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Convergences and divergences in Australian and New Zealand law

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Introduction

In the light of the 40 year anniversary of this conference, I have set myself the interesting but challenging task for this session of commenting on divergences and convergences in Australian and New Zealand law relevant to banking in that period.[1] The fact that this is a challenging task may tell us something significant, that Australian and New Zealand lawyers may not have a broad view of the commonalities and differences between the case law in the two legal systems. I recognise, of course, the possibility that all of the New Zealand banking and financial lawyers in this room do in fact have a close understanding of Australian law, and vice versa, and it is only me who is an exception (for the worse) here. I should, of course, also make the obvious disclaimer that my comments as to New Zealand law should be treated with wary scepticism; hopefully, they will at least have the advantage of giving the opportunity to others in the room to explain where I am wrong.

I should also acknowledge that a recent article provides a very useful statistical and qualitative analysis of interactions between Australian and New Zealand law, and its findings provides a very useful starting point for this session.[2] The authors recognise, unsurprisingly, a trend to greater reliance by New Zealand courts on citation of New Zealand cases, a decline in the citation of United Kingdom cases and a rise in citation of Australian cases (to 9% of cited cases) in the 1970s and 1980s, falling back marginally (to 8% of cited cases) in the 2010s. They recognise greater citation of Australian competition and consumer law, equity and contract cases in the 1990s with only one company law case being cited. They offer a plausible explanation for at least part of this trend, pointing to the influence of major Australian equity cases of the 1990s dealing with fiduciary duties and remedies on New Zealand decisions in the same period. The authors also note that there are differences in the development of public law in Australia and New Zealand as a result of the impact of the Treaty of Waitangi (1840), the *Bill of Rights Act* 1990 (NZ) and

[1] There is a reasonably extensive literature as to issues of commonality and divergence in civil law: see, for example, A Robertson and M Tilbury, "Why diverge?"; in A Robertson and M Tilbury, *Divergences in Private Law*. 2016, 1; A Robertson and M Tilbury, "Unity, divergence and convergence in the common law of obligations"; in A Robertson and M Tilbury, *The Common Law of Obligations: Divergence and Unity*, 2016, 1; P Finn, "Unity, then divergence: The Privy Council, the Common Law of England and the Common Law of Canada, Australia and New Zealand"; in A Robertson and M Tilbury, *The Common Law of Obligations*, 37; P Finn, "Common law divergences" (2013) 37 *Melb U L Rev* 508; M Leeming, "Equity in Australia and the United Kingdom: Dissonance and concordance", 25 October 2019.

[2] S Kos & D Qiu, "Parallel Universes: The Curious Death of Trans-Tasman Citation" [2023] *NZ Law Rev* 61. It is interesting that this article appears in a New Zealand law review and I have not been able to identify corresponding Australian analysis.

the recognition of Māori custom in the common law of New Zealand. Issues as to Australia's indigenous history have developed differently.

Contractual interpretation and implied terms

The objective approach to contractual construction is well-established in Australia. In *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640; 306 ALR 25; [2014] HCA 7 at [35] the plurality observed that (citations omitted):

> "[T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'."

Australian case law has emphasised that construction should commence with the language used by the parties, although the Court may also have regard to objective surrounding circumstances; an objective approach is applied in determining the rights and liabilities of a party to a commercial contract, by reference to its text, context and purpose; and "[t]he meaning to be given to its terms is determined by reference to what a reasonable business person would have understood those terms to mean."[3]

New Zealand Courts seem to have adopted a broadly similar approach to contractual interpretation, giving primacy to the natural and ordinary meaning to the words in the contract. In *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] 1 NZLR 696; [2021] NZSC 85 ("*Bathurst Resources*"), in a dispute as to royalty arrangements for coal exploration permits, the New Zealand Supreme Court identified the question to be determined as the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract; the decision was recently cited by Gwyn J for that proposition in *First NZ Properties Ltd v Millar* [2024] NZHC 1225 ("*First NZ Properties*").

New Zealand courts permit evidence to be led of background information known to the parties, without requiring that ambiguity first be established.[4] In *Bathurst Resources*, the Court observed that the admissibility of extrinsic evidence as to the construction of a contract was determined by the law of evidence; and such evidence

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[3] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37 at [46]-[52], [59]; *Price (dec'd)) v Spoor (as trustee)* (2021) 391 ALR 532; [2021] HCA 20 at [27], [42]; *Re Border Express Pty Ltd* [2023] VSC 769 at [69]ff; *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd* [2024] NSWCA 211 at [87].

[4] *Firm Pi 1 Ltd v Zurich Australian Insurance Ltd (t/as Zurich New Zealand) [2015] 1 NZLR 432; [2014] NZSC 147*; *Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621; *Bathurst Resources*; and, for commentary, see A Beck, "Contract" [2017] NZ L Rev 513; [2019] *NZ L Rev* 349; [2021] *NZ L Rev* 435; M Barber, "Contract Law" [2022] *NZ L Rev* 359.

would prima facie be admissible if it tended to prove or disprove anything of consequence in determining the construction question as formulated above.

Broadly similar approaches are adopted in Australia and New Zealand to the implication of terms, applying the approach taken in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 at 282–3; 16 ALR 363 at 376. In Australia, the High Court recently considered this issue in *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115; (2022) 406 ALR 678; [2022] HCA 39, in a case where licence agreements were not in writing and where there was no express oral agreement for the grant of the relevant licences. Kiefel CJ and Gageler J (at [18]) summarised the well-known *BP Refinery* factors, observing that:

> "Apart from being reasonable and equitable, capable of clear expression and non-contradictory of the express terms of the contract, to be implied a term must be necessary to give business efficacy to the contract (which will not be satisfied if the contract is effective without it), and it must be so obvious that "it goes without saying".

Their Honours also noted later authority that a term may be implied if it is "necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case" and pointed to a reconciliation of any difference in the two approaches, that a term which fails to meet the obviousness criterion would likely not be necessary for the reasonable or effective operation of the contract. Gordon J took a possible different approach (at [50]) observing that "there is now little, if any, distinction between the latter case of an "implied" term by reference to the obvious presumed or imputed intention of the parties, and the identification of the "express" terms of an agreement by reference to the objective intention of the parties", and that the approach taken in earlier cases no longer applied. Edelman and Steward JJ there observed (at [114]-[116]) that the *BP Refinery* criteria are not applied in an over-rigid way in informal contracts; these principles were recently summarised by Attiwill J in *Border Express* at [97]ff.

