZ).

enforce judgments given in the other country in proceedings where the defendant was served abroad and did not appear, unless the defendant was resident in that country at the time of service abroad, or had previously agreed to submit to that country's courts, however closely connected with that country the proceedings may be. In these respects our civil justice systems provide for less cooperation than has been achieved in Europe, between legal systems with much more significant differences, under the Brussels Convention (now the Brussels Regulation[4]) and the Lugano Convention. And it seems especially odd that we will enforce non-money arbitral awards made in the other country, but not non-money judgments, even where the parties had expressly agreed that the court in question would hear the dispute.

In my view, it is time for a more fundamental reappraisal of the rules that apply to civil proceedings with a trans-Tasman element. We have very similar court systems. We each have full confidence in the quality of the other's justice system. Most of the safeguards that are applied in relation to proceedings in other more distant and less similar countries simply are not relevant in the trans-Tasman context.

When I spoke three years ago, I outlined the current state of negotiations towards a global convention on jurisdiction and enforcement of judgments in civil and commercial matters, under the auspices of the Hague Conference on Private International Law. It seemed then that such a convention might go some way to addressing the concerns I identified. However I argued that it was possible for Australia and New Zealand to move faster, and to go further, than would be possible in the global context. Developments since 2000 have confirmed the difficulties of achieving widespread multilateral support for a broad convention on jurisdiction and enforcement of judgments. A Diplomatic Conference in mid-2001 exposed deep-seated differences between participants on fundamental questions of scope, as well as on myriad points of detail. The Hague Conference is now considering a proposal to work towards a more focused convention on choice of court clauses, providing for the chosen court to have jurisdiction, and for enforcement of judgment given by the chosen court. This is I think a very worthwhile project. But it illustrates starkly how limited, and how slow, progress is likely to be on these issues in any multilateral forum. The case for a special Australasian regime is stronger than ever.

What might that regime look like? Similar issues were addressed as between the Australian states and territories some 20 years ago. The Australian Law Reform Commission prepared a comprehensive report which led to the enactment of the

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[4] European Council Regulation (EC) No 44/2001 of 22 December 2000.

Service and Execution of Process Act 1992 (Cth).[5] Essentially, this Act provides that proceedings issued in one state can be served in another state in accordance with that Act, and are then treated as if they had been served domestically. The resulting judgments are enforced throughout Australia. It is not open to a defendant to fail to appear, then contest the jurisdiction of the original Court. However a defendant who considers that the Court in which proceedings have been commenced is not the appropriate forum can apply to that Court for a stay of proceedings on the grounds that another state's court provides a more appropriate forum, in all the circumstances.

I see no reason why this regime could not relatively simply be extended to New Zealand. This would achieve a significant reduction in uncertainty and risk associated with dealings between the two countries, and would reduce the waste of costs on unnecessary and inappropriate disputes about where a claim will be decided, and about the enforceability of judgments. The importance of addressing these issues to reduce transaction costs and facilitate trade was recognised early in the life of the European Community: the Brussels Convention, which provides a comprehensive regime governing questions of jurisdiction and enforcement of judgments in civil proceedings, was completed in 1968. We also need to deal with this issue, as one of building blocks on which trans-Tasman economic integration is founded. And raising our eyes above economic horizons, as Justice Kirby urged, such measures should also enhance access to justice and strengthen the rule of law in Australasia. Where a couple has separated, and one partner has gone to live in Australia, for example, it does no credit to our legal systems that the complexity and cost associated with resolving questions about division of property in the cross-border context may mean that neither partner has effective access to the Courts.

Regulatory proceedings

The work I have done on business law coordination over the last few years suggests to me that this model could be taken further still. The consumer protection and business regulatory frameworks in Australia and New Zealand are very similar. It is increasingly common for a firm in one country to deal with firms, and consumers, in the other. And technology makes it ever easier to do this direct, without local intermediaries. However, our regulatory regimes struggle to address this development. For example, suppose a New Zealand firm supplies unsafe goods direct to consumers in Australia, either through traditional mail order channels or (more likely in today's world) as a result of internet sales. It is an offence to supply those items in Australia, but it is not possible for proceedings to be commenced in Australia against a New Zealand firm, and

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[5] ALRC Report no 40, Service and Execution of Process, 1987.

served outside the jurisdiction. Nor is extradition usually an option in such cases: it is only available in respect of natural persons, yet most regulatory offences nowadays are committed by companies. And in very many cases, the sanction for breach of these regulatory regimes is a fine – possibly a substantial fine – but not a period of imprisonment sufficient to found a request for extradition.

