CORPORATE LAW REFORM IN NEW ZEALAND

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Well, it is the end of a long hard day, and we have had long serious discussions about directors, insolvency and various other things. So I thought it would be appropriate if you had some paper to concentrate on rather than simply looking at me and listening, or alternatively dropping off, which is even more embarrassing from my side of the deal here. What I hope you will have picked up when you came in is a collection of extracts from various reports which relate to the law reform process. You might also have picked up a synopsis which was bullied out of me when I was in the middle of some litigation in which I sat down and reviewed what exactly had been going on in New Zealand with corporate law reform over the last few years while I have had some connection with it. And so, I may as well tell you now, before any of you do start to drop off, that what I propose to deal with over the next 30 or 40 minutes are principally questions of the process of law reform, the contract theory of company law, and something about the solvency test and a business judgment rule.

In terms of personal disclaimers, I need to say that I am not a member of the Law Commission. I expired at midnight on the 31st of March and I am now somewhat less inhibited than I was before. Secondly, I take full responsibility for the Law Commission's Report No 16, and I share responsibility for the Law Commission's Report No 9. I am happy to say that I have no responsibility for the form in which the Companies Bill was introduced into the House. And finally, the disclaimer has to be that because of where law reform has got to in the process, I cannot be definite. As you know, the Bill is before a Select Committee. What the Select Committee will do in the face of the three volumes of submissions, we will have to wait and see with a certain degree of nervousness. So, I cannot be definite, in fact I will be quite indefinite, but I probably cannot be discreet either or I may be moderately indiscreet at various points.

I then mention in the synopsis various points of history, most of which do not require more than a sentence or two. You will all know of course that we have already had six Companies Acts, all of which we borrowed from the Brits and this is the first time that we are going to go it alone. You also know that from time to time some politician realises that Australia is quite close and that that is of some importance in relation to our commercial laws. There is some reference to that in the Macarthur Report which dates back to the late 1960s and early 1970s, and the process starts to get a bit of momentum with the Closer Economic Relations agreement. Then, in what probably should be described as "Rush of Blood to the Head, Part 3", comes the Memorandum of Understanding on Business Law Harmonisation. If there is time, I will come back to that Memorandum of Understanding.

I then mention the fact that we are living in an age of internationalisation of commerce and also of commercial law. That has been particularly relevant to me in the work I have

been doing at the Law Commission. For example, I am in the process of trying to finish a report on a new arbitration statute. The essential model for that will be an UNCITRAL model law which will have international application.

In relation to personal property securities, the work that the Commission presided over there is an attempt to pick up on what is effectively an internationalisation of Article 9 of the US Uniform Commercial Code type developments. And so it goes. That is not to say that there is not room for local development, or local variations. But in a number of areas it does make sense to follow international trends. But as I shall mention shortly, it is not possible to discern a single trend in corporate law. On the contrary, the world appears to be falling on different sides of an iron curtain which has moved somewhere off to the west of Spain.

Which brings me to the boys from Chicago, because one of the really interesting things about company law from an intellectual point of view, which I hope to come back to, is the fact that at the heart of capitalism, in North America, there is an extremely interesting, healthy and important debate going on about why you have corporate law and following from that, what you have in it. That kind of debate seems to be non-existent in Europe and in the United Kingdom. But I will come back to that at a later point.

I mention the Treasury in passing. I have a slight soft spot for Treasury because they get bashed so often. But the point about treasury I guess is that they have become an active party in the corporate law reform process, dating back to the time when they saw an incarnation of evil in the form of Colin Patterson and his proposals for takeovers reform. Since then there have been whiffs of, if not the full smell of, the battle which is being fought on the intellectual front in the United States.

I then refer to in part the chronology. You have the Law Commission as the good guys, and Report 9 and Report 16. Report 8 is the Personal Property Securities report which ought to have been an integral part of the company law reform package but for reasons allegedly relating to the Memorandum of Understanding has not been. I will come back to that. The forces of darkness are my friends at the Justice Department (all of what I say about the Justice Department is entirely vicious and not at all personal) - it has been an interesting time and we shall see what happens in due course as the ultimate result.

And the last and perhaps most unfortunate of all of the players, we have the Justice and Law Reform Committee. Now these were honest, respectable people, doing an interesting and probably worthwhile thing. Then they went into Parliament, and have got on to a committee where they are saddled not with just one Companies Bill, but two Companies Bills in the form of one from us and one from my friends over at the Justice Department. They then received about three-quarters of a ton of paper in the form of submissions, most of which managed to split down the middle on almost every important issue. And so there they all are struggling away with some of the most difficult areas known to law reform and in effect drowning in over-guidance. I will not come back to them, but we will be watching with interest to see what they actually do.