In New Zealand, in *Bathurst Resources*, the Court continued to apply the test for the implication of terms adopted in *BP Refinery* although it emphasised that the legal test for implication was a standard of strict necessity and a high hurdle to overcome; that the starting point was the terms of the contract, and the question of implication only arose when the Court found that a contract did not provide for the relevant eventuality; and (at [116]) that the first three factors in *BP Refinery* were in the nature of an analytical tool and the fourth and fifth factors were necessary for implication of a term.[5]

Contractual penalties

Turning now to contractual penalties, the approach adopted by the High Court of Australia in *Andrews v Australia and New Zealand Banking Corp Ltd* (2012) 247 CLR 205; [2012] HCA 30 ("*Andrews*") was, of course, rejected by the United Kingdom

[5] See also *Mobil Oil NZ Ltd v Development Auckland Ltd* [2017] 1 NZLR 48; [2016] NZSC 89; *Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621; *Melco Property Holdings (NZ) Ltd v Hall* [2022] NZHC 1180 at [68]-[71]; *Beatson v Property Brokers Ltd* [2024] NZHC 1583 at [28]; *Federated Mountain Clubs of New Zealand Inc v Griffin Creek Hydro Ltd* [2024] NZCA 360 at [110].

Supreme Court in *Cavendish Holding BV v Makdessi* [2016] AC 1172; [2015] UKSC 67 (*"Cavendish"*).

The High Court again considered the question of penalties in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28 ("*Paciocco*") and held that several late payment fees were not penalties. Kiefel J (with whom French CJ agreed) identified the question (at [29]) as whether a relevant payment was "out of all proportion to the interests of the party which it is the purpose of the provision to protect" in order to establish a penalty. Gageler J emphasised (at [122]) that *Andrews* had not disturbed the existing approach to penalties at common law, and summarised the inquiry (at [164]) as whether a stipulation is "properly characterised as having no purpose other than to punish". Keane J observed (at [221]) that an agreed payment should be struck down where a "gross disproportion is such as to point to a predominant punitive purpose" and that, if the provision is not "distinctly punitive", then the penalty rule did not displace the parties' ability to agree to a contractual allocation of benefits and burdens and rights and liabilities following a breach of contract. Nettle J, dissenting, applied substantially the same test as the majority (at [331]), namely, whether the amount of the fee was "wholly disproportionate to the greatest costs which could have been conceived of at the time of entry into the contract", but concluded that the late payment fees were penalties; see also *Broadway Plaza Investments Pty Ltd v Broadway Plaza Pty Ltd Combined Projects (Arncliffe) Pty Ltd* [2020] NSWSC 1778 at [2855]; *Re Computer Room Solutions Pty Ltd* (2021) 154 ACSR 672; [2021] NSWSC 845 at [69]ff; *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686.

This issue was also considered by the New Zealand Court of Appeal in *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] 3 NZLR 293; [2017] NZCA 152, where a late payment fee was found not to be out of all proportion to the interest in enforcement, and not to be unenforceable as a penalty; leave to appeal that decision was refused in *Torchlight Fund No 1 LP (in rec) v Wilaci Pty Ltd* [2017] NZSC 112. The question whether a term of a lease was a penalty was again considered in the New Zealand Supreme Court in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] 1 NZLR 179; [2020] NZSC 53, where the Supreme Court referred to both *Cavendish* and *Paciocco* and (at [56]) expressed the test for a penalty by reference to whether the stipulated consequence was out of all proportion to the legitimate interests of the innocent party in the performance of the primary obligation, including that party's interest in obtaining performance or an appropriate alternative to performance. The Court held that an indemnity for rent, applying if a second lift was not installed by a specified date, was not a penalty where it protected Honey Bees' legitimate interest in performance of the obligation to install that lift and did not impose a disproportionate detriment.

Equity

Australian lawyers of my generation were previously exposed to possible differences between the development of equity in Australia and New Zealand by the observations in the fourth edition of Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th ed, 2002, p xi that:

> "In New Zealand, the prospect of any principled development of equitable principles seems remote short of a revolution on the Court of Appeal. The blame is largely

> attributable to Lord Cooke's misguided endeavours. That one man could, in a few years, cause such destruction, exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error."[6]

New Zealand commentators have also approached equity in Australia, or at least in New South Wales, with a degree of scepticism, although in more circumspect terms than the comments quoted above. Two commentators have observed that:

> "We mean no disservice when we say the law of equity and trusts in New South Wales is notoriously conservative. By conservative we mean an insistence by many within the New South Wales legal community – be it bench, bar or academy – that equity and trust law maintains a particular historical, intellectual, and, ultimately, doctrinal position which is said to be purer and closer to the true traditions of equity and trust. For this group, New South Wales is seen as the last outpost of true equity. Certain developments elsewhere, such as Canada and New Zealand, are regarded with submission, if not treated with outright scorn."[7]

Unsurprisingly, those commentators refer to Meagher, Gummow and Lehane's text (then in its fourth edition) as an example of that proposition. They add, in a footnote reflecting New Zealand's short existence as part of New South Wales, that "[t]he only hope for equity in New Zealand, on this view, would have been if New Zealand had never separated from New South Wales."

It appears that New Zealand lawyers and judges have since fallen short of their early promise of radical nonconformity, since there is now a significant commonality of approach in Australia and New Zealand equity law, and the differences now seem somewhat tangential.

The major Australian cases in respect of fiduciary duties[8] have influenced New Zealand decisions[9] and the scope of fiduciary duties is formulated in similar terms. For example, in *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384; [2009] NZSC 15 ("*Premium Real Estate*"), the Supreme Court of New Zealand held that a real estate agent had breached its fiduciary duties owed to its vendor client by concealing (or at least failing to disclose) information concerning the purchaser of the property, including the purchaser's history of acquiring and reselling residential properties for a profit; the judgments took different views as to the extent to which fiduciary duties would generally apply to real estate agents. Blanchard J referred to the scope of the fiduciary's obligations to avoid a conflict of duty and interest as

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[6] This observation has attracted attention in New Zealand and is cited in A Butler & T Miller, "Thoughts on Equity in New Zealand and New South Wales" in J Glister & P Ridge, *Fault Lines in Equity*, 2012, pp 237-261, noted below, and again in Kos & Qiu, note [2], 88. For a more positive assessment of Lord Cooke's approach, see A Butler, "Simplicity and Innovation in the Law of Equity and Trusts: The Cooke Era" (2008) 39 *Victoria U Wellington L Rev* 167.

[7] Butler and Miller, note 6 above, 237.

[8] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; 55 ALR 417, *United Dominions Corporation v Brian* (1985) 157 CLR 1; [1985] HCA 49 ("*UDC v Brian*").