It seems to me that we should carefully study whether the solutions that have been adopted within Australia in relation to service and execution of criminal process across state borders could be adapted to the trans-Tasman environment. I have some reservations about the appropriateness and viability of simply extending the internal Australian regime, in this context. But at least we should do the work.

If more ambitious forms of co-operation in criminal proceedings are found to be too problematic, at least in the medium term, it seems to me that there may be lesser forms of cooperation which would be capable of being put in place relatively swiftly. At the least, we should be able to identify a positive list of statutes relating to consumer protection and business regulation, which are of particular importance in the context of trans-Tasman dealings. We could provide that proceedings under these statutes, where the sanction is limited to imposition of a fine, can be served in the other country. The statute could go on to provide that if the defendant elects not to appear (in person, by counsel or – perhaps – by video link, along the lines of the evidence regimes) then the Court can proceed in the absence of the defendant. Alternatively, provision could be made to compel the attendance of the defendant at court premises in the defendant's country, with a video link to the relevant court in the other country. Any fine imposed by the Court could be enforced in the usual way in the country in which it was imposed. And it could be enforced as if it were a civil money judgment in favour of the Government of that country, under the civil enforcement regime based on SEPA.

This proposal raises a few complex issues, and I acknowledge at once that it is quite novel. But it would ensure greater integrity and effectiveness for both countries' consumer protection and regulatory regimes, and its implementation requires only a little imagination and invention.

2 Mutual recognition

Adopting uniform laws across two jurisdictions, each with their own legislatures, distinct electorates, and differing political imperatives, is never simple. Nor, in most contexts, is it necessary or appropriate to do so.[6] In most fields of law, the

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[6] For more detailed discussion of the circumstances in which identical laws are required to achieve coordination objectives, see David Goddard, "Business laws and regulatory institutions: some approaches to CER coordination" in A Grimes, L Wevers & G Sullivan (eds) *States of Mind:*

principal objective of legal coordination is to reduce barriers to cross-border commercial activity, and to movement of people and assets. A very simple and effective tool to achieve this goal is mutual recognition. In essence, a mutual recognition regime provides that where a person carries on an activity in Country A, in accordance with the law of Country A, they can also engage in that activity in Country B while complying with the requirements of the law of Country A, and without needing to comply with any different or additional requirements that would otherwise apply to that activity under the law of Country B.

The Trans-Tasman Mutual Recognition Arrangement came into effect in 1998. The objective of the arrangement is "to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business."

The Arrangement gives effect to two basic principles relating to goods and occupations respectively:

> "1. Goods
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> The basic principle in respect of Goods is that a Good that may legally be sold in the Jurisdiction of any Australian Party may be sold in New Zealand, and a Good that may legally be sold in New Zealand may be sold in the Jurisdiction of any Australian Party.
>
> 2. Occupations
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> The basic principle in respect of Occupations is that a person Registered to practise an Occupation in the Jurisdiction of any Australian Party is entitled to practise an Equivalent occupation in New Zealand, and a person Registered to practise an Occupation in New Zealand is entitled to practise an Equivalent occupation in the jurisdiction of any Australian Party."

The Arrangement provides for a review after five years of operation. At the request of Australasian Heads of Government, the Productivity Commission (an independent body established under Commonwealth legislation, with expertise in microeconomic reform) is currently carrying out research to inform that review, in conjunction with the ten-year review of the Australian Mutual Recognition

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Australia and New Zealand 1901 – 2001 (Institute of Policy Studies & Stout Research Centre, 2002).

