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TRANS-TASMAN FEDERATION – ACHIEVABLE, IMPOSSIBLE, UNNECESSARY?

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The Hon. Michael Kirby AC CMG

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The Hon. Michael Kirby AC CMG**

A RECURRING THEME

In 1981, I was appointed by the New Zealand Government as the Senior ANZAC Fellow. The post was created to commemorate the close bond created between Australia and New Zealand at Gallipoli on 25 April 1915. Its object was to imbue citizens on both sides of the Tasman Sea with an appreciation of the precious links that exist between the two countries.

In consequence of my appointment, I travelled to all parts of New Zealand. I met the then leaders of the New Zealand nation, in and outside the law. As a result of the visit, I had occasion to reflect upon the divided political arrangement existing in Australia and New Zealand. In the result, each decade since, I have questioned whether Australia and New Zealand should take the necessary steps to formalise, in some appropriate way, a more intensive political relationship between them.

My first effort concentrated on the Closer Economic Relations (CER) Treaty that was signed in December 1982 in a ceremony conducted, symbolically enough, by a satellite link between Wellington and

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* Based on a paper presented to the Trans-Tasman Law and Practice Conference, Canterbury University, Christchurch, New Zealand, 27 August 2010.

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Canberra[1]. The CER treaty, and the detailed steps that followed it, addressed my mind to the need for much closer legal and political relationships between the two countries, if the aspiration of CER were to be fully realised[2].

In a further visit to New Zealand, following the ratification of CER, I engaged in a debate on *Radio Pacific* with the then New Zealand Prime Minister, Sir Robert Muldoon. In that debate, he was, at first, hostile to the idea of federation. But as the debate unfolded, it became tolerably clear that his objections were founded on what he perceived as the likely terms and conditions that Australia would offer for such a federation[3]. If the offer became more generous, it appeared that Sir Robert might have been capable of persuasion.

On a number of occasions, in the 1990s, I visited New Zealand and again raised the federal idea. Based upon these addresses, I was persuaded by Phillip A. Joseph to write with him a broader contribution for his book of constitutional essays. Heroically, the essay beckoned the reader to an exercise in futurology and a consideration of what would happen in trans-Tasman relations in the twenty-first century[4].

Now, on the eve of the thirtieth anniversary of that original visit that sparked my interest in this topic, I offer a third attempt[5]. Whilst

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1 Australia, Foreign Affairs *Record*, 1983 ,59.

2 M.D. Kirby, "Closer Economic and Legal Relations Between Australia and New Zealand", (1984) 58 *Australian Law Journal* 383. See also M.D. Kirby, "Closer Economic Relations, Trans-Tasman Courts and Australasia" [1993] *NZ Law Journal* 304.

3 Namely admission of New Zealand to the Commonwealth under the Australian Constitution, s121, as a single state.

4 M.D. Kirby and P.A. Joseph, "Trans-Tasman Relations – Towards 2000 and Beyond" in P.A. Joseph (Ed), *Essays on the Constitution*, Brookers, 1995, p142.

5 Paper for the Trans-Tasman Law and Practice Conference, Christchurch, New Zealand, 27-28 August 2010.

considering, once again, the historical background and the arguments for and against a formal political union between the two nations, I address a new question. This is whether an attempt to procure political union has now been overtaken by events that have followed the CER treaty. Effectively, is the idea of political union now out of date? Does the unity of two such similar nations of the South Pacific matter so much today, in the context of a globalised world and intensification of regional trade and commerce? In short, is it now too late to conjure with the dream of Australasia? Is it pointless to worry over lost opportunities and offers that might revive the aspiration of trans-Tasman nationhood?

This present essay is written against the background of economic and political events at the end of the first decade of the twenty-first century. It is affected by a new office to which I have recently been appointed: the Eminent Persons Group (EPG) of the Commonwealth of Nations. The EPG is examining the future political, legal and economic structures of that international family of nations. Because Australia and New Zealand are each foundation members of the Commonwealth of Nations, my work in the EPG has caused me to reflect, in that context, on the lost opportunities of the global Commonwealth relationship. In effect, as the British Empire appeared in the decades after the 1950s, the relationship of its former members in the new Commonwealth body drifted along. Nobody felt strongly enough to kill off the new relationships. Yet nobody felt strong enough to enhance those relationships so as to permit them to fulfil new aspirations and bolder dreams. In a way, the drift of the new Commonwealth association paralleled the drift in political relationships between Australia and New Zealand. The question was posed: did this matter? Was anything

different achievable? Was action urgent, lest the present association should fade away, not from opposition, but from indifference?

My conclusion will be that, in the case of the relationship between Australia and New Zealand (ANZ), elements of a kind of federal association have emerged as a result of CER. These elements are likely to continue their expansion and development. Whether they will produce a kind of trans-Tasman confederation or whether they will simulate a still closer political relationship, is not yet clear. Undoubtedly, great changes in the ANZ association have occurred over the past thirty years. It is likely that those changes will continue and intensify.

THREE LOST OPPORTUNITIES

The early colonial link: If one starts from the proposition that the natural association between two such similar nations as Australia and New Zealand is a federal union, three close-run encounters with a kind of formal federalism occurred but failed to deliver a lasting link of governmental arrangements between Australia and New Zealand.

In accordance with the European Imperial notions of the eighteenth and early nineteenth centuries, the British Crown might have claimed sovereignty over New Zealand in the 1770s upon the basis of the three voyages of discovery undertaken by James Cook, the British navigator[6]. What actually occurred was not entirely clear. Some of the language in the Royal Instructions given to Captain Arthur Phillip, when he was dispatched to be the Governor the new penal colony in New South Wales, might have been interpreted to authorise him, and his successors, to lay immediate claim to the lands of New Zealand to the

[6] Claudia Orange, *The Treaty of Waitangi*, Bridget Williams Books, 1987 (1992 reprint), 3-4.

east of Botany Bay. An important consideration at the time was the right, and duty, felt on the part of colonial officials in Whitehall, to facilitate the spread of the Christian religion to the heathen lands described by Cook.

However that may be, no immediate claim to sovereignty was made or authorised, although missionaries (including the New South Wales chaplain, Samuel Marsden) made several visits to New Zealand. In Marsden's case, there were seven visits between 1814 and 1839. Marsden propounded the belief that the Crown had a *parens patriae* interest in the welfare of the Maori tribes. The fact that this assertion was pursued by the Church Missionary Society in 1814 and the Wesleyan Missionary Society in 1822 went hand-in-hand with a perceived united frontier of trade and Christianity that was advanced to the New Zealand coast with regularity after 1800[7].