[9] *Chirnside v Fay* (2007) 1 NZLR 433; [2006] NZSC 68, where a fiduciary duty was established in respect of a joint venture for property development, where no formal agreement had been reached; a similar result was reached in *Matvin Group Ltd v Crown Financial Ltd* [2022] NZHC 2239. That result is consistent with the Australian approach to joint venture and anticipated joint venture cases: *UDC v Brian*; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1986] 2 Qd R 1; *Harrison v Schipp* [2001] NSWCA 13; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Edmonds v Donovan; Disctronics Ltd v Kingston Links Country Club Pty Ltd* (2005) 12 VR 513; [2005] VSCA 27; *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers & Palmer* [2005] VSCA 113; *Liquor National Wholesale Pty Ltd v Red Rock Co Pty Ltd* [2007] NSWSC 392.

requiring it not to act for its own or a third person's benefit without the principal's consent. It would be interesting to know whether New Zealand law has committed itself as strongly as the High Court of Australia to the proposition that fiduciary duties are prohibitive in character, limited to the rules against secret profits and conflicts of interest, and not extending to positive fiduciary duties.[10]

Both New Zealand and Australian law, like English law, recognise that not every breach of a duty owed by a fiduciary is a breach of fiduciary duty.[11] New Zealand case law, like Australian case law, recognises that fiduciary duties are moulded by the terms of the relationship; that is unsurprising, where the leading case applied in both jurisdictions is the Privy Council's decision on appeal from New Zealand in *NZ Netherlands Society Oranje Inc v Kuys* [1973] 2 NZLR 163 at 166-172.[12] Both jurisdictions also recognise that a fiduciary duty can be narrowed or excluded or a breach of duty ratified by informed consent.[13] Both jurisdictions recognise that a relationship between a bank and a customer would generally not be fiduciary, although a bank may assume fiduciary obligations in exceptional circumstances, typically where it has a long-standing advisory relationship with the customer.[14]

The Australian case law indicates that, broadly, a claim for equitable compensation for breach of fiduciary duty requires proof of a causal link between the breach and the loss; once a causal link between the conduct and the claimed loss is established, the onus will shift to the fiduciary.[15]

Earlier New Zealand cases were more receptive to the assimilation of common law and equitable principles than Australian law. In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 ("*Guardian Trust*") at 681, Richardson P, Gault, Henry and Blanchard JJ observed that:

> "The issue then is whether the breach of duty by Guardian to act with reasonable diligence is to attract liability on a restitutionary basis by analogy with breaches of trust causing loss to the trust estate or breaches of fiduciary duties of loyalty and

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[10] *Breen v Williams* (1996) 186 CLR 71; *Howard v Commissioner of Taxation* (2014) 253 CLR 83; 2014] HCA 21.

[11] *Bristol and West Building Society v Mothew* [1998] Ch 1; *Permanent Building Society v Wheeler* (1994) 11 WAR 187; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 680 (holding that a trustee's breach of a duty to exercise reasonable care was not a breach of fiduciary duty); for criticism of this approach, see JD Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in S Degeling and J Edelman, *Equity in Commercial Law* (2005) at 187-237.

[12] For example, *Fortex Group Ltd v MacIntosh, Cox & Forde* [1998] 3 NZLR 171; *Murdoch v Mudgee Dolomite & Lime Pty Ltd (In Liq)* (2022) 398 ALR 658; [2022] NSWCA 12.

[13] *Australian Securities and Investments Commission v City Group Global Markets Australia Pty Ltd* (2007) 25 ACLC 940; *Premium Real Estate* at [72]. The application of this principle in Citigroup has been controversial in Australia: PD Finn, "Fiduciary Reflections" (2014) 88 ALJ 127; A Eastwood & L Hastings "A response to Professor Finn's 'fiduciary reflections'" (2014) 98 ALJ 314.

[14] *Goddard v DFC New Zealand Ltd* [1991] 3 NZLR 580;.*Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453; *Lankshear v ANZ Banking Group (New Zealand) Ltd* [1993] 1 NZLR 481 at 490; *Preece v Colonial Mutual General Insurance Co (NZ) Ltd* [1995] 3 NZLR 730; *Dungey v ANZ Banking Group (NZ) Ltd* (1997) NZFLR 404 at 411; *Pacific Industrial Corp NZ v Bank of New Zealand* [1997] 1 NZLR 368; *Commonwealth Bank of Australia v Finding* (2001) 1 Qd R 168.

[15] *Swindle v Harrison* [1997] 4 All ER 705 at 733–734 *Maguire v Makaronis* (1997) 188 CLR 449 at 473; [1997] HCA 23*; Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484 at 502; [2003] HCA 15 at [44]; Break Fast Investments Pty Ltd v Rigby Cooke Lawyers (a firm)* [2021] VSC 398 [249]; *Porter v Mulcahy & Co Accounting Services Pty Ltd (No 5)* [2024] VSC 6 at [392]ff.

> fidelity. The rationale for a restitutionary approach in those situations is the need to deter breaches of trust and confidence by those in a position to take advantage of the vulnerable by using powers to be exercised solely for their benefit. Where that is not present as where a person, though under some fiduciary obligations, merely fails to exercise reasonable skill and care, there is no reason in principle for the law to treat that person any differently than those who breach duties of care imposed by contract or tort. That the liability arises in equity is no sufficient reason. Surely the stage has been reached in the development of the law where something more substantial than historical origin is needed to justify disparate treatment in the law of those in breach of the obligation to exercise reasonable care. The proper focus ought to be on the scope of the duty in the circumstances, with a consistent approach to compensating for breach. Only where good reasons exist is differentiation warranted. They do exist where breaches of trust dissipate trust property, where there is abuse of fiduciary duties of fidelity and loyalty or where there is dishonesty in the commission of certain intentional torts such as fraudulent misrepresentation."

Tipping J went somewhat further at 686-687:

> "Historically the law has tended to place emphasis on the classification of the relationship giving rise to the obligation. But more recently, for certain purposes at least, there has been a shift of emphasis from the classification to the nature of the obligation, or duty, as it is usually called. Thus the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the particular classification or historical source of that duty. What matters is not so much the historical source, be it equity or the common law, fiduciary duty or tort, but rather the nature and content of the obligation which has not been fulfilled. For example, duties of care are owed both in equity and at common law. But as a matter of policy it will not usually be appropriate, if the nature and content of the duty are the same, to have different approaches to causation and remoteness, according to its historical source."

Despite these observations, it is not apparent that there are real divergences in the application of causation principles in the case law.

Both Australian and New Zealand case law have adopted a similarly qualified approach to causation in respect of non-disclosure by a fiduciary, limiting the robust approach taken in *Brickenden v London Loan & Savings* [1934] 3 DLR 465 at 469 (*"Brickenden"*), where Lord Thankerton observed that:

> "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant".