In terms of the processes that have been going on, of which corporate law reform is a part, I mention there were a certain scattering of initiatives. It is one of the great (and in some lights humorous) legacies of the previous government that everything was up in the air at the same time and it was never quite clear who was juggling what and where it was going to fall and what kind of mess it was going to make when it did. But let me just mention some of those processes that were going on.

The earliest one I have already mentioned: takeovers. Takeover law reform, as I noted from going back and re-reading the Securities Commission's report, actually dates back

to 1979. Colin Patterson succeeded in producing an epic report on takeovers, largely based on concepts of company law, and in particular he managed to take the concept of *pari passu* and drive it into the ground with a totally unsustainable weight of logic on top of it. In the end the main justification which emerges from his report for change in the area is this notion of a distributive shift, which I always find much easier to refer to as the rape of a company. And the question is, what do you do about the rape of a company? The basic thing that you ought to do, in my view, is to make it non-rapeworthy. That largely involves the question of derivative actions and effective enforcement of shareholder remedies against the possibility of rape. So my view is that the takeovers area had a small problem in timing. The obvious logic to me is to get the corporate law reform right first and then build the securities and takeover structures on top once you have justified what it is you want to do there.

In the middle of the law reform process on company law which starts for the Law Commission in 1986, we suddenly get to the month of October 1987, which has become almost as famous as October 1917. Suddenly "entrepreneur" becomes a word which is not uttered in polite society and there is a certain blood lust developed in certain quarters, not least the press and amongst certain politicians. Insider trading legislation got rushed through in that process without any particular consultation on the work that the Securities Commission was doing. I understand that what was intended to be a discussion draft actually finished up as the Securities Amendment Act 1988, parts of which are still unintelligible to those who have to deal in that area.

Financial reporting was also another matter that the Securities Commission was responsible for, but they set about it in one of the most painstaking ways possible, the result of which was that at the very time that some reasonably stringent financial reporting standards were required, during the boom that preceded 1987, they simply were not there. They are still not there, and it seems to me that that is the highest priority for reform in the area. At least in relation to the securities market, where some more serious financial reporting constraints ought to assist comparability and information in the market.

Insolvency is another area where we ought to have had something decent in place before we had the insolvency boom that followed October 1987. But in fact it has not happened. When the Law Commission was given the responsibility of drafting a new Companies Act we were rather warned off insolvency by being told that the Justice Department was having a crack at that, but in fact nothing much has really happened so far. Partly that is said to be because the Australian Harmer Report has all the answers. In large part that is true, except that the Australians not having moved on the Harmer Report is not really much of an excuse for us not having done something on that process either. Nevertheless, our Companies Bill draft includes some streamlining of insolvency which has been sufficient to enrage most insolvency practitioners with whom I had many enjoyable discussions, particularly in the early days before I put something on paper that they could see.

This then takes me to the Share Market Inquiry which was presided over by Sir Spencer Russell - a fine character - but unfortunately not reading his terms of reference as clearly as he might have. The terms of reference actually said "review the share market" and "why did it crash?" He then proceeded to attempt to re-write the securities market rules across the board, and in my view the work was fundamentally misconceived and we ought to start again.

That then takes us to the Serious Fraud Unit which as far as I can judge results from a trip to the United Kingdom by the then Minister of Justice and Deputy Prime Minister. He was taken aside and told what a wonderful job their Serious Fraud people were doing,

and came back home and rushed through some legislation. As you see, I think that was "Rush of Blood, Part 2". I hope that people were listening this morning when there was reference to some abuses of the Serious Fraud Office powers in the United Kingdom being referred to. It seems to me that the potential for that at least is here, when some may think that they are Sheriff Wyatt Earp and they have powers as wide as those in the Serious Fraud legislation.

Well that takes me through the background to where we are. What I would like to do though is to come back to some of the points I wanted to stress. The first is the contract theory of corporate law. I doubt there is time for me to go into any detail on it. For those of you who are looking for bedtime reading of the highest quality, can I recommend to you the November 1989 issue of the ***Columbia Law Review*** which has a symposium featuring the leading gurus in corporate law in the United States discussing the question of contractual freedom in corporate law. It covers people from across the spectrum. The basic proposition is advanced by Easterbrook and Fischell, both of them from the Chicago Law School or those connections: that corporate law is no more than a nexus of contract, and there should be complete freedom to do whatever the contracting parties like. The other contributions involve various refinements of that back to a point which says there have to be significant mandatory rules which cannot be deviated from by the Constitution.