Nevertheless, although the New South Wales governors were afforded a vague jurisdiction over New Zealand because of the resources reported to exist there which might be supportive of the penal colony in Sydney, the governors in Sydney were generally cautious about claiming possession of the land in New Zealand. This caution exasperated some of the adventurous settlers in New South Wales who considered that New Zealand was the 'safest country in the world', certainly more secure than the Australian bush[8]. The conversion to Christianity of the northern Maori chiefs persuaded British officials, by 1839, that the time was ripe for a new political association between the New South Wales colony and the Maoriland of New Zealand.

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7 Orange, n6, 6.

8 Orange, *ibid*, 18.

Early in 1840, the jurisdiction of the New South Wales colony was extended to New Zealand, in anticipation of the success of a mission to New Zealand under Captain William Hobson. He was designated Lieutenant-Governor of the colony. He signed his letters as "Lieutenant-Governor of the British Settlements in Progress in New Zealand". On 6 February 1840, Hobson was dispatched by Governor Gipps in Sydney. A note reported that he had achieved the execution of a treaty with the Maori tribes at Waitangi. This treaty was an important turning point in the earlier chaotic relationships between British settlers, whalers, escaped convicts and missionaries and the Maori people who were introduced to the Christian religion. With the passage of time, the treaty of Waitangi was to become an even more important legal instrument. It defined the relationship between the Crown and British subjects in New Zealand and the Maori people in a way quite different from the relationships that evolved between the Crown and the settlers and Australian Aboriginals[9].

Late in 1840, the Imperial government separated New Zealand from the temporary jurisdiction of New South Wales. By *Royal Charter*, New Zealand became a fully fledged and separate British colony. Hobson was the commissioned as Governor. He was instructed to establish the machinery of state, including a small executive council and a legislative council. These instructions came into operation in New Zealand in May 1841. From that time, New Zealand was treated as legally quite separate from the British colonies in what is now Australia. However, it did not have to be so. Based upon Cook's 'discovery', New Zealand might have been claimed, and retained, as a possession of the Crown

[9] Orange, *ibid*, 82 citing Sir Keith Sinclair's *A Destiny Apart* (1986), 17.

after 1800. In the event, the possibility of early joint rule over Australia and New Zealand was lost. Formally, it lasted for less than two years. But given the similarities of the colonial experience on each side of the Tasman, history could have taken a different direction.

Three features of the New South Wales colony were to mark it off as different: its penal origin and purpose; the much larger population of settlers who were immediately attracted there; and the entirely different relationship with the indigenous people negotiated in New Zealand, when contrasted with that which emerged in Australia. The first opportunity for joint sovereignty of Australasia under the British Crown disappeared in 1841.

The 1890 federal movement: The second opportunity for formal amalgamation arose in the 1890s. It was preceeded by the passage through the Imperial parliament of the *Federal Council of Australasia Act* 1885 (Imp). That measure might have been enacted to inspire and encourage a closer involvement of New Zealand in the federal movement. Certainly, at the time of its enactment, Australia, as such, was a word of no political significance. A goal of Australasia (to include, New Zealand and possibly other British colonies in the southern ocean) was just as heroic an idea as was that of a Commonwealth of Australia. Nevertheless, the Federal Council produced little legislation, the only significant provision being the inter-jurisdictional enactment of a *Service and Execution of Process Act*. When the Australian Commonwealth was created in 1901, the 1885 Imperial Act faded away to its inglorious conclusion.

By 1889, however, the federal movement in Australia was gathering pace. The first constitutional convention took place in 1890 in Melbourne and later in 1891 in Sydney. The participants were elected, not by the people, but by the local colonial legislatures. From the beginning, New Zealand delegates were invited to participate. They included Sir George Grey, who declared that New Zealand was a "damsel to be wooed but not necessarily to be won"[10]. Whereas Sir Henry Parkes of New South Wales spoke of the "crimson thread of kinship [that] runs through us all", Sir John Hall, Prime Minister of New Zealand, emphasised the economic and emotional impediments. Captain George Russell declared that there were 1200 reasons standing in the way of union, being the 1200 miles separated the countries on both sides of the Tasman Sea.

The prospect of a large neighbour, with a common tariff against external nations, obliged the New Zealand delegates to take the possibility of joining the Australian Commonwealth seriously. Whilst both sides could understand the difficulties of the other, neither side wished to slam the door of federation in the face of the other.

In 1899, straw votes were taken amongst the members of the New Zealand House of Representatives to ascertain the feeling about union. Thirty members supported joining Australia. Twenty were opposed. Twenty-four members (including the four Maori members) abstained. The differential treatment of the Maori in New Zealand and Aboriginals in Australia formed one of the most serious obstacles to union. Maori males had possessed the franchise in New Zealand from 1867. Australian Aboriginals were substantially denied the right to vote. This

[10] Cited in M.D. Kirby, above n2, (1984) 58 *Australian Law Journal* 383.

reality was eventually to be reflected in constitutional provisions (s127 and also 251(xxvi) of the Constitution) that endured until the 1967 constitutional referendum.

In the end, a Royal Commission of enquiry was established in New Zealand to investigate and clarify the arguments. This body eventually recommended against union. The fact that in the second and later constitutional conventions, the Australian delegates were elected directly by the people qualified to vote in the several colonies, appeared to give them a greater sense of legitimacy and determination to bring about the federal union. Sir John Hall confessed that he admired and supported the union of the Australian colonies and regretted that New Zealanders could not join in the euphoria of the moment. Yet, he and others in New Zealand and Australia pressed for the door to remain open. So indeed, it was.

In cl.6 of the covering clauses in the Imperial Act, to which the Australian Constitution is annexed, the prospect of eventual New Zealand membership of the new Commonwealth is expressly left open. Indeed, it is declared that New Zealand is a federating state. The "states" were defined to mean[11]:

> "... such of colonies of New South Wales, *New Zealand*, Queensland, Victoria, Western Australia and South Australia and such colonies and territories as may be admitted into or established by the Commonwealth as States ..."

A simple procedure was left open for these federating states to join the Commonwealth at a later stage. By s121 of the Australian Constitution, it is provided that the Federal Parliament:

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[11] *Commonwealth of Australia Constitution Act* 1900 (Imp), cl.6.

> "[M]ay admit to the Commonwealth or establish new states, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit."

The object of this provision was to accommodate the possibility, which was real in 1900, that Western Australia might not, by the proclamation date, have concluded affirmatively the referendum authorising that colony to federate with the others. In the event, the necessary approval was given by Western Australia. Still, that left s121 on foot in the Australian Constitution as a deliberate, and simple, procedure for a later decision on the part of the New Zealand people to join the new Commonwealth.

That procedure has never been availed of. In peace and war, Australia and New Zealand have been very close neighbours, allies, trading partners and friends. It is difficult to think of two nations of comparable size in the world today that share so much in common, whilst remaining separate polities. But that is certainly what has occurred. At the turn of the twentieth century, the second opportunity for Australia and New Zealand to achieve a formal federal union, was lost.