Agreement. The Productivity Commission recently released a draft research report which suggests that the mutual recognition schemes are effective overall in achieving their objectives, and should continue.[7] The Productivity Commission has made preliminary findings suggesting some clarifications and minor extensions of the schemes. Submissions on the draft report are due by 8 August 2003, after which the Productivity Commission will prepare a final report to Governments. Officials will then conduct the formal review of the arrangement, and report to Heads of Government.

The Productivity Commission has carried out a thorough and careful review of the Mutual Recognition Schemes. The draft research report is a very useful document, which sheds a great deal of light on the current state of play in relation to mutual recognition, and identifies some worthwhile improvements. However, in the spirit of Justice Kirby's speech, I would like to suggest three more ambitious extensions to the mutual recognition regime.

Regulatory requirements affecting movement of goods

There is a strong case for the regime to be extended to apply to regulatory requirements that have the *effect* of preventing or deterring trans-Tasman movement of goods, whether or not those requirements relate directly to the sale of goods. In particular, it seems to me that the regime should apply to regulatory requirements in relation to the manner in which goods can be used. For example, a rule that washing machines that do not meet local standards cannot be connected to the plumbing network does not directly relate to sale of washing machines, but will prevent or discourage the sale of washing machines made in the other jurisdiction to that jurisdiction's standards.

This proposal is inspired by the European mutual recognition regime for goods, established by Articles 28-30 of the EC Treaty, and caselaw following the well-known *Cassis de Dijon* decision of the European Court of Justice.[8] Under that regime, a Member State's law is overridden by the mutual recognition principle if it discriminates directly against goods from another Member State, or if it is "indistinctly applicable" but in practice imposes a greater burden on goods from other Member States. However a rule that is generally applicable to all goods, regardless of origin, will be valid if:

- it is directed at a legitimate regulatory objective (eg public health and safety, the environment, consumer protection);

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[7] Australian Productivity Commission, *Evaluation of the Mutual Recognition Schemes – Draft Research Report*, June 2003.

[8] Case 120/78, [1979] ECR 649.

- it is proportional to that objective; and

- it gives effect to that objective in the manner least likely to impede the free movement of goods.

The European regime, while removing some barriers to movement of goods, has given rise to a new set of legal uncertainties and complexities. A key tool in resolving those uncertainties and complexities has been the existence of the ECJ, which can authoritatively determine the application of the mutual recognition principle to particular domestic laws of member states.

In Australasia we could simply leave such a principle to be applied by domestic courts: I would not rule that possibility out completely. But if that is seen as too risky and too ambitious, at least at this stage and in the absence of any authoritative trans-Tasman Court to bring consistency to the application of the regime, it seems to me we could devise an alternative institutional structure to give effect to a principle of this kind. For example, we could establish an inter-Governmental Review Committee, made up of senior officials from each of the participating jurisdictions, to which these issues could be referred.[9] Where a complaint is received that a domestic requirement infringes the extended mutual recognition principle, this Review Committee could consider whether the requirement prevents or impedes trans-Tasman movement of goods. If it does, the Review Committee would then go on to ask whether the requirement is directed at a legitimate regulatory objective (eg public health and safety, the environment, consumer protection), whether it is proportional to that objective, and whether it gives effect to that objective in the manner least distortionary to trade.

I envisage such a body having an advisory role, rather than making binding determinations of legal rights. The Review Committee would make recommendations to the Government in question in relation to any changes to the law which it considered were required by reference to the mutual recognition principle. That Government would be required to report within six months on its proposals to modify the regulatory regime, and within (say) 12 months on steps taken to do so.

Such a body would have three advantages. First, the questions are essentially policy design issues rather than pure legal issues. A body of this kind, supported

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[9] This would not need to be a permanent body, and no new bureaucracy would need to be established: I envisage that relevant expertise and support could be obtained as and when required from the Australian Office of Regulation Review and the New Zealand Regulatory Impact Assessment Unit. Advice might also be sought from the Productivity Commission, where the issue before the Committee was a significant one.

by agencies whose core business it is to assess regulatory measures against core principles of effectiveness and efficiency, would be more likely than a court to have the relevant expertise. Second, there may be a number of options for giving effect to the principle, rather than one "right answer": a general finding of inconsistency coupled with guidance on options for removing that inconsistency may be more appropriate, and leave more scope for legitimate local choices about implementation, than a court-imposed solution. And third, but perhaps most important, non-binding recommendations are more likely to be acceptable to participating jurisdictions: a proposal of this kind has better chances of acceptance.