In essence there are two questions in there: Do you have any constraints on the way you set up a company to start with? And do you have constraints on what happens to the company while it is in operation? They are different kinds of questions, but the fact of the second question is the reason why you have restrictions on alteration of constitutions (at least in our draft, and I think this applies to the Companies Bill) and management buy-outs.

That debate has been very vigorous and there is some wonderful stuff from the economists about how the lawyers do not like being colonised by economists, particularly when there is change of language and concepts involved. But this debate is not taking place outside the US to any great extent. As I say, in my reading, and in my conversations with people from those jurisdictions, the European community as a whole (including the UK) just is not taking any notice of that kind of debate. But when you get to the American debate, those who would be described as orthodox by our standards, Eisenberg from Berkeley or Clark from Harvard, they actually have difficulty in answering the contractarian approach. They actually finish up with a "default" contracting approach as their answer. That is, you provide what people (if they were fully informed) would contract for themselves. But the validity of the contract theory remains even for those who do not accept the full Chicago theory. The result is that North American law has been and continues to be relatively limited in what is required as mandatory, at least at the corporate law stage. European law, English law, Australian law and New Zealand law is very much in the mandatory mould. There is very little scope for contracting out of the arrangements that are laid down by a statute.

In both the Law Commission draft and the Justice Department draft there is a kind of running theme of "subject to the constitution ...". That is the contract theory coming through in corporate law. It means that if the constitution provides for something then that is what is going to happen, but there is a default rule provided by the Act itself. So it is of central importance to the way in which New Zealand company law reform is progressing.

The Law Commission's approach in all of this can be summarised as an attempt to achieve commercial reality. The law as it is at the moment dates back to the second

world war, and probably from the middle of the last century in terms of the English concepts carried through, and it does not really acknowledge the commercial realities of New Zealand with 150,000 odd small companies and a much smaller number of large companies; or that various commercial practices and other aspects of commercial life are now well established and cannot necessarily be regulated out of existence.

That touch with commercial reality was in my view extremely important in the process and it came very largely from the fact that we were able to consult widely with those who advised the commercial community and those who operate in it. That will become relevant in a moment. What I should mention at this stage is that the Justice Department involvement was something which was of a surprise to those of us who are naive enough to think that a law reform process would have a certain degree of logic to it.

As I might briefly mention that there was Report 9 back in June 1989, then Report 16 a draft of which was prepared in May 1990, and duly sent off to the Minister in the expectation that, with a bit of fine tuning by Parliamentary Counsel, it would be introduced for discussion with the government not having to take a position on it. Then people would focus on what we found were quite difficult issues such as the solvency test and things like that. Much to our surprise, we then discovered that the Justice Department was re-writing our draft line by line. Now our surprise was due to a number of factors, some of which I should not comment on but will.

The first was that the Law Commission had produced a reasoned report and a professional draft bill. The bill had been drafted by people out of the Parliamentary Counsel Office, Richard Clarke of Chapman Tripp in particular taking chief responsibility. Logic means that if you have a reasoned report and you have draft that goes into the statute book then you should stick with it so that the people trying to work out what is going on can follow it. In the jargon of the law, the ***travaux preparatoires***. There was also the fact that the Law Commission had the responsibility of producing the Act, has a very wide statutory role, and unlike Royal Commissions (or at least non-Australian Royal Commissions) it did not go away. The Law Commission continued to be there, the same people were there, the expertise and knowledge that they had built up remained there.

Then there was the fact that there had been a great deal of consultation with and acceptance of the Law Commission's approach by the professional and commercial communities who were mostly directly affected. There was also the fact that we had not actually had a submission from the Department of Justice. The reasons for that are not entirely clear, and the rumours ought not to be gone into. There was also the fact that the Department of Justice did not have people who had particular contact with the commercial or professional communities and indeed it was to be hoped that they were actually mostly involved in doing something constructive on the insolvency law reform front.