CER and its aftermath: The CER Treaty was undoubtedly a major step towards closer political, as well as economic, links between Australia and New Zealand. The treaty followed the earlier Treaty of Rome by which the European Economic Community (now the European Union (EU)) was created). In part, as a response to the resulting decline of Imperial trading preferences and the shift of British trade to its European partners, in 1965 Australia and New Zealand negotiated the free trade agreement between New Zealand and Australia (confusingly

titled “NAFTA”). The CER Treaty aimed to take NAFTA to a higher level of bilateral integration.

Article 1(a) of the CER Treaty, asserted that the first of its stated objectives was the strengthening of the “broader relationships” between the two countries. Whereas the main focus of CER was economic, the contemplation was that the CER Treaty would stimulate deeper and more varied relationships. Throughout its operation, there has been strong support for the CER Treaty in New Zealand (averaging 62% of New Zealanders who were polled). Nevertheless, the percentage support for a more profound political union between the two countries has never reached a majority of the people on either side of the Tasman, the votes in favour in New Zealand being typically lower than those in Australia[12].

Despite significant moves to make a formal political union between Australia and New Zealand easier to attain, without a parliamentary champion for the idea, it is unlikely that it will ever seize the popular imagination on either side of the Tasman.

In 2006, a committee of the Australian Federal Parliament urged that Australia and New Zealand should work towards a full union, or at least a single currency and more common markets. The chairman of the parliamentary committee, Mr. Peter Slipper, argued that the world had changed enormously since 1901. He said[13]:

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[12] See e.g. *Sydney Morning Herald*, 17 October 1989. In Australia, those who opposed of political union at that time were 64% of sample. In New Zealand, the opposition reached 75%. See M.D. Kirby and P.A. Joseph, above n4.

[13] Report, *Sydney Morning Herald*, 5 December 2006, 3. See also G. Williams, “A Nation Girt By Sea – And Divided By It”, *Sydney Morning Herald*, 30 March 2010, 11.

> "While Australia and New Zealand are of course two sovereign nations, it seems to the committee that the strong ties between the two countries – the economic, cultural, migration, defence, governmental and people-to-people linkages – suggest that an even closer relationship, including the possibility of union, is both desirable and realistic."

The Australian committee proposed that the parliaments of the two nations should establish a joint committee to examine and report on the possibility of union. The Australian parliamentarians (who included Mr. Malcolm Turnbull (Lib), Ms. Nicola Roxon and Mr. Daryl Melham (ALP) insisted that any change in the present relationship would have to be voluntary and mutually beneficial. High on the agenda of action, urged by the committee, was the creation of a common currency which would neither be the Australian nor New Zealand dollar but a shared ANZ denomination. So far, like many parliamentary committees with bold ideas, this one has produced no action. The then Prime Minister of New Zealand (Helen Clark) declined to comment on the Australian committee's report[14]. Subsequently, when the then leader of the opposition in New Zealand (Mr. Don Brash) suggested that it could be wise to at least explore the possibility of union, Ms. Clark declared that, if the opposition leader likes Australia so much, he should consider going to live there[15].

Ironically, the one governmental institution that Australians and New Zealanders shared into the late decades of the twentieth century was the notable imperial court: the Judicial Committee of the Privy Council. At least theoretically, certainly until the 1960s, it would have been possible (with British co-operation or acquiescence) to constitute common

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14 *Ibid*.

15 *New Zealand Herald*, 1 June 2006, 8 (Letters).

benches of the Privy Council for Australian and New Zealand final appeals. This was a proposal advanced before the British government by a formidable advocate, Sir Garfield Barwick (Chief Justice of the High Court of Australia)[16]. It was an idea that had the support of Mr. Gough Whitlam, when Prime Minister of Australia. However, the British government was never enthusiastic. The result was the gradual termination of Australian appeals to the Privy Council[17]. The last appeal to the Privy Council from Australia[18] was, by coincidence, from orders of the Court of Appeal of New South Wales, in a matter in which I had participated judicially. The appeal was dismissed.

The resulting discordancy between the institutional position in New Zealand (where Privy Council appeals remained) and in Australia (where they were abolished) was eventually concluded in 2003 by the creation of the Supreme Court of New Zealand, as the final appellate court of that nation[19]. In that sense, Australia and New Zealand have now been restored to identical institutional arrangements. The possibilities of finding a common judicial institution to deal with CER disputes presents difficulties from the point of view of the Australian Constitution[20]. Yet without a neutral, independent, judicial organ and a common legislative one, it is difficult, or impossible, to envisage the creation of a formal political union[21].

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16 G.E. Barwick, "A Regional Court of Appeal" [1969] *NZ Law Journal* 313.

17 By federal legislation and then by United Kingdom, federal and state enactments. See *Privy Council (Limitations of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); and *Australia Act* 1986 (UK and Australia), s11(1)(4). Cf. *Kirmani v Captain Cook Cruises Pty Ltd [No.2]* (1985) 159 CLR 461.

18 *Austin v Keele* (1987) 10 NSWLR 283 (PC).

19 *Supreme Court Act* 2003 (NZ).

20 Especially because of the operation of the constitutional writs provided for in *Australian Constitution*, s75(v).

21 See (1984) 58 ALJ at 395, 400.

In the early days of CER, some advocates of proceeding to a federal union between Australia and New Zealand, expressed the hope that CER and its obvious trading advantages would soften the opposition to such a union. Self-interest and growing integration of trade and commerce, economic and legal institutions, would, it was hoped, foster a bolder spirit that would embrace, as the final step, a trans-Tasman federation.

This has not happened. The 2006 proposal of the Australian parliamentary committee has come to nothing. Whenever the idea is raised, it is difficult, on both sides of the Tasman, to have a serious debate about the idea. Wedge politics, nationalism and rivalry have so far made it impossible to embark on a realistic estimate of the best interests of the people of both nations. In that sense, to the extent that CER might have been hoped to lead on to at least preliminary discussions for a deeper political association, the hopes have been dashed.

This is especially so in New Zealand where there are higher levels of resistance, despite the significant advantages that New Zealand has derived from the economic integration which CER has encouraged. Economic self-interest cannot, it seems, trump visceral dislike, rivalry and indifference[22]. To the extent that, in other hands and with consensus and strong leadership on both sides of the Tasman, CER might have lifted itself from a disjointed collection of individual projects, the trans-Tasman nations have once again missed an opportunity. Like the Commonwealth of Nations, Australia and New Zealand seem

[22] S. Hiebendall, "Trans-Tasman Relationship", *New Zealand Herald*, 1 April 2005, A1.

content to continue on their present separate journeys. The notion of striking out for new, different, and larger horizons has not been seized.

So what are some of the main arguments for changing this situation? And also for keeping things substantially as they are?