On a wide reading, this approach would prevent any inquiry into what would have happened if the fiduciary had disclosed the material facts, so that causation would be established even if the plaintiff could show that disclosure would not have altered the course of events. A more limited approach has been taken in later Australian case law. For example, in *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48

NSWLR 1; 39 ACSR 1 at [435]-[450][16], the New South Wales Court of Appeal rejected that wide reading and observed that *Brickenden* was authority that the Court would not permit speculation about the principal's response to information which had not been disclosed to it by a fiduciary; but that it did not exclude a finding that a loss would have occurred even if the fiduciary duty had been performed. Their Honours also observed (at [432]) that causation is to be determined using common sense and hindsight.[17] In *Short v Crawley (No 30)* [2007] NSWSC 1322 at [419], White J also applied *Brickenden* in a more qualified way, holding that the plaintiff must establish that, but for the breach of fiduciary duties, the loss would not have been incurred.[18]

Much the same approach was taken in New Zealand in *Guardian Trust* at 687, where Tipping J observed that:

> "[O]nce the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part.... Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach."[19]

That approach was followed in *Premium Real Estate* (at [85]) where Blanchard, McGrath and Gault JJ observed that:

> "It was once the strict rule that when a fiduciary committed a breach of duty by non-disclosure of material facts which the party to whom the duty was owed was entitled to know in connection with the transaction, the fiduciary could not be heard to maintain that the disclosure would not have altered the decision to proceed with the transaction; once the court had determined that the undisclosed facts were material, speculation as to what course the beneficiary, on disclosure, would have taken was not regarded as relevant. The strict rule could sometimes lead to unfair results and has been modified in this country by an approach which affords the fiduciary a limited opportunity of showing that all or some of the loss would have occurred even if disclosure had been made. ...
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> The same general approach should be taken when the matter in issue is restricted to the quantum of the loss. The same policy applies to both. That policy is designed to deter fiduciary breaches by limiting the circumstances in which fiduciaries in breach can escape or reduce their liability for the consequences of the breach. It would be artificial, and inconsistent with that policy, to distinguish between causation and quantum issues. Where there is a normal or prima facie measure of loss, the fiduciary must positively show that it is not an appropriate measure. The normal and natural measure of loss, when a fiduciary breach has affected the price at which

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[16] For commentary, see Tiso & Yeo, "Limited Liability for Breach of Fiduciary Duty" (1998) 114 *LQR* 181.

[17] Referring to *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 439; [1995] 3 All ER 785; (1995) 17 ACSR 582.

[18] Other Australian case includes *Greater Pacific Investments Pty Ltd v Australian National Industries Ltd* (1996) 39 NSWLR 143; *Maguire v Makaronis* (1997) 188 CLR 449 at 492 per Kirby J; *Watson v Ebsworth & Ebsworth* [2008] VSC 510 at [136].

[19] See also *Everist v McEvedy* [1996] 3 NZLR 348, where Tipping J treated *Brickenden* as giving rise to a presumption, unless the contrary was established, that the beneficiary would not have entered into the relevant transaction if material facts were disclosed and would therefore have avoided its loss.

property is sold, is the difference between the sale price and market value. Policy dictates that the onus should be on the fiduciary to demonstrate that the plaintiff's loss was actually less (or non-existent). If there is any doubt about that, the doubt should be resolved against the fiduciary."

The approach quoted above from *Guardian Trust* has itself been followed in Australian case law.[20]

Earlier New Zealand case law have been receptive to a wider range of remedies than Australian (or at least New South Wales) case law, likely reflecting the more sympathetic approach taken to the suggested assimilation of equity and the common law in New Zealand. In *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 at 193,[21] Cooke P observed that:

> "Neither law nor equity is now stifled by its origin and the fact that both are administered by one Court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole. I think it likely that over the years words such as unconscionable and inequitable have drawn closer to more objective concepts such as fair, reasonable and just. In some cases, acquiescence is one (see *Habib Bank v Habib Bank AG Zurich* [1982] RPC 1, 18), and stipulations as to time another (see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904), there has been a fusion in the sense that one general rule has replaced a plurality of rules. In other areas there are signs of a blending process - *Day v Mead* [1987] 2 NZLR 443 may come to be seen as such a case.
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> The constructive trust ... has not been left uninfluenced. It has come to be used as a device for imposing a liability to account on persons who cannot in good conscience retain a benefit in breach of their legal or equitable obligations. Its evolution or extension as a remedy may not yet have come to an end."

New Zealand law has allowed a contributory negligence defence to claims for equitable compensation for breach of fiduciary duty. In *Day v Mead* [1987] 2 NZLR 443 at 451 (*"Day v Mead"*),[22] Cooke P observed that:

> "Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Contributory Negligence Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends ..."

Somers J reached the same result by narrower reasoning, observing (at 462) that:

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[20] *Porter v Mulcahy & Co Accounting Services Pty Ltd (No 5)* [2024] VSC 6 at [394].

[21] Noted in Butler, note [7] above; an appeal to the Privy Council was dismissed in *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385.

[22] That decision is treated favourably in Butler, note [7] above.

> "… it would be unjust and unfair to impose total liability on Mr Mead. There was a degree of want of care for his own property on Mr Day's part which goes beyond reliance on Mr Mead and approaches acquiescence in the risk involved in the second investment. I would not attempt to assess the matter on the footing of the respective degrees of fault or blameworthiness but simply say that a lesser sum than the full amount invested will fairly compensate."

In *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 (*"Duke Group"*), the majority of the High Court of Australia did not accept that approach and pointed to "severe conceptual difficulties" in allowing apportionment for contributory negligence in claims for breach of equitable duties. The approach in *Day v Mead* is also disapproved in the current authors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015, [2-345])), who treat *Duke Group* as "correct[ing] crisply" that decision and add, in a rhetoric question which might well tempt a New Zealand answer:

> "For why ever should a statute designed to *enhance* the rights of a plaintiff at common law (by abrogating an absolute defence) produce the result in a legal system with a fused administration of common law and equity that the rights of a plaintiff be *diminished* by the analogous application of the statute to a defendant who has breached fiduciary obligations owed to the plaintiff?"