Anyway, that did not stop them. And in the absence of any particular consultation they then proceeded as I say to re-write the Law Commission's draft and had the cheek to say that it was based on the Law Commission's draft. The potential for lack of coherence and a significant departure from what was actually intended was obviously there and in my view it was fully achieved. All of that as you might imagine (although I could not possibly comment), caused great irritation and frustration for those who were involved in the law reform process from the Law Commission's point of view. I repeat my disclaimer. Anything that I say has nothing to do with the present Law Commission - it is entirely personal. It also ought to have caused extreme irritation and frustration to all those who had given a great deal of time and effort to help the Law Commission get its draft together. And you have to seriously ask yourself if you are one of those people,

what was the point? You spend a lot of time talking to the Law Commission who appear to be listening and then somebody without bothering to talk to you re-writes it all. It is not a process that anybody could be particularly proud of, I suggest.

The argument that was given for that particular intrusion was that the Department had a constitutional obligation to give advice to its Minister on anything that touched the Minister's portfolio. It sounds important. Several problems with it though. The first is that I have the (possibly unique but) firmly held view that constitutional law is a myth. The second is that there cannot be any responsibility to give bad advice. And the third is that, in the context, it really was not advice at all. You cannot realistically expect a Minister, particularly a Minister who does not have a particularly strong acquaintance with the topic, to choose between one draft and another which has something like 250 changes from one to the other. How realistically is that supposed to be done? That is not policy advice.

The process moved along a bit, and then went into interdepartmental discussions which were extremely interesting from my point of view, I had never been involved in departmental discussions before, they are probably subject to the Official Secrets Act, but the net result of that was that after about four different agencies, including the Law Commission, were involved. There was a vote basically three to one that said that the Justice Department proposals were ***ad hoc***, unprincipled, and likely to be dangerous. There was one vote against that and that was the vote that carried the day in terms of the bill that was introduced.

The bill was introduced, I suspect, because the then Minister, who was Minister No 2 in this process, was getting a fair old roasting from various people in the commercial community about why things had not been happening. He is a very nice man but he kept on making press statements saying that there was a bill coming out next month. And after the fourth or fifth month had passed when the press statement had come out and nothing had happened, pressure started to mount. So the result was that in the end something had to be done. And so in the last days the House sat before the last election, by which time the previous government was essentially brain dead, the Companies Bill was introduced into the House. And there it went off to the Select Committee which is where I came in a little earlier on with the rather difficult position that the Justice and Law Reform Committee comes into.

I should also mention in dispatches deserving appropriate credit for this along with some of those already mentioned, Parliamentary Counsel's Office. Parliamentary Counsel's Office achieved wondrous things in relation to the Companies Bill listed on a technical level. They managed to substitute shall for must in a number of important places, they also managed to put "of this section" in all the sub-sections where we had carefully taken it out. One of the most interesting things was to hear from somebody who is not a lawyer but involved in the corporate process very deeply was that the square bracketed internal cross references to other sections which were scattered all the way through our draft were the most helpful things he had struck in 40 years in commercial practice, but unfortunately they went as well.

What I think is the real tragedy about the process so far is that most of the time that has been spent on submission to the Select Committee has involved a deviation from what the real issues were. Now there are completely nonsense provisions about directors which were substituted by the Justice Department. They are universally rubbished by the submissions and I will be astonished if there is not substantial change there. But the difficult issues were things like the solvency test and if there had not been a diversion to some of the things that I have mentioned that were intruded into the Bill after it left the

tender hands of the Law Commission then there would have been much more focus on what are in my view the difficult issues. I will refer to some of those briefly and come back and spend a little time on business judgment and the solvency test. But, as I say in the synopsis, the troublesome issues include things like minority buy-outs. There is a real question there, particularly in the securities market, about how effective that is. But the other side of the equation is that there is what is called "the latecomer problem" in relation to contract theories of company law. Moving the goalposts once you have committed capital becomes a real problem.

There is also a noisy rather than difficult problem involving co-operatives. For anybody involved in co-operatives here or representing them, I should say that I come from a long line of dairy farmers and I have grown up with co-operatives as being genetically important. Nevertheless the arguments made by co-operatives for a separate statute did not make any sense at all. If it was not for the fact that the new Companies Bill as introduced stuffed up the rules about transfers of capital and transfers in and out of shareholders then there would be no need for such legislation. As it is there is now an extremely noisy co-operative lobby saying that we have got to have separate co-operative statutes.

The solvency test. As most of you will appreciate, the solvency test is quite fundamental in relation to a number of aspects of the new companies legislation. The essential point is that it has got a two-stage test, the first one is in fact a cash flow test and the second is of course a balance sheet test.