BASIC ARGUMENTS FOR AND AGAINST UNION

Arguments for Political Union

1. *History and geography*: Australia and New Zealand are, in a sense, historical and geographical anachronisms. They are 'leftovers' from the era of the British Empire. They are substantially peopled by citizens from European and Caucasian backgrounds who, for 200 years, have established societies and governmental arrangements copied from Europe, specifically the United Kingdom. They are surrounded on the Pacific and Indian Ocean sides by tiny states. To the north, Australia, in particular, has ????? neighbours of Melanesian, Malay, Chinese and Indian ethnicity. Australian and New Zealand are still overwhelmingly Christian identifying nations whereas, certainly to the north, Christianity does not predominate. Islam, Buddhism, Hinduism and Secular Confucianism do. In this sense, in the words of Australian defence analyst, Hugh White, Australia and New Zealand are "together, alone" in their part of the world. Being such, their failure to negotiate and secure national union with one another constitutes a reproach to earlier generations.

2. *The Monarch*: At present, Australia and New Zealand share the same Head of State. This is Queen Elizabeth II, who is widely respected in both countries. A republican movement exists both in Australia and New Zealand, but especially the former. Still, for the

purpose of exploring common governmental institutions, the existence of a shared head of state is an important link. Most countries do not share their head of state with any other.

The possible replacement, in one or both of the trans-Tasman nations, of the Queen or King of the United Kingdom as the head of state, cannot be excluded. At least, it cannot be easily excluded following a demise of the Crown. Whilst the shared governmental link exists, it would make the creation of a single nation easier to attain. It would be more difficult if the two nations had a different arrangement for the head of state.

One of the reasons why Mr. Paul Keating as Prime Minister of Australia may not have been as enthusiastic for a closer constitutional relationship with New Zealand, than other Australian Prime Ministers were, could have been his suspicion that New Zealanders were more favourable to the monarchy than Australians. Australia has always had a larger component of Irish immigrants, some of whom support a move to a republic. The referendum to provide for such a change to the Australian constitution failed to secure a majority in any state of Australia[23]. However, the fact was, in part, because of divisions amongst republicans over an appointed or elected presidency. Some confirmation of Mr. Keating's suspicion about the Anglophilia of New Zealand may be found in the restoration of knighthoods (including retrospectively) for distinguished New Zealanders after the election of the Key government. In Australia, this did not happen when Mr. Howard was elected on the defeat of the Keating Government in 1996.

[23] M.D. Kirby, "The Australian Referendum on a Republic. Ten Lessons", (2000) 46 *Australian Journal of Politics and History* 510. See also T. Blackshield and G. Williams, *Australian Constitutional Law and Theory*, Federation, Sydney (3rd.Ed, 2002), 334-5.

3. Parliamentary democracy: New Zealand and Australia are amongst the oldest legislative democracies in the world. Self-government and forms of responsible government date back to the 1850s. As well, the legislative institutions have had an unbroken record of service, with cyclical electoral replacement of the government that commands a majority in the Lower House (or in New Zealand, in the unicameral House of Representatives).

The fact that the trans-Tasman nations are beneficiaries of the evolution of British constitutionalism, following the American War of Independence, has endowed each of them with very similar parliamentary institutions, based on the Westminster model. In explaining why New Zealand could not join the Australian federation in 1900, Premier Sir John Hall, emphasised the importance of having a government that makes the law "in the sight and hearing of the people". The advent of communications technology has removed this suggested impediment as it existed in 1900. Parliamentary debates are broadcast and can be easily transmitted throughout both nations.

On the eve of the Australian federal election in August 2010, a suggestion was made by one writer that the Australian politicians were attempting to copy the highly successful political strategy of the New Zealand Prime Minister, Mr. John Key.[24] The praise was qualified by the observation that:

> "Truly visionary leadership and popularity are often mutually exclusive. However, today's politicians, on both sides of the Tasman, are increasingly trying to re-write that rule. Better to put off the hard decisions for future governments to deal with and bask in the reflected glow of your own popularity. Which raises the

[24] Andrew Patterson, "Key to Success Lies Across the Tasman", *The Australian*, 17 August 2010, 10.

question: Are trans-Tasman politics set to go the way of reality television – all show but very little substance?"

For good, and possibly for bad, the Australasian legislative model is very similar on both sides of the Tasman, although the adoption in New Zealand of the mixed member proportional system (MMP) has created a different electoral mechanism[25]. In the wake of the closely divided federal election in Australia in 2010, and the promise of each side of politics to reform the parliamentary system, it is far from impossible that Australia may adopt reforms of the electoral process, influenced by the New Zealand model. The political moods on each side of the Tasman are very similar at present.

4. Executive government: In both Australia and New Zealand, the system of Executive Government is virtually identical, save for Australian federalism. The institutional identity of the mechanisms for choosing the elected executive (Ministers) and the unelected officials, means that there would be no discordancy in merging the two polities. Save for attributes derived from the federal constitution and the MMP electoral system, New Zealanders would be entirely comfortable with the system of executive government operating in Australia. The comparative absence of corruption in elected politics is another feature that is common and distinctive.

5. The judicial branch: The common abolition of appeals to the Privy Council and the creation of a single apex supreme court in both Australia and New Zealand mean that the judicial system is substantially compatible. In Australia, there is, of course, the separate system of

[25] New Zealand, *Report of the Royal Commission on the Electoral System, Towards A Better Democracy*, New Zealand, December 1986, 295.

federal courts. However, as with the executive government, in both countries, the judicial branch is independent and of high integrity.

In recent years, important changes have been adopted to facilitate the use of trans-Tasman courts for the commencement of civil proceedings. The Trans-Tasman Court Proceedings and Regulatory Enforcement Treaty, signed in July 2008, has now been followed by the adoption of enabling legislation in Australia. Identical legislation is before the New Zealand Parliament. The object of this legislation is to facilitate the creation of, effectively, a shared trans-Tasman jurisdiction for most civil proceedings (including some proceedings before tribunals as well as courts). To a limited extent, the enforcement of criminal fines and trans-Tasman court orders to support defined criminal proceedings, mean that, already, the judicial systems of New Zealand and Australia are significantly integrated[26].

6. A federal capital: If federation were to proceed, the geographical location of Canberra is well placed to be equi-distant between outlying areas of the suggested federation. This means between Perth in Western Australia and Wellington in New Zealand. Fortunately, the situation of Canberra is suitable for a federal capital of Australasia. The impediment that previously existed because of the intervening Tasman Sea must now be reconsidered in the light of the modern technology of communications and the radical alterations of means of transport compared to those existing during the federal convention debates of the 1890s.

[26] A. McDonald and C. Clayton, "Trade Reform Across The Ditch", *Law Society Journal (NSW),* May 2009, 62. The treaty and legislation are aimed at strengthening provisions of the *Service and Execution of Process Act 1992* (Cth); the *Federal Court of Australia Act* 1976 (Cth), s32B. See *Trans-Tasman Proceedings Act* 2010 (Cth). See also Reid Mortensen, *Private International Law in Australia*, Lexis Nexis, 2006, 158-9.