Regulatory requirements affecting movement of service providers

Similarly, TTMRA could be extended to apply to regulatory requirements which have the effect of creating barriers to the movement of service providers between the two countries. Here also there would be a two-stage inquiry: does the regulatory requirement have the effect of preventing movement of service providers, and if so, is it justified by reference to a legitimate regulatory objective, is it proportional to that objective, and does it give effect to that objective in the manner least harmful to cross-border movement of service providers?

In this context also, it may be more productive to refer the question to a Review Committee with an advisory function, rather than to the Courts for a binding determination.

Remote and temporary provision of services

Third, TTMRA could be extended to facilitate remote and temporary provision of services, by establishing a regime for mutual recognition in relation to provision of services by persons who do not have a permanent establishment in the host jurisdiction. TTMRA focuses on movement of service providers. It facilitates registration in another jurisdiction. But registration is still required in each jurisdiction before services are provided in that jurisdiction. The TTRMA model does not work well for two increasingly common situations. First, it does not work well for mobile professionals, such as physiotherapists travelling with a sports team.[10] Second, it is increasingly common for services to be provided at a distance, using various forms of information and communications technology. An architect in New South Wales can readily provide services across the internet to clients in Victoria or Queensland or New Zealand. But it is unlawful either to provide the services or to call oneself an architect in those other jurisdictions, without becoming registered in each jurisdiction. This creates a significant barrier

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[10] See Productivity Commission op cit p 75.

to occasional sales into a market, and thus to organic growth of Australasian service sector businesses.

In Europe, there are two recognition models that address this issue. In some sectors, in particular financial services, a service provider is entitled to provide services in any Member State subject to the regulatory jurisdiction of their home State. Appropriate notice must be given as to the applicable regulatory regime. This approach is underpinned by a high degree of substantive convergence of the regulation of financial service providers. The second, generally applicable, model is established under Articles 49 *et seq* of the EC Treaty. A service provider from one Member State has the right to provide services on a temporary basis in another Member State. Those services are provided subject to the same regulatory requirements that apply to domestic providers in the host state. However, there are two important qualifications to this requirement. First, the host state cannot require registration as a condition of providing services in that state. Second, the host state cannot uncritically apply all the regulatory requirements that apply to domestic providers. The local rules can be applied only where they are justified by reference to a legitimate regulatory objective, are proportional to that objective, and do not impede temporary provision of services across borders more than is necessary to give effect to that objective. Very importantly, the manner in which the local rules are applied to providers of such services must not unnecessarily duplicate or overlap with regulatory requirements to which the service provider is subject in that service provider's home State.[11]

The Productivity Commission's draft report does not consider the possibility of adopting, in the Australasian context, one or other of these European models. In theory, either could work. The real question is what the benefits and disadvantages of each might be, in our part of the world.

The benefits seems reasonably clear, at least in principle. Regimes of this kind – especially a "home regulation" regime – would reduce barriers to cross-border provision of services, thus enhancing competition, increasing customer choice, and reducing compliance costs for businesses. Organic growth of businesses into service export markets would be facilitated. The real question is how significant these benefits would be: would they be widespread, or would they apply only to a very few firms in a limited number of sectors? This is an issue that the Productivity Commission might usefully consider, in completing its work.

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[11] For a helpful review of the EC law, see Catherine Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" EL Rev 2001, 26(1), 35 - 59.

Careful thought would also need to be given to the costs and risks of such a regime. The direct costs of administering such a regime seem unlikely to be significant. More important would be the risk of compromising some of the regulatory objectives of occupational regulation in each jurisdiction. On the one hand, it can be argued that purchasers of services would be willing, if for example they were opening an office in the other jurisdiction, to purchase the services there, under that jurisdiction's regime. So there is already an informal recognition of the adequacy of the other Australasian jurisdictions' regulatory regimes, just as there is with goods.[12] On the other hand, there is a plausible argument that the differences in regulation of service providers are more significant and more complex to evaluate. Purchasers of services make assumptions about the basis on which those services are provided, and the regulatory protections available to them, based on their domestic experience. For some purchasers a simple warning that the services are provided subject to the law of another designated jurisdiction would be insufficient to put them on notice as to the nature and significance of the choice they are making in selecting a service provider from that other jurisdiction, rather than a domestic provider.