New Zealand law has also allowed exemplary damages for breach of an equitable duty of confidence.[23] An earlier New Zealand case extended that approach to a claim for breach of fiduciary duty;[24] however, in *Skids Programme Management Ltd v McNeill* [2013] 1 NZLR 1; [2012] NZCA 314 at [121]-[123], the Court of Appeal treated *Aquaculture* as authority that exemplary damages were available for breach of confidence but observed that the question whether exemplary damages claimed for breach of fiduciary duty was still open in New Zealand law. In Australia, the availability of exemplary damages in equitable claims has been doubted by the Full Court of the Federal Court of Australia[25] and rejected, in strong terms, by the Court of Appeal in New South Wales.[26]

There may be a difference in the approach to knowing receipt in New Zealand and Australia, at least so far as the New Zealand case law adopts a criterion of unconscionability as a basis of liability[27]; however that difference is narrowed to the extent that unconscionability is found in the elements of a breach of fiduciary obligation; the recipient's receipt of the relevant property; and the recipient's knowledge of the relevant breach of fiduciary duty.[28]

Australian decisions as to estoppel have influenced the development of estoppel in New Zealand.[29] There has been a move towards adopting a unified approach to

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[23] *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (*"Aquaculture"*) (although Somers J expressed the contrary view at 302), noted in Butler, note [7] above.
[24] *Cook v Evatt (No 2)* [1992] 1 NZLR 676 at 706, noted in Butler, note [7] above.
[25] *Bailey v Namoi Pty Ltd* (1994) 53 FCR 102 at 112-113.
[26] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; [2003] NSWCA 10.
[27] *McLennan (as Liquidators of Neil Timber Ltd (in liq)) v Livaja* (2017) 18 NZCPR 776; [2018] NZAR 405; [2017] NZCA 446; Beatson v Property Brokers Ltd [2024] NZHC 1583 at [293].
[28] *First NZ Properties* at [293].
[29] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; [1988] HCA 7; *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10; *Wilson Parking Ltd v Fanshawe 136 Ltd* [2014] 3 NZLR 567; [2014] NZCA 407.

estoppel in New Zealand; the same approach in Australia has faced a degree of resistance.[30] Andrew Butler summarises the New Zealand approach as follows:

> "As the traditional limitations on the doctrines of promissory and proprietary estoppel have been removed, New Zealand Courts have drawn on cases from each stream of precedent without distinction.
>
> The end of this process has been the recognition of a unified doctrine of equitable estoppel, which is actionable as a cause of action and shorn of traditional limitations, qualifications and restrictions of the distinct strands of estoppel from which it was derived."[31]

The approach to unconscionability and undue influence in the general law in New Zealand would be broadly familiar to an Australian lawyer.[32]

Competition and consumer law

Unsurprisingly, there has been a degree of citation of Australian cases relating to competition and consumer law in New Zealand, where there are substantial similarities in the *Australian Consumer Law* and the *Fair Trading Act* 1986 (NZ).[33]

Section 20 of the *Australian Consumer Law* prohibits conduct, in trade or commerce, that is unconscionable within the general law. Section 21 of the *Australian Consumer Law* prohibits, in trade or commerce or in the supply or possible supply or acquisition of goods or services, conduct that is unconscionable in all the circumstances and s 22 specifies a non-inclusive list of relevant matters. These provisions were recently considered by the High Court in *Wills v ACCC* [2024] HCA 27, where a Commonwealth-funded education provider changed its process for enrolment by removing two controls which had previously reduced risks of unsuitable persons being enrolled (including by agent misconduct) at the date on which the College claimed fees in respect of their enrolment, so that the Commonwealth paid those fees and the students incurred VFH debts without any corresponding benefit. The education provider was held liable at first instance and by majority in the Full Court of the Federal Court on appeal. That result was affirmed in the High Court, which held that the system of conduct engaged in by that provider was unconscionable in contravention of s 21, and that Mr Wills was knowingly concerned in or party to, the College's contravention, where he knew the essential matters which together made up the unconscionable conduct and participated in that contravention, and his knowledge and conduct were attributed to a company

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[30] *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86; *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548. In *Wolfe v Wolfe* [2021] NZHC 2878, which involved a claim brought on the basis of proprietary estoppel, Fitzgerald J (at [78], citing *Gold Star Insurance* at 86) treated the elements of the "unified" doctrine of estoppel as consistent with those of proprietary estoppel, namely the defendant's creation or encouragement of a belief or expectation by the plaintiff; the plaintiff's reliance on that belief or expectation; and detriment as a result of that reliance.

[31] A Butler, *Equity and Trusts in New Zealand*, 2nd ed, 609. A third edition is due to be published later this year, sadly too late for this paper.

[32] *Gustav & Co Ltd v Macfield Ltd* [2007] BCL 668; [2007] NZCA 205 at [29], aff'd *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735; [2008] BCL 635; [2008] NZSC 47; M Barber, "Contract Law" [2022] *NZLR* 359.

[33] Kos & Qiu, note [2], 73.

associated with him which was also knowingly concerned in the education provider's contravention.

Similarly, ss 7 and 8 of the *Fair Trading Act* (NZ), introduced by the *Fair Trading Amendment Act* 2021 with effect from 16 August 2022, prohibit unconscionable conduct in trade, and is not limited to transactions with consumers and expressly not limited by any rule of law or equity relating to that concept.[34]

Section 9 of the *Fair Trading Act* (NZ) broadly corresponds to s 18 of the *Australian Consumer Law*, prohibiting misleading or deceptive conduct, and s 43 of the *Fair Trading Act* (NZ) provides a broadly corresponding remedial provision. In both New Zealand and Australia, the question whether conduct is misleading or deceptive is determined as a question of fact, with reference to the general usage of those terms, and liability does not require an intention to mislead or deceive.[35] In *Godfrey Hurst NZ Ltd v Cavalier Bremworth Ltd* [2017] 2 NZLR 611, the Court of Appeal observed that whether conduct would be misleading would be assessed to the standard of the ordinary, reasonable or typical members of the targeted class and also emphasised (at [49]) that:

> "Consistency with the Australian cases is important because the legislation in the two countries is substantially the same and because of the trans-Tasman trade ties."

A claim for a false or misleading misrepresentation can also be brought in New Zealand under s 35 of the *Contract and Commercial Law Act* 2017 (NZ);[36] such claims would ordinarily be brought in Australia for misleading or deceptive conduct under s 18 of the *Australian Consumer Law* or the state Fair Trading Acts.

New Zealand has also adopted an unfair contract terms regime in ss 26B-26E of the *Fair Trading Act* (NZ), largely modelled on the Australian provisions in ss 23-28 of the *Australian Consumer Law* and ss 12BV-12BM of the *Australian Securities and Investments Commission Act* 2001 (Cth).[37] By contrast with the Australian position, the *Fair Trading Act* (NZ) permits parties that are in trade to contract out of the application of the *Fair Trading Act* (NZ), where it is fair and reasonable to do so.[38]

Insolvency

There are similarities in the Australian and New Zealand insolvency regimes, and both countries are asking similar questions as to the effectiveness of those regimes.