7. Precedent - Newfoundland: The late accession of New Zealand to the Australian Commonwealth would be no different, in principle, from the accession of Newfoundland (now Newfoundland and Labrador) to become the tenth Province of federal Canada. This integration took place on 31 March 1949. It has, by common concurrence, been successful and is not now questioned. There is no separatist movement in Newfoundland and Labrador. This is so although Newfoundland itself was claimed for the British Crown by Sir Humphrey Gilbert as long ago as 1583.

The development that encouraged Newfoundland's incorporation in Canada included the geographical proximity of the two dominions of the Crown;, the links forged in two world wars; and the serious economic dislocation of the province because of the Great Depression of the 1930s. What happened to Newfoundland at least indicates that, despite a very long (indeed much longer) period of separate existence as a dependency and dominion of the Crown, incorporation in a larger federation can be successfully achieved.

8. Racial developments: Whereas in the 1890s, there were serious differences in principle between the attitudes of Australians to non-Caucasian persons, such attitudes have radically changed since the abolition of the White Australia Policy (1966) and the overwhelming popular adoption of the Aboriginal constitutional referendum (1967). These developments, together with court decisions both in New Zealand[27] and in Australia[28], have meant the removal of at least the

[27] *New Zealand Maori Council v Attorney-General* [1987] NZLR 641 at 664 (HC & CA).

[28] *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

formal impediments that previously obstructed a federal arrangement between the two countries.

The adoption, with bipartisan support, of the National Apology to the Aboriginal people of Australia by the Parliament of the Commonwealth is a further indication of moves in Australia towards a more modern and respectful attitude to racial and cultural differences. In this connection, New Zealand, which has always been in advance of Australia, could make a most valuable contribution to attitudes in Australia. Self-evidently, any constitutional arrangement between Australia and New Zealand would have to respect and protect the special status of the Treaty of Waitangi (in New Zealand) and the *Mabo* recognition of native title (in Australia).

9. Defence and ANZAC: The close relations that have existed, in times of war and peace, between Australia and New Zealand are most emphatically signified by the shared national day of remembrance, ANZAC Day (25 April). The joint military operations of the two countries, including in peacekeeping and in dangerous theatres of military operations, such as Afghanistan, reflect the continuing strong links in the field of defence.

The shared history in this and other respects, probably explained the fact that, in a survey of Australian attitudes to foreign policy conducted in 2009, the country which Australians trusted to act most responsibly and the country to which Australians acknowledged the most positive feelings, was New Zealand (described as 83°). Only Canada (80°) came close to this level. The United States and Japan were 67° and 66°,

respectively. Indonesia was 49°. Iran and Afghanistan were 38° and 37° respectively[29].

10. Ministerial meetings: The initiative of Prime Minister of Kevin Rudd in arranging in Sydney in 2008 a joint meeting of the most important ministers of the national cabinet of each country symbolised the shared interests between Australia and New Zealand in a very vivid way[30]. At the public event that followed the joint meeting of the senior ministers of both countries, 600 attendees heard New Zealand Prime Minister, Mr. John Key, say:

> "This is a relationship like none other. It is up to us, how far we let our imaginations go. We believe that a single trans-Tasman market, the sum can be greater than the separate pieces."

New Zealand business commentator, Mr. Colin James, observed that Australia's apparent escape from the global financial crisis had "softened the blow of the global downturn for us [in New Zealand]". Citing one of his predecessors, Mike Moore, who went on to become head of the World Trade Organisation, the Labour leader Phil Gough said:

> "We'll do everything you ask us to do, but nothing you tell us to do".

Regular meetings of New Zealand ministers with their Australian counterparts take place in 19 areas of governmental responsibility. Other areas of such activities in Australia also enjoy New Zealand participation, sometimes as an observer and on other occasions, as a fully participating member.

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[29] Australia, Lowy Institute, *National Survey of Australian Attitude to Foreign Policy*, reported *The Australian*, 14 October 2009, 12.

[30] Rowan Callick, "Opposites Attract in Renewed Trans-Tasman Friendship", *The Australian*, 31 August 2009, 12.

It would be difficult to imagine any other international neighbours co-operating in this intense, growing, friendly and political way. The issue that is presented by the foregoing considerations is whether it is in the interests of the people of Australia and New Zealand to extend and deepen still further these relationships. In international affairs, it is easy to allow the *status quo* to dominate the imagination. Without the impetus of external events and dangers, the opportunities for reconsideration of what stands in the best interests of those affected, may be much harder to assemble.

Arguments Against Political Union

1. *Lack of a champion*: The main obstacle to securing a deeper federal or other formal political union between Australia and New Zealand has always been the lack of prominent advocates for such an idea on both sides of the Tasman. Because of the political systems in operation in the ANZ region and the very short electoral cycles (three years), both Tasman nations are almost always in the midst of political electioneering. This means that any advocacy of a cause that may be unpopular with a particular group of citizens is difficult to sustain, most especially as an electoral poll approaches.

Probably, the highest support for a trans-Tasman union was at the time of the Australian constitutional conventions in the 1890s. At least then, a majority of the members of the House of Representatives in New Zealand expressed themselves in favour of union. Since then, there has been virtually no time when there has been such an endorsement of the idea. The endorsement is unlikely to arise spontaneously, absent a common peril or significant unifying cause.

2. Racial issues: Although Australia has made considerable progress in abandoning its earlier racist [White Australia] migration policy and its discriminatory laws and practices against Aboriginals, the fact remains that New Zealand has a culture which is more genuinely respectful of its indigenous peoples. No doubt this is because the proportion of Maori in New Zealand is approximately 17 times that of Aboriginals in Australia.

Moreover, important decisions of the courts demonstrate that, in terms of respecting and protecting the rights of indigenous peoples, New Zealand courts, on the whole, have adopted a much more favourable approach than have the courts in Australia. Two decisions of the High Court of Australia illustrate this proposition. They are *Kartinyeri v The Commonwealth*[31] and *Wurridjal v The Commonwealth*[32].

The former case concerned the meaning of the preposition "for" in s51(xxvi) of the Australian Constitution, following its amendment after the affirmative referendum in 1967. The issue was whether the power to make laws with respect to the "people of any race *for* whom it is deemed necessary to make special laws" connoted a requirement that the laws should be "for" the race concerned, in the sense of "in the interests of" or simply "for" in the sense of "with respect to". Although the provision was ambiguous and the record of the referendum supported a beneficial construction, the majority of the High Court of Australia rejected it. I dissented.

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[31] (1998) 195 CLR 337.

[32] (2009) 237 CLR 309.