In Report No 16 we added two matters of elaboration. The first refers to what documents regard might be had to in deciding whether or not there is a satisfaction of the solvency test; and the second attempts to grapple with the concept of realisable value. Now, when I put those things in, which is not putting that too modestly, I thought I was actually doing what the New Zealand Society of Accountants had suggested that we should do. Unfortunately the people I was talking to at the New Zealand Society of Accountants had a change in personnel and the next three people I was talking to did not think it was a good idea at all. Consequently the New Zealand Society of Accountants is now taking a different view on that.

That solvency test is based on the Model Business Corporations Act. The Model Business Corporation Act provides the model statute for company law for a number of US jurisdictions, and was put together by various experts. The real point of it is that it has the two limb solvency test which we took from there. We also took a provision which says directors might have reference to financial statements prepared on the basis of accounting practices and principles or on a fair valuation etc.

The submissions have come in and there are powerful submissions from almost all of the leading law firms and almost all of the leading accounting firms. None of them agree with one another to any great extent with the result that the Select Committee seems to me to have a difficult job.

The one point which is perhaps agreed to by most of the significant submissions is the removal of all the adjectives.

And there is some consensus among the significant submissions that our elaboration of matters directors may refer to should come back in some form and that the realisable value definition should be dropped as being too hard and too confusing. On those matters I am reasonably relaxed. As I have indicated, I had expected submissions would focus on this issue and that we would have the benefit of those who are more expert and more experienced than those of us in the Law Commission were at that time.

The real point is that the solvency test is there as a protection for creditors and shareholders. If you cannot be satisfied that your company is solvent after you do something, and in particular after you make a distribution, then the answer is relatively simple - you do not make the distribution. End of problem. So the idea is that one errs on the side of conservatism. I note that David Jones and Philip Nicholson who made, in my view, a particularly good submission to the Select Committee, suggested that the ***in terrorem*** aspect of this is an important reason for keeping realisable value as well. You may not know what it means, but it sure as hell frightens the life out of you, which is in fact a desirable objective.

However, the consensus is probably against realisable value, it is against the use of the concept of present value and there are some questions about whether or not the concept of contingencies ought to be included or not. I should say that the intention of the Law Commission at that stage was that contingencies would be dealt with in accordance with SSAP 15 which requires an exercise in judgment as to how you treat them, not that they should be regarded as being at face value. But there are submissions from the Securities Commission, the New Zealand Society of Accountants, Russell McVeagh, and Bell Gully Buddle Weir (as John Farrar used to be known), which are effectively along the line of sticking very much to the MBCA model. So my prediction would be that we will come back to something like that, but in practice there is going to be a settling down period, and possibly some attractive litigation just to help things settle down as well for those of us who enjoy that kind of sport.

The last thing that I should mention, is the business judgment rule. The directors' duties provisions of the Companies Bill as introduced are at least in my opinion nonsense, and completely destroy what was sought to be achieved in the previous draft. I am happy to note that there is almost complete acceptance of that proposition in the submissions. But the interesting question that has cropped up, largely because of the timing of publication of the Australian Companies and Securities Law Reform Committee Report on Indemnification, is whether there should be a separate explicit business judgment rule. And you might think that that is not a bad idea. What I would like to do though is to refer you to something else from the Model Business Corporations Act, clause 8.30 General Standards for Directors.

I should stress that, contrary to those such as the New Zealand Law Society who addressed a submission to the Select Committee saying that the Law Commission draft is based on a Canadian model, our draft was based on an amalgam of North American models. And two of the most influential were the Model Business Corporations Act and the American Law Institute Corporate Governance drafts. The general standards of directors in the Model Business Corporation says that the duties must be carried out in good faith, ordinarily prudent person-type care, and in a manner reasonably believed to be in the best interests of the corporation. And then there is reference to various matters: reliance on information and opinions and reports etc; and then an isolation of director liability by saying that directors are not liable for action taken if they perform their duties in accordance with the preceding parts of the section.

It does not purport to enact the American common law (or case law) business judgment rule developed by the courts. But you will notice the absence of things like proper purposes, and the availability of things like reliance on advice given, both of which are features of the Law Commission proposals on directors' duties. Now if you look at the American Law Institute draft you see the business judgment rule formulation recommended by the Institute which business judgment rule was in the Law Commission draft except it was scattered about.