Under the Australian regime, a liquidation or winding up of a company can take place as a voluntary liquidation initiated by a company's shareholders or by a court-ordered liquidation. The New Zealand liquidation regimes is broadly similar to the

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[34] K Tokeley & V Stace (eds), *Consumer Law in New Zealand*, 3rd ed, 331ff.
[35] *Red Eagle Corp Ltd v Ellis* [2010] 2 NZLR 492; [2010] NZSC 20 (a claim for misleading or deceptive conduct was brought in respect of a loan expenses connected with an aquaculture project, induced by a false statement of assets and liabilities); M Verkahn and L Trotman, "Misleading or Deceptive Conduct After Red Eagle – Cleaning Up the Confusion" (2014) 13 *Otago L Rev* 333; K Tokeley & V Stace (eds),*Consumer Law in New Zealand*, 3rd ed, 188-190.
[36] See, for example, *Kin v Oh* [2024] NZHC 1299.
[37] For commentary, see A Sims, "Unfair Contract Terms: A New Dawn in Australia and New Zealand" [2015] *Monash UL Rev* 735.
[38] *Fair Trading Act* (NZ) ss 5C – 5E.

Australian, although with differences of detail.[39] The approach now reached in Australia in respect of preferences in a liquidation had previously been reached in New Zealand. Earlier Australian cases had permitted a liquidator bringing a preference claim to quantify the amount of a preference from the point of "peak indebtedness" during a continuing business relationship within the relation-back period. The New Zealand Court of Appeal rejected that approach in *Timberworld v Levin* [2015] 3 NZLR 365 and, in *Bryant v Badenoch Integrated Logging Pty Ltd* (2023) 406 ALR 731; 163 ACSR 356; [2023] HCA 2, the High Court took broadly the same approach.

Australia has sought to address issues as to the suitability of the liquidation regime for small and medium enterprises by introducing a simplified form of liquidation for businesses with liabilities of less than AUD$1 million which commenced from 1 January 2021. The simplified liquidation process is only available in a creditors' voluntary liquidation, and not in a members' voluntary winding up or a winding up ordered by the Court. The simplified liquidation regime limits the circumstances in which unfair preferences can be recovered from creditors not related to the company; narrows the requirement for a liquidator to report potential misconduct to Australian Securities and Investment Commission ("ASIC"); removes requirements to call creditors' meetings and establish a committee of inspection; simplifies dividend and proof of debt processes; and increases the use of electronic voting and communications. The decision whether to adopt a simplified liquidation process in a creditors' voluntary winding up is made by the liquidator rather than by the company's directors. This regime is also less commonly used than the standard liquidation regime.

The primary alternative to a liquidation in Australia is a voluntary administration under Pt 5.3A of the *Corporations Act* 2001 (Cth) (*"Corporations Act"*), by which control of a company that is insolvent or likely to become insolvent passes to an independent insolvency practitioner (called the "voluntary administrator") who has control of the business. There are three possible outcomes of a voluntary administration, that the company is (rarely) returned to its directors without further steps being taken; or it is restructured by an agreement (a "deed of company arrangement" or "DOCA") which involves a compromise between the company and its creditors, often involving a compromise of creditors' debts and further funding contributed by the company's directors or shareholders; or, if restructuring is not possible, the company is placed in liquidation. The voluntary administration regime involves a significant level of investigation by the voluntary administrator, although that occurs over a relatively short time period, and a significant level of reporting to creditors. New Zealand adopted a broadly similar voluntary administration regime in Pt 15A of the *Companies Act* 1993 (NZ). Commentators have noted that the voluntary administration regime has been used less than other insolvency regimes in New Zealand, and most companies that are placed in voluntary administration

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[39] L Taylor, "A comparative analysis of the Australian and New Zealand liquidation schemes" (2023) *Int Insolv Rev* 60. This article is a relatively rare example of a detailed analysis of the similarities and differences in the comparable regimes in the two jurisdictions.

ultimately transition to liquidation rather than to the execution of a deed of company arrangement.[40]

At the same time as introducing the simplified liquidation process, the Government introduced a "simplified" restructuring process, as an alternative to the Australian voluntary administration regime. The simplified restructuring process reflects recommendations made in 2017 but was introduced by the *Corporations Amendment (Corporate Insolvency Reforms) Act* 2020 (Cth) and took effect from 1 January 2021, during the COVID-19 pandemic. This approach draws on the "debtor in possession" model adopted in the United States and has some similarities to the moratorium regime introduced in the United Kingdom by the *Corporate Insolvency and Governance Act* 2020 (UK) and to the company voluntary arrangement procedure in the United Kingdom. A company can only proceed under the simplified restructuring regime if it lodges any outstanding tax returns and pays employee entitlements by the time a restructuring proposal is made to creditors. The regime has had limited use.[41]

A company may appoint a small business restructuring practitioner and enter this regime if the eligibility criteria for the restructuring based on the company's liabilities, specified as AUD $1 million, are satisfied and the company's board resolves that it has reasonable grounds for suspecting that it is or is likely to become insolvent at a future time and that a small business restructuring practitioner should be appointed. The eligibility criteria include a limitation on the same directors' capacity to use the restructuring plan process more than once every seven years. The simplified restructuring regime allows the company's directors to retain control of the company and business, with the benefit of a moratorium on enforcement by creditors, while a restructuring plan is developed within a 20 business day period and put to creditors for approval. The simplified restructuring regime reduces the level of involvement of an insolvency practitioner in the restructuring. As far as I my researches go, a corresponding regime has not been adopted in New Zealand.

Both Australia and New Zealand permit schemes of arrangement under Pt 5.1 of the *Corporations Act* and Pt 15 of the *Companies Act* 1993 (NZ), although these are largely used for members schemes and only rarely for creditor's schemes in Australia. New Zealand law permits a compromise with creditors without court involvement under Pt 14 of the *Companies Act* (NZ); in Australia, such a compromise would proceed under the voluntary administration regime or by a scheme of arrangement.

A duty to take into account creditors' interests has been recognised in New Zealand, at least since the Court of Appeal's decision in *Nicholson v Permakraft (NZ) Ltd (in liq)* [1985] 1 NZLR 242 ("*Permakraft*"); that decision has been frequently cited in the Australian case law. Australian law has recognised that directors owe a duty to the company to take into account the interests of creditors, where there is a real and not remote risk of insolvency and the transaction will adversely affect creditor's

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[40] S Ellice, "Is voluntary liquidation failing companies? An investigation into the operation of voluntary administration in New Zealand from inception to 2019" (2021) 52 Victoria Uni Wellington LR 29.
[41] Australian Securities and Investments Commission, Report 756, Review of Small Business Restructuring Process, January 2023.

interests.[42] The Australian case law as to the duty to take into account creditors' interests was noted but not followed by the UK Supreme Court in *BTI 2014 LLC v Sequana SA* [2024] AC 211; [2023] 2 All ER 303; (2022) UKSC 25 ("*Sequana*"), which characterised such a duty as an element of the director's duty to act in the company's interests, and held that directors were required to consider the interests of a company's creditors when insolvency was imminent and that the interests of creditors became paramount when it was inevitable that the company would face liquidation (per Lord Reid P at [50], Lord Briggs and Lord Kitchin at [171]-[176]; Lord Hodge DP at [222]-[227].