Likewise, in *Wurridjal*, the issue was whether the legal process of a community of Aboriginal citizens in the Northern Territory of Australia was so defective as to be legally unarguable in so far as it challenged the constitutional validity of the extraordinary federal legislation authorising the so-called Northern Territory Intervention. The legislation had been proposed to the Federal Parliament and enacted just eight weeks before the Australian federal election of November 2007. The legal issue turned upon whether the challenged legislation generally failed to provide for "just terms", in accordance with s51(xxxi) of the Australian Constitution and whether such terms were constitutionally applicable. It was my view that the Aboriginal plaintiffs should have their day in court. However, by the orders made, this was denied to them and the matter dealt with in terms only of the language of the legislation.

Arguably, such a result would not have occurred in the more respectful curial environment of the New Zealand courts. Quite possibly, it takes a nation that is emerging from a century of overt, legislated racial discrimination a longer interval to conclude the process of emancipation from the motions of racial superiority and disempowerment.

3. *International status*: For a century, New Zealand has been effectively an independent nation. If it were to merge in the Australia federation, it would lose that status, and the voice that it gives New Zealand on the world stage. Although New Zealand has a population approximating that of the larger states of Australia, it is by no means a tiny nation. Thirty-two of the 54 countries of the Commonwealth of Nations are micro-states facing the special problems of such states. New Zealand does not fall in this category. Certainly since the Second World War, it has enjoyed a respected international status as a

sovereign nation. It would not be easy for a prime minister or prime ministerial aspirant to adjust to sub-national status as a premier of one (of the possibly two) states assigned to New Zealand in a new enlarged Australian federation.

4. Democratic deficit: One of the features of the endeavours of the judiciary in recent years, on both sides of the Tasman, has been to reject the notion that the common law must be identical throughout the Commonwealth of Nations. The recognition of the need to respect the right of the judiciary in different geographical countries to express the local common law doctrine, in a way suitable to local needs, has led to the decline of the notion that there is, and should be, but one statement of the common law.

There are many examples of this development, reflecting the different approaches to basic legal concepts on different sides of the Tasman[33]. Having endeavoured for so long to terminate Privy Council appeals and to recognise local diversity in common principles, it would seem odd now to demand identical common law rules that would come with federation. This would remove a feature of the democratic character of different countries, which have now long enjoyed different histories, cultural features and economic necessities.

5. Uncongenial federalism: Federalism, as it is often explained, is legalism[34]. It produces a sophisticated mode of resolving what are often, effectively, political contests. Not everyone appreciates this style

[33] M.D. Kirby, 'Australia and New Zealand' in L. Blom-Coooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords 1876-2009*, OUP, Oxford, 2009, 339 referring to *Parker v The Queen* (1963) 111 CLR 610 (Australia) and *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (New Zealand).

[34] Chief Justice Dixon in farewell speech (1952) 85 CLR xi.

of government. Least of all, those who have been accustomed (as New Zealanders have been) to a single unicameral parliament without the occasional intrusion of the courts to strike down invalid legislation.

At least in a country with a comparatively small population and short distances between the extremities of the nation, the recognition of parliament as 'sovereign', in most circumstances, can be seen as desirable from a democratic point of view. New Zealand has a functioning parliamentary system, with potent human rights legislation and effective law reform machinery. Why, in these circumstances, would New Zealanders want to abandon these modest but well-operating institutions of government for the uncertainties and rhetoric of legalistic federal government?

6. Defective federalism: Nor is the federal system of government, as operating in Australia, without flaws. In particular, the way in which the system was originally intended to operate has been overtaken by events, many of them of the High Court's making. Notably, this includes the highly literalist interpretation of the provisions in the Australian Constitution demanded by the 1920 decision of that Court in the *Engineers' Case*[35]. Whereas in other tasks of interpretation (that of wills, contracts, ordinary legislation and regulations), the courts in Australia and elsewhere have moved to a purposive and contextual approach to the task, constitutional interpretation in Australia remains a world apart. Whilst this approach has undoubtedly contributed to Australian nation-building and empowerment of the Federal Parliament in times of war and crisis, it has also seriously diminished the powers of the Australian States. Thus, no inference of limitation or control on the

[35] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 144ff.

grant of a single power may be derived either from the language of other granted powers nor by reference to the essential federal character of the Constitution[36].

This is the clear law of constitutional interpretation in Australia. It is unlikely to change. It is a formula for greatly enlarging the powers of the Federal Parliament, at the expense of the residual powers belonging to the State legislatures. In the event that New Zealand were to join the Australian federation, it would have to do so knowing that the residual powers of its (State) parliament(s) would be subject to the *Engineers'* doctrine. This would mean the necessary attrition of power from the outlying state(s), including New Zealand, and the accumulation of constitutional power to the Federal Parliament in Canberra. In that Federal Parliament, there would be no way at present that the people of New Zealand (admitted under s121 of the Constitution) would enjoy reserved, guaranteed or protected residual powers. This is a feature of Australian constitutional decision-making that makes federalism as practised in Australia unattractive to a newly joining unit which might wish to preserve to its parliament(s) the power to make laws of specific relevance to the needs and ??? of the communities so joining.

7. Abolition of Privy Council: The abolition of the Privy Council in both Australia and New Zealand means that there is now no prospect of creating a superior apex court over the powers of, respectively, the High Court of Australia and the Supreme Court of New Zealand. Whilst it might be possible in the latter case, no appeals now lies from the High Court of Australia to any other court; nor could that occur. This being the case, and because of the powers of judicial review that can be

[36] *New South Wales v Commonwealth (Work Choices Case)* (2008) 229 CLR 1 at 226 [547].

directed to all “officers of the Commonwealth” (as defined) (including judges), the power of the High Court of Australia to have the last word in constitutional and legal adjudications for the Commonwealth of Australia is guaranteed by the present terms of the Australian Constitution. Without an amendment of the Australian Constitution, notoriously difficult to secure, there is no real chance of preserving to New Zealand courts a protected, separate status, independent of the High Court of Australia.

8. Nationalism and pride: Because of their separate development as identifiable nations, Australia and New Zealand have cultivated, over more than a century, a proper sense of nationalism and pride in their respective achievements. This is so in sport, in legislation, in foreign affairs and in domestic policy. Intangible elements such as these make it difficult to change arrangements that have endured for so long.

Arguably, New Zealand punches above its weight on the world stage. It has distinctive policies, such as in relation to the rights of the Maori people; in relation to a nuclear-free environment; and in relation to social matters (including the availability of same-sex civil unions which are forbidden by federal legislation in Australia). Were New Zealand to join the Australian Commonwealth, it would have to abandon many of these features; or engaged in a painstaking and ongoing negotiation over its felt need to reflect differently, and commonly more liberal, policies and legislation, when compared to that operating in Australia.