The important parts are that the director has to operate in good faith and in the best interests of the company, and to make appropriate inquiries; there is recognition of delegation and then the emphasis on lack of interest, proper information, and a rational belief that business judgment is in the best interests of the corporation. The burden of proof of breaches of duty is on those who are trying to attack any aspect of the business judgment. The second part of the exercise is reliance on directors' officers etc which says that if you act in good faith then you are entitled to rely on information given to you by co-directors, by your officers or employees or committees or indeed professional outside advisers such as legal counsel, public accountants etc. Those two parts of the ALI together add up to the business judgment rule, the US version, and they are in fact in the Law Commission draft. Particularly recall that the Law Commission draft purposes clause includes repeated emphasis to the fact that corporate law is about taking business risks. It is a simple enough proposition if you are involved in the commercial sector, but it does not seem to be apparent to some people who are not involved in the commercial sector. You do not automatically make money in business. People do not necessarily have to buy what you have got to sell. You can go broke. Many people do, particularly recently.

The last of the business judgment formulations is the Australian Companies and Securities Law Reform Committee view which includes all sorts of expressions like proper purposes, exclusion of matters relating to appointment of executive officers, and is generally in my submission less satisfactory than the ALI draft. In terms of the major submissions that the Select Committee has got, it has got a fairly neat split with possibly a slight a majority favouring in effect the American Law Institute proposals, that is going back to what the Law Commission had. But a number of others have picked up (not least no doubt because Report 16 of the Law Commission mentioned it) that the Australian test is available, and there are a number of people who suggest that that test or variations of it might be appropriate. Some of those no doubt would include advocates of closer business law harmonisation between Australia and New Zealand. And so, as threatened, I might just return to that topic to conclude on.

Going back to my synopsis, I might summarise my gratuitous advices. Let me tell you about Nigerian company law reform because it is actually relevant to this point. There had been a very enjoyable getting together of law reform agencies at the Commonwealth Law Conference last year and the Law Commission organised an entirely extravagant outing on a boat which went out to Kawau Island. In the course of that I happened to be sitting next to two Nigerian gentleman. It turned out that they had been involved in the Nigerian Law Reform Commission's company law project. I asked "how big a bill did you produce?" "Oh, it was about 1200 sections." I said: "That is a bit long, there must have been a lot of argument about that. How long is it going to take to get it through?" "Oh, no problem. We went and saw the General on Thursday, and he signed the Order in Council." Since then my faith in democracy which was already flagging slightly has been under further stress indeed.

Anyway, supposing that we had a Nigerian law reform process involved and I was in charge of it, then my suggestions as to what ought to happen are: In terms of the Companies Bill, you simply junk what was introduced by Mr Jeffries in September of last year and go back to the Law Commission draft. As far as takeover law is concerned you do exactly what is being done at the moment which is that somebody has got their foot on it and see how it can be justified later on. In relation to financial reporting you do something damned quick, because it remains the biggest single hole and the proper source of lack of public confidence in a variety of aspects of commercial activity. On insolvency we give a prod to our friends across the Tasman and say: "What the hell has happened to Harmer because it is a bloody good report and it is about time we both got

it going." And as far as securities are concerned, you take a small match and a long period of time and you deal with the Russell Committee proposals in that fashion.

You then still have this question about the Memorandum of Understanding on business law harmonisation signed by Mr Palmer and I think Mr Bowen as the respective Attorneys-General of New Zealand and Australia in July 1988. And what I suggest there is that you throttle back on, if you do not actually throttle, the Memorandum of Understanding. The point is that it has got a dynamic of its own which is entirely unjustifiable. In terms of a number of topics it seems to be an excuse for doing nothing when something ought to be done. The obvious example that the Law Commission is familiar with is the personal property securities area where the perfectly respectable answer and the most useful thing we can do to help our Australian friends is to enact it and see what problems arise with it after that.

But more generally, there is an implicit, totally unjustified, and totally unprovable theory that extended harmonisation across the board, beyond what we already have (which is very substantial, basic principles of contract law, much law about transport, admiralty, all sorts of obscure things which are pretty much the same, and some actual property laws which are pretty much the same) is a good thing. That if you spend time and invest in further harmonisation of commercial law there is going to be some kind of a dividend. My response is that that is nonsense. And nobody has been able to come up with any evidence for it.

What you do have are real problems with the social welfare differentials, you have real problems in different labour laws, somewhat exacerbated by the employment contract legislation in very recent memory, and you also have huge tax problems which make no sense at all in doing trans-Tasman business. In the context of those sorts of problems, the amount of time and effort that is being spent delaying the process so that harmonisation can take place is quite clearly immaterial and insignificant. And so what is probably the appropriate thing to happen on the Memorandum of Understanding is a long period of constructive silence, which is my cue to stop!