Australian law also has a broad, and often criticised, regime imposing liability for insolvent trading upon directors under s 588G of the *Corporations Act*, although there are defences and a recently introduced safe harbour defence to promote restructuring, introduced by the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act* 2017 (Cth).

The New Zealand approach is somewhat different. Section 131 of the *Companies Act* (NZ) requires a director to act in good faith and in what the director believes to be the company's best interests; s 135 prohibits reckless trading and that prohibition is not limited to a company that is in or near insolvency; and s 136 prohibits a company incurring an obligation unless "the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so". The scope of s 135 was considered in *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2021] 1 NZLR 42; [2020] NZSC 100, and the decision in *Permakraft* was there treated (at 31]) as authority that "the interest of creditors have to be considered where the company is insolvent or nearly insolvent"; see also *Kumar v Smart Pay Ltd* [2023] NZCA 410.

Both ss 135 and 136 were considered in *Yan v Mainzeal Property & Construction Ltd (in liq)* [2023] 1 NZLR 296; [2023] NZSC 113 (noted at last year's conference), where the Supreme Court of New Zealand observed that the New Zealand and English provisions correspond "only at a very high level of generality" and emphasised that the duties under ss 135 and 136 were owed to the company and directed to protecting the interests of creditors. The Court there also referred (at [143] to *Permakraft* and to the Australian decision in *Kinsela v Russell Kinsela Pty Ltd* (186) 4 NSWLR 722 and observed that:

> "The Courts have also recognised that in circumstances of doubtful insolvency, actual insolvency or inevitable insolvent liquidation, directors may be required to have regard to the interests of creditors ... [although] any requirement to have regard to the interests of creditors was a subject of the duties owed by directors to the company."

The Court also referred to *Sequana* and held (at [184(a)]) that it was not there required to determine whether, and at what point, the interests of creditors become paramount in that case, but that liability under ss 135 and 136 could arise on the

[42] *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557 at [162]; *Termite Resources NL (in liq) v Meadows* (2019) 370 ALR 191 at [202]; *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533 at [453].

basis that "directors are required to have at least substantial regard to the interests of creditors" in the circumstances in which those sections were engaged.

Financial services

The Australian and New Zealand legislation have broadly similar objectives, including to promote confident and informed participation of investors and consumers in the financial markets. However, financial services regulation has been problematic in Australia, as is reflected by retail investors' losses from the failure of several entities providing products and services to the retail sector, issues as to the quality of financial advice and recurrent inquiries into the effectiveness of the regime.[43] These issues were, of course, recognised in 2019 by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ("Hayne Royal Commission"). Australian attempts to address these issues include the Future of Financial Advice reforms,[44] attempts to increase competency standards of advisers under the *Corporations Amendment (Professional Standards of Financial Advisers) Act* 2017 (Cth) (which took effect from January 2019) and, possibly the most promising approach, the introduction of product design and distribution obligations by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act* 2019 (Cth), where we are now seeing enforcement actions.[45] The former BEAR regime and now the FAR regime

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[43] For reviews of the issues, see Report of the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Financial Products and Services in Australia (November 2009); D Kingsford Smith, "Regulating investment risk: Individuals and the global financial crisis" (2009) 22 UNSWLJ 514; ASIC Report 279, *Shadow shopping of retirement advice*, March 2012; ASIC Report 337, *SMSFs: Improving the quality of advice given to investors*, April 2013; P Hanrahan, "Regulating financial advice for retirement – the recent Australian reforms", 10 March 2017; G Pearson, "Failure in corporate governance: financial planning and greed" in C Mallin (ed), *Handbook on Corporate Governance in Financial Institutions* , 2016, pp 189-190; Senate Economics References Committee, *Agribusiness Managed Investment Schemes: Bitter Harvest*, 2016; ASIC Report 499, *Financial Advice: Fees for no service*, October 2016; ASIC Report 562, *Financial Advice: Vertically Integrated Institutions and Conflicts of Interest*, January 2018; D Wishart & A Wardrop, "What can the Banking Royal Commission achieve: Regulation for good corporate culture" (2018) 43 *Alternative LJ* 81 at 82 .

[44] For case law and commentary, see *Australian Securities and Investments Commission (ASIC) v NSG Services Pty Ltd* (2017) 122 ACSR 47; [2017] FCA 345; *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 123 ACSR 624; [2018] FCA 2; *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; 373 ALR 455; 141 ACSR 1; [2019] FCAFC 187, appeal dismissed in *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118; (2021) 387 ALR 1; (2021) 150 ACSR 125; [2021] HCA 3; *Australian Securities and Investments Commission v Commonwealth Bank of Australia* (2023) 163 ACSR 442; [2022] FCA 1149, appeal dismissed in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2023] FCAFC 135; H Liu et al "In Whose Best Interests? Regulating Financial Advisers, the Royal Commission and the Dilemma of Reform" (2020) 42 *Syd LR 37*; C Byrne "The Liability of Directors and Officers When AFS Licences Provide Defective Product Advice" (2022) 39 *C&SLJ* 19; I Ramsay & M Webster, "Enforcement Action by the Australian Securities & Investments Commission in Relation to Financial Adviser Misconduct" (2022) 39 *C&SLJ* 225. I have drawn here on AJ Black & P Hanrahan, *Securities and Financial Services Law*, 10th ed, 2021, [11.2] and AJ Black, "Misconduct in Banking and Financial Services: Implications of Australia's recent Royal Commission", paper presented at the University of Oxford, 26 February 2020.

[45] *Australian Securities and Investments Commission v Bit Trade Pty Ltd* [2024] FCA 953 (margin extension in a national currency was a credit facility for the purposes of s 12BAA of the *Australian Securities and Investments Commission Act* 2001 (Cth) and Bit Trade had contravened s 994B of the *Corporations Act* by making a margin extension product available to customers trading on a crypto currency exchange, without making the required TMD); Australian Securities and Investments

should also incentivise executives of banks and financial institutions to assume, rather than displace, responsibility.[46]

There has also been recent Australian focus on the complexity of aspects of the *Corporations Act*, and particularly Chapter 7 dealing with financial services and the associated Corporations Regulations, ASIC class orders and instruments, although one should approach any claim for a direct link between complexity and misconduct with scepticism. The Australian Law Reform Commission has also made substantial recommendations for reform of the regulatory regime in respect of financial services.[47] Several recent Australian cases have also considered the potential application of the licensing regime to products involving cryptocurrencies.[48] ASIC has also continued to bring proceedings against holders of Australian financial services licences in respect of conduct of business issues.[49]

The scope of financial services regulation has been expanded in New Zealand in recent years, with the introduction of the *Financial Advisors Act* 2008 (NZ), the

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Commission v American Express *Australia Ltd* [2024] FCA 784 (substantial penalty imposed in respect of an admitted contravention of s 994C(4) of the *Act* in respect of credit cards primarily distributed through retail stores, where American Express had failed to cease retail product distribution where it knew, or ought reasonably to know, that the TMD was no longer appropriate); *Australian Securities and Investments Commission v Firstmac Ltd* [2024] FCA 737. (contravention of s 994E(3) of the *Act* by failure to take reasonable steps that would result in, or would be reasonably likely to result in, retail product distribution conduct of a financial product being consistent with the TMD).