9. Self-interest: Sometimes, economic policy gets mixed up with politics and self-interest. This is certainly what New Zealand alleged had happened in the 90 year old ban that Australia has imposed

on the import of New Zealand apples[37]. Obviously, New Zealand is a country well positioned for the harvesting of apples. But, allegedly on quarantine grounds, Australia has rejected the import of New Zealand apples, said to be worth $100 million of export income to New Zealand. Recently, the World Trade Organisation (WTO) rejected the Australian assertion that its ban on New Zealand apples was based on the fear of "devastating pest fire blight", which is said to exist in New Zealand apples. The WTO regarded the reason as spurious or at least unproved. Australia has appealed against the WTO ruling. It has pointed out that it imports large quantities of Chinese apples which are said to be free of the blight.

Of possible significance to the Australian decision was the fact that several border-line seats in the recent Australian federal election (La Trobe, McEwen, Macquarie, Bass and Hasluck) are all in apple-growing areas. A federal arrangement of some kind might, consistently with s92 of the Australian Constitution, cure this problem. But if quarantine is a genuine reason, it might not. The fact that deep suspicions exist on both sides of the Tasman suggests that good relations only endure where there are strong reasons to sustain them and no political reasons to undermine them.

10. Soft law and the future: A reflection on the many steps in the direction of harmonisation, that have occurred since the CER Treaty, demonstrates that much can be achieved without necessarily embracing political union. Political union would require acceptance by New Zealand of strong national Australian institutions: legislative, executive

[37] F. Anderson, "Apply Growers Fight New Zealand Import Threat", *Australian Financial Review*, 11 August 2010, 5.

and judicial. Not only would these involve a departure from the arrangements that have endured for most of the last century. They would also deprive New Zealand of at least part of local self-government through the institutional arrangements that have generally worked well.

Given that many of the advantages of federation can be secured by initiatives that do not involve the embrace of the institutions of a unified federal nation, a serious question is presented as to why, at this stage, New Zealand would take such a step? To persuade its citizens to do so, it would be necessary to demonstrate that the marginal utility of entering the Australian federation outweighed the marginal cost of doing so. That cost would not only include the economic costs inherent in the legalism of any federal system; the travel and communications costs of officials within the enlarged federation; and the costs of the communications arrangements that would follow. They also include the costs of the democratic character of the current arrangements which prevail in a country that would remain a considerable distance from its putative Federal Parliament. And which displays social, ethnic and economic divergencies that cannot be waived aside.

THE WAY AHEAD

Reforms achieved and not achieved: There are countless laws and policies that have been adopted since the CER Treaty was agreed that promote beneficial inter-jurisdictional arrangements. This is especially so in the fields of the movement of goods and services; civil procedure; the promotion of international commercial arbitration[38]; and the movement of goods and services.

[38] Promotion of international commercial arbitration is agreed between the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and Institute of Arbitrators & Mediators Australia (IAMA) (2009).

On the other hand, there remain disparities that, at least potentially, might be the target of further initiatives. These include:

- The adoption of a common currency for the trans-Tasman area;
- Agreement on common financial regulations;
- Agreement to establish an ANZ patent office, after the model of the European Patent Office in Munich;
- The possible creation of a common stock exchange;
- Agreement over withholding tax; and
- The creation of a "seamless business environment" as proposed by the Howard government in 2004; and of a single economic market, as proposed by former Prime Minister, Kevin Rudd, at the joint ANZ cabinet meeting in August 2009.

Advances of soft law: There are many other topics that would be appropriate for intensive rationalisation or harmonisation of law and policy. These include:

- Harmonisation of the laws governing on corporate governance[39];
- Mutual assistance in collecting taxes and mutual recognition of imputation credits;
- Common approaches to tax avoidance and to promote the effectiveness of the separate tax avoidance rules of Australia and New Zealand in combating such avoidance[40];
- Creation of a single competition and consumer protection framework by harmonising the provisions of the *Australian Trade Practices Act* 1974 (Cth) and the *New Zealand Commerce Act*

[39] "Politics Hinder Close Ties with New Zealand" citing Kevin McCann, *The Australian*, 14 May 2010, 25.

[40] T. Delany, "A Trans-Tasman Comparative Study" (2008) 11 *New Zealand Journal of Taxation Law and Policy* 161.

1986 (NZ). This would enable the ACCC and the New Zealand Commerce Commission to use their information-gathering powers for the purpose of acting on a request for investigative assistance from each other. It would also allow the respective Commissions to exchange information obtained through their statutory gathering powers[41];

- Creation of a harmonised trans-Tasman insolvency law[42];
- Improvement in the rationalisation of trans-Tasman defence procurement and co-operation; and
- Development of a trans-Tasman privacy law through co-operation between the Australian Law Reform Commission and the New Zealand Law Commission[43].

Many of the foregoing programmes are, on their own, relatively specialised and particular. They are not the bold ideas that capture the imagination of a community. Nonetheless, they would be, specially when combined, a major ongoing reform of the legal and economic relations between Australia and New Zealand. Reforms of a more fundamental character, such as:

- The creation of a currency union; and
- The establishment of a single trans-Tasman economic market need urgent attention at the highest level.

Unfortunately, the political uncertainties in Australia, resulting from the 2010 federal election, may make it difficult to initiate such bold measures. In times of political uncertainty, governments usually seek to

[41] F. Wilson, "Hands Across the Tasman", *Lawyers' Weekly,* 5 November 2004, 9.

[42] D. Brown, "Law Reform in New Zealand – Towards A Trans-Tasman Insolvency Law" (2007) 15 *Insolvency Law Journal* 148.

[43] D. Ogden, "Cross-Tasman Privacy to be Reviewed", *Lawyers' Weekl*y, 10 November, 2006.

minimise areas of controversy and opposition[44]. No large economic policy can ever be adopted that is neutral to the interests of all citizens. The larger the aspiration, the greater is likely to be the impact on employment, wealth, taxation and disposable income.

More soft law: These conclusions bring me to the likely future of the Australia-New Zealand relationship, at least as it can be envisaged at the present time.

Over the past two decades, treaties, parallel legislation and administrative abrogations of strict national sovereignty have combined to affect the pattern of the trans-Tasman framework. Although this has certainly involved the enactment of federal legislation in Australia and the adoption of binding treaties and international agreements, it has also remitted in administrative steps which are in the nature of "soft law". These steps may, or may not, be sustained by legislative sanctions for the breach. But they have combined to alter the environment in which the ongoing ANZ relationship, especially in economic concerns, advances.

This point has been well made by Associate Professor Luke R. Nottage in a paper which examines not simply the trans-Tasman relationship, but the wider Asia-Pacific regional associations that are now being formed[45]. As Professor Nottage points out, countries throughout the Asia-Pacific region (including Australia and New Zealand) have entered into a plethora of bilateral free trading agreements (FTAs).

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[44] C. Harvey, "Defence Dispute Threatens ANZAC Links Warns Brash", *The Australian*, 15 March 2004, 15.

[45] L.R. Nottage, "Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era", unpublished paper, Sydney University Law School, Research Paper No.09/125.