There would also be some issues about enforcement against distant service providers, but these could be addressed by the proposals outlined in section 1 of this paper.

One possible middle road might be to create a regime of this kind, but to exclude services provided to consumers, ie to persons who acquire the services primarily for personal, family or household purposes. Business purchasers of services, who are more sophisticated and better placed to identify and manage risks, could then decide whether they were or were not willing to deal with remote service providers, regulated in another jurisdiction under somewhat different rules.

A general presumption of mutual recognition of commercial regulation?

But this focus on an extension of TTRMA – even significant extension of TTRMA – probably falls short of the challenge to be imaginative and inventive. Stepping back, these proposals form part of a broader tapestry of mutual recognition projects currently underway: cross recognition of securities offerings, recognition of financial reporting, and various other possibilities identified in the field of business regulation. Is there any general principle that underpins these various initiatives?

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[12] This argument played a central role in the case for the mutual recognition regime in relation to goods: see Gary Sturgess, "Fuzzy Law and Low Maintenance Regulation: The Birth of Mutual Recognition in Australia", address to Royal Institute of Public Administration Australia (Qld Division), Brisbane, 12 February 1993.

It seems to me that that general principle may be that Australia and New Zealand are increasingly willing to recognise regulation of commercial activities by the other, and refrain from imposing additional local requirements, in the absence of compelling reasons to the contrary. We could take the Memorandum of Understanding on Coordination of Business Law a step further, and make this approach explicit, by introducing a strong presumption of mutual recognition of regulation of business activities with a trans-Tasman element. The MoU could provide a direction to policymakers to consider, when preparing new or revised legislation, the potential for trans-Tasman activity, or for an entity established and regulated in one country to carry on its regulated business in the other. Where that potential is present, the default approach should be to include in the legislation a power to make regulations implementing a recognition regime, in the absence of compelling reasons not to do so.[13] Regulations introducing mutual recognition on a trans-Tasman basis would normally follow.

The extent of recognition would vary from context to context – in some cases, the home country's regulatory regime would be sufficient without more, in others aspects of the home country regulatory regime would be retained, and in some cases there would be tailored "top-up" or "translation" requirements that would need to be complied with in order to obtain recognition. The need for such tailoring in many cases, and the need to vary the tailored requirements as and when domestic regulatory regimes change in the other country, is the main reason for implementing such recognition regimes by regulations, rather than directly in primary legislation.

Political economy factors point to pursuit of such regimes on a mutual basis, in most cases, though in principle unilateral recognition often makes good sense.

There is a link between this proposal, and the suggestion of establishing a trans-Tasman Review Committee to consider regulatory impediments to trans-Tasman provision of services and movement of goods. A key technique for reducing such impediments will often be mutual recognition. The ability to introduce and adapt mutual recognition regimes will be an important mechanism for giving effect to recommendations of the Review Committee. And effective mutual recognition regimes will of course reduce the prospect of regulatory regimes coming before the Review Committee, and of adverse findings being made.

3 Joint institutions

What of joint institutions? Would it not be more imaginative and more inventive to advocate across-the-board merger of our regulatory institutions? Work is well

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[13] See eg Part 5 of the Securities Act 1978, inserted by the Securities Amendment Act 2002.

advanced on a joint therapeutic products agency. Why not a single patents office? A single accounting standards setting body? A single competition agency? A single securities regulator?