[46] For commentary, see K Manwaring & P F Hanrahan, "BEARing Responsibility for Cyber Security in Australian Financial Institutions: The Rising Tide of Directors' Personal Liability" (2019) 30 *J Banking and Finance Law and Practice*, 20-42.

[47] ALRC Report 141, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*.

[48] For example, *Australian Securities and Investments Commission v Web 3 Ventures Pty Ltd* [2024] FCA 64 (arrangement involving the pooling of crypto currency assets was found to constitute a managed investment scheme and, where it was unregistered, the operator of that arrangement contravened s 911A of the *Act* by carrying on a financial services business without an Australian financial services licence and contravened s 601ED(5) by operating an unregistered managed investment scheme); *Australian Securities and Investments Commission v Finder Wallet Pty Ltd* [2024] FCA 228 (payment of bitcoins purchased using Australian dollars, for which investors were to be paid a fixed rate of return by Finder Wallet, was not a debenture and therefore not a financial product, so that Finder Wallet had not contravened the licensing provisions or requirements for lodgement of disclosure documents and design and distribution obligations under the Act; that decision is now on appeal); *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457 (relevant product was a "financial product" within the scope of s 763A of the *Act*, as a non-cash payment facility under s 763D of the *Act*; BPS was exempt from the requirement to hold an AFSL to issue that product under s 911A(2)(a), only while it was a representative of an AFSL holder; ASIC has brought an appeal from that decision, in respect of the scope of the exemption under s 911A(2)(a)).

[49] For example, *Australian Securities and Investments Commission v RM Capital Pty Ltd* [2024] FCA 151 (contravention of s 963F, which requires the holder of an Australian financial services licence to take reasonable steps to ensure that its representatives do not accept conflicted remuneration, was established where the licence holder authorised a corporate authorised representative to provide financial product advice and that representative accepted conflicted remuneration as to advice of self-managed superannuation funds to acquire property); *Australian Securities and Investments Commission v Macquarie Bank Ltd* [2024] FCA 416 (penalty imposed for an admitted contravention of s 912A by reason of the bank's failure to have adequate systems to prevent or detect fraudulent transactions by third parties in cash management accounts).

Financial Service Providers (Registration and Dispute Resolution) Act 2008 (NZ), the *Financial Markets Authority Act* 2011 (NZ) and the *Financial Markets Conduct Act* 2013 (NZ) ("*FMCA*"). A new regulatory regime for financial advice introducing additional conduct requirements was introduced in New Zealand by the *Financial Services Legislation Amendment Act* 2019 (NZ), with effect from 15 March 2021. The *Financial Markets (Conduct of Institutions) Amendment Act* 2022 (NZ), which at least partly responded to developments in Australia reflected in the Hayne Royal Commission, introduces a statutory regime (also known as the Conduct of Financial Institutions or "CoFI" regime) for regulation of retail banking and insurance services and an obligation to treat customers fairly commence from 31 March 2025.[50]

Both Australian and New Zealand financial services law adopt disclosure regimes, including the issue of a product disclosure statement in respect of financial products and, in Australia, a prospectus in some circumstances. New Zealand law imposes a licensing requirement in respect of financial advisers under Pt 6 Sub-part 5A of the FMCA; in Australia, individual advisers are generally not directly licensed but regulated as employees or authorised representatives of corporate licensees. Both regimes include conduct and competence requirements and both apply more exacting duties in respect of dealings with retail clients.[51] It would be interesting to know whether New Zealand is facing similar issues to Australia as to the effectiveness of enforcement and complexity in this field.

Personal Property Securities legislation

Finally, I do not venture into the territory of the PPSA, given the expertise in this room. I merely note, as a matter of history, that the *Personal Property Security Act* 1993 (Saskatchewan, Canada) and the *Personal Property Securities Act* 1999 (NZ) both influenced the later introduction of the *Personal Property Securities Act* 2009 (Cth) in Australia, and early Australian cases as to the *Personal Property Securities Act* 2009 (Cth) gave close attention to the Canadian and New Zealand law.[52] It is now too late to ask whether Australia might have been better served following the Canadian or New Zealand legislation more closely, rather than adopting the more complex model in the Australian legislation.[53] Further amendments to the Australian

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[50] K Tokeley & V Stace (eds), *Consumer Law in New Zealand*, 3rd ed, 12, 401ff, 443. For earlier commentary, see G North, "Financial advice reforms: Striking the right balance"; in S Griffiths et al, *Exploring Tensions in Finance Law: Trans-Tasman Insights* 2014, pp 77-99; R Pains, "Kerbing Irrational Exuberance: Conduct and governance in the Financial Markets Conduct Act 2013" (2014) 20 *Auckland UL Rev* 10; T Burgess and C Hollings, "Financial Markets Act 2013" (2014) 20 *Auckland UL Rev* 290; R Bowley, "Regulating the financial advice profession: An examination of recent developments in Australia, New Zealand and the United Kingdom and recommendations for further reform" (2017) 36 *U Qld LJ* 177, which is a rare example of a comprehensive comparative review.
[51] K Tokeley & V Stace (eds), *Consumer Law in New Zealand*, 3rd ed, 418.
[52] For example, *Maiden Civil (BE) Pty Ltd* [2013] NSWSC 832; *Warehouse Sales Pty Ltd (in liq) v LG Electronics Australia Pty Ltd* (2014) 291 FLR 407; [2014] VSC 644.
[53] Commentary had raised that question at the time; for subsequent commentary, see A Duggan, "The trials and tribulations of personal property security law reform in Australia" (2015) 78 *Sask L Rev* 257; A Duggan, "Quinquagenarises" (2023) 48 *Dalhousie LJ* 379; A Duggan and M Gedye, "Personal Property Securities Law Reform in Australia and New Zealand: The Impetus for Change" (2009) 27 *Penn St Int L Rev* 655.

PPSA may now be made by the proposed *Personal Property Securities Amendment (Framework Reform) Bill* 2023 (Cth), in response to the Whittaker review.