According to Professor Nottage, the *ad hoc* developments that make up the present regulation of the trans-Tasman area make it one difficult for outsiders to perceive or to apply to other trans-national relationships. He goes on[46]:

> "At present, in the Trans-Tasman context, we face an increasingly complex set of arrangements that is difficult to perceive in a holistic fashion. Ironically, the picture risks becoming even more complicated since Australia and New Zealand agreed in 2004 to develop a long-term vision for a seamless trans-Tasman business environment: a single economic market (SEM)."

Professor Nottage points out that this SEM is "not about prescribing a particular set of institutional arrangements to govern trans-Tasman markets", as one would do in a political union. Instead, it is about "identifying innovative actions that could reduce discrimination and costs arising from different, conflicting or duplicated regulatory requirements. The aim is to ensure that trans-Tasman markets for goods, services, labour and capital operate effectively and support economic growth in both countries".

As an illustration of the type of generally soft law development that is occurring in the context of trans-Tasman trade and commerce, Professor Nottage lists the following astonishing collection of recent achievements[47]:

- "The signing of the treaty on mutual recognition of securities offerings in February 2006.
- The completion of the review of the Memorandum of Understanding on Business Law in February 2006, with a revised agenda for the next five years.

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[46] Nottage, *ibid*, 29.

[47] *Ibid*, 29.

- The establishment of a common Australia/New Zealand passport/customs line at Australian and New Zealand airports from November 2005.
- The establishment of the Trans-Tasman Council for Banking Supervision to enhance co-operation in trans-Tasman banking regulation.
- The establishment of the Trans-Tasman Accounting and Auditing Standards Advisory Group developing a protocol of co-operation between the two countries' accounting standards bodies. [This Advisory Group] hosted the inaugural Asia-Oceania Regional Policy Forum on International Financial Reporting Standards.
- The commencement of payments of the wine equalisation tax rebate to New Zealand wine producers.
- Signing of the protocol to the New Zealand-Australia double taxation agreement.
- The completion of negotiations for substantially more liberal trans-Tasman Rules of Origin, albeit with one exception in the area of men's suits.
- Endorsement by the New Zealand and Australian governments of the Trans-Tasman Mutual Recognition Agreement review outcomes.
- An undertaking to consider adding an investment component to guide CER to reduce barriers to trans-Tasman capital flows."

The foregoing list may now be updated by reference to several other developments including, most recently, the passage of the *Trans-Tasman Proceedings Act* 2009 (Cth).

In his reflections on this practical, but diverse and somewhat chaotic collection of individual measures, Professor Nottage quotes some words written by Gary Hawke[48]:

> "The future world is likely to be one in which WTO rounds are not the way for managing economic interdependence. The agenda will be organised around the terms on which cross-border business can be done. ... Governments and their bureaucracies will have to change so as to allocate their resources according to judgments of national interests within this agenda, rather than relying on

[48] Gary Hawke, cited in Nottage, *ibid*, 29.

> conventional thinking about how trade negotiations are done. The model is likely to be less trade law as now practised than how customs, health or veterinary authorities manage their international diplomacy albeit with greater co-ordination and collaboration within individual governments than is currently common in many jurisdictions."

The very fact that the economic environment of the trans-Tasman market involving Australia and New Zealand now includes regular adoption of highly specific and detailed administrative measures, indicates the way in which inter-jurisdictional law itself is changing in the current times. Some of the foregoing measures may be supported by treaty provisions or legislation, offering a sanction against those who do not conform. But many simply involve the operation of professional and industry bodies, laying down policies and standards which are adopted and followed throughout the trans-Tasman region for the very good reason that it is sensible, efficient and economic to observe a single standard.

As Professor Nottage acknowledges, these developments pose a quandary in balancing the respect to be given to "economic efficiency and democratic legitimacy". It is inevitable that, as the world becomes more global and regional in its trans-national organisation, the power of people in a particular area to impose their values and approaches on everyone else, will be reduced.

Before it is too late?: When retiring as Australian High Commissioner to Wellington in 2006, Dr. Allan Hawke, observed, in language which is relevant to the current time[49]:

[49] Allan Hawke, "The Last Post", *The Listener* (NZ), 28 January 2006, 22.

> "The danger [to the ANZ relationship] comes when there is a transition from Clark and Howard to whoever their successors happen to be, and whether those leaders will have the same attitude."

Australia is now in the circumstance that Dr. Hawke predicted. Mr. Key has succeeded Helen Clark as Prime Minister of New Zealand. The political uncertainty in Australia has delivered two highly intelligent national leaders in Ms. Gillard and Mr. Abbott. Yet neither of them has had ministerial experience in the field of international relations. Neither of them have given much attention to the subject of international relations in their electoral campaigns. Neither has evinced specific attention to Australia's relationship with New Zealand.

So what lies ahead? In 1995, I suggested (with Phillip Joseph) a number of options, including[50]:

- Preservation of the status quo;
- Gradual advance to a political union;
- Development, instead, of an Asia-Pacific political alliance that would include Australia and New Zealand in its wider association;
- Creation of a supra national union along the lines of the Treaty on European Union (the "Maastricht Treaty").

Essentially the same options remain before us today. However, now there is a new ingredient. It is the rapid development of broader economic and political associations, such as APEC, the G20 nations and the Asia-Pacific community with its fast increasing trade with other countries of the region[51]. The risk must now be faced, that whatever

[50] M.D. Kirby and P.A. Joseph, above n4, 141.

[51] *Ibid*, 137-8.

chances once existed to strengthen the "crimson thread of kinship" between Australia and New Zealand, that thread is now of lesser significance to each country. New Zealand's way ahead may lie in the direction of associations with Pacific Island states and possibly with Latin America. The Australian relationships are increasingly forged with China, India, Japan and the Republic of Korea.

In 2002, I suggested that the centenary of ANZAC in 2015 might provide one last historic opportunity to embrace a further political and institutional relationship with New Zealand that went beyond the highly particular but disparate provisions that scarcely engage the imagination of the people of either nation[52].

At that time, I said[53]:

> "At the very least, we should be thinking about [the trans-Tasman relationship] and doing so in an organised, sympathetic and mutually respectful way. And our motto should be: 'Economics is good; but it is not enough'."

That remains my opinion. Without delay, Australia and New Zealand need a high level trans-Tasman body that is bold enough, but realistic enough, to dream of larger ideas. The centenary of ANZAC will afford an appropriate moment when our two countries can examine the past, consider the present and reflect on the future. There will probably never be another opportunity to spark ideas that go beyond the tiny steps of economic and professional harmonisation. If we fail this time, it will almost certainly be forever.

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[52] M.D. Kirby, "The Unfinished Trans-Tasman Business" (2002) 28 *Commonwealth Law Bulletin* 1083.

[53] *Ibid*, 1090.