Some of these possibilities may make sense, and may in time come to pass. But there are significant costs and challenges associated with establishing single institutions that are effectively accountable to two distinct polities. I explored some of these in a paper presented to the recent "States of Mind" conference.[14] The practical experience of developing the ownership, governance and accountability arrangements for the joint therapeutic products agency has confirmed that these are real issues, not merely theoretical ones. The initial and ongoing costs of establishing joint institutions are non-trivial. The work done in developing the joint therapeutics products agency should provide a template that simplifies somewhat the creation of further joint institutions. But I suspect their number will increase fairly slowly over the coming years. Other techniques – mutual recognition, cross appointments of members of the regulatory body (as with the Takeovers Panel), information sharing – will almost certainly be more common.

4 Coordinated policy processes

The proposals set out above move a little way beyond the purely economic. They involve an element of imagination and invention. But I suspect that Justice Kirby might find them a disappointing response to his challenge: I have perhaps lost sight of the wood, through focussing too much on the trees.

So let me conclude with a more broad brush, more ambitious, suggestion. It seems to me that the degree of legal convergence and regulatory co-ordination between Australia and New Zealand has reached the point where we can envisage, and should progressively undertake, coordinated policy development processes. We face many of the same challenges. We are both relatively small OECD countries. We have similar legal and institutional frameworks. There are social and cultural differences between the two countries, but in many contexts they are not especially dramatic or especially relevant. So why should we invent the wheel separately, twice, when one research project would do? And in particular, where we are both implementing international models for a particular legal regime, why do we need to do so separately, with subtle differences that increase costs for those subject to both regimes?

Initially, I suggest two forms of co-ordinated policy process:

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[14] David Goddard, op cit fn 5.

- we should experiment with joint projects undertaken by the New Zealand Law Commission and the Australian Law Reform Commission. Where the same law reform issue arises in both countries, and is suitable for referral to a Law Commission, the Australian and New Zealand Governments could make parallel references to the two Commissions, and ask them to work together and (if possible) prepare a single report to the two Governments. It seems to me this would enrich the law reform process – a broader range of perspectives on any issue is always valuable – and reduce the risk of unnecessary divergence of laws, where there is no substantive difference between the two countries which requires different regulation;

- we should set up some pilot joint officials' processes, with Ministers from both sides of the Tasman asking their officials to undertake a policy exercise in tandem, and prepare a single report to the two Ministers. This already happens in relation to inherently trans-Tasman issues, such as the direction from Ministers earlier this year to explore options for closer coordination of financial reporting bodies. That should be encouraged. But there is no reason why projects such as implementation in each country of cross-border insolvency law should not be undertaken jointly.

The best starting point for joint policy processes may come in the context of multilateral law reform processes. There is already a significant degree of formal and informal cooperation between New Zealand and Australian representatives in many international fora. A more conscious approach to joint participation in certain exercises, to maximise our joint impact, could be followed by joint work on domestic implementation.

Finally, we should not rule out the possibility of joint rule making in some well defined areas. The discussion paper released by the Australian and New Zealand Governments in relation to the proposed joint therapeutic products agency contemplates new forms of joint legislative instruments: rules to be made by the Ministerial Council (broadly analogous to regulations) and Orders to be issued by the Agency (similar to Orders issued by the Therapeutic Goods Administration under the existing Australian regime, and to rule-making powers conferred on some agencies in New Zealand). These new forms of legislative instrument would be made under the Treaty governing the joint regime, and would have direct effect in both countries by virtue of domestic implementing legislation.

This approach could – cautiously – be taken further. In some other areas where there is no material difference in conditions in the two countries, or in relevant preferences, and where some form of detailed delegated rule making or decision making is required, legislation in each country could confer the power to make those detailed rules on a single agency or committee, or could require the rules to

be made with the concurrence of two domestic agencies.[15] The model could also be appropriate where the necessary rules are very technical - "lawyers' law" – and where there is no good reason for differences between the two countries. The rules made by this body would be subject to parliamentary oversight in both countries. There would need to be appropriate processes to ensure voice for stakeholders in each country, and accountability to those stakeholders.

This suggestion falls short of moving to a single legislature responsible for primary legislation generally, and well short of political union. But it goes far beyond the purely economic. And who knows what it might lead to, over time.

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[15] Another model is provided by the Food Standards Authority of Australia and New Zealand (FSANZ) which makes food standards, to which each country is then required to give effect by regulations. Again, we have a single set of rules.